**SUPERIOR COURT FOR THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

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| **Wanderline Benjamin Banks**<br>5024 Illinois Avenue, NW<br>Washington, D.C. 20011<br><br>Petitioner,<br><br>v.<br><br>**DISTRICT OF COLUMBIA,**<br>**Office of Employee Appeals**<br><br>Serve on: Sheila Barfield, Esq.<br>Executive Direct<br>Office of Employee Appeals<br>955 L'Enfant Plaza SW, Suite 2500<br>Washington, DC 20024<br>Respondent. | C.A. No. 2017 CA 008306 P(MPA)<br><br>Judge: Anthony C. Epstein<br><br>Dated: February 6, 2018 |

**PROOF OF SERVICE OF INITIAL ORDER AND ADDENDUM WITH PETITION FOR REVIEW**

I, Robert. J. Shore, Assistant General Counsel, National Association of Government Employees, residing at 1300 Taylor Street, NE, Washington, D.C. 20017, hereby affirm and swear to the following:

1. I personally served, pursuant to paragraph (c)(3) of Rule 4 of the D.C. Superior Court Rules of Civil Procedure, via Certified U.S. Mail, Return Receipt Requested, a copy of the Petition for Review of Agency Decision with all attachments, but without the Initial Order and Addendum because it had not been received by undersigned counsel, on January 8, 2018, to the Office Employee Appeals, Attn: Sheila Barfield, Executive Director, Office of Employee Appeals. A return receipt was never received by undersigned counsel, but the Office of Employee Appeals, through Wynter A. Clarke, Paralegal Specialist, confirmed receipt via electronic mail on January 22, 2018. A copy of the mailing envelope and email from Ms. Clarke are attached as Attachments 1 and 2, respectively.

2. On January 24, 2018, a copy of the Initial Order and Addendum was sent, via Certified U.S. Mail, Return Receipt Requested to the Office of Employee Appeals, Attn: Sheila Barfield. A copy was also sent via electronic mail to Wynter Clarke, Paralegal Specialist, D.C. Office of Employee Appeals, per

her request via email. The return receipt was received on Monday, February 5, 2018. A copy of the return receipt is attached as Attachment 3 and the electronic mail is attached as Attachment 4.

3. As previously stated, a copy of the mailing from January 8, 2018, the electronic mail confirming receipt of the Petition for Review from Wynter Clarke, a copy of the return receipt from January 24, 2018, and a copy of the electronic mailing of the Initial Addendum are attached as Attachments 1, 2, 3, and 4, respectively.

Respectfully submitted,

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**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

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| WANDERLINE BENJAMIN BANKS | : | |
| | : | |
| v. | : | Case No. 2017 CA 008306 P(MPA) |
| | : | |
| DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS | : | |
| | : | |

**ORDER**

The Court grants in part the petition of Wanderline Benjamin Banks to review a decision of the Office of Employee Appeals ("OEA").

Ms. Banks challenges a Reduction in Force ("RIF") in the Metropolitan Police Department (the "Agency" or "MPD"). Ms. Banks was one of fourteen employees affected by this RIF. *See* Pet. Brief at 2; Opp. at 2 (R. 26, 196). The Court has decided petitions for review by at least three other of these employees relating to this RIF. *See Boone v. D.C. Office of Employee* Appeals, Case No. 2017 CA 002471 P(MPA) (D.C. Sup. Ct. March 13, 2018) (Edelman, J.) ("*Boone*"); *Adeboye v. D.C. Office of Employee Appeals*, Case No. 2017 CA 002469 P(MPA) (D.C. Sup. Ct. Feb. 13, 2018) (Pan, J.) ("*Adeboye*"); *Gamble v. D.C. Office of Employee Appeals*, Case No. 2017 CA 002472 P(MPA) (D.C. Sup. Ct. April 30, 2018) (Rigsby, J.) ("*Gamble*").

## I. BACKGROUND

In 2011, Ms. Banks was an employee in the Office of the Chief Information Officer ("OCIO") at MPD in D.C. *See* Notice of Personnel Action (R. 19).

On August 24, 2011, the Chief of Police sought authorization to conduct a RIF in the OCIO. *See* Request for Approval of Realignment and Reduction in Force in the Metropolitan Police Department (R. 199). The reasons for the RIF were an Agency realignment and shortage

of work. *See* Pet. Brief at 2; Opp. at 2 (R. 26, 196). On September 14, 2011, Ms. Banks was informed that she would be "separated from the District government services" effective October 14, 2011. *See* Letter (R. 22).

On November 11, 2011, Ms. Banks filed an appeal with the OEA. *See* Petition for Appeal (R. 1).

On October 28, 2014 after completion of briefing, the ALJ issued an initial decision holding that "the Agency did not violate the RIF procedures set forth in D.C. Code § 1-624.02" but "the Agency failed to receive the necessary approval to conduct a RIF" and the RIF was therefore unlawful. Initial Decision at 6 (R. 353) & 8 (R. 355). According to the ALJ, the RIF was unlawful because the Agency did not provide the legally required Realignment Approval Form ("RAF") signed by the City Administrator. *See* Initial Decision at 7 (R. 354). The ALJ ordered the Agency to reinstate Ms. Banks to her last position or an equivalent position and to reimburse all back pay and benefits lost as a result of the RIF. *See* Initial Decision at 9 (R. 356).

On December 2, 2014, the Agency filed a petition for review, with a signed RAF as an exhibit. *See* Petition for Review at Attachment 1, 13-14 (R. 386-87). The Agency argued that the Initial Decision should be reversed because the signed RAF was "material evidence ... that despite due diligence, was not available when the record closed." *See id.* at 1 (R. 365). Also on December 2, 2014, Ms. Banks filed a limited petition for review of the ALJ's decision, claiming that the initial decision did not address all of the issues of law and fact raised in the appeal. *See* Employee's Limited Petition for Review of Administrative Judge's Decision at 4 (R. 362).

On May 10, 2016, the OEA issued an order that (1) remanded the case back to the ALJ "for the purpose of determining whether the newly-produced RAF can be sufficiently authenticated as to warrant a different outcome in the disposition of this matter" and (2) denied

Ms. Banks' petition for limited review. *See* Opinion and Order on Petition for Review at 6 (R. 432) & 7 (R. 433).

In accordance with the OEA's remand order, the ALJ set a hearing on September 7, 2016. *See* Order Scheduling Evidentiary Hearing at 1 (R. 652); R. 658. At the hearing, the Agency elicited testimony from Allen Lew and Lewis Norman. *See* Hearing Transcript at 8, 29 (R. 665, 686). Mr. Lewis was the city administrator when the RIF took place and signed the RAF. *See* Hearing Transcript at 10:11 (R. 667); *id.* at 12:15-19 (R. 669). Mr. Lew testified that he signed thousands of documents during his career and did not specifically remember signing this RAF, but that he recognized his signature on the document. *See id.* at 12:10-12 (R. 669); *id.* at 15:21-16:2 (R. 672-73). Mr. Lew further testified that it was "very unlikely" that his signature could have been put on the RAF without him actually signing it. *See id.* at 22:3 (R.679). Mr. Norman was a supervisor in the D.C. Department of Human Resources when the RIF occurred. *See id.* at 31:11-21 (R. 688); *id.* at 33 (R. 690). Mr. Norman testified that he and his staff searched for the signed RAF but were unable to locate it prior to the Initial Decision. *See id.* at 39:21-40:11 (R. 696-97), 41:3-8 (R. 698), 42:15-21 (R. 699), 62:21-63:7 (R. 719-20). Mr. Norman also asked the Office of the City Administrator and the MPD for a copy, but neither had one. *See id.* at 43:3-13 (R. 700). Eventually, after the Initial Decision was issued, Mr. Norman located the signed RAF "in a box with other personnel documents." *Id.* at 63:17-18 (R. 720). Mr. Norman explained that he had moved offices and that "but for the move, the move of the office from one [sic] portion of the building to another, [the signed RAF] wouldn't have [been misplaced]." Hearing Transcript at 85: 8-10 (R. 742).

On January 7, 2017, the ALJ issued an Initial Decision on Remand holding that the Agency had not established the authenticity of the RAF and that "the Initial Decision issued on October 28, 2014, must stand." Initial Decision on Remand at 5 (R. 845).

On February 10, 2017, the Agency filed a petition for review of the ALJ's Initial Decision on Remand. *See* Agency's Petition for Review of Initial Decision on Remand at 3-4 (R. 850-51). On November 7, 2017, the OEA issued an order and opinion concluding that "[t]here is no credible evidence in the record to indicate that the signatures [on the RAF] were backdated, forged, or prepared in anticipation of litigation before OEA" and "[t]herefore, the ALJ's findings are not supported by the record because Agency complied with DCPR § 2406.4." Opinion and Order on Remand at 8 (R. 870) & 9 (R. 871). The OEA further held that reinstatement was not appropriate in the circumstances because "there is no indication that Agency's failure to produce a fully executed RAF in a timely manner significantly affected its final decision to conduct the instant RIF." *Id.* The OEA also agreed with the ALJ's finding that "Agency had the discretion, but was not required, to consider job sharing or reduced working hours prior to conducting the RIF." *Id.* at 10-11 (R. 872-73).

Ms. Banks petitioned the Court to review this decision by OEA. On May 7, 2018, Ms. Banks filed a brief in support of her petition for review ("Pet. Brief"). On June 21, 2018, the Agency filed an opposition ("Opp."). On June 29, 2018, Ms. Banks filed a reply ("Reply").

## II. STANDARD OF REVIEW

The Court "shall not set aside the action of the agency if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law." D.C. Super. Ct Civ. P. Agency Review R. 1(g). Conversely, the Court must set aside any actions or findings that are "[a]rbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law

... or ... [u]nsupported by substantial evidence in the record of the proceedings before the Court." D.C. Code § 2-510(a)(3)(A) and (E). Rule 1(g) requires the Court to "base its decision exclusively upon the administrative record."

In order for a court to affirm an agency's decision, the agency "must make factual findings on all material contested issues, the finding must be supported by substantial evidence on the record, and the conclusions must rationally flow from the findings." *D.C. Appleseed Center for Law & Justice, Inc. v. D.C. Dep't of Insurance, Securities, and Banking*, 54 A.3d 1188, 1216 (D.C. 2012) (citation omitted). "Substantial evidence is relevant evidence such as a reasonable mind might accept as adequate to support a conclusion." *Id.* (quotation and citation omitted); *see Leach v. D.C. Police & Firefighters Retirement & Relief Board*, 965 A.2d 849, 855 (D.C. 2009) ("Substantial evidence is more than a mere scintilla ...") (citations and quotations omitted). "If the administrative findings are supported by substantial evidence, we must accept them even if there is substantial evidence in the record to support contrary findings." *Office of District of Columbia Controller v. Frost*, 638 A.2d 657, 660-61 (D.C. 1994) (quotation and citation omitted). "The corollary of this proposition, however, is that we are not obliged to stand aside and affirm an administrative determination which reflects a misconception of the relevant law or a faulty application of the law." *Zenian v. D.C. Office of Employee Appeals*, 598 A.2d 1161, 1166 (D.C. 1991) (quotations and citations omitted).

"While it is the OEA's final decision and not that of the ALJ that may be reviewed by this court, the ALJ's findings of fact are binding at all subsequent levels of review unless they are not supported by substantial evidence." *Department of Public Works v. Colbert*, 874 A.2d 353, 358 (D.C. 2005) (citation omitted). "An agency may not reject an examiner's findings of disputed fact based on the resolution of witness credibility unless the examiner's findings are

unsupported by substantial evidence." *Frost*, 638 A.2d at 660 (internal quotations, ellipses, and citations omitted). "In reviewing the OEA, we give great deference to any credibility determinations of the administrative factfinder." *See Metropolitan Police Dep't v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989) (citation omitted).

## III. DISCUSSION

Ms. Banks makes three argument for reversal of the OEA's decision: (1) the OEA erred in overturning the ALJ's decision that the Agency did not carry its burden to prove that the RAF was authentic; (2) the OEA erred when it concluded that the Agency's delay in producing the signed RAF was not harmful error; and (3) the OEA erred by holding that the Agency was not required to consider job sharing or reduced hours as alternatives to the RIF. The Court addresses each argument in turn.

### A. Authenticity of the RAF

Ms. Banks argues that the OEA erred when it overturned the ALJ's decision that the Agency did not carry its burden to prove that the RAF was authentic. Pet. Brief at 7. In related cases, other ALJs found that the same RAF was authentic, and this Court upheld these findings. *See Boone* at 11-13; *Adeboye* at 8-11; *Gamble* at 3-5. Of course, as the OEA acknowledges, "if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding." *See* Opinion and Order on Remand at 6 (R. 868). In Ms. Banks' case, the OEA reasonably concluded that the ALJ did not have a sufficient basis to discredit the testimony presented by the Agency authenticating the RAF. The issue before the OEA was not whether substantial evidence established that the RAF was not authentic; rather, the issue was whether the Agency's evidence of authenticity was so

one-sided that no reasonable fact-finder could conclude that the Agency had not carried its burden to establish authenticity. *See* Opinion and Order on Remand at 8 (R. 870).

Notably, the ALJ did not find incredible Mr. Lew's testimony that it was his signature on the RAF. As the OEA stated, any question about the circumstances in which Mr. Norman located the document has "no bearing on Lew's ability to authenticate his own signature or whether the RAF contained all of the necessary signatures prior to the implementation of the RIF." *Id.* Likewise, the ALJ did not find that Mr. Norman was untruthful when he testified that the RAF was misfiled during a series of office moves. The ALJ also (and understandably) did not express skepticism that government bureaucracies occasionally misplace documents, nor did the ALJ suggest either that Mr. Norman fabricated the RAF or that someone else fabricated it long after the RIF and then placed it in an unrelated file in which that person knew Mr. Norman would look. Indeed, the OEA correctly stated that the record does not contain any credible evidence "that the signatures were backdated, forged, or prepared in anticipation of the litigation before the OEA." *Id.*

The ALJ stated that he was "skeptical that Mr. Norman was the only individual who could have located a copy of the RAF which included the four necessary signatures, including that of the City Administrator's" and that he found it "incredible for [MPD] to argue that it did not have a copy of the RAF containing the necessary signature" because MPD was supposed to get the signed RAF. Initial Decision on Remand at 4, 5 (R. 844, 845). However, the OEA reasonably concluded that these suspicions did not significantly undermine the substantiality of the direct and credible evidence that Mr. Lew signed the RAF as City Administrator and that Mr. Norman eventually located the document that had been inadvertently misfiled. The ALJ's

uncertainty about why the Agency was unable to find the signed RAF sooner than it did are not enough to create a substantial likelihood that Mr. Lew's signature was forged or backdated.

**B. Delay in producing the RAF**

Ms. Banks challenges "[t]he OEA's findings that even if the Agency failed to receive the City Administrator's signature on the RAF documents, that failure was not harmful error." Pet. Brief at 9. The Court agrees with Ms. Banks that the OEA could not lawfully have concluded that the RIF was valid even if the City Administrative did not approve it. However, that is not what the OAE concluded. The OEA concluded only that the "Agency's failure to *produce* the fully executed RAF *prior to the issuance* of the Initial Decision was not a harmful error." Opinion and Order on Remand at 9 (R. 871) (emphasis added). The statements challenged by Ms. Bank relate only to "the "Agency's failure to produce a fully execute RAF *in a timely manner*." *Id.* (emphasis added).

The record supports the OEA's finding that Ms. Banks was not prejudiced by the Agency's failure to produce the signed RAF before the Initial Decision. Indeed, the Agency's failure to produce the signed RAF on a timely basis resulted in Ms. Banks' reinstatement with back pay in the ALJ's initial decision. *See* Initial Decision at 8-9 (R. 355-56).

**C. Failure to consider job sharing or reduced hours**

Ms. Banks argues that "[t]he OEA's finding that the Agency was not required to consider job sharing is contrary to law." Pet. Brief at 11. Both the ALJ and the OEA held that the "Agency had the direction, but was not required, to consider job sharing or reduced working hours prior to conducting the RIF." Opinion and Order on Remand at 110-11 (R. 872-73); *see* Initial Decision at 5 (R. 352). The undersigned judge agrees with the analysis in *Boone* (at 16-18) and *Adeboye* (at 14-16) that the plain and unambiguous language of D.C. Code § 1-

624.02(a)(4) mandates "Consideration of job sharing and reduced hours" in any RIF. These holdings are not binding in this case, *see Lewis v. Hotel Restaurant Employees Union Local 25 AFL-CIO*, 727 A.2d 297, 302 (D.C. 1999), but they are persuasive. To the extent that *Gamble* (at 6-8) holds otherwise, the undersigned judge respectfully disagrees. *Gamble* (at 7) is correct that this Court's role is generally not to consider whether the Agency "sufficiently" considered a relevant factor, but the problem here is that there is no indication that the Agency considered job sharing or reduced hours at all. To the extent that 6-B DCMR §§ 2403.2 and 2404.1 suggest that consideration of job sharing and reduced hours is discretionary in this situation, the statute controls.

Furthermore, even if the Agency had discretion about whether to consider job sharing and reduced hours as alternatives to a RIF, the Agency abused its discretion by failing either to recognize that it had this discretion or to explain why it exercised its discretion not to consider these options. "Failure to exercise choice in a situation calling for choice is an abuse of discretion – whether the cause is ignorance of the right to exercise choice or mere intransigence – because it assumes the existence of a rule that admits of but one answer to the question presented." *See Johnson v. United States*, 398 A.2d 354. 363 (D.C. 1979). The Agency may have a good explanation about why job sharing or reduced hours were not a lawful or practical alternative to the RIF that included Ms. Banks, but it is not too much to ask the Agency to provide that explanation. The Court may "not assume that an issue has been considered *sub silentio* when there is no discernible evidence that it has." *See D.C. Dep't of Mental Health v. D.C. Dep't of Employment Services*, 15 A.3d 692, 697 (D.C. 2011) (quotation, brackets, and citation omitted).

## IV. CONCLUSION

For these reasons, the Court orders that:

1. The petition for review is granted in part.

2. The case is remanded to the OEA for further proceedings consistent with this opinion.

Anthony C. Epstein
Judge

Date: July 11, 2018

Copies to:

Robert Shore
*Counsel for Petitioner*

Frank McDougald
*Counsel for Respondent*

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

REPLY TO:
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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

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| WANDERLINE BENJAMIN-BANKS<br>SUPERIOR COURT,<br>Petitioner,<br>v.<br><br>DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS,<br><br>Respondent. | Case No. 2017 CA 008306 P(MPA)<br><br>Judge Anthony C. Epstein |

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Wanderline Benjamin-Banks v. Metropolitan Police Department,* OEA Matter No. 2401-0027-12R16. The record consists of two volumes containing forty-seven (47) tabs.

Wynter Clarke
Wynter Clarke
Paralegal Specialist

LASHEKA BROWN BASSEY NOTARY PUBLIC MY COMMISSION EXPIRES 6/14/2021 DISTRICT OF COLUMBIA

District of Columbia: SS
Subscribed and Sworn to before me
this 5th day of March, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001
Telephone: (202) 879-1133 • Website: www.dccourts.gov

DC FIRE & EMERGENCY MEDICAL SERVICES DEPARTMENT
Vs.
D.C. OFFICE OF EMPLOYEE APPEALS

C.A. No. 2018 CA 000821 P(MPA)

# INITIAL ORDER AND ADDENDUM

Pursuant to D.C. Code § 11-906 and District of Columbia Superior Court Rule of Civil Procedure ("Super. Ct. Civ. R.") 40-I, it is hereby **ORDERED** as follows:

(1) Effective this date, this case has assigned to the individual calendar designated below. All future filings in this case shall bear the calendar number and the judge's name beneath the case number in the caption. On filing any motion or paper related thereto, one copy (for the judge) must be delivered to the Clerk along with the original.

(2) Within 60 days of the filing of the complaint, plaintiff must file proof of serving on each defendant: copies of the summons, the complaint, and this Initial Order and Addendum. As to any defendant for whom such proof of service has not been filed, the Complaint will be dismissed without prejudice for want of prosecution unless the time for serving the defendant has been extended as provided in Super. Ct. Civ. R. 4(m).

(3) Within 21 days of service as described above, except as otherwise noted in Super. Ct. Civ. R. 12, each defendant must respond to the complaint by filing an answer or other responsive pleading. As to the defendant who has failed to respond, a default and judgment will be entered unless the time to respond has been extended as provided in Super. Ct. Civ. R. 55(a).

(4) At the time and place noted below, all counsel and unrepresented parties shall appear before the assigned judge at an initial scheduling and settlement conference to discuss the possibilities of settlement and to establish a schedule for the completion of all proceedings, including, normally, either mediation, case evaluation, or arbitration. Counsel shall discuss with their clients **prior** to the conference whether the clients are agreeable to binding or non-binding arbitration. **This order is the only notice that parties and counsel will receive concerning this Conference.**

(5) Upon advice that the date noted below is inconvenient for any party or counsel, the Quality Review Branch (202) 879-1750 may continue the Conference **once**, with the consent of all parties, to either of the two succeeding Fridays. Request must be made not less than seven business days before the scheduling conference date.
No other continuance of the conference will be granted except upon motion for good cause shown.

(6) Parties are responsible for obtaining and complying with all requirements of the General Order for Civil cases, each judge's Supplement to the General Order and the General Mediation Order. Copies of these orders are available in the Courtroom and on the Court's website http://www.dccourts.gov/.

Chief Judge Robert E. Morin

Case Assigned to: Judge ELIZABETH WINGO
Date: February 6, 2018
Initial Conference: 9:30 am, Friday, May 11, 2018
Location: Courtroom A-47
515 5th Street NW
WASHINGTON, DC 20001

## ADDENDUM TO INITIAL ORDER AFFECTING ALL MEDICAL MALPRACTICE CASES

In accordance with the Medical Malpractice Proceedings Act of 2006, D.C. Code § 16-2801, et seq. (2007 Winter Supp.), "[a]fter an action is filed in the court against a healthcare provider alleging medical malpractice, the court shall require the parties to enter into mediation, without discovery or, if all parties agree[,] with only limited discovery that will not interfere with the completion of mediation within 30 days of the Initial Scheduling and Settlement Conference ("ISSC"), prior to any further litigation in an effort to reach a settlement agreement. The early mediation schedule shall be included in the Scheduling Order following the ISSC. Unless all parties agree, the stay of discovery shall not be more than 30 days after the ISSC." D.C. Code § 16-2821.

To ensure compliance with this legislation, on or before the date of the ISSC, the Court will notify all attorneys and *pro se* parties of the date and time of the early mediation session and the name of the assigned mediator. Information about the early mediation date also is available over the internet at https://www.dccourts.gov/pa/. To facilitate this process, all counsel and *pro se* parties in every medical malpractice case are required to confer, jointly complete and sign an EARLY MEDIATION FORM, which must be filed no later than ten (10) calendar days prior to the ISSC. D.C. Code § 16-2825 Two separate Early Mediation Forms are available. Both forms may be obtained at www.dccourts.gov/medmalmediation. One form is to be used for early mediation with a mediafor from the multi-door medical malpractice mediator roster; the second form is to be used for early mediation with a private mediator. Both forms also are available in the Multi-Door Dispute Resolution Office, Suite 2900, 410 E Street, N.W. Plaintiff's counsel is responsible for eFiling the form and is required to e-mail a courtesy copy to earlymedmal@dcsc.gov. *Pro se* Plaintiffs who elect not to eFile may file by hand in the Multi-Door Dispute Resolution Office.

A roster of medical malpractice mediators available through the Court's Multi-Door Dispute Resolution Division, with biographical information about each mediator, can be found at www.dccourts.gov/medmalmediation/mediatorprofiles. All individuals on the roster are judges or lawyers with at least 10 years of significant experience in medical malpractice litigation. D.C. Code § 16-2823(a). If the parties cannot agree on a mediator, the Court will appoint one. D.C. Code § 16-2823(b).

The following persons are required by statute to attend personally the Early Mediation Conference: (1) all parties; (2) for parties that are not individuals, a representative with settlement authority; (3) in cases involving an insurance company, a representative of the company with settlement authority; and (4) attorneys representing each party with primary responsibility for the case. D.C. Code § 16-2824.

No later than ten (10) days after the early mediation session has terminated, Plaintiff must eFile with the Court a report prepared by the mediator, including a private mediator, regarding: (1) attendance; (2) whether a settlement was reached; or, (3) if a settlement was not reached, any agreements to narrow the scope of the dispute, limit discovery, facilitate future settlement, hold another mediation session, or otherwise reduce the cost and time of trial preparation. D.C. Code§ 16-2826. Any Plaintiff who is *pro se* may elect to file the report by hand with the Civil Actions Branch. The forms to be used for early mediation reports are available at www.dccourts.gov/medmalmediation.

Chief Judge Robert E. Morin

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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| DISTRICT OF COLUMBIA FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT<br>c/o of the Office of the Attorney General for the District of Columbia<br>441 Fourth Street, N.W.<br>Suite 1180 North<br>Washington, D.C. 20001<br><br>Petitioner, | Civil Action No. |
| v.<br>DISTRICT OF COLUMBIA<br>OFFICE OF EMPLOYEE APPEALS<br>955 L'Enfant Plaza, Suite 2500<br>Washington, D.C. 20024<br><br>Respondent. | |



PETITION FOR REVIEW OF AGENCY DECISION

A. Notice is hereby given that the District of Columbia Fire and Emergency Medical Services Department ("Agency" or "Petitioner") appeals to the Superior Court of the District of Columbia from the Initial Decision on Remand ("IDR") dated December 12, 2017, and all rulings encompassed therein, issued by the District of Columbia Office of Employee Appeals ("OEA" or "Respondent") in the matter of *Sylvia Johnson v. D.C. Fire & Emergency Medical Services*, OEA Matter No. J-0145-15R17. A copy of the IDR is attached to this Petition for Review as Petitioner's Exhibit 1. Petitioner seeks to have the IDR reversed and the final Agency decision to separate Sylvia Johnson ("Employee") during her probationary period upheld.

Employee worked for Petitioner as a Management Liaison Specialist. On August 12, 2015, Petitioner notified Employee that she was separated from her position during her probationary period effective that same day. Employee filed an appeal of the Agency's decision to the Office of Employee Appeals ("OEA") on September 21, 2015. Following the submission of briefs, the Administrative Judge ("AJ") issued an initial decision dated February 11, 2016, holding that Employee was terminated during her probationary period and that therefore, OEA lacked jurisdiction to hear this matter on the merits.

Thereafter, Employee filed a Petition for Review with the OEA Board on March 17, 2016. The OEA Board issued its Opinion and Order on Petition for Review on June 6, 2017, granting Employee's Petition for Review and remanding the matter back to OEA for the AJ to determine whether Employee was a probationary employee based on her previous employment with the Agency and whether she was eligible for reinstatement to her former position based on the applicable District Personnel Manual ("DPM") regulations. Employee asserted that the AJ previously mischaracterized her initial appointment as a "term appointment" and that she was reinstated to her former position when hired by the Agency in August 2014, thereby negating the requirement to serve another probationary period of twelve months. The Agency maintained that Employee's initial appointment resulted in only a series of "term appointments" and when she was rehired by the Agency in August 2014, she was subject to another probationary period of twelve months.

On remand, after the submission of briefs by both parties, the AJ determined that because Employee obtained her initial term appointment through open competition and that she served in that initial term appointment beyond four years, she obtained Career Service Permanent status. Additionally, the AJ found that Employee was reinstated when rehired by the Agency in August

2014 and could only be removed for cause. Thus, the AJ stated that Petitioner failed to remove Employee in accordance with the applicable provisions of the DPM and her termination must be reversed. The AJ ordered that Employee should be reinstated to the same or comparable position prior to her termination, with back pay and benefits reimbursed as well.

B. Address of Respondent Agency

District of Columbia Office of Employee Appeals
955 L'Enfant Plaza, Suite 2500
Washington, D.C. 20024

Serve on: Lasheka Brown-Bassey, Esq.
General Counsel
District of Columbia Office of Employee Appeals
955 L'Enfant Plaza, Suite 2500
Washington, D.C. 20024

C. Names and Addresses of all other parties to the Agency Proceeding:

Petitioner: District of Columbia Fire and Emergency Medical Services
c/o Janea J. Hawkins, Esq.
441 Fourth Street, N.W.
Suite 1180 North
Washington, D.C. 20001

Employee: Sylvia Johnson
2806 14th Street, NW
Washington, D.C. 20009

Johnny M. Howard, Esq.
1001 Connecticut Avenue, NW
Suite 402
Washington, D.C. 20036
Counsel for Employee

D. Names and Addresses of Parties or Attorneys to be served:

| Name | Address |
|---|---|
| 1. District of Columbia Office of Employee Appeals, Respondent | Lasheka Brown-Bassey, Esq.<br>General Counsel<br>955 L'Enfant Plaza,<br>Suite 2500<br>Washington, D.C. 20024 |
| 2. Sylvia Johnson, Employee | 2806 14th Street, NW<br>#204<br>Washington, D.C. 20009 |
| 3. Johnny Howard, Esq., Counsel for Employee | 1001 Connecticut Ave., NW<br>Suite 402<br>Washington, D.C. 20036 |

E. A copy of the December 12, 2017 Initial Decision on Remand sought to be reviewed is attached to this Petition.

Date: February 1, 2018

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

NADINE C. WILBURN
Chief Counsel and Senior Advisor
Personnel, Labor and Employment Division

/s/ Andrea G. Comentale
ANDREA G. COMENTALE, #405073
Chief, Personnel and Labor Relations Section

By: /s/Janea J. Hawkins
JANEA J. HAWKINS, #1025600
Assistant Attorney General
441 4th Street, NW, Suite 1180N
Washington, DC 20001
(202) 724-6611 (Phone)
(202) 741-8575 (Fax)
Janea.Hawkins@dc.gov

**CERTIFICATE OF SERVICE**

I hereby certify that on this 1st day of February 2018, a copy of the foregoing Petition for Review of Agency Decision, with attachment, was sent via certified mail, return receipt requested, to the following parties:

District of Columbia Office of Employee Appeals
c/o Lasheka Brown Bassey, Esq., General Counsel
955 L'Enfant Plaza, Suite 2500
Washington, D.C. 20024

Johnny Howard, Esq.
1001 Connecticut Ave., NW
Suite 402
Washington, D.C. 20036

And I further certify, in accordance with SCR-Civil Agency Review 1(a) that a copy of the foregoing Petition for Review of Agency Decision was sent by first class U.S. mail, postage prepaid, on February 1, 2018 to:

Sylvia Johnson
2806 14th Street, NW
#204
Washington, D.C. 20009

Janea Hawkins
Assistant Attorney General

# EXHIBIT 1

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**



| | |
|---|---|
| In the Matter of: | |
| SYLVIA JOHNSON,<br>Employee | OEA Matter No. J-0145-15R17 |
| v. | Date of Issuance: December 12, 2017 |
| D.C. FIRE & EMERGENCY MEDICAL SERVICES,<br>Agency | |
| | Arien Cannon, Esq.<br>Administrative Judge |

Johnny M. Howard, Esq., Employee Representative
Janea J. Raines, Esq., Agency Representative

## INITIAL DECISION ON REMAND

### INTRODUCTION AND PROCEDURAL BACKGROUND

Sylvia Johnson ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") on September 21, 2015, challenging the District of Columbia Fire & Emergency Medical Services' ("Agency") decision to remove her from her position as a Management Liaison Specialist. An Initial Decision was issued on February 11, 2016, dismissing this matter for lack of jurisdiction.

Employee filed a Petition for Review on March 17, 2016, asserting that the Initial Decision mischaracterized her initial appointment as a "term appointment" and erroneously concluded that Employee never satisfied a probationary period between July 2009 and March 2014. The OEA Board issued an Opinion and Order on Petition for Review on June 6, 2017, which remanded this matter to the undersigned for further considerations.

On July 26, 2017, a Status Conference was convened to address the Board's Opinion and Order. Subsequently, an Order was issued which required the parties to address the issues raised by the OEA Board. Both parties have submitted their briefs accordingly. The record is now closed.

## JURISDICTION

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

## ISSUE

1. Whether Employee was converted to a Career Service (Permanent) employee; and if so, whether the requirements of District Personnel Regulations ("DPR") § 823.2 have been met.

## BURDEN OF PROOF

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.[1]

## FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee worked continuously with Agency from July 20, 2009, through March 30, 2014. The following summarizes the numerous term appointments that Employee served during the relevant time periods:

1. On July 20, 2009, Employee began working at Agency as a Management Liaison Specialist, pursuant to a term appointment not to exceed ("NTE") August 21, 2010.[2]

2. On August 22, 2010, Agency extended Employee's term for another year, not to exceed September 21, 2011.[3]

3. On September 22, 2011, Agency extended Employee's term for another year, not to exceed October 21, 2012.

4. On October 22, 2012, Agency again extended Employee's term, not to exceed July 19, 2013.

5. On or about July 30, 2013, then-Director of DCHR, Shawn Stokes, approved Agency's request to extend Employee's term beyond four (4) years via the Request for Superior Qualifications/Exceptions Form DCSF No. 11B-10.[4] Based on this approval, Employee's term was again extended until January 19, 2014.

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[1] OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).
[2] Employee's Brief, Exhibit A (August 15, 2017); See also Agency's Reply Brief, Attachment 2 (September 13, 2017).
[3] Employee's Brief, Exhibit B (August 15, 2017).
[4] Agency's Reply Brief, Attachment 6 (September 13, 2017). Extending Employee's numerous term appointments

6. Employee's term was once again extended on January 20, 2014, for an additional two months, not to exceed March 30, 2014.

7. Finally, on March 30, 2014, Employee's was terminated due to the expiration of her appointment.[5]

After a break in service for nearly six (6) months, Employee was again appointed to work with Agency as a Management Liaison Specialist, effective September 22, 2014. This was the same position Employee held from July 2009 through March 2014.[6]

Agency argues that Employee's new appointment in September of 2014, was a Career Service (Probational) appointment pursuant to D.C. Code § 1-608.01 (a)(5) and was subject to a probationary period of twelve (12) months. However, Employee maintains that she obtained Career Service with permanent status when she was employed with the District government from July 2009 through March 2014. Employee further contends that when she returned to service in September 2014 to the same position, grade, and salary, she was eligible for reinstatement under DPR § 816.1.

DPR § 816.1 states that:

> Except for a person who has a retreat right to a position in the Career Service as provided in chapter 9 or 10 of these regulations, a person shall have reinstatement eligibility for three (3) years following the date of his or her separation if he or she meets both of the following requirements:
>
> (a) The person previously held a Career Appointment (Permanent); and
>
> (b) The person was not terminated for cause under chapter 16 of these regulations.

Employee argues that during her numerous term appointments made between June 2009 and March 2014 she was converted to a Career Appointment (Permanent). Employee's argument is based on the language in DPR § 823.2.[7] Relevant to Employee's argument are DPR §§ 823.1 and 823.2:

> **823.1** A personnel authority may make a term appointment for a

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consecutively, exceeding four (4) years, is of significance because of the language set forth in District Personnel Regulations ("DPR") §§ 823.1 and 823.2.

[5] Agency's Reply Brief, Attachment 9 (September 13, 2017).
[6] *Id.*, Attachment 10.
[7] It is noted that Employee, through her attorney, asserted for the first time in her Petition for Review that her position was converted to Career Service (Permanent) status, pursuant to DPR § 823, during her numerous term appointments from July 2009 through March 2014.

period of more than one (1) year when the needs of the service so require and the employment need is for a limited period of four (4) years or less.

**823.2** Unless supported by grant funds, an employee continuously serving in a term appointment four (4) years or more, which is acquired through open competition, shall:

(a) Be separated from District government service; or

(b) Have his or her appointment converted to a regular Career Service appointment with permanent status.

Here, it is undisputed that Employee held her "term appointment" continuously for more than four (4) years after it was extended numerous times. It is further undisputed that Employee's position was not supported by grant funds. However, the parties disagree whether Employee's term appointment was acquired through open competition.[8] Agency asserts that there is no indication in the record to support the idea that Employee competed for the term appointment she obtained in July 2009. I disagree. In the July 20, 2009, SF-50[9], "Box 34" indicates that the position occupied is through "Competitive Service," indicating that Employee's position was through open competition. Accordingly, I find that Employee's term appointment, which was served continuously for more than four (4) years, was acquired through open competition.

Furthermore, DPR § 823.2 provides an agency with two options when the following conditions are met: the employee is in a position *not* supported by grant funds, the position was acquired through open competition, and the employee has continuously served in a term appointment for at least four (4) years. The two options are to (1) separate the employee from District government; or (2) convert the employee's appointment to a regular Career Service appointment with permanent status. Agency did not separate Employee from service in July of 2013, after she had been serving continuously for four (4) years. Thus, her position was required to be converted to a regular Career Service appointment with permanent status. Because Employee's position was not supported by grant funds, her position was acquired through an open competition, and she served continuously for more than four (4) years under numerous term appointments, I must find that Employee's position was converted to a Career Service (Permanent) status in July of 2013.

Moreover, the Standard Form 50 in this matter, which officially documented Employee's return to service on September 22, 2014, indicates in "Box 24" that Employee's tenure upon her return to service was permanent.[10] The form further indicates in "Box 6-B" that Employee was

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[8] DPR § 899.1 defines open competition as the use of examination procedures which permit application and consideration of all persons without regard to current or former employment with the District government.
[9] See Agency's Reply Brief, Attachment 2 (September 13, 2017).
[10] A SF-50 is an employee's official personnel action form. See Agency's Reply Brief, Attachment 10, p. 2 (September 13, 2017).

reinstated to a Career Service position.

It is noted that attached with Agency's Reply Brief filed on September 13, 2017, is an affidavit submitted by a DCHR Specialist attempting to clarify the circumstances surrounding Employee's return to service on September 22, 2014. Despite the submission of this affidavit, the SF-50 must take precedence. The affidavit seems to acknowledge that an error was purportedly made in processing Employee's return to work in September 2014. However, it was not until the instant litigation that the purported error made in processing Employee's return to work in September of 2014, that Agency attempted to correct this supposed error. It is further noted that a new SF-50 attempting to correct the alleged error was never produced. Thus, I must rely on the SF-50 provided in the record, which indicates that Employee was reinstated effective September 22, 2014, in a Career Service (Permanent) position. Therefore, Employee could only be removed for cause.

Pursuant to DPR § 1603.2 (August 27, 2012), disciplinary action against an employee may only be taken for cause. As a permanent Career Service employee, Employee had the right to have an adverse action taken only for cause, along with the right to appeal to this Office any adverse action that leads to termination. Here, Agency issued Employee's termination letter on August 12, 2015, which noted that Employee was being terminated during her probationary period pursuant to DPR § 814. Because Agency did not properly impose the adverse action against Employee and failed to adhere to the guidelines that must be followed when dismissing a Career Service employee with permanent status as set forth in DPR §§§ 1608, 1612, 1613 (August 27, 2012), Employee's termination must be reversed.

## ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency's termination of Employee is **REVERSED**; and
2. Agency shall reinstate Employee to the same or comparable position prior to his termination;
3. Agency shall immediately reimburse Employee all back-pay and benefits lost as a result of his removal; and
4. 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:

Arien P. Cannon, Esq.
Administrative Judge

## NOTICE OF APPEALS RIGHTS

This is an Initial Decision that will become a final decision of the Office of Employee Appeals unless either party to this proceeding files a Petition for Review with the office. A Petition for Review must be filed within thirty-five (35) calendar days, including holidays and weekends, of the issuance date of the Initial Decision in the case.

All Petitions for Review must set forth objections to the Initial Decision and establish that:

1. New and material evidence is available that, despite due diligence, was not available when the record was closed;

2. The decision of the presiding official is based on an erroneous interpretation of statute, regulation, or policy;

3. The finding of the presiding official are not based on substantial evidence; or

4. The Initial Decision did not address all the issues of law and fact properly raised in the appeal.

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with Administrative Assistant, D.C. Office of Employee Appeals, 955 L'Enfant Plaza Suite 2500, Washington, D.C. 20024. Four (4) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review may file their response within thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review.

Instead of filing a Petition for Review with the Office, either party may file a Petition for Review in the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

**CERTIFICATE OF SERVICE**

I certify that the attached **INITIAL DECISION** was sent by regular mail on this day to:

Sylvia Johnson
2806 14th Street, NW
#204
Washington, DC 20009

Janea Raines, Esq.,
441 4th, NW.
Suite 1180 N,
Washington, DC 20001

Johnny M. Howard, Esq.
1001 Connecticut Ave, NW
Suite 402
Washington, DC 20036

Katrina Hill
Clerk

December 12, 2017
Date

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

REPLY TO:
955 L'Enfant Plaza, S.W.
Suite 2500
Washington, DC 20024
(202)727-0004
FAX (202)727-5631



SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

SYLVIA JOHNSON,
Petitioner,

v.

D.C. OFFICE OF EMPLOYEE APPEALS,
Respondent.

Case No. 2018 CA 000821 P(MPA)

Judge Elizabeth Wingo

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Sylvia Johnson v. D.C. Fire and Emergency Medical Services,* OEA Matter No. J-0145-15R17AF18. The record consists of one volume containing thirty-one (31) tabs.

Wynter Clarke
Wynter Clarke
Paralegal Specialist

LASHEKA BROWN BASSEY NOTARY PUBLIC DISTRICT OF COLUMBIA
MY COMMISSION EXPIRES 6/14/2021

District of Columbia: SS
Subscribed and Sworn to before me
this 13th day of March, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

| | |
|---|---|
| **In the matter of:**<br><br>**WIDMON BUTLER,**<br>**1717 R Street NW, Apt. 202**<br>**Washington, DC 20009**<br><br>***Petitioner,***<br><br>**v.**<br><br>**METROPOLITAN POLICE DEPARTMENT,**<br>**300 Indiana Avenue, NW, Room 4125**<br>**Washington, DC 20001**<br><br>**and**<br><br>**D.C. OFFICE OF EMPLOYEE APPEALS**<br>**955 L'Enfant Plaza, SW, Suite 2500**<br>**Washington, DC 20024**<br><br>***Respondents.*** | 2018 CA 000430 P(MPA) |



**PETITION FOR REVIEW OF AGENCY DECISION**

Notice is hereby given that Petitioner Widmon Butler ("Petitioner Butler"), by and through counsel, appeals to the Superior Court of the District of Columbia from the District of Columbia Office of Employee Appeals ("OEA") Board Opinion and Order on Petition for Review issued on the 19th day of December, 2017. A copy of the Order sought to be reviewed is attached to this petition as Exhibit A.

Petitioner Butler worked as a Claims Examiner with the District of Columbia Metropolitan Police Department (the "Agency"), and the Agency issued a Notice of Final Decision ("Notice") on November 8, 2013, ordering him to serve a thirty-day suspension. Ex. A at 1. The Notice charged Petitioner Butler with an "on-duty or employment-related act or

omission that interferes with the efficiency and integrity of government operations: Misfeasance." *Id.* Specifically, the Notice accused Petitioner Butler of submitting a "PD 42 Findings & Determination" memorandum recommending that a member of the Metropolitan Police Department (MPD) be placed in Non-Performance of Duty ("Non-POD") status, in which he purportedly omitted pertinent information about the member's medical history. *Id.* at 1-2.

Petitioner Butler appealed the Notice to the OEA on December 23, 2013, and the OEA issued an Initial Decision on January 27, 2017, upholding the charge and the thirty-day suspension. *Id.* at 2-3. The Petitioner submitted a Petition for Review to the OEA Board, and the Board incorrectly upheld the Initial Decision on December 19, 2017, finding that the Initial Decision was based on substantial evidence in the record, that the Agency considered the *Douglas* factors in selecting the penalty, and that the selected penalty was reasonable. *Id.* at 5-8.

Petitioner Butler hereby files this Petition for Review of the OEA Board's December 19, 2017 Opinion and Order on Petition for Review, upholding the Agency's decision to charge Petitioner Butler with misfeasance and suspend him for thirty days.

Address of Respondent Agencies or Officials:

D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

Metropolitan Police Department
300 Indiana Avenue, NW, Room 4125
Washington, DC 20001

Names and addresses of parties or attorneys to be served:

Ronald Harris, Esq.
Metropolitan Police Department
300 Indiana Avenue, NW, Room 4125
Washington, DC 20001

Karl A. Racine
Office of the Attorney General
441 4th Street, NW, Suite 1100S
Washington, D.C. 20001

Sheree L. Price, Chair
D.C. Office of Employee Appeals
1100 4th St SW, Suite 620 East
Washington, DC 20024-4451

Respectfully submitted,

*/s/ David A. Branch*

David A. Branch, DC Bar # 438764
Law Office of David A. Branch and
Associates, PLLC
1828 L Street, NW, Suite 820
Washington, D.C. 20036
(202) 785.2805 phone
(202) 785.0289 fax
davidbranch@dbranchlaw.com

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of January 2018 a copy of the foregoing was served on the following by first-class mail:

Karl A. Racine
Office of the Attorney General
441 4th Street, NW, Suite 1100S
Washington, D.C. 20001

Sheree L. Price, Chair
D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

Ronald Harris, Esq.
Metropolitan Police Department
300 Indiana Avenue, NW, Room 4125
Washington, DC 20001

Respectfully submitted,

*/s/ David A. Branch*
David A. Branch

A

# Exhibit A

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | |
| WIDMON BUTLER, | ) | |
| Employee | ) | |
| | ) | OEA Matter No.: 1601-0041-14 |
| v. | ) | |
| | ) | |
| | ) | Date of Issuance: December 19, 2017 |
| METROPOLITAN | ) | |
| POLICE DEPARTMENT, | ) | |
| Agency | ) | |
| | ) | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Widmon Butler ("Employee") worked as a Civilian Claims Specialist with the Metropolitan Police Department's Medical Services Branch ("Agency"). On November 8, 2013, Agency issued Employee a Notice of Final Decision ordering him to serve a thirty-day suspension based on a charge of "[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Misfeasance." The charge stemmed from an incident wherein Employee submitted a "PD 42 Findings & Determination" memorandum which recommended that a sworn member of the Metropolitan Police Department be placed in Non-Performance of Duty ("Non-POD") status.[1] In his memorandum, Employee

[1] For privacy purposes, the parties agreed to identify the MPD employee as "Officer O."

allegedly omitted pertinent and relevant information from Officer O's medical history that could have resulted in the denial of a lawful worker's compensation claim for the sworn officer involved. Employee's suspension commenced on December 30, 2013.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 23, 2013. In his appeal, Employee argued that the Agency's charge was false and misleading because his conduct did not constitute misfeasance. In addition, he claimed that Agency's adverse action was not supported by evidence and that the charge was "divorced from the circumstances." As a result, Employee requested that his suspension be reversed.[2]

Agency filed its Answer to the Petition for Appeal on January 16, 2014. It denied Employee's substantive allegations and requested that a hearing be held in the matter.[3] An OEA Administrative Judge ("AJ") was assigned to the matter in July of 2014. After several scheduling conflicts, a newly-assigned AJ held a prehearing conference on November 30, 2015 to assess the parties' arguments.[4] An evidentiary hearing was subsequently held on December 21, 2016, wherein the parties presented testimonial and documentary evidence in support of their positions.

An Initial Decision was issued on January 27, 2017. The AJ first held that Agency met its burden of proof with respect to the misfeasance charge. According to the AJ, Employee admitted that he never conducted any additional research into Officer O's medical history to determine if he had prior injuries related to the claim at issue. In addition, the AJ dismissed Employee's arguments that his supervisor rushed him to finish the form PD 42; that Officer O was to blame for not explicitly stating that that his current injury was related to a prior claim; and that Employee did not believe there was an issue with the claim because his supervisor ultimately instructed him to change the recommendation from a Non-POD to a POD status. The AJ further

[2] *Petition for Appeal* (December 23, 2013).
[3] *Agency Answer to Petition for Appeal* (January 16, 2014).
[4] *Order Convening a Prehearing Conference* (October 30, 2015).

stated that Employee's testimony was defensive, combative, evasive, and not credible. Lastly, he determined that Employee consistently performed his duties in a careless and unprofessional manner. Consequently, the AJ determined that Agency had sufficient cause to charge Employee with misfeasance.

Regarding the penalty, the AJ relied on the holding in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), wherein the D.C. Court of Appeals held that OEA must determine, *inter alia*, whether the penalty imposed upon an employee is within the range allowed by law, regulation, and any applicable Table of Penalties. In reviewing Agency's adverse action, the AJ provided that the penalty for a charge of misfeasance is found in Chapter 16 of the District Personnel Manual ("DPM"). Since Agency identified at least one previous instance wherein Employee was disciplined for misfeasance, the AJ concluded that a thirty-day suspension was proper under the Table of Appropriate Penalties. Accordingly, Employee's suspension was upheld.[5]

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on February 22, 2017. He makes a myriad of arguments regarding the AJ's findings of fact. Of note, Employee contends that Agency did not have cause to charge him with misfeasance and that it did not meet its burden of proof with respect to the charge and specification levied against him. Employee also disagrees with the AJ's credibility determinations. In addition, Employee submits that the Initial Decision was not based on substantial evidence. According to Employee, the AJ made a mistake of fact by including prior incident of discipline in his analysis that was previously settled by the parties. He further states

[5] *Initial Decision* at 6.

that Agency's adverse action was an act of retaliation and a part of a "workplace mobbing event." Thus, Employee requests that the Board reverse his suspension.[6]

Burden of Proof

Employee contends that Agency failed to meet its burden of proof in this matter. OEA Rule 628.1 provides that 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." As previously stated, there is an abundance of evidence in the record to prove that Employee conducted his duties as a Claims Examiner in a careless manner. His misconduct constituted an on-duty or employment-related act or omission that interfered with the efficiency and integrity of government operations. Therefore, This Board agrees with the AJ's determination that Agency met its burden of proof in this matter.

Misfeasance

Employee argues that Agency failed to establish that it had cause to take disciplinary action against him. In accordance with Section 1651(1) of the CMPA (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. The definition of cause includes "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations." Under Section 1619 of the DPM, a charge of misfeasance includes "careless work performance, failure to investigate a complaint, providing misleading or inaccurate information to superiors; dishonesty; unauthorized use of government resources; using or authorizing the use of government resources for other than official business."

[6] *Petition for Review* (February 22, 2017).

As a Civilian Claims Specialist, Employee's duties included making determinations on Worker's Compensation claims filed by Agency employees who reported an injury or illness that he or she believed was incurred while on duty. Employee was tasked with determining whether the claim was compensable or non-compensable. As part of the process, he was required to review each report associated with the claim; consort with the legal department, if needed; speak with the case managers who were handling the claim; and talk with the medical providers who treated the employee making the claim. Employee was ultimately required, based on the totality of the circumstances, to make a recommendation to designate the injury as "Performance of Duty" or "Non-Performance of Duty."[7]

After reviewing the record, the AJ concluded that there was sufficient evidence to support a finding that Employee performed his job duties in a careless manner when he failed to conduct a full and exhaustive research of Officer O's medical file prior to recommending that she be placed in Non-POD status. This Board agrees with the AJ's determination. Employee failed to communicate with the legal or medical department regarding Officer O's previous on-the-job (POD) injury to determine if there was a causal relationship to the current claim. In this regard, Employee fell short of the standard required of his position. Officer O's medical file included a recordation of previous injuries to her left knee, which required multiple surgeries. As Agency has argued, omitting relevant information from the PD 42 Findings & Determination could have resulted in the denial of the officer's legitimate and lawful Worker's Compensation claim. Accordingly, this Board finds that Employee's conduct constituted misfeasance as defined under DPM § 1619.

[7] Evidentiary Hearing Transcript, p. 22.

Reasonableness of Penalty

According to Employee, the AJ made a mistake of law in allowing Agency to include a prior charge of misfeasance in selecting the penalty levied against him. He states that the previous matter that the AJ referenced was settled via a Whistleblower lawsuit on October 24, 2016. The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for a first offense of any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations (misfeasance) is a suspension for fifteen days. A second offense carries a penalty of suspension for twenty to thirty days. The penalty for a third offense of misfeasance is termination. Under D.C. Personnel Regulation ("DCPR") § 1606.2, adverse actions occurring within a three year period may be considered when imposing a penalty.

In his Initial Decision, the AJ noted that OEA has previously upheld Employee's twenty-five day suspension for misfeasance and insubordination in an unrelated matter.[8] On November 3, 2015, OEA's Board denied Employee's Petition for Review and upheld Employee's suspensions.[9] Accordingly, Agency was permitted to rely upon the aforementioned charge in selecting the appropriate penalty in this case because it occurred within the previous three-year statutory period as required under DCPR § 1606.2.

The record reflects that the current matter is Employee's second offense of misfeasance.[10] Under the Table of Appropriate Penalties, a second offense carries a maximum penalty of thirty

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[8] *See Butler v. D.C. Metropolitan Police Department*, OEA Matter Nos. 1601-0236-12 and 1601-0069-14 (September 28, 2015). In the first matter, Employee was suspended for twenty-five days. In the second matter, Employee was suspended for thirty days for insubordination. These matters were consolidated by the AJ for efficient adjudication.

[9] The case is currently pending in D.C. Superior Court. *See* 2017 CA 003455 P(MPA).

[10] The AJ stated that this matter was the third charge of misfeasance, referencing OEA Matter No. 1601-0049-15 (November 30, 2016). However, Employee was not charged with this offense at the time Agency issued its advance

days. In addition, Agency considered the *Douglas* factors in selecting the penalty to levy against Employee.[11] Based on the foregoing, Employee's suspension for thirty days was appropriate under the circumstances.

Witness Credibility

In his Petition for Review, Employee disagrees with nearly all of the AJ's findings of fact and credibility determinations. However, the AJ found Employee's testimony to be inconsistent, combative, and not credible. Conversely, he found that Agency's witnesses provided ample evidence to support its adverse action. The D.C. Court of Appeals in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. The OEA Administrative Judge was the fact finder in this matter. As this Board has consistently ruled, we

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notice of proposed suspension in this case. *See also* Evidentiary Hearing Transcript, pg. 12. Therefore, we will analyze the appropriateness of the penalty accordingly.

[11] Evidentiary Hearing Transcript, p. 10. In *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981) the Merit Systems Protection Board ("MSPB") provided the standard for assessing the appropriateness of a penalty. The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

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

will not second guess the AJ's credibility determinations.[12] Moreover, Employee's voluminous assertions in his Petition for Review are merely disagreements with the AJ's findings. This is not a valid basis for appeal. Accordingly, we find Employee's arguments to be without merit.

Substantial Evidence

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[13] The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. In this case, the AJ's findings were based on substantial evidence. His conclusions of law flowed rationally from the evidence presented. As a result, Employee's charge of misfeasance was taken for cause and the penalty of a thirty-day suspension was appropriate. Consequently, Employee's Petition for Review must be denied.[14]

---

[12] *Ernest H. Taylor v D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Derrick Jones v. Department of Transportation*, OEA Matter No. 1601-0192-09, *Opinion and Order on Petition for Review* (March 5, 2012); *C. Dion Henderson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0050-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Ronald Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); and *Theodore Powell v. D.C. Public Schools*, OEA Matter Nos. 1601-0281-10 and 1601-0029-11, *Opinion and Order on Petition for Review* (June 9, 2015).

[13] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

[14] Employee makes several other arguments in his appeal regarding his disagreements with the Initial Decision. This Board finds that Employee was not substantially prejudiced by scheduling delays, as he argues. In addition, he submitted no credible evidence during the course of this appeal that Agency's adverse action was a result of retaliation, malice, or bad faith. Employee states that Agency's decision to place him on Performance Improvement Plan was unwarranted, but provided no evidence in support of his assertions. This Board will also not consider his arguments relative to failed mediations before OEA, as discussions at the conference and the offers of the parties are confidential and may not be offered or received into evidence or otherwise disclosed in subsequent adjudication or litigation. *See* OEA Rule 606.9. We also find that any minor mistakes in the AJ's decision, such as referring to this matter as a termination, rather than a suspension, were de minimus in nature and did not substantially impact the outcome of the case.

**ORDER**

Accordingly, it is hereby ordered that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

P. Victoria Williams

Jelani Freeman

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001
Telephone: (202) 879-1133 • Website: www.dccourts.gov

WIDMON BUTLER
Vs.
METROPOLITAN POLICE DEPARTMENT et al

C.A. No. 2018 CA 000430 P(MPA)

# INITIAL ORDER AND ADDENDUM

Pursuant to D.C. Code § 11-906 and District of Columbia Superior Court Rule of Civil Procedure ("Super. Ct. Civ. R.") 40-I, it is hereby **ORDERED** as follows:

(1) Effective this date, this case has assigned to the individual calendar designated below. All future filings in this case shall bear the calendar number and the judge's name beneath the case number in the caption. On filing any motion or paper related thereto, one copy (for the judge) must be delivered to the Clerk along with the original.

(2) Within 60 days of the filing of the complaint, plaintiff must file proof of serving on each defendant: copies of the summons, the complaint, and this Initial Order and Addendum. As to any defendant for whom such proof of service has not been filed, the Complaint will be dismissed without prejudice for want of prosecution unless the time for serving the defendant has been extended as provided in Super. Ct. Civ. R. 4(m).

(3) Within 21 days of service as described above, except as otherwise noted in Super. Ct. Civ. R. 12, each defendant must respond to the complaint by filing an answer or other responsive pleading. As to the defendant who has failed to respond, a default and judgment will be entered unless the time to respond has been extended as provided in Super. Ct. Civ. R. 55(a).

(4) At the time and place noted below, all counsel and unrepresented parties shall appear before the assigned judge at an initial scheduling and settlement conference to discuss the possibilities of settlement and to establish a schedule for the completion of all proceedings, including, normally, either mediation, case evaluation, or arbitration. Counsel shall discuss with their clients **prior** to the conference whether the clients are agreeable to binding or non-binding arbitration. **This order is the only notice that parties and counsel will receive concerning this Conference.**

(5) Upon advice that the date noted below is inconvenient for any party or counsel, the Quality Review Branch (202) 879-1750 may continue the Conference **once**, with the consent of all parties, to either of the two succeeding Fridays. Request must be made not less than seven business days before the scheduling conference date.
No other continuance of the conference will be granted except upon motion for good cause shown.

(6) Parties are responsible for obtaining and complying with all requirements of the General Order for Civil cases, each judge's Supplement to the General Order and the General Mediation Order. Copies of these orders are available in the Courtroom and on the Court's website http://www.dccourts.gov/.

Chief Judge Robert E. Morin

Case Assigned to: Judge JOHN M MOTT
Date: January 23, 2018
Initial Conference: 10:00 am, Friday, April 27, 2018
Location: Courtroom 518
500 Indiana Avenue N.W.
WASHINGTON, DC 20001

## ADDENDUM TO INITIAL ORDER AFFECTING ALL MEDICAL MALPRACTICE CASES

In accordance with the Medical Malpractice Proceedings Act of 2006, D.C. Code § 16-2801, et seq. (2007 Winter Supp.), "[a]fter an action is filed in the court against a healthcare provider alleging medical malpractice, the court shall require the parties to enter into mediation, without discovery or, if all parties agree[,] with only limited discovery that will not interfere with the completion of mediation within 30 days of the Initial Scheduling and Settlement Conference ("ISSC"), prior to any further litigation in an effort to reach a settlement agreement. The early mediation schedule shall be included in the Scheduling Order following the ISSC. Unless all parties agree, the stay of discovery shall not be more than 30 days after the ISSC." D.C. Code § 16-2821.

To ensure compliance with this legislation, on or before the date of the ISSC, the Court will notify all attorneys and *pro se* parties of the date and time of the early mediation session and the name of the assigned mediator. Information about the early mediation date also is available over the internet at https://www.dccourts.gov/pa/. To facilitate this process, all counsel and *pro se* parties in every medical malpractice case are required to confer, jointly complete and sign an EARLY MEDIATION FORM, which must be filed no later than ten (10) calendar days prior to the ISSC. D.C. Code § 16-2825 Two separate Early Mediation Forms are available. Both forms may be obtained at www.dccourts.gov/medmalmediation. One form is to be used for early mediation with a mediator from the multi-door medical malpractice mediator roster; the second form is to be used for early mediation with a private mediator. Both forms also are available in the Multi-Door Dispute Resolution Office, Suite 2900, 410 E Street, N.W. Plaintiff's counsel is responsible for eFiling the form and is required to e-mail a courtesy copy to earlymedmal@dcsc.gov. *Pro se* Plaintiffs who elect not to eFile may file by hand in the Multi-Door Dispute Resolution Office.

A roster of medical malpractice mediators available through the Court's Multi-Door Dispute Resolution Division, with biographical information about each mediator, can be found at www.dccourts.gov/medmalmediation/mediatorprofiles. All individuals on the roster are judges or lawyers with at least 10 years of significant experience in medical malpractice litigation. D.C. Code § 16-2823(a). If the parties cannot agree on a mediator, the Court will appoint one. D.C. Code § 16-2823(b).

The following persons are required by statute to attend personally the Early Mediation Conference: (1) all parties; (2) for parties that are not individuals, a representative with settlement authority; (3) in cases involving an insurance company, a representative of the company with settlement authority; and (4) attorneys representing each party with primary responsibility for the case. D.C. Code § 16-2824.

No later than ten (10) days after the early mediation session has terminated, Plaintiff must eFile with the Court a report prepared by the mediator, including a private mediator, regarding: (1) attendance; (2) whether a settlement was reached; or, (3) if a settlement was not reached, any agreements to narrow the scope of the dispute, limit discovery, facilitate future settlement, hold another mediation session, or otherwise reduce the cost and time of trial preparation. D.C. Code§ 16-2826. Any Plaintiff who is *pro se* may elect to file the report by hand with the Civil Actions Branch. The forms to be used for early mediation reports are available at www.dccourts.gov/medmalmediation.

Chief Judge Robert E. Morin

GOVERNMENT OF THE DISTRICT OF COLUMBIA

★★★

OFFICE OF EMPLOYEE APPEALS

REPLY TO:
955 L'Enfant Plaza, S.W.
Suite 2500
Washington, DC 20024
(202)727-0004
FAX (202)727-5631



SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

| | |
|---|---|
| WIDMON BUTLER,<br>Petitioner,<br><br>v.<br><br>METROPOLITAN POLICE DEPARTMENT et al.,<br>Respondents. | Case No. 2018 CA 000430 P(MPA)<br><br>Judge John M. Mott |

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Widmon Butler v. Metropolitan Police Department* OEA Matter No. 1601-0041-14. The record consists of two volumes containing thirty-six (36) tabs.

Wynter Clarke
Wynter Clarke
Paralegal Specialist

LASHEKA BROWN BASSEY NOTARY PUBLIC DISTRICT OF COLUMBIA
MY COMMISSION EXPIRES 6/14/2021

District of Columbia: SS
Subscribed and Sworn to before me
this 2nd day of April, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

| | |
|---|---|
| WIDMON BUTLER,<br>Petitioner<br><br>v.<br><br>METROPOLITAN POLICE DEPARTMENT, et al.,<br>Respondents. | Case No. 2018 CA 000430 P(MPA)<br><br>Judge John M. Mott<br><br>**Next Event: Status Hearing**<br>**December 21, 2018 at 10:00 a.m.** |

**OFFICE OF EMPLOYEE APPEALS' STATEMENT IN LIEU OF BRIEF**

Pursuant to the Scheduling Order that was entered on July 17, 2018, Respondent Office of Employee Appeals submits that it relies on the final decision of its Board in the matter of *Widmon Butler v. Metropolitan Police Department,* OEA Matter Number 1601-0041-14 (December 19, 2017). The final decision is attached hereto as Exhibit #1.

Respectfully submitted,

Lasheka Brown Bassey

Lasheka Brown Bassey
D.C. Bar # 489370
General Counsel
D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024
202.727.0738
Lasheka.Brown@dc.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of September, 2018, the forgoing Office of Employee Appeals' Statement in Lieu of Brief was served via the Court's electronic filing system, CaseFileXpress.com to the following:

David Branch, Esq.

Jhumer Razzaque, Esq.

Respectfully submitted,

Lasheka Brown Bassey

Lasheka Brown Bassey
D.C. Bar # 489370
General Counsel
D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024
202.727.0738
Lasheka.Brown@dc.gov

# Exhibit 1

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

| | |
|---|---|
| In the Matter of: | |
| WIDMON BUTLER,<br>Employee | |
| v. | OEA Matter No.: 1601-0041-14 |
| | Date of Issuance: December 19, 2017 |
| METROPOLITAN<br>POLICE DEPARTMENT,<br>Agency | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Widmon Butler ("Employee") worked as a Civilian Claims Specialist with the Metropolitan Police Department's Medical Services Branch ("Agency"). On November 8, 2013, Agency issued Employee a Notice of Final Decision ordering him to serve a thirty-day suspension based on a charge of "[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Misfeasance." The charge stemmed from an incident wherein Employee submitted a "PD 42 Findings & Determination" memorandum which recommended that a sworn member of the Metropolitan Police Department be placed in Non-Performance of Duty ("Non-POD") status.[1] In his memorandum, Employee

[1] For privacy purposes, the parties agreed to identify the MPD employee as "Officer O."

allegedly omitted pertinent and relevant information from Officer O's medical history that could have resulted in the denial of a lawful worker's compensation claim for the sworn officer involved. Employee's suspension commenced on December 30, 2013.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 23, 2013. In his appeal, Employee argued that the Agency's charge was false and misleading because his conduct did not constitute misfeasance. In addition, he claimed that Agency's adverse action was not supported by evidence and that the charge was "divorced from the circumstances." As a result, Employee requested that his suspension be reversed.[2]

Agency filed its Answer to the Petition for Appeal on January 16, 2014. It denied Employee's substantive allegations and requested that a hearing be held in the matter.[3] An OEA Administrative Judge ("AJ") was assigned to the matter in July of 2014. After several scheduling conflicts, a newly-assigned AJ held a prehearing conference on November 30, 2015 to assess the parties' arguments.[4] An evidentiary hearing was subsequently held on December 21, 2016, wherein the parties presented testimonial and documentary evidence in support of their positions.

An Initial Decision was issued on January 27, 2017. The AJ first held that Agency met its burden of proof with respect to the misfeasance charge. According to the AJ, Employee admitted that he never conducted any additional research into Officer O's medical history to determine if he had prior injuries related to the claim at issue. In addition, the AJ dismissed Employee's arguments that his supervisor rushed him to finish the form PD 42; that Officer O was to blame for not explicitly stating that that his current injury was related to a prior claim; and that Employee did not believe there was an issue with the claim because his supervisor ultimately instructed him to change the recommendation from a Non-POD to a POD status. The AJ further

[2] *Petition for Appeal* (December 23, 2013).
[3] *Agency Answer to Petition for Appeal* (January 16, 2014).
[4] *Order Convening a Prehearing Conference* (October 30, 2015).

stated that Employee's testimony was defensive, combative, evasive, and not credible. Lastly, he determined that Employee consistently performed his duties in a careless and unprofessional manner. Consequently, the AJ determined that Agency had sufficient cause to charge Employee with misfeasance.

Regarding the penalty, the AJ relied on the holding in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), wherein the D.C. Court of Appeals held that OEA must determine, *inter alia*, whether the penalty imposed upon an employee is within the range allowed by law, regulation, and any applicable Table of Penalties. In reviewing Agency's adverse action, the AJ provided that the penalty for a charge of misfeasance is found in Chapter 16 of the District Personnel Manual ("DPM"). Since Agency identified at least one previous instance wherein Employee was disciplined for misfeasance, the AJ concluded that a thirty-day suspension was proper under the Table of Appropriate Penalties. Accordingly, Employee's suspension was upheld.[5]

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on February 22, 2017. He makes a myriad of arguments regarding the AJ's findings of fact. Of note, Employee contends that Agency did not have cause to charge him with misfeasance and that it did not meet its burden of proof with respect to the charge and specification levied against him. Employee also disagrees with the AJ's credibility determinations. In addition, Employee submits that the Initial Decision was not based on substantial evidence. According to Employee, the AJ made a mistake of fact by including prior incident of discipline in his analysis that was previously settled by the parties. He further states

[5] *Initial Decision* at 6.

that Agency's adverse action was an act of retaliation and a part of a "workplace mobbing event." Thus, Employee requests that the Board reverse his suspension.[6]

Burden of Proof

Employee contends that Agency failed to meet its burden of proof in this matter. OEA Rule 628.1 provides that 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." As previously stated, there is an abundance of evidence in the record to prove that Employee conducted his duties as a Claims Examiner in a careless manner. His misconduct constituted an on-duty or employment-related act or omission that interfered with the efficiency and integrity of government operations. Therefore, This Board agrees with the AJ's determination that Agency met its burden of proof in this matter.

Misfeasance

Employee argues that Agency failed to establish that it had cause to take disciplinary action against him. In accordance with Section 1651(1) of the CMPA (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. The definition of cause includes "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations." Under Section 1619 of the DPM, a charge of misfeasance includes "careless work performance, failure to investigate a complaint, providing misleading or inaccurate information to superiors; dishonesty; unauthorized use of government resources; using or authorizing the use of government resources for other than official business."

[6] *Petition for Review* (February 22, 2017).

As a Civilian Claims Specialist, Employee's duties included making determinations on Worker's Compensation claims filed by Agency employees who reported an injury or illness that he or she believed was incurred while on duty. Employee was tasked with determining whether the claim was compensable or non-compensable. As part of the process, he was required to review each report associated with the claim; consort with the legal department, if needed; speak with the case managers who were handling the claim; and talk with the medical providers who treated the employee making the claim. Employee was ultimately required, based on the totality of the circumstances, to make a recommendation to designate the injury as "Performance of Duty" or "Non-Performance of Duty."[7]

After reviewing the record, the AJ concluded that there was sufficient evidence to support a finding that Employee performed his job duties in a careless manner when he failed to conduct a full and exhaustive research of Officer O's medical file prior to recommending that she be placed in Non-POD status. This Board agrees with the AJ's determination. Employee failed to communicate with the legal or medical department regarding Officer O's previous on-the-job (POD) injury to determine if there was a causal relationship to the current claim. In this regard, Employee fell short of the standard required of his position. Officer O's medical file included a recordation of previous injuries to her left knee, which required multiple surgeries. As Agency has argued, omitting relevant information from the PD 42 Findings & Determination could have resulted in the denial of the officer's legitimate and lawful Worker's Compensation claim. Accordingly, this Board finds that Employee's conduct constituted misfeasance as defined under DPM § 1619.

[7] Evidentiary Hearing Transcript, p. 22.

Reasonableness of Penalty

According to Employee, the AJ made a mistake of law in allowing Agency to include a prior charge of misfeasance in selecting the penalty levied against him. He states that the previous matter that the AJ referenced was settled via a Whistleblower lawsuit on October 24, 2016. The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for a first offense of any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations (misfeasance) is a suspension for fifteen days. A second offense carries a penalty of suspension for twenty to thirty days. The penalty for a third offense of misfeasance is termination. Under D.C. Personnel Regulation ("DCPR") § 1606.2, adverse actions occurring within a three year period may be considered when imposing a penalty.

In his Initial Decision, the AJ noted that OEA has previously upheld Employee's twenty-five day suspension for misfeasance and insubordination in an unrelated matter.[8] On November 3, 2015, OEA's Board denied Employee's Petition for Review and upheld Employee's suspensions.[9] Accordingly, Agency was permitted to rely upon the aforementioned charge in selecting the appropriate penalty in this case because it occurred within the previous three-year statutory period as required under DCPR § 1606.2.

The record reflects that the current matter is Employee's second offense of misfeasance.[10] Under the Table of Appropriate Penalties, a second offense carries a maximum penalty of thirty

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[8] *See Butler v. D.C. Metropolitan Police Department*, OEA Matter Nos. 1601-0236-12 and 1601-0069-14 (September 28, 2015). In the first matter, Employee was suspended for twenty-five days. In the second matter, Employee was suspended for thirty days for insubordination. These matters were consolidated by the AJ for efficient adjudication.

[9] The case is currently pending in D.C. Superior Court. *See* 2017 CA 003455 P(MPA).

[10] The AJ stated that this matter was the third charge of misfeasance, referencing OEA Matter No. 1601-0049-15 (November 30, 2016). However, Employee was not charged with this offense at the time Agency issued its advance

days. In addition, Agency considered the *Douglas* factors in selecting the penalty to levy against Employee.[11] Based on the foregoing, Employee's suspension for thirty days was appropriate under the circumstances.

Witness Credibility

In his Petition for Review, Employee disagrees with nearly all of the AJ's findings of fact and credibility determinations. However, the AJ found Employee's testimony to be inconsistent, combative, and not credible. Conversely, he found that Agency's witnesses provided ample evidence to support its adverse action. The D.C. Court of Appeals in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. The OEA Administrative Judge was the fact finder in this matter. As this Board has consistently ruled, we

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notice of proposed suspension in this case. *See also* Evidentiary Hearing Transcript, pg. 12. Therefore, we will analyze the appropriateness of the penalty accordingly.

[11] Evidentiary Hearing Transcript, p. 10. In *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981) the Merit Systems Protection Board ("MSPB") provided the standard for assessing the appropriateness of a penalty. The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

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

will not second guess the AJ's credibility determinations.[12] Moreover, Employee's voluminous assertions in his Petition for Review are merely disagreements with the AJ's findings. This is not a valid basis for appeal. Accordingly, we find Employee's arguments to be without merit.

Substantial Evidence

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[13] The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987) found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. In this case, the AJ's findings were based on substantial evidence. His conclusions of law flowed rationally from the evidence presented. As a result, Employee's charge of misfeasance was taken for cause and the penalty of a thirty-day suspension was appropriate. Consequently, Employee's Petition for Review must be denied.[14]

---

[12] *Ernest H. Taylor v D.C. Fire and Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Derrick Jones v. Department of Transportation,* OEA Matter No. 1601-0192-09, *Opinion and Order on Petition for Review* (March 5, 2012); *C. Dion Henderson v. Department of Consumer and Regulatory Affairs,* OEA Matter No. 1601-0050-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Ronald Wilkins v. Metropolitan Police Department,* OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); and *Theodore Powell v. D.C. Public Schools,* OEA Matter Nos. 1601-0281-10 and 1601-0029-11, *Opinion and Order on Petition for Review* (June 9, 2015).

[13] *Mills v. District of Columbia Department of Employment Services,* 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services,* 801 A.2d 983 (D.C. 2002).

[14] Employee makes several other arguments in his appeal regarding his disagreements with the Initial Decision. This Board finds that Employee was not substantially prejudiced by scheduling delays, as he argues. In addition, he submitted no credible evidence during the course of this appeal that Agency's adverse action was a result of retaliation, malice, or bad faith. Employee states that Agency's decision to place him on Performance Improvement Plan was unwarranted, but provided no evidence in support of his assertions. This Board will also not consider his arguments relative to failed mediations before OEA, as discussions at the conference and the offers of the parties are confidential and may not be offered or received into evidence or otherwise disclosed in subsequent adjudication or litigation. *See* OEA Rule 606.9. We also find that any minor mistakes in the AJ's decision, such as referring to this matter as a termination, rather than a suspension, were de minimus in nature and did not substantially impact the outcome of the case.

**ORDER**

Accordingly, it is hereby ordered that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

Sheree L. Price

Sheree L. Price, Chair

Vera M. Abbott

Vera M. Abbott

Patricia Hobson Wilson

Patricia Hobson Wilson

P. Victoria Williams

P. Victoria Williams

Jelani Freeman

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

**CERTIFICATE OF SERVICE**

I certify that the attached **OPINION AND ORDER** was sent by regular mail on this day to:

Widom Butler
1717 R Street, NW
Apt. 202
Washington, DC 20009

Ronald Harris
Metropolitan Police Department
300 Indiana Ave., NW
Room 4125
Washington, DC 20001

Katrina Hill
Clerk

December 19, 2017
Date

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

| | |
|---|---|
| **TYEAST WILLIAMS** | |
| | **Case Number 2017 CA 0012997P(MPA)** |
| **Petitioner,** | **Judge Michael L. Rankin** |
| **v.** | **Date of Issuance: February 27, 2018** |
| **DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS** | |
| **Respondent** | |

**ORDER**

Tyeast Williams, Petitioner, hereby responds to Judge Michael L. Rankin **Order** to serve the Office of Employee Appeals with a copy of the Petition for Review no later than February 28, 2018.

Sincerely,

Tyeast Williams
Petitioner

The following **Order Petition for Review** was hand carried to and served to the following on February 28, 2018.

Office of Employee of Appeals
955 L'Fant Plaza
Suite 2500
Washington, DC 20024

The following **Order Petition for Review** was sent via U.S>=. Postal Mail Certified on February 28, 2018.

D.C. Department of Corrections
General Counsel Office
2000 14th Street, NW
7th Floor
Washington, DC 20009

Tyeast Williams

Petitioner

## THE DISTRICT OF COLUMBIA

## BEFORE THE SUPERIOR COURT



| | |
|---|---|
| In the Matter of: | |
| Tyeast Williams,<br>Employee<br>5206 QueensTROLL PL. SE<br>v. Washington. DC. 20019 | ) OEA Matter No: 1601-0137-15<br>)<br>) Date of Issuance:<br>) March 23, 2017 |
| District of Columbia<br>Department of Corrections<br>Agency 1901 DST SE<br>Washington D.C. 20003 | ) 17-0001997 |

## PETITION FOR REVIEW

The Employee, Tyeast Williams hereby file a Petition for Review. The cause for this action Is based on new and material evidence is available that, despite due diligence, was not available when the record was closed.

The discovery of new evidence and material are as follows:

1. Andra Parker v. D.C. Department of Corrections
   OEA Matter No. 1601-0056-08

2. Anthony Dyson v. D.C. Department of Corrections
   OEA Matter No. 1601-0039-14

3. Department of Corrections Complaint Officer Necole Williams against Lieutenant Manuel Willliams

4. Department of Corrections Complaint Officer S. Fields

17-1997

The investigative process and disciplinary actions are similar in nature and tone, alleged employee inappropriate relationship or over familiarity with staff or inmates. However, the results of the case were different whether in the initial disciplinary action or during the appeal process which could affect the outcome of the employee case favorably than unfavorable as rendered by OEA.

Sincerely

Ty East Williams

Tyeast Williams
Employee

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**

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| **TYEAST WILLIAMS,**<br><br>***Petitioner,***<br><br>**v.**<br><br>**DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS,**<br><br>***Respondent.*** | **Case No. 2017 CA 001997 P(MPA)**<br>**Judge Michael L. Rankin** |

**ORDER**

Upon consideration of the respondent's unopposed Motion to Reset or, in the Alternative, Enlarge Briefing Schedule,it is this 5th day of February, 2018 hereby:

**ORDERED**, that the motion is **GRANTED**; and it is further

**ORDERED**, that the Status Hearing scheduled for February 9, 2018 at 10:00 a.m. is **VACATED**; and it is further

**ORDERED**, that Petitioner shall serve the Office of Employee Appeals with a copy of the Petition for Review no later than February 28, 2018; and it is further

**ORDERED**, that this matter shall convene for a scheduling conference on April 6, 2018 at 10:30 a.m.

**SO ORDERED.**

Michael L. Rankin, Associate Judge

**Copies to:**
Counsel of Record
*Via CaseFileXpress*

Ms. Tyeast Williams
5206 Queens Street Place, SE
Washington, DC 20019
*Via First-Class Mail*

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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| **TYEAST WILLIAMS**<br><br>**Petitioner,**<br><br>**v.**<br><br>**DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS**<br><br>**Respondent.** | **Civil Action No. 2017 CA 001997 P(MPA)**<br><br>**Judge Michael L. Rankin**<br><br>**Next Event: Respondent's Brief Due December 31, 2017** |

**MOTION TO RESET OR, IN THE ALTERNATIVE, ENLARGE BRIEFING SCHEDULE**

The District of Columbia Department of Corrections ("Respondent" or "DOC"), by and through the Office of the Attorney General for the District of Columbia, respectfully moves this Court under Rule 6(b) of the District of Columbia Superior Court Rules of Civil Procedure, as incorporated by Superior Court Agency Review Rule 1(h), to reset or enlarge the briefing schedule that is currently set as follows: Petitioner's Brief due on December 1, 2017, Respondent's Brief due on December 31, 2017. The Status Hearing (if any) is currently scheduled for 10:00 a.m. on February 9, 2018. With due diligence, counsel for Respondent has attempted to contact Petitioner to obtain her consent to this motion, however counsel for Respondent was unable to locate any contact information for Petitioner other than her mailing address. In support of its motion, Respondent submits the attached Memorandum of Points and Authorities.

Respectfully submitted,

KARL A. RACINE
Attorney General for the District of Columbia

NADINE C. WILBURN
Chief Counsel and Senior Advisor
Personnel, Labor and Employment Division

/s/ Andrea G. Comentale
ANDREA G. COMENTALE, #405073
Chief, Personnel and Labor Relations Section

By: /s/ Janea J. Hawkins
JANEA J. HAWKINS [#1025600]
Assistant Attorney General
441 4th Street, N.W.
Suite 1180 North
Washington, D.C. 20001
(202) 727-2815 (direct)
(202) 741-8575 (fax)
janea.hawkins@dc.gov

## RULE 12-I(a) CERTIFICATION

On December 26, 2017 and December 27, 2017, counsel for Respondent attempted to obtain consent to the relief sought in this Motion from Petitioner. However, the undersigned counsel was unable to find valid contact information for Petitioner other than her mailing address. Accordingly, this Motion should be treated as contested.

/s/ Janea J. Hawkins
Janea J. Hawkins
Assistant Attorney General

## CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of December 2017, a copy of the foregoing was served via first class U.S mail to the following:

Tyeast Williams
*Pro Se* Petitioner
5206 Queens Stroll Place, SE
Washington, DC 20019

/s/ Janea J. Hawkins
Janea J. Hawkins
Assistant Attorney General

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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| TYEAST WILLIAMS<br><br>Petitioner,<br><br>v.<br><br>DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS<br><br>Respondent. | Civil Action No. 2017 CA 001997 P(MPA)<br><br>Judge Michael L. Rankin<br><br>Next Event: Respondent's Brief Due December 31, 2017 |

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF RESPONDENT'S MOTION TO RESET, OR IN THE ALTERNATIVE, AMEND BRIEFING SCHEDULE**

The District of Columbia Department of Corrections ("Respondent" or "DOC"), by and through the Office of the Attorney General for the District of Columbia, pursuant to Rule 6(b) of the District of Columbia Superior Court Rules of Civil Procedure, as incorporated by Superior Court Agency Review Rule 1(h), respectfully requests that this Court reset or enlarge the briefing schedule currently set in this matter. In support of its motion, DOC submits the following:

1. According to this Court's docket, on March 27, 2017, Tyeast Williams ("Petitioner") filed a Petition for Review of an Office of Employee Appeals ("OEA") Initial Decision, issued by Administrative Judge Arien Cannon on December 9, 2016.

2. At the time of her filing, Petitioner named only DOC. However, DOC did not receive this Court's notice of the filing, as it was returned to the Court as undeliverable on December 12, 2017.

3. Moreover, Petitioner's filing did not comply with Agency Review Rule 1(e) by failing to name OEA, a necessary party. Pursuant to Rule 1(e), within sixty (60) days from the date of service of a petition for review upon the agency, the agency shall certify and file with the Clerk the entire agency record. To date, OEA has not been named nor has it filed an agency record with this Court.

4. This matter proceeded to a Scheduling Conference on September 29, 2017. Only Petitioner appeared. The Court set the following briefing schedule for the parties:

a. Petitioner's Brief due on December 1, 2017; and

b. Respondent's Brief due on December 31, 2017.

5. Petitioner's Brief was timely filed with the Court on December 1, 2017.

6. However, Petitioner's Brief failed to comply with Rule 1(e) because it failed to include specific references to the pages of the agency record that support the averments relied upon.

7. On December 18, 2017, DOC received notice of Petitioner's filing and the above captioned matter that is currently pending. The undersigned counsel entered her appearance on behalf of DOC on December 27, 2017.

8. While DOC recognizes that its brief is due on or before December 31, 2017, it cannot comply with this Court's Rules in doing so. The Agency (OEA) record has not been filed, and thus DOC cannot reference any pages to a record as mandated by Rule 1(e). Furthermore, DOC cannot adequately respond to Petitioner's Brief, which contains no reference

to the agency record. Finally, this Court cannot issue a ruling in this matter due to these substantive defects.

9. Accordingly, DOC hereby requests that this Court require that Petitioner name and serve OEA with her Petition for Appeal so that an agency record may be filed. Once filed, DOC proposes that this Court set another briefing schedule so that all pleadings dutifully comply with Court Rules. DOC proposes that another Initial Scheduling Conference be scheduled for April 6, 2018 at 9:30 a.m. or a later time that is convenient for the Court.

10. In the alternative, DOC hereby requests an extension of thirty days after the OEA record has been filed to file its brief.

11. DOC brings this motion before the expiration of the period originally prescribed. *See* SUPER. CT. CIV. R. 6(b), as incorporated by SUP. CT. AGENCY REV. R. 1(h).

For the foregoing reasons, DOC respectfully requests that the Court issue an Amended Scheduling Order as proposed in paragraphs nine (9) or ten (10) above.

Dated: December 27, 2017

Respectfully submitted,

KARL A. RACINE
Attorney General of the District of Columbia

NADINE C. WILBURN
Chief Counsel and Senior Advisor
Personnel, Labor and Employment Division

/s/ Andrea G. Comentale
ANDREA G. COMENTALE, #405073
Section Chief
Personnel and Labor Relations Section

/s/ Janea J. Hawkins
JANEA J. HAWKINS, #1025600
Assistant Attorney General
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(202) 724-6611 (direct)
(202) 741-8575 (fax)

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

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| **TYEAST WILLIAMS**<br><br>**Petitioner,**<br><br>**v.**<br><br>**DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS**<br><br>**Respondent.** | **Civil Action No. 2017 CA 001997 P(MPA)**<br><br>**Judge Michael L. Rankin**<br><br>**Next Event: Respondent's Brief Due December 31, 2017** |

**PROPOSED ORDER**

Upon consideration of the District of Columbia Department of Corrections' s Motion to Reset or, in the Alternative, Enlarge Briefing Schedule, including the attached memorandum of points and authorities, and the entire record herein, it is hereby

**ORDERED** that Respondent's Motion is hereby **GRANTED**;

**ORDERED** that the Status Hearing scheduled for February 9, 2018 at 10:00 a.m. is hereby vacated; and it is further

**ORDERED**, that Petitioner name and serve the Office of Employee Appeals with a copy of Petitioner's Petition for Review no later than January 31, 2017, so that the Agency record may be filed.

SO ORDERED, this _____ day of _____, 2017.

Date

Judge Michael L. Rankin

Copies to:

Janea J. Hawkins, Esq.
Counsel for Respondent

Ms. Tyeast Williams
5206 Queens Stroll Place, SE
Washington, DC 20019
Petitioner

# Fraternal Order of Police

Department of Corrections Labor Committee

711 4th Street, Northwest
Washington, D.C. 20001

Phone: 202-737-3505
Fax: 202-737-1505

email: fopdoclc@gmail.com

Date : November 29, 2017

To : Presiding Official
DC Superior Court
TYEAST WILLIAMS PRO SE

From : Sergeant John Rosser
Chairman, FOP DC Corrections Union

Re : Letter of Explanation, FOP DC Corrections Union
Supporting the Efforts of Former Corrections Officer
Tyeast Williams

Dear Superior Court Presiding Official,

As you are aware, Former Corrections Officer Tyeast Williams chose the route of the Office of Employee Appeal (OEA) to litigate her case appealing her termination from employment at DC Corrections. In supporting her appeal she filed various pieces of evidence to include her narrative of events. Also appearing was the DC Department of Corrections representative out of their General Counsel's Office (DOCGC) presenting their reasoning and basis for terminating Corporal Williams. DOCGC's primary evidence against Corporal Williams was the document titled "Findings of Facts" presented by the DC Correction's Office of Investigative Services (OIS). Also the Briscoe case being brought up in Williams case at the last moment is unforgivable. The cases were not similar at all other than it allegedly involved inmates and Officers. Briscoe resigned and therefor again the agency tried by inference to influence this case. It worked at OEA regrettably. I represented Shante Briscoe. The cases are absolutely not the same! OIA and the agency should be sued over this late misuse of its case files to influence non-correctional decision makers whose prejudices are assuaged by other purportedly "similar" incidents. The DOC Human Resource department and OIS should be litigated over this.

The Union recognizes every member's right to choose between the grievance process and OEA and to either have or eschew representation by the Union's lawyer. The Union recognizes William's decision in this case and where it stands now. The Union however, and upon request by Ms. Williams, will enter this letter to challenge the efficacy and credibility of hers or any "Finding of Facts" presented by the Office of Investigative service while under the management of the prominently listed Ms. Wanda Patten. The Union's sole purpose in the matter of Tyeast Williams vs. DC Department of Corrections is to shed light on the credibility of the evidence – through that OIS Final Report "Finding of Facts" – presented in this case. Accompanying this letter are three of the many documents the Union possesses;

1) **Document A (A 1-24)** - United States Court of Appeals for the District of Columbia No. 12-7090
Stephen Ifeany Amobi and Ngozy Amoby Appellants V. DC Dept of Corrections, Et Al.

2) **Document B (B 1-55)** - Arbitration between FOP DC Corrections Labor Committee and DC Dept. of Corrections.
FMCS Case No. 080527-0391-T Before Paul Greenberg Arbitrator.

3) **Document C (C 1- 42)** – Arbitration between FOP DC Corrections Labor Committee and DC Dept. of Corrections.
FMCS Case No. 080722-58014-A Before Arbitrator Joyce M. Klein

All DC Department of Corrections incidents/accusations, as long as I have been employed, are investigated by our Office of Investigative Services (OIS). First they are early in the notification chain, then a determination based on early evidence is made on whether a full investigation is necessary. In cases alleging a violations of law or regulation Corrections Officers are always investigated to the fullest. Ms. Patten, and Mr. Collins, names generally found in the footnotes of all OIS investigations, have been the lead investigators since at least 2005. Ms. Patten ran OIS at least since then until very recently. The court will notice that in all presented "final reports" presented Ms. Patten presents herself as *Chief of the OIS.* It is these documents, The OIS Final Reports, that form the basis for all Correctional Officer and Support Staff Termination proposals. The **theory** is that these "OIS Final Reports" are genuinely factual and objectively arrived at, in an effort to guide the agency on the handling of potential disciplinary action. In theory these investigations produce truthful and reliable "Findings" that in each presented case supplied in the three documents cost good Officers their jobs. **With the exception Mr. Logan who was found to be a manager and Corporal Morris who resigned all the other listed Officers in the supplied documents are currently employed at the DC Jail.** I say this to point out that the OIS "Findings of Facts" in their cases were so deeply flawed as to not hold up in arbitration – not even a preponderance of them!! Horribly, in the document labeled (A), which is an opinion written by a Superior Court Judge – *Circuit Judge* Brown, on page A-6 at D midway down the Paragraph where its "Third" ***and perhaps most seriously, Johnson*** **[OLRCB Attorney]** ***cautioned that although the police had relied on DOC's eyewitness statements, Patten and Beard's supposed interview of brown was pure fiction.....*** **PURE FICTION!** That means it never occurred, was made up, and got an innocent Officer arrested in the Wardens conference room, cuffed, and escorted in front of his peers out of the DC Jail. As Malcolm X said – "By any means necessary"- and apparently that standard applies to OIS investigations reports of "Findings of Facts", whether factual or not. In another incident just as brutal, one of our most dependable Sergeants Today, Felix Ball was accused of seizing and destroying an inmates orange jumpsuit to "cover up" and assault on a juvenile inmate so he and his coworkers could "go home" on Christmas day. This nightmare is chronicled in Document (C). On page C-14 Ms. Patten acknowledges "errors made". (Please note the Officers had already been terminated for a number of years!). Also on page C-14 the video evidence supplied in the OIS Final Report signed off on by OIS Director Wanda Patten showing then Corporal Ball holding what she stated was "the Bloody Jumpsuit" that he "Destroyed" was in fact Corporal Balls hand on an inmates shoulder as he escorted him down the tier of that unit. This admission of "error" occurred on the arbitration witness stand. Finally the court needs to take a good long look at paragraph 3 on page C-34 and page C-35 in its entirety to see the disdain the arbitrator had for the "OIS Finding of Facts". What generally happens is the inmate is interviewed first. He/She tells their story. Amazingly, and with stark regularity up to today, that inmate narrative becomes the basis for truth and any – any story different is regarded as lying (See Document A at A-3 paragraph 2 and Document C at C-15) and the Officers charged with all manner of willfully omitting and false reporting. OIS believes its inmates over its Officer in many cases. In Document (B), as in all the OIS investigations, a conclusion of facts was actually reach prior to the investigation. Not only were the interviews and facts manipulated but the process was manipulated as well. Director Devon Brown, supplied by OIS Director Wanda Patten ignored the common sense conclusions of their first hearing Officer (The late Mr. Godwin) and produced a pliant second hearing Officer – the unethical Mr. Henderson (resigned four days after his ruling in this case for violating federal Hatch Act rules) who on January 14th issue his ruling for termination in that case. The arbitrator brought all but one Officer back to work while stating that the forth Officer was acting more under the color of management.

**Honorable Judge** I supply these documents in an effort to show the court that the DC Department of Corrections' Office of Investigative Services operates on a shrewd standard of always getting their man/woman. Their Findings of Fact have been alternately described as "unusual", "untruthful", "manipulative", and in the case of the Appellate Court – " Fictional". After reading the case presented by the OIS "Findings of Facts" in the case of Corporal Tyeast Williams, I see all the same patterns of innuendo and chronologically manipulated facts designed to portray something that it is not. I will leave the defense of Corporal Williams to their own devices but what I will say by way of the presented evidence is **don't take the dc Department of Corrections Office Of Investigative Service's report on its word!** They are often unreliable and manipulative. If Ms. Williams is refuting OIS's facts and findings there is probably reliable reason to believe her. The FOP DC Corrections Union and our Attorneys Hannon Law group place little if any factual value to OIS's Findings of Facts. Invariably they collapse under scrutiny and in arbitrations. OIS has enjoyed DOC administrations that value the maxim "the end justifies the means". Today it is a health CABAL within the agency that drives this behavior. The FOP DC Corrections Union ask that the court listen very carefully to Williams objections to the way OIS is presenting what it calls facts. We also ask that you view OIS's submission in her case for what it is – unreliable, a means to an end.

**DISTRICT OF COLUMBIA**
**SUPERIOR COURT**

| | | |
|---|---|---|
| Tyeast Williams<br>Employee, Pro Se | ) | Honorable Michael L. Rankin |
| v. | ) | Case Number: 2017-CA 001997P(MPA) |
| District of Columbia Government<br>D.C. Department of Corrections<br>Agency | ) | |

**CLOSING ARGUMENT**

The D.C. Department of Corrections, Agency, an entity of the District of Columbia Government subjected Employee, Tyeast Williams to an internal investigation by their Office of Special Inspector (OSI) initially as a result of a group photograph discovered an inmate cell. There was no evidence to support Employee Williams was in violation of the District Personnel Manual (DPM) or Agency, Policy and Procedures. No charges were rendered by the Agency. However, an investigation continued by the OSI resulting of Employee Williams being charged violations of the DPM and Agency, Policy and Procedures. This stem from the OSI investigation making a determination Employee Williams ~~made~~ Received 3-4-19 telephone calls and visit and inmate appearing to be at an outside correctional facility and jurisdiction. The matter was Appealed to the Office of Employee Appeals (OEA). The initial Hearing the presiding Judge concluded that there was no evidence to support the charges rendered by the Agency resulting in Employee Williams termination of employment. However, afforded the Agency to present any other evidence or cases support the cause for Employee Williams termination. The Agency submitted a Case Shante Briscoe v. D.C. Department of Corrections resulting in Employee Briscoe termination of employment. The Final OEA Hearing, the presiding Judge rendered a decision and ruling upheld the Agency position Employee Williams termination. The supporting evidence reveal telephone calls were made from Employee Williams, mother listed phone in that the inmate in question was a family friend and neighbor of 15 years or more who was provided the family telephone number long before and prior to Employee Williams employment as a Correctional Officer. Further, the evidence failed to reveal Employee Williams had knowledge of ; was in receipt of telephones calls or visited the inmate in question. However, considering the facts and evidence of the case, in the OEA decision failed to demonstrate Employee Williams ~~made~~ Received 3-4-19 telephone calls or visited an inmate during her employment as a Correctional Officer. Employee deny the charges as rendered through the OSI investigation and refutes and deny ~~making~~ Receiving - TLW telephone calls or visiting an inmate. Therefore, Employee Williams requested further review of the disposition of this case by this Court. Wherefore, having cause the OEA decision to upheld the case Termination of Employment was wrongful and made in error. Employee refutes the Agency

claim of violation of the DPM or Agency Policy and Procedures and request the Court Reverse the decision to reinstate Employee Williams to her position of record, Correctional Officer with the D.C. Department of Corrections. The imposed penalty is not consistent with most other similar Agency cases of termination as provided as part of discovery resulting in Reinstatement or Suspension. Further, additional similar cases as provided to this Court today revealed the same. Employee Williams request consideration of this Court of the proposed penalty as rendered by the Agency for the same.

Sincerely,

Tyeast L. Williams

Tyeast Williams
Employee
Pro Se

A-1

# United States Court of Appeals

**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Argued October 25, 2013 Decided June 27, 2014

No. 12-7090

STEPHEN IFEANYI AMOBI AND NGOZI AMOBI,
APPELLANTS

v.

DISTRICT OF COLUMBIA DEPARTMENT OF CORRECTIONS, ET AL.,
APPELLEES

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Appeal from the United States District Court
for the District of Columbia
(No. 1:08-cv-01501)

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*J. Michael Hannon Jr.* argued the cause and filed the briefs for appellants.

*Richard S. Love*, Assistant Attorney General, Office of the Attorney General for the District of Columbia, argued the cause for appellees. With him on the brief were *Irvin B. Nathan*, Attorney General, *Todd S. Kim*, Solicitor General, and *Donna M. Murasky*, Deputy Solicitor General at the time the brief was filed. *Loren L. AliKhan*, Deputy Solicitor General and *Mary L. Wilson*, Assistant Attorney General, entered appearances.

A-2



Before: TATEL and BROWN, *Circuit Judges*, and EDWARDS, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* BROWN.

BROWN, *Circuit Judge*: The facts giving rise to this case are as curious as they are disturbing. Eight years ago, Derrick Brown ("Brown" or "the Inmate"), a conniving prisoner serving a series of weekend sentences at the District of Columbia Jail, assaulted Correctional Officer ("CO") Stephen Amobi. Despite the fact that Amobi was the victim of an unprovoked attack whose injuries required medical attention, Amobi was arrested, criminally prosecuted, and fired from his employment. Even after being acquitted at his subsequent criminal trial, after Brown admitted to initiating the confrontation and assaulting the officer, and after prevailing in a contested administrative hearing, Amobi was not reinstated until a D.C. Superior Court judge intervened.

Amobi and his wife sued the District of Columbia, the D.C. Department of Corrections ("DOC"), and several Jail officials, seeking relief under federal law and D.C. common law for conspiracy, false arrest, malicious prosecution, defamation, intentional infliction of emotional distress ("IIED"), deprivation of due process, aiding and abetting, and loss of consortium. The Defendants moved for summary judgment and, in a perfunctory nine-page opinion, the district court granted the motion. On appeal, Amobi challenges the district court's judgment in favor of the Defendants. Concluding that genuine issues of material fact exist regarding the false arrest, malicious prosecution, and IIED claims, we affirm in part, reverse in part, and remand to the district court for further proceedings.

A-3



I

A

The puzzling details of this dispute begin on the morning of June 4, 2006, when the Jail was locked down because of the escape of two extremely dangerous inmates the day before. Brown, who is transgendered, was serving the third of fifteen weekends for simple assault and was scheduled for release at noon. The lockdown slowed the release process and Brown became increasingly agitated as he waited to be released from his cell. When Amobi arrived, Brown was argumentative and abusive. By the time Amobi and Brown arrived at the sally port, the verbal altercation had escalated into a nose-to-nose shouting match. Amobi attempted to retreat into the "Bubble," a round glass enclosure separating the sally port from the inmate housing units, but Brown obstructed his path.

As Brown later testified, when he saw the officials approaching the sally port, he wanted to lure Amobi into attacking him so he could file a civil suit and "get some money." Brown was in a position to see, and be seen by, someone in the adjacent hallway. Warden Robert Clay, Deputy Warden Stanley Waldren, and Major Elbert White were conducting a fire and safety inspection. As the officials approached the sally port, Brown took advantage of their restricted line of sight and punched Amobi on his right forearm. Amobi reacted immediately by restraining Brown and forcing him against the wall. The officials, who saw Amobi's reaction, but not the assault that precipitated it, sprinted to the sally port, ordered Amobi to release Brown, and turned a deaf ear to Amobi's attempt to explain he had acted in self-defense. White ordered Amobi not to speak until instructed to do so.

A-4



After receiving medical attention, Amobi was taken to the Command Center where his injuries were photographed. When he proceeded to Waldren's office, as instructed, he found the three officials who had stopped the altercation, the Director of the Office of Internal Affairs (Wanda Patten) and an OIA investigator (Valerie Beard). Amobi was ordered placed on administrative leave, and he and the witnesses, including the witnesses who had actually seen what happened or heard Brown boast that he had just set up a lawsuit, completed incident reports.

The initial investigation ignored this exculpatory evidence and focused instead on an alleged interview with Brown in which Patten and Beard claimed Brown wanted to press criminal charges. While Amobi was preparing his incident report, the police were summoned. The responding police officer, Albert Henley, was shown the incriminating incident reports of Clay, Waldren, and White, but none of the exculpatory reports. Officer Henley was also told that the Inmate had made a corroborating statement witnessed by Patten and Beard. As a result, Amobi was arrested, charged with simple assault, and released.

B

On July 12, 2006, Amobi was summarily removed from his position. The basis for Amobi's dismissal included the interview with Inmate Brown which, as subsequent events revealed, was fictional. Amobi promptly challenged the Department's actions and, after a hearing on August 3, 2006, the hearing officer determined Amobi had acted in self-defense and recommended reinstatement. DOC's Director, Devon Brown, disagreed, and Phuoc Nguyen, the hearing officer, under pressure from the administration, reconsidered and recommended termination. Amobi appealed, but for reasons

never explained in the record, the appeal was never resolved. Consequently, Amobi demanded arbitration in accordance with his union's collective bargaining agreement ("CBA").

C

The criminal prosecution, which had stalled in August 2006 when the District was unable to produce the photos of Amobi's injuries, *see United States v. Amobi*, 2006 CMD 012120 (D.C. Super. Ct. Aug. 15, 2006), was reopened in October 2006, after the U.S. Attorney's Office was, according to Amobi, pressured to refile the charges. The government's case fell apart when Brown took the stand, however, and for the first time, provided a damning, self-inculpatory account of the artifice he employed during the June 2006 assault. Brown admitted he wanted to "set Mr. Amobi up so someone could witness [Amobi] do something to [him]." S.A. 297.[1] Brown confessed he knew the three Jail officials were "important people"[2] and that, in wake of the inmate escape, the officials "were very suspicious about things that were going on in the jail." *Id.* at 296–97. Exultant over having secured the Jail officials as witnesses to his ruse, Brown boasted to CO Wayne Taylor of his exploits, which CO Stephen Harris overheard and documented in his incident report. And true to his word, Brown made good on his plan to file a civil suit. *See*

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[1] "S.A." and "P.A." refer to Appellants' Supplemental Appendix and Public Appendix, respectively.

[2] Brown's numerous run-ins with the law provided ample opportunity to become well acquainted with DOC officials. Brown testified he had a criminal history of simple assault, fleeing law enforcement, four counts of destruction of property, sexual solicitation, and contempt of court. P.A. 12; S.A. 275–76. Brown also testified he attempted to smuggle marijuana into the Jail the weekend before the June 2006 assault. S.A. 290–91.

*Brown v. D.C. Dep't of Corrections*, 2006 SC3 014278 (D.C. Super. Ct. Dec. 22, 2006). Brown explained his motivation for the stunt was a desire to get even with those who ridiculed him for being transgendered "when [he] was coming to do [his] sentence." S.A. 305–06. Ultimately, Brown owned up to "turn[ing] the altercation from verbal to physical . . . [so] that [he] would get a response from Mr. Amobi[,] . . . get . . . money[,] . . . and . . . get . . . witnesses." S.A. 312. Following Brown's bombshell testimony, the trial judge found Amobi not guilty—the verdict coming exactly one year to the day of the June 4, 2006 altercation.

D

Although Amobi had requested the arbitration, to which he was entitled under his CBA, he requested that, in light of his exoneration, he be allowed to return to work immediately. The District's attorney, Repunzelle Johnson, also counseled against proceeding with the scheduled arbitration and instead advised Director Brown to return Amobi to work. In an October 1, 2007 memo to Director Brown, Johnson laid bare the numerous discrepancies in the District's case. First, Johnson recounted how each of the three Jail officials acknowledged they did not see what happened prior to the alleged assault. Second, Johnson highlighted the fact that DOC "did not do an independent investigation to determine what happened prior to the assault of Inmate Brown." S.A. 398. Third, and perhaps most seriously, Johnson cautioned that although the police had relied on DOC's eyewitness statements, Patten and Beard's supposed interview of Brown was pure fiction, and Amobi's incident report was never given to the police. Fourth, Johnson reminded Director Brown of the Inmate's incriminating testimony and that CO Ernest Wallace also corroborated Amobi's account. Fifth, Johnson informed Director Brown that, in addition to Amobi's visit

with Dr. Boakai, the District had "independent medical documentation from a private physician which supports that Amobi had a bruise on his right arm."[3] *Id.* Sixth, Johnson lamented DOC's inability to locate the three photographs taken of Amobi's injuries. Finally, Johnson admonished the Director for failing to consider all the *Douglas* Factors, which, on balance, suggested "termination is probably not warranted."[4] S.A. 399.

Despite Amobi's request and Johnson's appeal to reason, Director Brown proceeded with the arbitration hearing and refused to reinstate Amobi. Hearings were held on October 2 and 3, 2007. A little less than three months later, the arbitrator concluded Amobi had applied appropriate self-defense

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[3] In fact, based on medical reports, the D.C. Office of Risk Management, Disability Compensation Program determined that Amobi was eligible for disability compensation as a result of the contusion he suffered on his right arm. *See* P.A. 14, 158.

[4] *See Douglas v. Veterans Admin.*, 5 MSPB 313, 332 (1981). In *Douglas*, the United States Merit Systems Protection Board announced twelve factors relevant to determination of an appropriate penalty for a government employee's job-related misconduct, including: the nature and seriousness of the offense; the employee's job level, past work record, and past disciplinary record; likely effect of the offense on the employee's ability to perform at a satisfactory level; consistency of proposed penalty with those imposed for similar offenses and with an applicable agency table of penalties; notoriety of the offense; impact on agency reputation; clarity of the rules violated; potential for employee rehabilitation; mitigating circumstances; and adequacy of alternative sanctions. *See also Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985) (noting that an agency must "conscientiously consider the relevant [*Douglas*] factors and . . . strike a responsible balance within tolerable limits of reasonableness").

techniques and that his summary dismissal was without cause. The arbitrator further ordered that Amobi be reinstated with full backpay and benefits and that DOC correct, remove, or destroy all records related to Amobi's summary removal.

Seeking further redress, Amobi and his wife filed suit against the District, DOC,[5] and several Jail officials on June 4, 2008. On August 9, 2012, the district court granted the Defendants' motion for summary judgment, and Amobi and his wife timely appealed on September 10, 2012.

II

We review de novo a district court's grant of summary judgment, viewing all evidence in the light most favorable to the non-moving party. *Ayissi-Etoh v. Fannie Mae*, 712 F.3d 572, 576 (D.C. Cir. 2013). The district court focused on the following claims: common law and constitutional false arrest; common law malicious prosecution; common law and constitutional defamation; deprivation of procedural due process; and IIED.[6] We address each in turn.

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[5] DOC is a *non sui juris* subordinate government agency, D.C. Code § 24-211.01; *Simmons v. District of Columbia Armory Bd.*, 656 A.2d 1155, 1156 (D.C. 1995), and has since been dismissed from this suit.

[6] Holding that Amobi had no other viable claim against any of the defendants, the district court summarily dismissed Amobi's aiding and abetting and loss of consortium claims. *Amobi v. District of Columbia Gov't*, 882 F. Supp. 2d 78, 84 (D.D.C. 2012). Perhaps employing a similar rationale, the district court did not address Amobi's conspiracy claims. *See id.* at 82 n.6. Because we conclude genuine issues of material fact exist as to the false arrest, malicious prosecution, and IIED claims, on remand the district court must reckon with these previously unanalyzed counts.

Amobi claims the district court erred in concluding there was probable cause to effectuate his arrest. We are unable to decide the merits of the common law claim, however, because it is barred by a one-year statute of limitations. *See* D.C. Code § 12-301(4). Amobi filed his complaint on June 4, 2008, two years after his arrest. Although the district court did not decide the claim was time-barred, Appellees raised the timeliness of the common law claim in their motion for summary judgment below. *See* P.A. 94. Appellees may therefore reassert the argument now. *Warren v. District of Columbia*, 353 F.3d 36, 38 (D.C. Cir. 2004) ("[A] prevailing party may defend the judgment on any ground decided or raised below.").

Amobi's rejoinder is unavailing. He claims Appellees' fraudulent concealment of exculpatory evidence tolls the statute of limitations. This argument fails. To establish a claim of fraudulent concealment, Amobi must demonstrate that the information fraudulently concealed was material to the delay. *Fitzgerald v. Seamans*, 384 F. Supp. 688, 693 (D.D.C. 1974). "If plaintiff's delay in bringing the lawsuit is to be excused, the Court must have reason to believe that the 'timely assertion' of plaintiff's rights 'has been postponed as a result of the fraud of the party against whom liability might otherwise have been urged.'" *Id.* (quoting *Searl v. Earll*, 221 F.2d 24, 26 (D.C. Cir. 1954)).

Our cases require that the information concealed be "so material in character that knowledge of a basis for, or intelligent prosecution of, the cause of action was precluded." *Emmett v. E. Dispensary & Cas. Hosp.*, 396 F.2d 931, 937

(D.C. Cir. 1967). Said differently, the fraudulent concealment must actually succeed in precluding the plaintiff from acquiring knowledge of the material facts. *See Westinghouse Elec. Corp. v. City of Burlington*, 351 F.2d 762, 764 (D.C. Cir. 1965). Where "the plaintiff knew, or by the exercise of due diligence could have known, that he may have had a cause of action," the claim that defendants' fraudulent concealment of the facts tolls the statute of limitations must fail. *Id.*

Here, Amobi contends "[t]he concealment of the lack of an investigation by the Office of Internal Affairs, and the cover-up of the fact that no interview with the inmate ever took place following the incident caused the statute to be tolled until this information was revealed." Appellants' Reply Br. at 3. But Amobi's eventual claim for false arrest was not predicated on the fraudulently concealed evidence. *See* P.A. 36, ¶ 38 (noting as the basis for his false arrest claim his arrest by the police "without probable cause and without the issuance of a warrant as required under District of Columbia law"). Indeed, Amobi concedes, perhaps unwittingly so, that "[t]he evidence of fraudulent concealment was not revealed to [him] until *after* the initiation of his lawsuit." Appellants' Reply Br. at 3 (emphasis added). Thus, if Amobi knew he had—and in fact initiated—a cause of action for false arrest, Appellees did not succeed in precluding him from acquiring knowledge of the material facts necessary to initiate the claim. While knowledge of the alleged fraudulent concealment would have no doubt buttressed a claim of false arrest, "[m]ere ignorance of evidentiary details, although such information might be useful at trial, will not suffice," *Fitzgerald*, 384 F. Supp. at 693 (citing *Moviecolor Ltd. v. Eastman Kodak Co.*, 288 F.2d 80, 87 (2d Cir. 1961)).

Amobi's constitutional false arrest claim presents a tougher question. Constitutional and common law claims of false arrest are generally analyzed as though they comprise a single cause of action. *See, e.g., Scott v. District of Columbia*, 101 F.3d 748, 753–54 (D.C. Cir. 1996); *District of Columbia v. Minor*, 740 A.2d 523, 529 (D.C. 1999) (noting that, if the court finds a viable common law claim of false arrest, then a viable constitutional claim naturally flows, and vice versa). The elements of both claims are "substantially identical." *Scott*, 101 F.3d at 753. Amobi seeks compensatory and punitive damages under 42 U.S.C. § 1983 for violations of his Fourth Amendment right to be free from unreasonable seizure. Specifically, Amobi claims that, in contravention of D.C. Code § 23-581(a)(1),[7] he was arrested without probable cause for an alleged assault that did not occur in Officer Henley's presence. Appellees agree that, construed as a Fourth Amendment claim for false arrest, Amobi is safely within the prescribed three-year statute of limitations. *See* Appellees' Br. at 33 (citing *Carney v. Am. Univ.*, 151 F.3d 1090, 1096 (D.C. Cir. 1998)). Yet, because Amobi did not name Officer Henley as a defendant in his complaint, *see* P.A. 25–26, he must show either that the "custom or policy of the [District] caused the violation," *Brown v. District of Columbia*, 514 F.3d 1279, 1283 (D.C. Cir. 2008), or that one of the individually named

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[7] Section 23-581(a)(1) provides that an officer may only make a warrantless arrest for a misdemeanor committed outside his presence if there is probable cause *and* reason to believe that unless immediately arrested, the individual "may not be apprehended, may cause injury to others, or may tamper with, dispose of, or destroy evidence." *See also Enders v. District of Columbia*, 4 A.3d 457, 466 (D.C. 2010).

defendants[8] is to blame, *see Jones v. Horne*, 634 F.3d 588, 600 (D.C. Cir. 2011).

As to the District, Amobi seems to argue that it violated his Fourth Amendment rights based on its alleged custom and policy of failing to comply with its statutory prohibition on warrantless arrests for misdemeanors committed outside of an officer's presence. Amobi is mistaken. Whether the assault occurred in Officer Henley's presence is not the *sine qua non* of a Fourth Amendment violation. The Supreme Court has made clear that the "Constitution's protections concerning search and seizure" do not vary with state arrest law, *see Virginia v. Moore*, 553 U.S. 164, 172–73 (2008), and Amobi makes no argument that the Constitution requires the District's misdemeanor arrest rule. Nevertheless, whether Officer Henley could have had probable cause to execute Amobi's arrest—even without the crime occurring in his presence—is still a relevant inquiry.

"Generally, probable cause exists where the facts and circumstances within the arresting officer's knowledge, of which he had reasonably trustworthy information, are sufficient in themselves to warrant a reasonable belief that an offense has been or is being committed." *Rucker v. United States*, 455 A.2d 889, 891 (D.C. 1983). "The issue of probable cause in a false arrest case is a mixed question of law and fact that the trial court should ordinarily leave to the jury." *Bradshaw v. District of Columbia*, 43 A.3d 318, 324 (D.C. 2012). Only where the facts are undisputed or clearly established does probable cause become a question of law for the court. *Id.* The district court held Amobi's claim for false

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[8] The individually named defendants include Devon Brown, Robert Clay, Stanley Waldren, Elbert White, Joan Murphy, and Denise "Toni" Shell. *See* P.A. 25–26, 32.

arrest failed because the Jail officials "merely reported what they observed, and their observations constituted probable cause" for Amobi's arrest and prosecution. *Amobi*, 882 F. Supp. 2d at 83. Amobi counters with two arguments he claims demonstrate want of probable cause.

First, Amobi contends his claim of innocence created a genuine issue of material fact that should have been sent to the jury. *See* Appellants' Reply Br. at 6–7 (citing *Wolter v. Safeway Stores*, 153 F.2d 641, 642 (D.C. Cir. 1946)). This argument fails. "Once a police officer has a reasonable basis for believing there is probable cause, he is not required to explore and eliminate every theoretically plausible claim of innocence before making an arrest." *Ricciuti v. N.Y.C. Transit Auth.*, 124 F.3d 123, 128 (2d Cir. 1997); *Panetta v. Crowley*, 460 F.3d 388, 395–96 (2d Cir. 2006) ("[A]n officer's failure to investigate an arrestee's protestations of innocence generally does not vitiate probable cause.").

Here, Officer Henley testified that he based his probable cause finding on statements from five witnesses. Although Amobi contends the five witnesses provided inaccurate information, the officer had no reason to discredit the eyewitness testimony. *See Enders*, 4 A.3d at 470–71 ("[T]he relevant inquiry in a false arrest defense is not what the actual facts may be but rather what the officers could reasonably conclude from what they were told and what they saw on the scene."). Thus, Amobi's statement that Brown struck him first does not by itself vitiate probable cause. In sum, because violation of § 23-581 did not result in constitutional injury, and because Amobi failed to identify any other municipal policy, practice, or custom that was a moving cause of his claimed constitutional violation, his constitutional false arrest claim against the District was properly dismissed.

Amobi's second argument is more nettlesome, but persuasive. He asserts that, although the three Jail officials did not carry out his arrest, they are nevertheless personally liable for his false arrest because they withheld exculpatory evidence from the arresting officer. "[T]o establish personal liability in a § 1983 action, it is enough to show that the official, acting under color of state law, caused the deprivation of a federal right. . . . [T]he plaintiff in a personal-capacity suit need not establish a connection to governmental policy or custom . . . ." *Hafer v. Melo*, 502 U.S. 21, 25 (1991).

Under D.C. law, "[l]iability is incurred for the procuring of a false arrest and imprisonment if by words, one directs, requests, invites or encourages the unlawful detention of another." *Smith v. District of Columbia*, 399 A.2d 213, 218 (D.C. 1979). "[P]rocurement of false imprisonment is the equivalent in words or conduct to 'Officer, arrest that man.'" *Id.* (quoting RESTATEMENT (SECOND) OF TORTS, § 45A). Accordingly, "[t]o accuse a person of committing a crime, however slanderous it may be, is not enough to sustain a claim of false arrest so long as the decision whether to make the arrest remains with the police officer and is without the persuasion or influence of the accuser." *Id.* But "[t]he weight of authority holds that an informer who knowingly gives false information to a police officer necessarily interferes with the intelligent exercise of the officer's independent judgment and discretion and thereby becomes liable for a false arrest that later occurs." *Vessels v. District of Columbia*, 531 A.2d 1016, 1020 (D.C. 1987). Logic counsels that "[t]o consciously misstate the facts under such circumstances must be for the purpose of inducing action by the police." *Id.* For this reason, "[a] complainant is required to disclose . . . material facts; that is, facts material to the alleged crime charged, facts which would have a tendency to throw light upon whether any malicious mischief was in fact committed,

and who in all probability committed them. Immaterial facts need not be stated." *Sears Roebuck & Co. v. Gault*, 175 A.2d 795, 797 (D.C. 1961)

Provided all material facts are disclosed, complainants "may without fear of civil reprisal for an honest mistake, report to the police or public prosecutor the facts of a crime and in good faith, without malice, identify to the best of their ability . . . the perpetrator of the crime." *Smith*, 399 A.2d at 219. "It is settled that merely giving facts to an officer showing that an offense has been committed and that a person may be suspected of its commission does not comprise the tort of false imprisonment." *Id.* at 218. *Cf. Smith v. Tucker*, 304 A.2d 303, 308 (D.C. 1973) ("Where . . . a crime of a serious nature has been committed and from the admitted facts or uncontradicted evidence it appears that the injured party *has done nothing more than take reasonable and proper steps for the discovery and apprehension of the criminal* that party merits, and should receive, the protection of the court." (emphasis added)).

Here, the three Jail officials did not merely tell Officer Henley what they saw; they omitted several material facts they either knew or should have taken reasonable and proper steps to discover. Clay, Waldren, and White all acknowledge they did not see what happened before the assault. Clay admitted he "had no idea what had transpired between" Amobi and Brown before he arrived on the scene. S.A. 231. Nevertheless, Clay told Officer Henley that Amobi's claim of self-defense was "not true." S.A. 172. Waldren conceded he did not know what led to the "physical contact," S.A. 372, and that he could not "testify one way or another as [to] whether Mr. Brown ever put his hand on Mr. Amobi," S.A. 378. White confessed Brown's arms were not always visible from the hallway as he and the other officials approached, S.A. 388,

and that he had a compromised view through the metal gate and into the sally port, *id.* None of these facts were disclosed to Officer Henley. *See* S.A. 190. Furthermore, Waldren knew it was "standard operating procedure to take photographs of injured officers," S.A. 18, and to "afford [them] medical attention," S.A. 16. And White knew photographs of Amobi's injuries had been taken and that surveillance footage may have been available. S.A. 22–23, 177. Yet neither officer took reasonable steps to determine whether the photographs or medical examination of Amobi suggested Brown had initiated the assault. In fact, White admitted he had no reason to disbelieve Amobi's claim of self-defense, and Waldren and White saw that Amobi was using what they recognized as a restraint technique taught to COs.

At the very least, the preceding facts demonstrate the Jail officials had no "honest belief" that Amobi did not act in self-defense. *See Vessels*, 531 A.2d at 1020–21; *Tucker*, 304 A.2d at 307. Moreover, none of the officials took reasonable steps to secure and submit to Henley the exculpatory statements from COs Wallace, Taylor, and Harris, despite Waldren's acknowledgment that it was his duty to oversee and manage the approximately 600 COs at the Jail. Failing to disclose the foregoing material facts evinces a lack of good faith and is equivalent to "Officer, arrest that man." *Smith*, 399 A.2d at 218. Accordingly, we reverse the grant of summary judgment on this claim as to Clay, Waldren, and White, but affirm as to the other parties.



Genuine issues of material fact persist concerning whether probable cause existed for both the initiation and continuation of Amobi's prosecution. To support a malicious prosecution claim, "[t]here must be (a) a criminal proceeding *instituted or*

*continued* by the defendant against the plaintiff, (b) termination of the proceeding in favor of the accused, (c) absence of probable cause for the proceeding, and (d) Malice, or a primary purpose in instituting the proceeding other than that of bringing an offender to justice." *DeWitt v. District of Columbia*, 43 A.3d 291, 296 (D.C. 2012) (emphasis added).

In the District, a common law claim of malicious prosecution encompasses criminal, civil, and administrative proceedings. *See Melvin v. Pence*, 130 F.2d 423, 426 (D.C. Cir. 1942). "The issue in a malicious prosecution case is not whether there was probable cause for the initial arrest, but whether there was probable cause for the underlying suit." *Pitt v. District of Columbia*, 491 F.3d 494, 502 (D.C. Cir. 2007); *Dellums v. Powell* (*Dellums II*), 566 F.2d 216, 220 (D.C. Cir. 1977) (noting that in the criminal context, "the critical event triggering liability for malicious prosecution is the filing of an information"). Nevertheless, a malicious prosecution claim is sustained where the proceeding is "induced by fraud, corruption, perjury, fabricated evidence, or other wrongful conduct undertaken in bad faith." *Moore v. Hartman*, 571 F.3d 62, 67 (D.C. Cir. 2009); *Dellums v. Powell* (*Dellums I*), 566 F.2d 167, 192 (D.C. Cir. 1977); *Melvin*, 130 F.2d at 428 ("Instigation is sufficient, when institution [of a criminal, civil, or administrative proceeding] actually follows from it."). Additionally, "appearing in court and testifying and keeping the prosecution alive" creates a genuine issue of dispute as to whether a defendant continued a malicious prosecution. *See Viner v. Friedman*, 33 A.2d 631, 632 (D.C. 1943); *see also id.* at 633.

Before turning to the merits, we must quickly dispense with Appellees' contention that the claim is time-barred. Appellees appear to calculate the statute of limitations from the date the malicious prosecution was initiated—June 4,

2006—instead of from the date the prosecution was terminated in Amobi's favor—June 4, 2008. The former method is incorrect. *See Shulman v. Miskell*, 626 F.2d 173, 174–75 (D.C. Cir. 1980).

Turning to the merits, we note Appellees dispute only prongs (c) and (d)—the existence of probable cause and whether malice was shown.[9] *See* Appellees' Br. at 25–28. We think our discussion of probable cause for the false arrest is sufficiently analogous so as to be dispositive on the malicious prosecution claim. The record is clear that the U.S. Attorney's Office relied on the Jail officials' statements. *See* Appellants' Br. at 10 (noting that the Jail officials' statements were among the documents produced to Amobi during discovery). Similarly, we think the Jail officials' lack of good faith and honest belief suggests the primary purpose in instituting and continuing (by testifying against Amobi at trial) the criminal proceeding was for some purpose "other than . . . bringing an offender to justice." *DeWitt*, 43 A.3d at 296. Even were that not the case, it is axiomatic that malice may be presumed from the lack of probable cause. *Viner*, 33 A.2d at 632. As such, the malicious prosecution claim should have been submitted to the jury. *Pitt*, 491 F.3d at 504 ("The determination of malice is exclusively for the factfinder.").

In addition to the criminal prosecution, the record raises genuine issues of material fact regarding whether Director Brown and Toni Shell continued the administrative proceeding

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[9] The district court concluded Amobi did not allege any defendant acted with malice. *Amobi*, 882 F. Supp. 2d at 82 n.4. This is demonstrably false. Amobi's complaint alleged each defendant acted with malice. *See* P.A. 32, 34, 36–37, 39.

19

against Amobi without probable cause.[10] As recounted above, Nguyen (the hearing officer) initially found inadequate evidence to terminate Amobi, S.A. 209, but Director Brown and Shell pressured her to reach a different conclusion, S.A. 43, 47, 50.[11] Similarly, the Director elected to proceed with the arbitration although the District's attorney had detailed numerous discrepancies in the District's case against Amobi. *See* Part I.D., *supra*. Of most concern is Director Brown's tacit ratification of Patten and Beard's fabricated interview memorandum. The interview memorandum, which was drafted on the same day as Amobi's notice of summary dismissal, formed part of the evidentiary basis for Amobi's summary discharge. Brown knew this portion of evidence was now in dispute. For these reasons, the district court erred in granting summary judgment on the malicious prosecution claim. Thus, we reverse the grant of summary judgment on this claim as to Director Brown, Clay, Waldren, White, and the District.

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Amobi also sought relief for malicious prosecution under 42 U.S.C. § 1983, asserting that Appellees deprived him of his

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[10] Toni Shell was not named as a defendant in the common law malicious prosecution claim.

[11] The district court suggested Director Brown was justified in remanding Nguyen's decision because the "initial written recommendation was quite conclusory in nature." *Amobi*, 882 F. Supp. 2d at 82. We are not convinced. Each recommendation was of equal length, *compare* S.A. 201–02, *with* S.A. 208–09, and Nguyen was not given any new evidence to consider in her second recommendation, *see* S.A. 47. Yet, despite the seemingly cursory analysis of *both* recommendations, Director Brown took issue only with the first.

constitutional rights by initiating criminal proceedings against him without probable cause. As with the common law claim, disputed issues of material fact exist here, too. "[M]alicious prosecution is actionable under 42 U.S.C. § 1983 to the extent that the defendant's actions cause the plaintiff to be unreasonably 'seized' without probable cause, in violation of the Fourth Amendment." *Pitt*, 491 F.3d at 511. Nevertheless, because the relevant conduct at issue in this case occurred before we issued our decision in *Pitt*, clearly establishing malicious prosecution as a violation of constitutional rights, qualified immunity is appropriate here. That the Defendants failed to make this argument in their briefs in this court is of no moment because they raised the issue in the district court. *See* P.A. 72, 82–85; *see also Jones v. Bernanke*, 557 F.3d 670, 676 (D.C. Cir. 2009) ("[W]e may affirm a judgment on any ground the record supports and that the opposing party had a fair opportunity to address"). Accordingly, we affirm the district court's grant of summary judgment as to all Defendants on Amobi's constitutional malicious prosecution claim.

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Amobi argues the district court erred in holding his common law defamation claim is time-barred. He is wrong. D.C. Code § 12-301(4) establishes a one-year statute of limitations for common law defamation claims. Amobi filed his complaint on June 4, 2008, two years after his defamation injury accrued. Nevertheless, Amobi maintains the common law claim is not time-barred because "Defendants' defamatory statements and reckless disregard for the truth were continuing," Appellants' Reply Br. at 13, and therefore tolled the statute of limitations. We are not persuaded.

"The statute of limitations on a tort claim ordinarily begins to run when the plaintiff sustains a tortious injury . . . ." *Beard v. Edmondson & Gallagher*, 790 A.2d 541, 546 (D.C. 2002). "At the latest . . . a cause of action accrues for limitations purposes when the plaintiff knows or by the exercise of reasonable diligence should know (1) of the injury, (2) its cause in fact, and (3) of some evidence of wrongdoing." *Id.* Here, it is undisputed that, as of June 4, 2006, Amobi knew of his injury and the role Appellees played in causing it. The question is whether the continuation of the criminal litigation delayed the accrual of Amobi's cause of action. "A 'continuous tort' can be established for statute of limitations purposes by showing (1) a continuous and repetitious wrong, (2) with damages flowing from the act as a whole rather than from each individual act, and (3) at least one injurious act . . . within the limitation period." *Id.* at 547–48. Yet, under D.C. law, continuous defamatory statements do not toll the statute of limitations. *Id.* The only exception—not applicable here—is "if the continuing tort has a cumulative effect, *such that the injury might not have come about but for the entire course of conduct.*" *Id.* at 548 (emphasis in original). Thus, because Amobi knew, as of June 4, 2006, that he had been injured, the statute of limitations began to run and was not tolled.



Amobi fares no better on his constitutional defamation claim. As a threshold matter, the parties dispute whether Amobi adequately pled a constitutional defamation claim under § 1983. We need not resolve the dispute however, because even assuming the claim is adequately pled, Amobi is not entitled to further relief.

In his reply brief, Amobi claims to have pled a reputation-plus defamation claim under § 1983. Appellants' Reply Br. at 14. Amobi asserts his defamation "stemmed from the constitutional violation of his due process rights by depriving him of his property interest in his employment." *Id.* at 14–15. A plaintiff may be able to state a due process claim based on the allegedly defamatory actions of government officials if "the defamation [is] accompanied by a discharge from government employment or at least a demotion in rank and pay." *Mosrie v. Barry*, 718 F.2d 1151, 1161 (D.C. Cir. 1983). This type of action "is usually termed a reputation-plus claim." *O'Donnell v. Barry*, 148 F.3d 1126, 1140 (D.C. Cir. 1998). The remedy for an established reputation-plus claim is "an opportunity to refute the charge," one which will "provide the person an opportunity to clear his name." *Codd v. Velger*, 429 U.S. 624, 627 (1977); *McCormick v. District of Columbia*, No. 12-7115, 2014 WL 2178831, at *9 (D.C. Cir. May 27, 2014). Here, Amobi had an opportunity to refute the charges at both a criminal judicial proceeding and an administrative arbitration. This was sufficient. Thus, even assuming Amobi adequately pled a claim for constitutional defamation, he received all the process he was due, and the claim is therefore moot.[12]

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[12] Amobi also was afforded adequate pre-termination due process. The Supreme Court has suggested that the way to ensure pre-termination due process rights are preserved is to suspend an employee accused of detrimental conduct with pay. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 544–45 (1985); *Munoz v. Bd. of Trs. of Univ. of Dist. of Columbia*, 427 F. App'x 1, 3 (D.C. Cir. 2011). That is exactly what happened here. Clay ordered Amobi placed on paid administrative leave, *see* P.A. 45, 49, and Amobi's termination was not finalized until August 29, 2006, *see* S.A. 203. In any event, in the district court Amobi argued only that his termination infringed his procedural due process rights because Director Brown's "remand" of Nguyen's decision violated the CBA.

We turn finally to Amobi's IIED claim. The district court concluded there was "no evidence that any of the defendants engaged in extreme or outrageous conduct or that Amobi suffered severe emotional distress." *Amobi*, 882 F. Supp. 2d at 84. We disagree.

"Establishing a prima facie case of intentional infliction of emotional distress requires a showing of (1) extreme and outrageous conduct on the part of the defendants, which (2) intentionally or recklessly (3) causes the plaintiff severe emotional distress." *Futrell v. Dep't of Labor Fed. Credit Union*, 816 A.2d 793, 808 (D.C. 2003). The conduct alleged must be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community." *Bernstein v. Fernandez*, 649 A.2d 1064, 1075 (D.C. 1991). "Where reasonable persons may differ, it is for the jury, subject to the control of the court, to determine whether, in the particular case, the conduct has been sufficiently extreme and outrageous to result in liability." *Homan v. Goyal*, 711 A.2d 812, 818 (D.C. 1998).

Amobi argues that our affirmance of a jury verdict for IIED in *Pitt* is instructive in this case. We concur. In *Pitt*, the plaintiff was falsely arrested for robbery although both victims of the crime told the police that the plaintiff was not the perpetrator. 491 F.3d at 502. The police affidavit subsequently submitted to the prosecutor's office contained no

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*See* P.A. 91. Because the collective bargaining agreement clearly authorized the remand, and because Amobi failed to argue that the pre-termination proceedings were otherwise constitutionally defective, we affirm the district court's dismissal of this claim.

mention of the victims' negative identifications, despite containing inconsequential details about the robbery and the stop of plaintiff's car. *Id.* at 504. The affidavit also contained one unambiguously false statement—that the plaintiff was observed "getting into a car within seconds after a building employee saw the robber leave the building," when, in fact, "the perpetrator had been gone for at least eight minutes by the time the police spotted [the plaintiff] in the area." *Id.* In addition, there was a dispute about whether the officers' notes describing the show-up identification in detail was included in the case file submitted to prosecutors; the officer did not recognize the notes and did not know if those had been shown to the prosecutors. *Id.* Based upon this evidence, we affirmed the jury's verdict, noting the "material misstatements" and "glaring omissions" in the arrest report and affidavit submitted to prosecutors. *Id.* at 504, 506.

As recounted above, the facts here bear some resemblance to those in *Pitt.* As in *Pitt*, Clay, Waldren, and White's incident report contained several glaring omissions, and at least one false statement, which was later ratified by Director Brown. From these facts, we think it clear that genuine issues of material fact exist and that it was for the jury to determine whether the conduct has been sufficiently extreme and outrageous to result in liability. For these reasons, the grant of summary judgment is reversed as to Director Brown, Clay, Waldren, White, and the District.

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The district court's order is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

*So ordered.*

C-1

**FEDERAL MEDIATION AND CONCILIATION SERVICE**

In the Matter of Arbitration Between:

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**FRATERNAL ORDER OF POLICE/**
**DEPARTMENT OF CORRECTIONS**
**LABOR COMMITTEE,**

"Union,"

- and -

**DISTRICT OF COLUMBIA,**
**DEPARTMENT OF CORRECTIONS**

"Agency."

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FMCS Case No. 080722-58014-A
(Felix Ball, Roman Morris & SaTonya Eggleston)

# OPINION AND AWARD

**Before**
**Arbitrator Joyce M. Klein**

Appearances:

**For the Union:**
J. Michael Hannon, Esq.
Ann-Kathryn So, Esq.
Hannon Law Group

**For the Agency:**
Darnita Y. Akers, Esq.
Jonathan O'Neill, Esq.
Natasha Campbell, Esq.
Repunzelle R. Johnson, Esq.
D.C. Office of Labor Relations
& Collective Bargaining

C-2

The Fraternal Order of Police/Department of Corrections Labor Committee (the "Union") challenged the May 21, 2008 removals of Correctional Officers Felix Ball, Roman Morris and SaTonya Eggleston ("Grievants"). By letter dated February 27, 2009, I was appointed as arbitrator pursuant to the terms of the collective bargaining agreement ("Agreement") and the rules of the Federal Mediation and Conciliation Service.

I conducted hearings on July 20, 22 and 23, 2009 in the District of Columbia. At the hearings, the parties argued orally, examined witnesses and introduced documentary evidence into the record. Testimony was received from Thomas Hoey, Director of Office Management and Information Technology Services, OIA Investigator Benjamin Collins, OIA Investigator Valarie Monique Beard, Lt. Christopher Hardwick, Vincent Akuchie, Coordinator for Education, Deputy Warden Orlando Harper, Director Devon Brown, Officer Linwood Becton, Lt. Commander James Arthur Kinard, Dr. Nicole Davis-Hrobowski, Unity Health Care, Corporal Mazie Lindsey, Wanda Patten, Chief of the OIA, Dominic Snowden, Training Specialist at the Department of Youth & Rehabilitative Services, Sgt. Mack Wilson, Grievant Roman Morris, Sgt. Bernard Hall, Grievant SaTonya Eggleston and Grievant Felix Ball. The parties filed post-hearing briefs which were received on September 18, 2009, after which date the record was closed.

## ISSUE

The parties agreed to state the issue to be decided as follows:

> Were the Grievants terminated for cause? If not, what shall the remedy be? (T. 13)[1]

## RELEVANT CONTRACT PROVISIONS, AGENCY POLICIES AND PROCEDURES, DISTRICT PERSONNEL REGULATIONS AND DISTRICT LAWS

Relevant portions of the parties' collective bargaining agreement effective from December 19, 2002 through September 30, 2005 and rules, regulations, policies and procedures provide in pertinent part as follows:

ARTICLE 11 – DISCIPLINE (CORRECTIVE/ADVERSE ACTIONS)

Section 14: The Employer agrees that disciplinary action shall not be punitive but based on conduct or performance deficiencies. The selection of the

[1] (T.__) refers to pages from the hearing transcripts of the July 20, 2009, July 22, 2009 and July 23, 2009. (J. Ex. __) refers to joint exhibits, and (A. Ex.__) and (U. Ex.__) refer to Agency and Union exhibits respectively.

appropriate penalties shall be based on progressive discipline principles consistent within the department. Consideration shall be given to any mitigating or aggravating circumstances that have been determined to exist.

Relevant portions of the Agency's policies, procedures, rules and regulations provide as follows:

**DC Personnel Regulations, Chapter 16, Part 1**
**General Discipline and Grievances**

1603.2 Except where a less restrictive standard is provided by statute or other provision of law, a corrective or adverse action, including without limitation, a reprimand, suspension, reduction in grade, or removal, may only be taken for cause. this provision shall not be construed to extend job tenure or protection not provided for in the District of Columbia Government Comprehensive Merit Personnel Act of 1978, as amended, nor shall it be construed to extend any job tenure or protection to any employee who, by law or contract is subject to a less restrictive standard for application of a corrective or adverse action. This section shall, however, be construed in a manner consistent with the Fifth Amendment Due Process Clause of the United States Constitution.

1603.3 For the purposes of this chapter, "cause" means ... any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law; any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations; and any other on duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious. This definition includes, without limitation, unauthorized absence, negligence, incompetence, insubordination, misfeasance, malfeasance, the unreasonable failure to assist a fellow government employee in performing his or her official duties, or the unreasonable failure to give assistance to a member of the public seeking services or information from the government.

* * * *

1603.5 No employee may be subject to a corrective or adverse action under this chapter for a de minimis violation of the cause standard contained in this section.

1603.6 This section shall not be construed as intended to incorporate or rely upon previous regulatory, statutory,

administrative, or judicial interpretations of the terms "cause," "just cause," "inefficiency," and "efficiency," the phrase "cause to promote the efficiency of the service," or any other predecessor statute, regulation or rule.

1603.7 Unless otherwise mandated by law, no other provision of the District of Columbia personnel regulations shall be construed as authorizing creation or use of a cause standard other than the one contained in this section.

1603.8 Removal is not mandated under any provision in this section. Unless otherwise mandated by law, previous standards or doctrines for selection of a corrective or adverse action for cause are hereby repealed. Notwithstanding any other regulation, the authority to adopt corrective or adverse action penalty guidelines or requirements is held exclusively by the Mayor, the City Administrator, the Director of Personnel, and (upon approval of the guidelines or requirements by the Director of Personnel) agency heads. With regard to the Metropolitan Police Department, the authority to adopt corrective or adverse action penalty guidelines or requirements is held exclusively by the Mayor and the Chief of Police.

1603.9 Unless otherwise required by law, in selecting the appropriate penalty to be imposed in a corrective or adverse action, consideration shall be given to any mitigating or aggravating circumstances that have been determined to exist, to such extent and with such weight as is deemed appropriate.

1603.10 In any disciplinary action, the government shall bear the burden of proving by a preponderance of the evidence that the corrective or adverse action may be taken or, in the case of summary action, was taken, for cause as that term is defined in this section.

1603.11 All notices issued in connection with an adverse or corrective action under this chapter shall conform to all requirements of the Fifth Amendment Due Process Clause of the United States Constitution.

1603.12 When used in this section, the term "employment-related act or omission" means an act or omission, occurring during a time that the employee was other than on duty, and which adversely and materially has affected, or is likely to affect, the efficiency of

government operations or the employee's performance of his or her duties.

1603.13 Except where a less restrictive standard is provided by statute or other provision of law, no employee may be subjected to a corrective or adverse action under this section for an act or omission committed prior to the effective date of this section unless the employee also could have been subjected to the same adverse or corrective action under the applicable regulations that existed prior to October 21, 1998.

## Basic Regulations for DOC Employees

CHAPTER 1 – BASIC REGULATIONS FOR ALL EMPLOYEES

1.1 Operational Knowledge Required: Employees are required to have complete understanding of their Position Description and all Regulations, Rules, Policies and Procedures pertaining to the Department and their Division, Service and Unit, and to comply therewith. Employees are responsible for the understanding and compliance with all documents posted on official Bulletin Boards.

1.4 Attention to Duty: Employees are required to devote their entire attention to their official duties. Loafing, newspaper reading, the use of telephones for personal or idle conversation, or acts directed at any other personal pursuits are prohibited.

## An Open Letter to DC Department of Corrections' Employees from Director Devon Brown DOC-OL06-13 – March 29, 2006 (Code of Silence)

This communication stands as official notice: The DOC Code of Ethics and a Code of Silence cannot coexist, they are unquestionably mutually exclusive. Staff who choose not to share relevant information that a reasonable person would conclude to be proper to report may be subject to disciplinary action proportional to that received by the person committing the act in question. Again, you must report:

- Illegal acts
- Acts that could pose an immediate threat to the safety, security and welfare of staff, visitors and inmates
- Violations of post orders, department rules, regulations, policies and procedures

**An Open Letter to D.C. Department of Corrections Employees from Director Odie Washington**

**DOC-OL04-28 October 6, 2004**

The Department of Corrections has placed significant emphasis on enhancing security measures at the Central Detention Facility (D.C. Jail), which supports our overall goal of accomplishing a more safe, secure, and "weapons free" work and detention environment. Consistent with this goal, new procedures have been established for bringing food into the jail.

Beginning Sunday, October 17, 2004, staff will be restricted from bringing food onto the operational areas of the facility where inmates are housed – including the basement and Levels 1, 2, and 3. Food is permitted in the Administrative Areas.

A number of lockers have recently been installed in the lounge and poolroom areas of the facility for staff to store food.

The food restriction reflects our seriousness to stop contraband from entering the Jail but is not intended to interfere with your options for enjoying lunch. I encourage staff to consider eating in the renovated Officer's Dining Room (ODR), which reopened on April 15, 2004. The menu option and cost make it an excellent choice for purchasing and eating your lunch. Employees who like to leave the building for lunch may continue to do so....

**Memorandum to All Shift Commanders/Supervisors – Daily Inspections during Holiday Season November 29, 2007**

This correspondence is generated to ensure that you re-emphasize to all subordinate staff their fiduciary responsibility to be particularly vigilant while conducting **daily comprehensive** inspections in their respective housing unit and pay extra attention in directing unusual and out of the ordinary behaviors exhibited by the inmate population especially during the holiday season. In our capacity as correctional professionals we are acutely aware of the emotional challenges our inmate population undergoes and are presented during this time of year. Therefore, it is the responsibility of each staff member to closely monitor and refer all unusual behavior to the appropriate discipline.

Correspondingly, these inspections must be documented in the unit log book that is strategically located in your respective work areas. Our primary goal is to provide a safe and secure facility for both staff and inmates alike.

All questions, comments or concerns should be referred to your immediate supervisors. (emphasis in original)

**DC DOC Program Statement 1280.2C**

9. Definitions

a. Significant Incident – Any unplanned event or activity that disrupts the normal, orderly operation of an institution; facility or work unit but does not pose an immediate threat to life and/or property. Significant Incidents include but are not limited to:

- Miscounts
- Verbal Confrontations
- Suicide gestures not requiring hospitalization
- Halfway house curfew violations
- Vehicle accidents that do not result in personal injury or serious property damage

b. Extraordinary Occurrence – Any event, planned or unplanned, which results in loss of live, serious bodily injury or poses an immediate threat to the health, safety and/or welfare of staff, inmates or the general public. Extraordinary Occurrences include but are not limited to:

- Escape/Attempted Escape
- Erroneous/Late Release
- On Duty Death of Staff Member
- Death of an Inmate
- Assaults
- Disturbance
- Hostage Situation
- Fire
- Inmate Work Stoppage
- Staff Work Stoppage
- Suicide/Attempted Suicide
- Use of Force

C-8

- Major Utility/Equipment failure or incidents regarding a major utility, utility system or essential equipment
- Vehicular accidents resulting in personal injury or serious property damage
- Arrest of an employee
- Medical Emergency requiring 911 response
- Criminal Activity requiring notification to OIA or MPD
- Discharge of a Firearm (other than training)
- Failure to Clear a Recount
- Discovery of firearms (homemade or manufactured), drugs and controlled substances
- Any unusual incident which may be newsworthy or politically sensitive
- Any unusual incident involving a high profile inmate
- Any other matter which the Warden, Administrative or Office Chief determines to be of an extraordinary nature

## BACKGROUND

Grievants Felix Ball, SaToyna Eggleston and Roman Morris are front-line correctional officers for the District of Columbia Department of Corrections. Prior to the incidents that gave rise to their termination, none of the Grievants had a history of disciplinary actions. (T. 468, 581, 687). All of the Grievants had satisfactory or better evaluations. (J. Exs. 30, 31 & 32). Officer Eggleston worked for the D.C. Department of Corrections from 1991 through 2002. She was laid off as a result of a reduction in force and returned in 2004. Officer Morris worked for the D.C. Department of Corrections since 1992, with a break in service due to a reduction in force from February of 2002 until September of 2006. Officer Ball worked for the D.C. Department of Corrections for approximately 15 months prior to his termination. Before his employment with the Agency, Officer Ball had a long career and extensive corrections experience.

None of the Grievants had received training from the Agency regarding working with juvenile inmates. (T. 469). Since December of 2007, the juvenile housing unit has been moved out of the Agency's Central Detention Facility and training regarding juvenile behavior modification has been provided to correctional officers working with juvenile inmates. (T. 251-255) In December of 2007, the Agency's Juvenile Housing Unit (JHU) housed between 30 to 34 young men, ranging from minimum to maximum security. (T. 472). On December 25, 2007 all three Grievants were working from 7:00 a.m. to 4:00 p.m. on the South Two tier, which was the JHU at the Central Detention Facility. The facility was short-staffed and the unit had been ordered to self-relieve. Self-relief is needed when there are only three officers in a unit, and no relief officer is available, so officers are instructed to relieve themselves leaving only two officers on the unit.

(T. 566). Officer Morris testified that at the beginning of the shift on December 25, 2007, South Two received a full complement of officers, but shortly after the count, the Command Center called and one officer had to report to the Command Center. (T. 475). Officer Eggleston was assigned to the Control Module as the Officer-in-Charge. As Officer-in-Charge, she was responsible for controlling the doors, answering the telephone, and documenting incidents and security checks in the logbook. (U. Ex. 57).

At approximately 1:34 p.m. (13:34:3.38), the Agency's security cameras, which are motion sensitive, show all three of the Grievants in the South Two Control Module, also known as the bubble. (A. Ex. 2A). That photograph shows Officer Ball sitting and he appears to be eating. (A. Ex. 2A). Review of subsequent photographs shows that Officer Morris left the Control Module approximately one minute later at 13:35:10.58 and returned to the bubble at 13:36.14.64. At approximately 1:39 p.m. (13:39.23.63), Officer Ball left the bubble for approximately one minute, returning at 13:40.18.08. At 13.41.38.16, Officer Morris left the Control Module, approached and talked to an inmate, and re-entered the bubble at 13:47.1.9. All three Grievants then remained in the Control Module approximately 1:56 p.m. when Officer Ball left the bubble. (A. Exs. 1, 2B and 2C). During this period, various inmates walked past the bubble. (A. Ex. 1).

Corporal Ball testified that on December 25, 2007 he was working voluntary overtime. Because it was Christmas day, Corporal Ball took his lunch break by going out to get his lunch and bring it back so that the unit would not be short an officer and would have three officers on the floor. (T. 632). Officer Ball testified that he was not aware of the policy that there should be no food in the Control Module. (T. 655). Officer Eggleston testified that it is common for officers to bring food into the facility. (T. 606).

At approximately 1:59 p.m., juvenile inmate S.C.[2] began pacing in front of the bubble. At 2:03 p.m., S.C. approached the Control Module and asked Officer Eggleston for a paper towel. Officer Eggleston testified that when S.C. approached the bubble he appeared a little agitated and was moving around and asked for a paper towel. According to Officer Eggleston, in response to her inquiry, S.C. said that no one was "messing" with him. (T. 591). Officer Eggleston testified that when S.C. approached the bubble she did not see any sign of injury or notice any blood on him. (T. 592). Subsequent photos show S.C. walking away wiping his mouth with the paper towel. (A. Ex. 1).

Officer Ball recalled that he was doing a security check on the top right tier when Corporal Eggleston signaled to him and told him to check on S.C. because he seemed a little agitated. (T. 633). Ball continued with the security check and as he passed S.C.'s cell, he asked if everything was okay and S.C. replied in the

[2] Juvenile inmates are identifled by their initials.

affirmative. (T. 633-634). Ball explained that when he went past S.C.'s cell he was lying on his bed with the light off. (T. 634).

Because Officer Eggleston thought that S.C. appeared agitated, she called Officer Morris to the bubble and asked him to check on S.C. (T. 480, 592). Officer Morris testified that he went down to the bottom right tier and into inmate S.C.'s cell and asked him what was going on. Inmate S.C. replied that he was fine. As Officer Morris was talking to him, he noticed a "very small dry smudge, red on his t-shirt." (T. 481). So, Officer Morris, summoned Officer Ball to the area, then ordered inmate S.C. to take off his clothes and searched him and found no blood. (T. 481-482). When Officer Morris strip searched S.C., Officer Ball remained outside his cell. (T. 634).

After inmate S.C. got dressed, Officer Morris took S.C. into the sallyport area to ask him what was going on. (T. 481-482). Officer Morris testified that he did not see signs of blood anywhere in S.C.'s cell and did not see signs of injury anywhere on S.C.'s body. As Officer Morris questioned S.C. who repeated that he was alright and that he was fine. (T. 484). Inmate S.C. added, "I just don't want to be on that tier anymore." At that point, Officer Morris told inmate S.C. that he was going to place him on "involuntary P.C." (protective custody). (T. 485). Then, Officer Morris went with S.C. to his cell and he placed all of his possessions in the middle of his mattress, folded it and carried his mattress to the other side. (T. 486). S.C. was moved from cell 65 to cell 38. Photographs show S.C. moving his mattress and belongings at approximately 2:15 p.m. (14:15:14.94).

Officer Morris interviewed three inmates in the first session attempting to find out what happened with inmate S.C. at approximately 2:25 p.m. and then interviewed two additional inmates starting at about 2:36 p.m. (T. 508; A. Ex. 6). Officer Morris indicated that after S.C. was moved and he had spoken to the three inmates named by S.C. as individuals he wanted to move away from, he asked Officer Ball to tell Officer Eggleston to lock everybody down. (U. Ex. 58; p. 18). Officer Morris explained that he was trying to determine what happened with S.C.

Officer Morris testified that when he moved S.C., S.C. had the jumpsuit that he was wearing. (T. 507, U. Ex. 58, p. 12). Officer Morris testified further that inmates on the JHU typically have two jumpsuits but he could not recall whether he had another one. (T. 550-551). Morris testified that S.C. was very large and wore a jumpsuit in a size that you have to sign for. (T. 551).

Officer Morris testified that the CMP Officer had asked if the juvenile inmates could be given a five minute holiday call in the Case Manager's office. (T. 476). So, Officer Morris was trying to monitor the juvenile inmates on the

phone in the Case Manager's office while addressing the issue with inmate S.C. (T. 479).

At approximately 2:50 p.m., Officers Morris and Ball both noticed water flooding the floor on the lower right tier. Officer Morris found that the water was coming from inmate D.S.'s cell and that he had stuffed everything in the toilet and kept on flushing it. (T. 488). Officer Ball testified that as Officer Morris was placing S.C. in Cell 38 he noticed there was water on the tier and that D.S. was flooding his cell. According to Officer Ball, he and Officer Morris responded and signaled to Officer Eggleston to open up D.S.'s cell so that they could go in and stop the flooding.

Officer Eggleston testified that once she became aware of the flooding, she could see D.S. and could see him wrapping the sheet around his neck and motioned to Morris to get him to take care of it. (T. 601-602). Officer Morris discovered that D.S. had a sheet tied to his neck and attached to the end of the bed railing. (T. 494). Then Officer Ball came to the bubble and got the wonder knife from the bubble in order to cut the sheets from the bed and from D.S. (T. 494, 602). Apparently, D.S. was upset because his visits had been taken away. (T. 495).

According to Officers Ball and Eggleston, Lt. Thomas was on the unit during the flood and hanging incident. (T. 602-603, 637). Officer Eggleston explained that she did not mention that S.C. wanted to move his cell to Lt. Thomas when he was on the unit because she was focused on D.S. Officers Eggleston and Morris escorted D.S. to the infirmary around 3:25 or 3:30 p.m. (T. 496, 603).

Officer Eggleston recalled that either she or Corporal Morris wrote an incident report for the incident involving D.S. but she did not recall writing an incident report for the incident involving S.C. on December 25, 2007. (T. 604). Officer Eggleston explained that S.C. was agitated, Officers Morris and Ball investigated and found no problems, no bumps no bruises and that he wanted to move. (T. 606). None of the officers wrote an incident report about S.C. and each testified that a potential assault or fight had been investigated, but no evidence that anything actually happened was discovered. So, they concluded that no unusual or extraordinary incident had occurred.

When Officer Morris approached the bubble and told Officer Eggleston that he was moving S.C. to Cell 38, she started to make out an index card and she could not recall whether she called Compliance to let them know that S.C.'s cell was being moved. (T. 595). Officer Eggleston testified further that while she completed the index card, she did not get a chance to record the cell move in the logbook. (T. 595). Officer Eggleston explained that there is a panel in the bubble with the names of each inmate and each cell so that an officer who is not familiar

with the unit can come in there and have no problem and seeing what's going on and seeing the status of each inmate. (T. 596). According to Officer Eggleston, there is more than one officer in the bubble on any given day. (T. 607). Officer Eggleston acknowledged that she could have called Compliance to advise them about S.C.'s cell change but she did not make the opportunity. (T. 611, 613). In her January 2, 2008, O.I.A. interview, Officer Eggleston acknowledged that it was her responsibility to call Compliance regarding moving S.C.'s cell. Officer Eggleston indicated that she didn't get the chance to call compliance because shortly after S.C. was moved, D.S. began flooding the unit and they needed to deal with the flood, deal with D.S. and complete the 3 p.m. count. (U. Ex. 57).

Officer Eggleston testified that when she made a log book entry about D.S. it did not occur to her to also log in that S.C. had been moved to a new cell because her focus was on D.S. at that time. (T. 617).

Officer Eggleston testified that when Corporal Mazie Lindsey, the Officer-In-Charge on South Two on the number three shift, came in, she asked about the index card with S.C.'s name on it and why he had been moved. (T. 598). According to Officer Eggleston, she explained that S.C. had approached the bubble and had been agitated and that Corporal Morris had suggested putting him in Cell 38 until the next day when he had an opportunity to approach Mr. Akuchie, the CMP. (T. 598). As then Case Manager, Mr. Akuchie was responsible to make cell assignments. (T. 171)

Officer Lindsey testified that she came to work on the number three shift on South Two (the juvenile unit) on December 25, 2007, and was walking through the tiers when she saw inmate D.S. D. S. complained of stiffness in his neck, so Officer Lindsey asked Officer Morris to take D.S. to the infirmary. Officer Morris testified that Cpl. Lindsey did not ask him to take D.S. to the infirmary. (T. 508). Officer Morris explained that he and Cpl. Eggleston had a discussion with Cpl. Lindsey regarding whether an officer from the number three shift would escort D.S. to the infirmary, but Cpl. Lindsey did not want to assign an officer to take D.S. to the infirmary. (T. 542; U. Ex. 58, p. 13).

Later that day, after the shifts were changed, Officer Lindsey, testified that she observed that S.C. had been moved to a different cell. When she asked him about it, S.C. told her that he had been assaulted on the number two shift and as a result was moved to another cell.[3] As Officer Lindsey proceeded through the unit, on the bottom left tier she noticed that S.C. was in cell 38 and that his face was bruised and his lip was swollen. (T. 309-310; J. Ex. 25). Officer Lindsey called Lt. Hardwick to advise him of the incident. Lt. Hardwick instructed that S.C. be taken to the infirmary to be checked out. (T. 143). On December 25,

[3] The logbook reflects that Officer Douglas actually spoke with S.C. in cell 38 and spoke with him. (J. Ex. 40). Then she relayed the information to Cpl. Lindsey who entered it in the logbook.

2007 at 11:21 p.m., Lt. Hardwick sent the following e-mail to Major Brinson memorializing his actions and thoughts:

> On Wednesday, 25 December 2007 at 16:20 this authority was notified by south two unit O.I.C. Cpl. Lindsey, Mazie that inmate [S.C.] DCDC#316-932 had been assaulted on the number two shift. No time listed. By three identified inmates [V.M.] DCDC# 311-606 Cell #66, [D.P.] DCDC#315-199 Cell #78, [D.A.] DCDC# 314-669 Cell #79. Captain Talley was able to contact #2 Shift Zone II Lieutenant Thomas, William who stated that he was not contact by any officer that there indeed was a problem in the unit. Further stated that assigned Officer Cpl. Morris, Roman had some information and moved inmate [S.C.] to Cell #38 without making any notification to his Zone Lt. which is negligence. Other assigned officers were Cpl. Eggleston, Satonya and Pvt. Ball, Felix on (overtime). All inmates were taken to the infirmary for treatment. Then returned back to the unit. Inmates [V.M., D.P., and D.A.] were placed on administrative segregation until seen by the adjustment board. Notification was made through the chain of command and stopped by Major Brinson, Gary at 17:55.
>
> ** At 23:00 Cpl. Lindsey informed this authority that inmate [S.C.] had just told her on the tier while patrolling the unit that Pvt. Ball had taken the jumpsuit/underwear covered with blood that he was wearing when assaulted and threw items away. This sounds like a cover-up from officers that were trying to go home at the end of their shift. This matter needs to be investigated. (J. Ex. 3 at p. 11).

At that point, sometime shortly after 5:00 p.m., a supervisor came and took S.C. to the infirmary where he was examined by Dr. Nicole Davis-Hrobowski. She found that he had a bruise near his eye and a small cut under his lip. (T. 290; J. Ex. 42). Dr. Davis-Hrobowski testified that it is standard procedure to document injuries with photographs. (T. 303).

A series of photographs from the motion-sensitive camera on the lower right tier show that between 16:58:38.67 and 17:3:54.19, a laundry detail came through and picked up orange jumpsuits, including an orange jumpsuit from Cell 38 which, at that time, housed inmate S.C. Officer Morris explained that an inmate carrying a green bag was carrying a personal laundry bag. (T. 506). Officer Morris also identified Corporal Tibbs, the officer in charge of laundry detail, as appearing in the photograph with a clipboard and blue rubber gloves at 16:58:43.48. (T. 506-507; U. Ex. 48).

As a result of Lt. Hardwick's e-mail, when they reported to work on December 26, 2007, Officers Ball, Eggleston and Morris were directed to

complete incident reports regarding S.C. by Mayor Gary Brinson. All three officers did so. (T. 497, 605; J. Exs. 26, 27 & 28). Officer Morris testified that once he investigated the small spot of blood on S.C.'s tee-shirt and found no obvious injuries, in his view there was nothing further to investigate or report. (T. 559). Officer Eggleston testified that she did not complete an incident report on S.C. on December 25, 2007 because there was no incident. (T. 606). An administrative investigation by the Agency's Office of Internal Affairs (OIA) commenced.

Wanda Patten, Chief of the Office of Internal Affairs, and a deputized U.S. Marshall authorized to operate within the Washington, D.C. area, supervised the conduct of the investigation and issued a report on the incidents of December 25, 2007. (J. Ex. 3). Ms. Patten acknowledged errors in the report, including that the report referred to the incident involving S.C. as "staff-on-inmate" when in fact, the incident reported was of inmate-on-inmate. (T. 347). Ms. Patten testified further that a photograph that OIA concluded showed Officer Ball holding an orange jumpsuit actually showed Officer Ball and a portion of an inmate's body. (T. 361-367). Ms. Patten acknowledged that she inserted the word "prior" into her restatement of South Two Post Order, V 9 (b) which provides: "[i]nmates are not to be moved from cell to cell without approval from a supervisor and the compliance officer." (T. 391; J. Ex. 3 at 4). Ms. Patten also testified that photographs of S.C. should have been taken in the infirmary but that her file did not include any photographs. (T. 351).

During the course of the investigation, OIA investigators interviewed all three Grievants as well as Officer Lindsey, S.C., and the detail inmate. Although the interviews with the Grievants, S.C. and the detail inmate were recorded, there is no record of the interview with Officer Lindsey. Additionally, investigators took steps to preserve photographs from some security cameras located in the JHU. Although there are no camera in individual cells, there are security cameras showing the common hallways on the tiers. There are no preserved photographs of the hallway near S.C.'s original cell number 65.

Benjamin Collins, Supervisor in the Agency's Office of Internal Affairs testified that he observed a still photo that appeared to show Officer Ball holding something orange, which he believed to be an orange jumpsuit (T. 89; A. Exs. 1 & 2). A photo of Officer Ball at approximately 2:10 p.m. (14:10.54.39) shows him pointing and appears to show something orange on his left side. The next frame, taken at 14:10:55.58 shows Officer Ball still pointing and an inmate, wearing an orange jumpsuit, walking into camera range. (T. 99; A. Ex. 1; U. Exs. 43 &44).

On January 3, 2008, OIA Investigator Valerie Beard interviewed S.C. regarding the events of December 25, 2007. During that interview, S.C. indicated that he had been beaten up by three inmates in his cell. (A. Ex. 60 at p. 3). According to S.C., he was hit approximately 30 times over a period of

approximately five minutes. (A. Ex. 60 at 3-4). After the three assailants left his cell, S.C. went and got a paper towel from Officer Eggleston and indicated that he changed his jumpsuit. (U. Ex. 60 at 7). According to S.C., he showed Officer Morris the cut on the inside of his lip. (A. Ex. 60 at 10). S.C. also indicated that "there was blood on my toilet, the floor, the walls" and there was blood on his jumpsuit so he changed it. (U. Ex. 60 at 10).

When asked whether there was blood in S.C.'s cell, the detail inmate who was assigned to clean it after S.C. was moved stated, "I think that was, no I uh don't think there was any blood in there, probably in the toilet or something, there probably wasn't any blood maybe something." (U. Ex. 61). The detail inmate described the water in the toilet as being "orange." (U. Ex. 61).

Ms. Patten testified that she believed the statement of S.C. that he had a bloodstained orange jumpsuit and that he took it off and gave it to Officer Ball. (T. 353, 354. 367). Ms. Patten acknowledged that she credited S.C.'s statement over that of the three correction officers. (T. 354). Ms. Patten testified that she credited the statements of inmate S.C. because the report from the infirmary appeared to back up his statement that he had been assaulted. (T. 419). Ms. Patten testified that no bloody jumpsuit, towel or other item was turned over to security as a result of the incident. (T. 354, 355). According to Ms. Patten, she spoke to the security lieutenant, but nothing had been turned over with respect to the December 25, 2007 incident involving S.C. (T. 356-357).

Ms. Patten's report concluded that "Officer Ball took possession of inmate "SC"'s bloodstained orange jumpsuit and discarded it." (J. Ex. 3, p. 6). She concluded further that Officer Ball "lied to OIA investigators when questioned about his actions." (T. 358; J. Ex. 3 p. 6). Ms. Patten explained that she relied upon the photograph of Officer Ball "with an orange jumpsuit in his hand." (T. 361-362). The OIA report included a statement that, "At 2:10 p.m. Ofc Ball was observed standing in front of the UCM with an orange inmate jumpsuit in his hand. Ms. Patten testified that the photograph referenced in her report at 2:10 p.m. where Officer Ball "was observed standing in front of the UCM with an orange jumpsuit in his hand" is inaccurate. (T. 380). Ms. Patten testified further that she realized that this portion of the report was inaccurate when she reviewed the record in preparation for the arbitration hearing. Instead, Ms. Patten testified that Officer Ball was in possession of the orange jumpsuit in front of the case manager's office. (T. 381). Reviewing video of an officer appearing to hold an orange object as viewed through the door of the Case Manager's office at approximately 4:03 p.m., Ms. Patten identified that frame as showing Officer Ball with an orange jumpsuit. (T. 414-416).[4] During his interview with the OIA, Officer

[4] Although not addressed in the OIA report, Officer Ball addressed a photograph depicting him carrying clear plastic bag with something orange and a white square, indicating that he may have been trash. (T. 638; A. Ex. 2). Officer Ball testified that at no time did he take possession of S.C.'s jumpsuit. (T. 638).

Ball stated that he "never took possession of an orange jumpsuit that day." (J. Ex. 3, p. 4).

Ms. Patten testified that she could not recall any photographs or video footage showing the exact time of the assault, including any footage of the inmates approaching S.C.'s cell, where S.C. indicated the assault occurred. (T. 365).

The OIA report indicated that "[m]embers of the OIA determined that all Unit Officers were in the UCM from 1:34 p.m., until 1:56 p.m. (J. Ex. 3, p. 3). The OIA report also noted that the unit logbook for December 25, 2007 has no entries between 12:20 p.m. and 3:10 p.m. and an entry at 3:24 p.m. shows that D.S. was taken to the infirmary due to his attempted hanging. (J. Ex. 3 at p. 4).

Sergeant Mack Wilson, testified that correctional officers are supposed to perform security inspections every thirty minutes unless something distracts from the inspection. (T. 444). Sgt. Wilson provided several examples of distractions that could keep correctional officers from performing security inspections every thirty minutes such as feeding, court, nurse on the unit, sick call, inmates going in and out for social visits, or officers taking inmates up to medical or for a legal visit. (T. 444). Because of these events, Sgt. Wilson testified that officers don't conduct security inspections every thirty minutes. (T. 444-445). Sgt. Wilson testified that his review of the log book shows that security inspections are not noted every thirty minutes for all shifts. (T. 445; J. Ex. 40). Review of the logbook for South Two for the period between November 9, 2007 through December 31, 2007, shows that security inspections were rarely conducted and entered into the logbook every thirty minutes. (J. Ex. 40). Sgt. Wilson testified that security checks are done as often as possible given other activities. (T. 447). Sgt. Wilson testified that "not very often" are security inspections performed and noted every half hour. (T. 448). Sgt. Wilson testified that he has previously worked as a zone supervisor and that the staffing requirements for South Two during the day shift on a holiday is four officers. (T. 452-453; U. Ex. 52).

Sgt. Bernard Hall, who was Acting Lieutenant of the number two shift on December 25, 2007, recalled an incident with D.S. on December 25, 2007, but was unclear as to whether he was aware of an incident with S.C. (T. 565). Sgt. Hall testified that there are circumstances when more than one officer would need to be in the Control Module. (T. 566). According to Sgt. Hall, those circumstances could include inmates coming into the unit, officers relieving each other, instructions being given out and other circumstances. (T. 567). Sgt. Hall testified that there are times when an officer would eat in the bubble, including when an officer is self-relieving and officers don't have an opportunity for a break or if a person is diabetic.

C-17

Deputy Warden Orlando Harper explained that officers are responsible to record all situations in the logbook, including security checks, the food cart, etc. According to Harper, the logbook may become important in court proceedings and officers should make entries into the logbook every half hour. (T. 183). According to Harper, only one officer should be in the Control Module at a time. (T. 190). Harper estimated that approximately 50% of logbook entries are made every thirty minutes as they should be. (T. 203). Harper testified that when he has seen more than one officer in the Control Module he has corrected the situation. Harper explained that officers are needed to provide security for inmates on the cellblock. Citing Program Statement 1280.B, Harper testified that anytime there is an emergency situation or multiple incidents, officers are instructed to call a supervisor. (T. 213). Review of the logbook for South Two from November 9, 2007 through December 31, 2007 shows that security inspections were entered into the logbook on fewer than half of the shifts. (J. Ex. 40). Review of the supervisor's logbook for December 25, 2007 shows no entries. (J. Ex. 41).

On April 7, 2008, each Grievant was provided with advanced notice of a proposal to remove them from their employment as Correctional Officers. (J. Exs. 11, 16 and 21). Officer Ball's advanced notice charged him with negligence as he (1) "sat in the control module eating and engaging in conversation" in violation of South Two Post Order § V.10(g) and Open Letter to All Employees DOC-OL 04-28; (2) spent approximately 22 minutes in the Case Manager's office when he should have been conducting routine security patrol; (3) failed to ensure that inmate S.C. received medical care; and (4) failed to submit an incident report regarding S.C. as required by Program Statement 1280.2C.

Officer Eggleston's advanced notice charged her with negligence because she (1) "failed to provide active supervision of the housing unit"; (2) sat in the Control Module "engaging in conversation" with Officers Ball and Morris while Officer Ball ate food in the Control Module in violation of South Two Post Orders § V.10(g) and Open Letter to All Employees DOC-OL 04-28; (3) allowed Officer Ball and Morris access to the Case Manager's office for a 22 minute period when they should have been conducting routine security patrol; (4) failed to make proper notification and to prepare an incident report upon learning that inmate S.C. was wearing a blood-stained tee-shirt in violation of Program Statement 1280.2C.; (5) failed to ensure that S.C. received medical attention; (6) allowed S.C.'s cell to be moved in violation of South Two Post Orders § V.9(b) and V.9(f); and (7) failed to place entries in the logbook from 12:50 p.m. to 3:10 p.m. in violation of South Two Post Order § V.27(a).

Officer Morris' advanced notice charges him with negligence because he (1) sat in the Control Module engaging in conversation with Officers Eggleston and Ball while Officer Ball ate in violation of South Two Post Order § V.10(g) and Open Letter to All Employees DOC-OL 04-28; (2) spent approximately 22

minutes in the Case Manager's office when he should have been conducting routine security patrol; (3) failed to ensure that inmate S.C. received medical care; and (4) failed to submit an incident report regarding S.C. as mandated by Program Statement 1280.2C.

On May 12, 2008, a hearing officer recommended that the charge of negligence against all three Grievants be sustained and the proposed penalty of termination be imposed. (J. Exs. 13, 18 & 23). Based upon the charges included in the advanced notices, on May 21, 2008, Officers Morris, Ball and Eggleston were terminated for negligence for violating Basic Regulations for Employees 1.1 – Operational Knowledge Required – complete understanding of their Position Description and all Regulations, Rules, Policies and Procedures pertaining to the Department and their Division, Service and Unit, and to comply therewith and 1.4 – Attention to Duty – devote their entire attention to their official duties. (J. Exs. 14, 19 and 24).

Director Devon Brown testified that when he received the OIA report of the incidents on South Two on December 25, 2007, he terminated the Grievants because he was struck by the egregious nature of the negligence, citing that the officers had left their post and congregated in the bubble, thereby leaving the unit unsecured, an inmate had been injured, and "there appeared to be a cover-up of these facts." (T. 222). Director Brown explained that he considered mitigating factors including their tenure with the department and disciplinary record, but found that termination was warranted because the Grievants did not "attend to their duties" because they did not make rounds while they were in the bubble, they brought food into the bubble and they did not log the injury to S.C. (T. 223, 231, 233).

## POSITIONS OF THE PARTIES

### The Agency

The Agency asserts that the Grievants committed gross negligence which is sufficient grounds for termination on the first offense. The Agency relies upon the definition of gross negligence as denoting "intentional or willful acts or omission, in flagrant or reckless disregard of the consequences to persons or property." Relying upon this definition that is included in Discipline and Discharge in Arbitration (Brand 1998), the Agency argues that where, as here, the Grievants acted in wanton disregard of the consequences of their actions, termination is merited for the first offense and progressive discipline is not necessary. Because the Grievants have acknowledged that they were aware of the Agency's policies, but cannot explain their failure to adhere to them, the Agency maintains that it has shown that the Grievants willfully disregarded its policies and regulations and failed to carry out their assigned tasks. As a result,

the Agency points out an inmate assault was not prevented and that inmate did not receive immediate medical attention.

Asserting that the Grievants failed to maintain diligent duty on the unit, the Agency points to a nearly two and one half hour time frame between 12:50 p.m. and 3:10 p.m. on December 25, when no entries were made in the log book. Pointing out that there are no entries after Officer Morris' security check at 12:50 p.m., no other entries were made for over two hours and it is thus unclear whether security checks were made during that period. The Agency points out that for approximately 20 minutes, between 1:34 p.m. and 1:56 p.m., all three Grievants were in the UCM and thus, no officers were patrolling the tiers during that period. The Agency points out that this absence of patrol left the inmates unsupervised and violated its policies including Chapter 1, Section 1.4 of the Agency's Basic Regulations for all employees which provides "employees are required to devote their entire attention to their official duties." (J. Ex. 5, at 1) and Section 10g of the South Two Housing Unit Post Orders which provide that "only one Officer shall be in the Control Module [UCM] at a time." The Agency notes that in his OIA Interview, Officer Morris cited two "dead areas" in the unit where inmates like to fight, the shower area and in the cells. (U. Ex. 58 at 15). Pointing out that inmate S.C. was assaulted in his cell, the Agency maintains that the events leading up to the assault and perhaps the assault itself took place during the period when no officers were patrolling the tiers. The Agency maintains that the Grievants' lack of diligence contributed to a situation where S.C.'s assailants were provided an opportunity to enter his cell without being detected. The Agency points out that although officers have a good general view from the UCM, there are blind spots. (T. 583). Taking advantage of these blind spots, the Agency maintains that while the three officers were in the Control Module, the assailants were able to follow S.C. into his cell without being detected.

The Agency also points out that the Grievants did not notify or prepare an incident report regarding S.C.'s assault in violation of Agency Program Statement 1280.2C which outlines the procedures for reporting significant incidents and extraordinary occurrences. (J. Ex. 8). The Agency asserts that no matter whose version of the events related to the incident involving S.C. one credits, the officers should have reported the incident. The Agency asserts that S.C. reported to Officer Morris that he was assaulted by three other inmates which qualifies as an extraordinary occurrence. According to the Agency, even if S.C. did not report that he was assaulted, Officer Eggleston though S.C.'s behavior when he came to the UCM and asked for a paper towel to be unusual that she sent Officers Ball and Morris to check on him. (J. Ex. 27 at 1). The Agency also asserts that Officers Morris and Ball stated that they saw S.C. wearing a blood-stained tee-shirt with no obvious source of bleeding. (J. Ex. 26 at 2, J. Ex. 28 at 2). In addition, the Agency points to Officer Morris' statement that when he first saw the blood, he believed someone had been stabbed. (T. 545; U. Ex. 58 at p. 6).

Continuing to rely on the reports of Officers Ball and Morris, the Agency points out that they visually inspected S.C.'s body for injuries, locked down the unit, moved S.C. to a new cell and investigated by interviewing five different juvenile inmates concerning what occurred. Based upon these events, the Agency maintains that these actions "disrupted the normal orderly operation" of South Two and thus, constitute a significant incident. The Agency points to Officer Ball's interview with OIA investigators during which he acknowledged that he should have completed a DCDC-1 regarding the incident. (U. Ex. 56 at 10). The Agency notes that Officer Morris told the OIA investigators that he did not view what occurred with S.C. as a significant incident. (U. Ex. 58 at 11-12). Officer Eggleston indicated that she was not aware of the blood on S.C.'s tee-shirt, but if she had been, she would have notified a supervisor. (U. Ex. 57 at 9-10). In contrast, the Agency points to the testimony at hearing of all three Grievants that the occurrences with S.C. did not rise to the level of a significant incident. (T. 614-615, 651). The Agency points out that Officer Ball was unable to explain the difference in his testimony between his OIA interview and the hearing. (T. 653-654).

The Agency also cites the Grievants' failure to seek approval from or notify the Compliance Office before placing S.C. in a new cell. The Agency points out that the post orders for the South Two housing unit provide that "inmates are not to be moved from cell to cell without approval from a supervisor and a compliance officer." (J. Ex. 4 at 6). The Agency cites Officer Eggleston's comment in her OIA interview that she should have contacted compliance regarding moving S.C.'s cell and at hearing Officer Eggleston acknowledged that protocol required her to contact compliance regarding the movement of S.C. (T. 613; U. Ex. 57 at 6-7). Despite Officer Eggleston's acknowledgement that she should have contacted compliance before moving S.C., the Agency cites Corporal Lindsey's report that compliance was not notified. (J. Ex. 25 at 2). The Agency argues further that even if Officer Eggleston did not have an opportunity to contact compliance, she still had an opportunity to notify Lt. Thomas when he came into the unit at 3:15 p.m. and was informed about the flooding by inmate D.S. (T. 602-603; A. Ex. 5, J. Ex. 3 at 11).

The Agency cites the Grievants' failure to ensure that S.C. received appropriate medical attention. According to the Agency, S.C. showed Officer Morris his cut lip and Officer Morris observed the blood from his cut on his tee-shirt. The Agency relies upon the statement from S.C. that Officer Morris told him that he would call the infirmary but Officer Morris never did escort S.C. to the infirmary. Whether Officer Morris did not take S.C. to the infirmary because of the incident with D.S. or for some other reason, the Agency maintains that it is unlikely that the Grievants did not observe the injuries to S.C.'s face based upon the statements of others who saw him. The Agency cites Corporal Lindsey's report that she visually observed that S.C.'s lip was swollen and his right eye was

C-21

bruised. (J. Ex. 25). The Agency also cites the report of Dr. Davis-Hrobowski that S.C. had a cut under his lip, a bruised right eye and a bump on his temple. (J. Ex. 3 at 61). Addressing the possibility that S.C. was injured after Officers Ball and Morris talked to him, the Agency asserts that the injury must have occurred before that because immediately after Officer Ball left S.C.'s cell, he locked down the unit. (T. 649). Because no one had access to S.C. from the time when Officers Ball and Morris examined him and the time that Corporal Lindsey saw him on the third shift, S.C.'s injuries must have occurred before the lockdown.

The Agency maintains that the Grievants' excuses do not mitigate their gross neglect of duty. First, the Agency maintains that its staffing shortages were not a factor in the Grievants' failure to carry out their duties. Acknowledging that at the beginning of the Grievants' shift they were order to self-relieve because a relief officer was not available to them for breaks, the Agency asserts that self-relieving is not an excuse for three officers to be in the UCM at the same time. To the contrary, the Agency asserts that because the shift had two officers rather than three to patrol the tiers, while one officer remained in the UCM at all times, it was crucial that both officers remained out on the tier patrolling rather than in the UCM engaging in conversation. The Agency asserts that even if one of the officers decided to bring lunch into the Control Module in order to cut down on the time he or she was out of the unit as Officer Ball did, there is no sound reason for the other two officers to be in the Control Module while the other one was eating lunch. (T. 631-632). The Agency asserts that self-relief is not sufficient to explain the presence of Officers Eggleston and Morris in the UCM with Officer Ball while he was eating.

The Agency asserts that the Grievants' lack of juvenile training was not a factor in failure to carry out their duties. The Agency maintains that the policies violated by the Grievants were basic security standards that applied in every housing unit regardless of whether the inmates were juveniles or adults. That the Grievants did not document regular 30-minute security checks or make notations in the log book is in direct contradiction to the South Two post orders and is unrelated to specific training in how to handle juveniles. Similarly, the Agency maintains that the Grievants' failure to notify either their supervisor or the Compliance Office that S.C. had been moved, is also a violation of post orders and the requirement is the same in adult housing units. The Agency's requirement that all employees complete an incident report for significant incidents also is the same requirement as would be applied to an adult housing unit.

The Agency asserts that a lack of post orders was not a factor in the Grievants' failure to carry out their duties. The Agency asserts that the post orders in place for the South Two housing unit were those in place at the time of S.C.'s assault even though they listed North One rather than South Two because

juvenile inmates had formerly been housed in North One and had subsequently been moved to South Two. (U. Ex. 57 at 1). Accordingly, the Agency maintains that post orders from North One and South Two would be virtually identical and the use of North One on the post orders for South Two is simply a typographical error. The Agency relies upon Corporal Lindsey's testimony that the post orders were automatic and always in place. (T. 313). The Agency relies further on the testimony of Officers Morris and Eggleston that they were aware of the stated Agency policy requiring that only one officer be in the Control Module at a time. (T. 553, 617). Additionally, the Agency points to Officer Ball's testimony acknowledging that he had read South Two post orders. (T. 656).

Acknowledging problems with the OIA investigation, the Agency maintains that there is ample evidence to support the charges against the Grievants. Although the February 19, 2008 OIA report submitted to Director Brown is flawed to the extent that it relies upon the surveillance photo taken at 2:10 p.m. in front of the UCM which the OIA investigators believed showed Officer Ball holding an orange jumpsuit in his hand, the Agency maintains that the report and the investigators questioning of Ball demonstrate that they believed the photograph showed him holding a jumpsuit. (A. Ex. 2 at G, U. Ex. 56 at 11-12). The Agency notes that OIA Investigator Ben Collins' testimony reiterated this position initially until it was demonstrated on cross-examination that what appeared to be an orange jumpsuit in Officer Ball's hand was actually the shoulder of an inmate wearing a jumpsuit. (T. 99). The Agency acknowledges further that Wanda Patten, Chief of the OIA, retracted the OIA position that Officer Ball was holding an orange jumpsuit at 2:10 p.m. and presented additional testimony indicating that the video record showed Officer Ball walking past the Case Manager's office holding an orange jumpsuit. (T. 383). The Agency suggests that this testimony is unlikely to be accurate because it not only contradicts the written OIA report, but the video upon which she relies was taken at 4:03 p.m. which is after the third shift had come on duty and after Officer Ball had left the jail for the day.

Responding to the Union's argument that the OIA investigators were not sufficiently thorough in their attempts to track down the orange jumpsuit that OIA believed was discarded by Officer Ball, the Agency maintains that the fact that no discarded jumpsuit was retrieved from the trash does not prove that the jumpsuit was not discarded. Addressing the Union's argument that the missing orange jumpsuit was actually picked up during the laundry exchange, the Agency acknowledges that photos do give the appearance of an orange jumpsuit being picked up by an inmate outside of the cell that had been occupied by S.C. (U. Ex. 48). The Agency contends, however, that when the photographs were taken, it is not clear that S.C. was in his cell. The Agency points out that after Corporal Lindsey came on duty at 4:15 p.m., she moved S.C. out of the protective custody area on the lower left tier and back to the other side of the unit. (U. Ex. 60 at 50, U. Ex. 57 at 8-9). The Agency also points out that S.C. was taken to the infirmary and the medical report from the nurse who took his vital signs was

C-23

signed at 5:17 p.m. making it likely that at 5:00 p.m. when the photos of the laundry exchange were taken, S.C. had already been moved from cell 38 and was either in the infirmary or in cell 65. (U. Ex. 48; J. Ex. 3 at 60). Also, the Agency notes that since Corporal Lindsey moved three other inmates over to the lower left tier when she moved S.C. back with the general population, one of those three inmates could have been in cell 38 handing over his jumpsuit in the laundry exchange.

The Agency also maintains that Officer Ball has not been able to explain satisfactorily the photograph taken at 2:22 p.m. showing him exit the unit with a clear plastic bag that appears to hold an orange jumpsuit along with white linens or clothing. (A. Ex. 2 at l). The Agency points to Officer Ball's testimony that he does not remember what it is in hand in the photo but that "it might be trash." (T. 638). The Agency asserts that the item in the bag held by Officer Ball at 2:22 p.m. is "clearly the same distinctive bright orange in color as the inmate jumpsuits."

The Agency points out that OIA investigators reviewed hundreds of photographs and hours of surveillance video, interviewed numerous witnesses and examined corroborating evidence including medical reports of S.C.'s injuries. Acknowledging that their case would be stronger if OIA had tracked down the orange jumpsuit and obtained photos of the hallway leading to S.C.'s cell prior to the assault, the Agency maintains that the preponderance of the evidence leads to the conclusion that the Grievant's version of the events does not ring true. The Agency asserts that it relied on the statements of S.C. when these statements were corroborated by other evidence.

The Agency argues that the Grievants' versions of events are contradictory and do not correspond to the corroborating evidence. For example, the Agency cites S.C.'s statement that there was blood all over his cell while Officers Ball and Morris report only a smudge of dried blood on S.C.'s tee-shirt. However, the Agency cites the statement Officer Morris made that when he saw the blood he thought someone had been stabbed. (U. Ex. 58 at 6). The Agency asserts that a corrections officer would not jump to the conclusion that someone had been stabbed based upon one dried smear of blood. However, Officer Morris' statement about the stabbing corresponds with S.C.'s statement of that when Officer Morris saw the blood he thought that S.C. had "got stabbed or something." (U. Ex. 60 at 10). The Agency relies further on S.C.'s statement that when Officer Ball was in his cell, he searched his bloodstained jumpsuit for a weapon and said "look at all this blood over here." (U. Ex. 60 at 14). The Agency also cites the fact that a detail inmate was ordered to clean cell 65 after S.C. was moved to the new cell on the lower tier. (U. Ex. 59 at 1). The Agency asserts that it is suspicious that officers would call a detail inmate to clean out the cell when the unit was locked down if there was not a specific reason that the cell needed cleaning. The Agency cites the detail inmate D.G.'s statement about

whether there was blood in S.C.'s cell, "I think there was, no, I, uh, don't think there was any blood in there. Probably in the toilet or something. There probably wasn't any blood. Maybe something." (U. Ex. 59 at 2).

The Agency asserts that Officer Morris' story that he observed the flooding in D.S. cell immediately after moving S.C. to his new cell does not fit with the timeline of other events. The Agency points out that at hearing, Officer Morris testified that he noticed water running in the lower left tier immediately after placing S.C. in his new cell. (T. 537). The Agency cites Officer Morris' testimony that he focused on cleaning up the flooding and dealing with D.S.'s suicidal gestures to the exclusion of all other activities. (T. 538). However, the Agency points out that the surveillance photos that S.C. moved his belongings to the bottom left tier at around 2:15 p.m. and after that Officer Morris took S.C. into the sallyport medical room to talk to him, then went to the day room to talk to other inmates from the bottom right tier. Since all of these activities occurred before Officer Morris began responding to the flood caused by D.S., and based upon Officer Morris' statement to the OIA investigators that he did not become aware of the flooding until at least 2:50 p.m., Officer Morris' version of the timeline is flawed. (U. Ex. 58 at 22). The Agency maintains that this timeline is important because the Grievants assert that they were unable to notify anyone that they had moved S.C. to a new cell due to D.S.'s flooding and for the same reason they did not have the opportunity to make notations in the logbook or to complete a DCDC-1 regarding S.C. The Agency maintains that approximately 35 minutes elapsed between the time Officer Morris escorted S.C. to his new cell and the time Officers Ball and Morris began dealing with the D.S. flood. Additionally, Officer Eggleston was unable to come up with an explanation as to why she was not able to log S.C.'s move into the logbook or place a call to compliance. Relying upon Officer Eggleston's statement to the OIA investigators that "kids get upset all the time and flood, the only thing you do is turn the water off and clean it up", thus showing that the flooding incident with D.S. was not an extraordinary event. As a result, the Agency maintains that the only plausible explanation for the Grievants' failure to properly report S.C.'s assault was that they chose not to do so.

## The Union

The Union argues that the Agency has failed to meet its burden of proof that each of the Grievants were terminated for cause. The Union asserts that because Director Brown, the deciding official, relied upon the Final Investigative Report which included erroneous conclusions, the burden of proof has not been met. (J. Ex. 3). The Union maintains that termination was not warranted because there was no cause for discipline. Additionally, the Union asserts that there is no evidence that the Agency considered any mitigating factors in determining an appropriate punishment and, even if there is cause for discipline, removal was not mandated.

C-25

Turning to the specific reasons for the termination of the Grievants, the Union asserts that the Grievants cannot be punished for violating Open Letter DOC-OL 04-28 that addressed eating food in the Control Module. The Union asserts that the Open Letter cites reasons for restricting food in certain locations within the DC jail but does not create a structure or guidelines or explain ramifications for non-compliance. Additionally, the Union maintains that the Agency's management does not comply with the Open Letter and it is not a Program Statement and does not have the force and effect of one. Accordingly, the consequence for a violation of an Open Letter cannot be the same as that of a Program Statement, according to the Union. The Union maintains that the Open Letter does not constitute sufficient notice of improper on-duty conduct or notice of any potential discipline. Even if the Open Letter could make an employee subject to termination, such a punishment for violation of the Open Letter is not warranted here, according to the Union, where the event occurred on Christmas day when the facility was short staffed and the Grievants were ordered to self-relieve.

The Union maintains that the Grievants did not violate Basic Regulations for Agency Employees 1.1 and 1.4. Initially, the Union points out that the Agency did not present specific evidence as to either of these charges and thus, they cannot stand. Addressing Section 1.1 regarding Operational Knowledge, the Union argues that the Agency did not establish that the Grievants had knowledge of or access to all of the rules and regulations, policies and procedures pertaining to the Department, their Division, Service and Unit. The Union maintains that the Agency did not show that the Grievants did not understand the requirements of their jobs. The Union points to the confusion regarding whether the Post Orders submitted as part of the Final Investigative Report were the Post Orders for South Two housing unit. The Union cites testimony from the Grievants that they had not seen these Post Orders before and notes that the document itself has two different housing units in the header. (T. 197, 606; J. Ex. 3 at 30-33).

The Union maintains that the Agency also failed to provide evidence that the Grievants failed to exercise the Attention to Duty Requirement. The Union emphasizes that the Grievants were performing extra duties because the Facility was understaffed. The Union notes further that the Agency did not present support or evidence that any of the Grievants were engaged in "personal pursuits" during the shift. Addressing the argument that this occurred during the period when Officers Ball and Morris were in the Control Module with Officer Eggleston, the Union points out there is no proof regarding the contents of their conversations or what occurred in the Control Module and any conclusion that the conversations were personal would be speculative.

Turning to Officer Balls' charges, the Union maintains that he did not engage in any misconduct that justifies any discipline let alone termination.

Addressing the charge that Officer Ball was in the Control Module with other officers engaged in conversation and eating, the Union asserts that all three officers were not in the Control Module at the same time during the time in question for the entire period. In any event, the Union points out that more than one officer is frequently in the Control Module at one time notwithstanding the Post Order because in practice, a shift exchange never takes place otherwise. The Union also cites the testimony of other officers with direct front-line experience that there is often more than one officer in the Control Module. (T. 167). Acknowledging that Officer Ball was eating in the Control Module, the Union points out that the officers were ordered to self-relieve due to staff shortage. (T. 632). The Union relies on the testimony of Sgt. Bernard Hall that eating in the bubble is acceptable when officers are forced to self-relieve. (T. 567). The Union notes that Officer Ball left the facility to pick up food but given the staffing shortage, did not take his full break outside the jail and instead, brought it back to eat in the unit. (T. 632). Additionally, the Union points out that the Open Letter was issued prior to his arrival and he was not trained or advised of the contents of the letter or even that it existed. (T. 655). The Union points out that the Agency cannot prove that Officer Ball had seen the Open Letter. Under these circumstances, the Union maintains that Officer Ball's conduct in the Control Module does not constitute negligence and his termination should be reversed.

Addressing the assertion that Officer Ball spent 22 minutes in the Case Manager's office rather than making routine security controls on housing unit tiers, the Union maintains that this charge is unsupported. The Union asserts that no officer is in the Case Manager's office for 22 minutes. The Union maintains that the video presented in support of this charge does not show anyone in the Case Manager's office for 22 minutes consecutively.

Addressing the charge that Officer Ball failed to ensure that inmate S.C. received medical care, the Union asserts that the Agency has not proven by competent evidence that S.C. was assaulted. Additionally, the Union maintains that the Agency has not produced evidence that S.C. was in need of medical care during the shift and that Officer Ball had knowledge of that need. The Union points out that S.C. denied that an assault took place and Officer Ball, together with Officer Morris, conducted a strip search and saw no signs of physical injury. (T. 633, 635). Turning to the charge that Officer Ball failed to report the alleged assault of S.C. in violation of Program Statement 1280.2C, the Union reiterates that there is no evidence that S.C. was assaulted or that Officer Ball knew of any assault. The Union asserts that Officer Ball's efforts to determine whether an assault occurred were either thwarted by S.C. or satisfied through Officer Ball's investigation. The Union asserts that since Officer Ball's investigation revealed no evidence of an assault, he cannot be expected to report an event of which he was unaware. The Union maintains that, based on the evidence before Officer Ball, the incident involving S.C. did not qualify as a significant or extraordinary

C-27

incident under Program Statement 1280.2C. The Union points out that Officer Ball told the OIA that he did not consider what happened with S.C. to be an extraordinary occurrence and he reiterated that position at the arbitration hearing. (T. 654-658).

Addressing the allegations that Officer Ball lied to investigators and destroyed evidence, the Union asserts that they are totally baseless. The Union cites Director Brown's testimony that there appeared to be a cover-up. (T. 222). The Union maintains that these accusations reflect the Agency's bias from the outset of the investigation. The Union maintains that had the Agency not erroneously assumed that there was a "cover-up," the incident would not have risen to the level of termination for the Grievants. The Union cites the testimony of Lt. Christopher Hardwick who jumped to the conclusion that there was a cover-up. (T. 155-156). The Union points out that Benjamin Collins accused Officer Ball of disposing of a bloody orange jumpsuit and identified him as doing so in a photograph. (T. 55, A. Ex. 2G). The Union points out that although Collins accused Officer Ball of obstruction of justice in an effort to cover up a crime, the Agency was unable to prove that Officer Ball disposed of the alleged bloody jumpsuit. (T. 90-91). The Union points out that the Agency relied upon a photograph of Officer Ball allegedly holding the jumpsuit, but the Union proved that this was not so. (A. Ex. 2G, U. Exs. 43 & 44). The Union points out that during Collins' testimony, what Collins believed to be the orange jumpsuit in Officer Ball's hand was actually the shoulder of another inmate. The Union also points out that the Agency claimed Officer Ball was destroying evidence in a bag that contained a mysterious orange item. (A. Ex. 21). The Union points out that Officer Ball was taking out the trash. (T. 636).

Addressing the testimony of Wanda Patten, the Union points to her review of hours of video in an attempt to show Officer Ball disposing of the bloody orange jumpsuit. The Union notes that she selected a portion of the video showing an officer who is not Officer Ball and who has no resemblance to Officer Ball carrying an orange object. Indeed, the Union emphasizes that Officer Ball had left the facility by the time the shift had changed and the video was taken. The Union points out that Patten also testified that Officer Ball retrieved a new jumpsuit for inmate S.C. without any evidence supporting this assertion.

The Union takes issue with OIA's investigation of the incident involving the Grievants. The Union notes that OIA did not attempt to secure the area or all jumpsuits to determine whether there was a bloody jumpsuit in the facility. Nor did OIA make an attempt to secure camera evidence of the inmate being assaulted or to locate the allegedly destroyed evidence. (T. 95, 97, 98). The Union cites the testimony of Thomas Hoey, the Agency's IT and camera evidence expert, that the camera could have captured all of the evidence relevant to the incident, including whether other inmates were in or near inmate S.C.'s cell during the time of the alleged assault. (T. 118-121). The Union also

points to Hoey's testimony that there is limited storage capacity on the cameras and, unless there is a timely request for video evidence, it is overwritten. The Union urges that an adverse inference be drawn from the Agency's failure to preserve or present this evidence. Additionally, the Union points out that the final investigative report of the alleged assault relies on hearsay of convicted felons whose testimony was not presented in this hearing.

Turning to the charges of Officer Eggleston's negligence, the Union initially points out that the Agency did not provide authority for the charge that she failed to provide active supervision of the housing unit. The Union points to the testimony of Sgt. Mack Wilson that there is no criteria used to designate the "officer in charge" of the unit. (T. 448). Since the Officer-In-Charge designation is a title only and there is no supporting authority detailing the responsibilities of the Officer-In-Charge, the Union maintains that Officer Eggleston cannot be disciplined for violating a non-existent standard. Addressing the charge that Officer Eggleston sat in the bubble with Officers Ball and Morris engaging in conversation while Officer Ball was eating, the Union points out that during the time at issue, all three officers were not always in the bubble at the same time. The Union maintains further that there was testimony that more than one officer can be in the Control Module at any one time notwithstanding the provision of the South Two Post Orders. (T. 190, 567; J. Ex. 4 at 8 J. Ex. 3 at 34). The Union points to the testimony of the agency's Deputy Warden that more than one officer in the Control Module at one time "could" subject officers to discipline but it is not mandated. (T. 190).

Addressing the charge that Officer Eggleston allowed Officers Ball and Morris to have access for 22 minutes to the Case Manager's office when they should have been making secured housing patrols on housing tiers, the Union reiterates that the Agency provided no evidence in support of these allegations and cited no authority, program statement or post order that this conduct could violate. Further, the Union maintains that any access Officers Ball and Morris had to the Case Manager's office over a 22 minute period did not inhibit their ability make security checks. The Union asserts that evidence submitted by the Agency shows that Officers Morris and Ball were not in the Case Manager's office for 22 minutes consecutively and if Officer Eggleston allowed this access it had no negative impact and this charge should be dismissed.

Turing to the charge that Officer Eggleston violated program statement 1280.2C, failure to report alleged assault of inmate S.C., the Union reiterates that based on her experience and interaction with inmate S.C., Officer Eggleston did not think that the incidents were either "significant" or "extraordinary." (T. 606). Additionally, Officer Eggleston had no evidence that an assault took place and was unaware of any blood on a tee-shirt. (T. 594-595; 614).

C-29

Addressing the charge that Officer Eggleston failed to ensure that inmate S.C. received proper medical care, the Union points out that the Agency produced no evidence that Officer Eggleston was aware that inmate S.C. needed medical care during her shift. The Union reiterates that Officer Eggleston was unaware of any blood on inmate S.C.'s body or on his tee-shirt. (T. 594-595; 614). The Union notes that Officer Eggleston saw no visible signs of injuries and had no reason to believe that inmate S.C. required medical care. (T. 592). The Union points out that Officer Eggleston took inmate D.S. to the infirmary for medical treatment following his attempted suicide and thus recognized the signs when an inmate needed medical attention and the procedures for obtaining that care. (T. 603). The Union points out that the Agency did not produce authority that a correctional officer must ensure that an inmate receive care for nebulous and undefined medical ailments and suggests that an officer would face discipline for failure to do so.

Addressing the charge that Officer Eggleston violated two provisions of the South Two Post Orders regarding inmate S.C.'s move to another cell, the Union points to the language in the investigative report charging Officer Eggleston with violating Section V-9(b). That report provides that Section V-9(b) states "inmates are not to be moved from cell to cell without **prior** approval from a supervisor and the compliance officer." (J. Ex. 3 at 35, emphasis added). The Union emphasizes that the word "prior" is not included in the post order and was inserted into the language of the order by Wanda Patten.

Turning to the charge that Officer Eggleston violated Section V-9(f) of the South Two Post Order which requires that "no inmate shall be assigned from one cell to another without the approval of the compliance officer" and that "all reassignments shall be telephonically communicated to the Count Book Officer by the Union O.I.C., the Union points to Officer Eggleston's testimony at hearing that she could not recall if she contacted a compliance officer. (T. 612). The Union acknowledges that she stated that she did not have the opportunity to contact compliance in her OIA interview. Officer Eggleston subsequently testified that she did not have time to place the entry in the logbook but did remember placing it on an index card. (T. 612-613).

Acknowledging Officer Eggleston's difficulty in remembering whether or not she had contacted Compliance and entered the change in the logbook, the Union emphasizes that the Post Order requires approval for cell changes but does not address when that approval must be obtained. The Union points out that the actual practice at the facility and common sense dictate that inmate cell moves occur without prior approval of a compliance officer. The Union cites testimony that inmates are often moved from one cell to another without the necessity of contacting anyone in Compliance before executing the move. (T. 242-245). The Union cites the testimony of Officer Linwood Becton that an officer can move an inmate in many situations including emergency and a

situation where two inmates do not get along with each other. (T. 242-243). The Union cites Officer Becton's testimony that he was aware of such moves occurring without notification to Compliance and that when an inmate is moved without notification to Compliance he can be moved back to his cell without notification as well. (T. 243-245).

The Union asserts that even if Officer Eggleston was required to call a compliance officer, her failure to make such a call must be considered in light of the mitigating circumstances of the unit being short-staffed to the point of requiring self-relief and inmate D.S.'s simultaneous flooding of the unit and attempted suicide. Under such circumstances, the Union maintains that the termination is too harsh a punishment.

Addressing the charge that Officer Eggleston violated South Two Post Order Section V-27(a) by failing to make logbook entries every half hour, the Union cites the Deputy Warden's testimony that there is no policy or standard for discipline for failing to make entries in a logbook every half hour. (T. 185). The Union cites additional testimony that not all officers make proper and sufficient logbook entries following the requirement strictly. (T. 444-445; U. Ex. 39 & 40). The Union also points out that there was no consideration given to the mitigating circumstances noted above.

The Union argues that the Agency's determination to terminate Officer Morris for negligence in connection with his actions on December 25, 2007. The Union maintains that Officer Morris' actions shows his dedication to juveniles and that he was working diligently to investigate any violation against inmate S.C. and to protect him from potential future harm. Addressing the charge that Officer Morris was in the bubble with Officers Eggleston and Ball and talking while Officer Ball was eating, the Union points out that Officer Morris was in and out of the bubble more than any other officer. In addition, the Union reiterates its argument that more than one officer is often in the Control Module at one time, notwithstanding the Post Order. The Union notes that due to the staffing shortage, Officer Morris did not take a lunch break in order to assist his co-workers. The Union points out that the Agency did not consider this sacrifice. The Union also points out that the Open Letter does not provide a basis for termination for violation of the terms of the Open Letter. Addressing the charge that Officer Morris spent approximately 22 minutes consecutively in the Case Manager's office rather than making routine security patrols on housing unit tiers, the Union maintains that the evidence produced by the Agency does not support this charge and that the video shows Officer Morris was in and out of the office with frequency. The Union asserts that there is nothing on the video that would suggest that Officer Morris was prevented from performing other duties such as routine security checks.

As with Officers Eggleston and Ball, Officer Morris was charged with failing to ensure that inmate S.C. received medical care. Reiterating that the Agency produced no evidence that inmate S.C. was in need of medical care during this shift, and that Officer Morris had knowledge of that need, the Union argues that suspected blood on a tee-shirt after a through strip search that produces no evidence of injury does not demonstrate the need for medical care. The Union emphasizes that inmate S.C. repeatedly denied that an assault took place and Officer Morris, with Officer Ball present, conducted a through strip search and saw no signs of physical injury.

Addressing the charge that Officer Morris failed to report the alleged assault of inmate S.C. in violation of Program Statement 1280.2C, since Officer Morris found no evidence of an assault against inmate S.C., there was no proof of an assault to report. The Union points out that Officer Morris interviewed inmates S.C., P.A. and D.M. and all denied that an assault had occurred. (U. Ex. 58, A. Ex. 6).

The Union argues that the Douglas[5] factors were inappropriately evaluated by the Agency. In support, the Union points to the testimony of Director Brown that he need only state that he consider the factors and need not demonstrate that his decision was a reasoned judgment. (T. 227-229). The Union notes that the final decisions for each of the three Grievants indicate that Director Brown "relied on" Douglas factors 1, 2, 5, 6 and 9 only. (J. Ex. 14, 19 & 24). The Union points out that Director Brown lists only the factor itself and provides no explanation as to his assessment or evaluation of the factors. Citing D.C. Department of Public Works vs. Colbert, 874A. 2d, 353 (D.C. 2005), the Union argues that Director Brown was obligated to balance the relevant factors.

The Union argues that Director Brown did not consider the Grievants' past disciplinary record, past work record, or their length of service and performance on the job. The Union points to Director Brown's testimony that he considered the tenure and disciplinary records of the officers. (T. 223). The Union cites

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

Director Brown's testimony that he reviewed only the final investigative report and hearing officer's report and that the Grievants' tenure and disciplinary record data were mitigating factors contained in those documents. (T. 222-223). The Union points out that Director Brown testified further that he did not have personal knowledge of what was in the Grievants' personnel files. (T. 237-238). The Union points out that the Hearing Officers' report for each Grievant includes "boiler plate language with regard to the mitigating factors of tenure and disciplinary history." (J. Exs. 13, 18 and 23). The Union notes that the evaluation is the same for each of the three Grievants and there is no information to indicate that there was any responsible balancing of the Douglas factors. Instead, the Union maintains, a series of conclusory statements were offered without support from the hearing officer which does not comply with the requirements of Colbert. The Union notes that Director Brown found mitigating circumstances of acute staffing shortages, the uncooperative nature of inmate S.C., the lack of any evidence of assault before the Grievants, and disregard at the actual extraordinary occurrence that day were not taken into consideration. The Union maintains that because there is no way to determine whether the Agency responsibly balanced the Douglas factors, the terminations cannot stand.

The Union argues that the Agency violated the Grievants constitutional rights to abide by internal procedural regulations defining their due process rights. The Union argues that the Agency is obligated to engage in "scrupulous compliance" with its own procedures for the discipline and removal of employees. The Union asserts that rather than "scrupulous compliance" with D.C. personnel regulations and federal and local law, the Agency manipulated the process to achieve management's goal of terminating the Grievants. The Union maintains that the Grievants were held to the letter of the law and regulation but the inmates were not held accountable for any Agency, policy, procedure, law or evidentiary rule. The Union emphasizes that though there was no actual evidence that an assault occurred on December 25, 2007, OIA concluded that one did occur. Additionally, the Union emphasizes that the Agency pursued a scenario in which the Grievants covered up the alleged assault and one of the officers destroyed evidence and lied to investigators after the fact. The Union asserts that there is no evidence supporting these suppositions but the Agency's chief investigator continued to implicate the Grievants to the extent of creating explanations to support the conclusions of her department, such as Officer Ball replacing the destroyed bloody jumpsuit with a clean one though there was evidence to contradict her testimony. The Union reiterates that there is no medical evidence that the Grievant was assaulted on December 25, 2007, no camera footage that would have or could have shown the inmates entering and exiting S.C.'s cell where the alleged incident took place; there is no evidence of a bloody jumpsuit. The Union argues that the Agency's determination no to pursue any evidence to substantiate any of the claims it made in this case create an inference that the Agency manipulated the process to ensure the termination of the Grievants.

The Union maintains that the bias in the process is illustrated by the testimony of Director Brown that "the egregious nature of what was reported in terms of the negligence ..." in the final investigative report and his testimony that the Grievants had "left their post and had congregated in the bubble leaving the unit unsecured; the revelation that an inmate had been injured; and that there appeared to be a cover-up of those facts." (T. 221-222). The Union maintains that the Hearing Officer's report creating this impression on the final decision-maker prior to the "impartial" adjudication of their discipline strips the Grievants of their due process rights. The Union cites further the false conclusions reached by the OIA and that discipline flowed from those conclusions nonetheless. The Union cites the testimony of Mr. Collins that Officer Ball had an orange jumpsuit in his hand in Agency Exhibit 2G and Mr. Collins admission that he did not review the photos immediately before or after that photo. The Union emphasizes that upon reviewing the photo captured approximately one second after Agency Exhibit 2G, Mr. Collins agreed that Officer Ball was not carrying an orange jumpsuit. (T. 55; U. Exs. 43 & 44). The Union maintains that it is disingenuous for the Agency's investigators to assert that they are not involved in the disciplinary process but to make serious and groundless determinations that they know will lead to disciplinary action by the Agency.

The Union raises concerns that the Agency credits convicted felons at the expense of correctional officers. In support, the Union cites the initial decision of Judge Lynn, Bryant et. al. vs. DC DOC, Case Nos. 1601-0031-08; 1601-0039-08. (U. Ex. 35). In that decision, Judge Lynn stated:

> [I]t is troubling to realize that Agency is perfectly willing to destroy the long careers of these employees based on weak evidence and sloppy investigation. In the case of two of these employees, Management even based its entire case solely on the hearsay statement of a notorious criminal repeat offender -- one of the escapees himself!"

In this case, the Union points to Ms. Patten's testimony that she credited the inmate over the officers. (T. 354, 358, 360).

The Union asks that the Grievants' terminations be reversed and they be reinstated with full back pay and benefits, including applicable night differentials and overtime. The Union seeks that all references to the Grievants' terminations be removed from all D.C. Government, personnel, training and other files and that they suffer no retaliation as a result of pursuing their rights to appeal this termination. Finally, the Union seeks costs including attorney's fees of defending this action.

## DISCUSSION

I have carefully reviewed and considered the arguments and evidence presented by the Agency and the Union in support of their positions. The Agency has the burden to prove by the preponderance of the evidence that it had cause to terminate the Grievants.

In reaching the decision to terminate the Grievants, Director Brown relied upon the conclusions of the Hearing Officer and the evidence included in the underlying report prepared by the Office of Internal Affairs. Thus, review of Director Brown's decision must be viewed in light of the totality of the evidence supporting the findings and conclusions of the OIA report.

The OIA report includes troubling oversights, inaccuracies and unsupported conclusions. These include mischaracterization of the incident as an "officer on inmate" assault rather than alleged inmate on inmate assault; inaccurate conclusions regarding the length of time all three officers were in the Control Module; and the conclusion that Officer Ball took a bloody jumpsuit from S.C. to engage in a cover-up based in part on a photograph purporting to show Officer Ball with a jumpsuit (the next consecutive photograph clarified that it was the shoulder of an inmate).

Ms. Patten, Chief of the OIA, testified that she credited inmate S.C.'s statement over that of the correctional officers because evidence of his injuries were corroborated by the infirmary. While Ms. Patten is correct that the infirmary's records demonstrate that S.C. was assaulted, her report indicates that S.C.'s medical records for December 25, showed a bump on his right temporal area, with "no bleeding," a laceration to the inside of his lip, also with "no bleeding," and a bruise to the right infraorbital region. Despite including this information in the OIA report, Ms. Patten credited S.C.'s statement that there was blood on his jumpsuit and that Officer Ball took his bloody jumpsuit. S.C. also testified that there was blood on the walls, floor and toilet in his cell. The detail inmate's testimony regarding blood in S.C.'s cell was inconclusive and at most seemed to indicate that there might have been blood or something "orange" in the toilet. Given S.C.'s statement that he had initially lied to Officer Morris and said that he fell off his bed, Ms. Patten's determination to credit S.C.'s unsworn statement over that of Officers Ball and Morris without further corroboration raises additional concerns.

I note that OIA made no effort to track down the missing bloody jumpsuit, and did not seek to preserve the camera footage in front of S.C.'s cell. Such footage might have served to corroborate either S.C.'s or Officer Ball's and Officer Morris' version of the events. There are no preserved photographs of the hallway near S.C.'s original cell number 65 that might have corroborated S.C.'s statements regarding an assault and might have shown the removal of any

clothing from the cell as well as whether there was any clean up of the cell prior to the arrival of the detail inmate. Nor does the OIA investigative file include photographs of S.C.'s injury. S.C. stated that photographs were taken in the infirmary and Dr. Davis-Hrobowski testified that it is standard procedure to document injuries with photographs. Taken together with the inaccuracies and unsupported conclusions, these omissions call into question the findings in the OIA report, that is the basis for the charges levied against the Grievants.

With this backdrop, I turn to the events of December 25, 2007. Underlying the removal of the Grievants is the belief, first articulated by Lt. Hardwick in his e-mail that a "cover-up" had occurred where evidence of an assault on S.C. was hidden so that the Grievants could "go home at the end of their shifts" on Christmas Day. This belief is perpetuated by Ms. Patten who concluded that Officer Ball "took possession of inmate [S.C.]'s blood stained orange jumpsuit and discarded it" and then lied about it to OIA investigators. After reviewing the OIA report, Warden Brown testified that he found the Grievants' negligence "egregious" in part because "there appears to be a cover-up of these facts." Under these circumstances, and when all of the offenses were considered, Warden Brown determined that removal was appropriate despite mitigating factors including the Grievants' disciplinary records and length of service.

The Agency has not met its burden to show by the preponderance of the evidence that a "cover-up" occurred, that a bloody jumpsuit either existed, was disposed of, or destroyed. The OIA report relies upon a photograph of Officer Ball at approximately 2:10 p.m. appearing to have "an orange inmate jumpsuit in his hand." At the arbitration hearing, Mr. Collins and Ms. Patten both acknowledged that what appeared to be an orange jumpsuit was in fact the body of an inmate wearing an orange jumpsuit as is revealed in the next photograph captured by the security camera. Ms. Patten subsequently testified that a photo of another correctional officer taken at 4:03 p.m. near the Case Manager's office was Officer Ball with the orange jumpsuit. The Agency has acknowledged that the individual was not Officer Ball.

The Agency continues to rely upon another photograph taken at 2:22 p.m. of Officer Ball carrying a clear plastic bag containing something orange and a white square. The Agency maintains this bag contains an orange jumpsuit and white linens. Officer Ball is not certain what is in the bag but indicates that it is likely trash as the garbage is usually collected and removed at that time of day. This photograph by itself is inconclusive at best and does not serve to sustain the Agency's burden of proof that Officer Ball disposed of or destroyed a bloody orange jumpsuit. Additionally, a photo of an orange item, presumably an orange jumpsuit, on the floor outside of cell 38 as the laundry detail came through the Unit at 5:00 p.m. suggests that S.C.'s orange jumpsuit could have been placed in the laundry. Since S.C. was in the infirmary at 5:17 p.m., according to his medical records and Officer Lindsey moved him back to cell 65 during the

number three shift, the Agency suggests that the laundry outside of cell 38 may have belonged to another prisoner. Officer Eggleston estimated that it took about 5-7 minutes to get to the infirmary from the South Two housing unit. Given even a seven minute walk to the infirmary, S.C. is likely to have still been in his cell at 5:00 p.m.[6] The logbook reflects that S.C. was moved back to cell 65 at 5:55 p.m. after he returned from the infirmary. Thus, any laundry placed outside of cell 38 on December 25 at 5:00 p.m. more likely than not to belonged to S.C.

The Agency has suggested that Officers Ball and Morris cleaned up S.C.'s cell as part of the "cover-up" based upon some inconsistencies regarding the time sequence of events. The only other evidence that Officer Ball disposed of a bloody jumpsuit is the unsworn testimony of S.C. In the absence of additional evidence supporting the existence and disposal of a bloody jumpsuit, S.C.'s statement and inconsistencies in the time sequence between S.C.'s move from cell 65 to cell 38 and when the flood caused by D.S. was discovered are insufficient to prove that Officer Ball took a bloody jumpsuit and linens from S.C.'s cell and disposed of them. Accordingly, the basis for the "cover-up" initially suspected by Lt. Hardwick is not supported by the preponderance of the evidence. Thus, the charges must be examined on their own and not in light of a presumed "cover-up."

All three Grievants were charged with negligence in part, as a result of the OIA conclusion that they spend approximately 22 minutes in the Control Module between 1:34 p.m. and 1:56 p.m. engaging in conversation while Officer Ball was eating in violation of South Two Post Order §V-10(g) and Open Letter to All Employees DOC-OL04-28. Photographs from the motion sensitive camera show that Officer Ball remained in the bubble for that period, leaving only for one minute while he completed his lunch break. During that period Officer Morris entered and exited the bubble repeatedly, between 1:35 p.m. and 1:47 p.m. and was not in the bubble between 1:41 p.m. and 1:47 p.m. Officer Morris remained in the bubble from 1:47 p.m. until 1:56 p.m. for approximately nine minutes. As Officer-in-Charge, Officer Eggleston remained in the bubble during the entire period.

Consequently the conclusion that all three officers remained in the bubble and thus left the inmates unsupervised for a period of approximately 22 minutes is not fully supported by the photographic evidence. Nonetheless, all three Grievants did violate the South Two Post Order's proscription against having more than "one officer in the Control Module at a time," with Officer Ball remaining in the Control Module while eating lunch and Officer Morris remaining in the Control Module for a period of nine minutes with Officers Ball and Eggleston.

[6] The logbook entry showing that S.C. was taken to the Infirmary is made immediately below a 5:00 p.m. entry, but the time of the entry is illegible.

There is significant testimony that there are many situations when more than one officer could be in the Control Module. Those situations include shift changes, extraordinary occurrences and periods of brief communication between two officers. Sgt. Hall testified those circumstances could include inmates coming into the unit, officers relieving each other, instructions being given out and other circumstances. There is no evidence that any of those circumstances were present on December 25, 2007 with respect to Officers Ball and Eggleston between 1:34 p.m. and 1:56 p.m., and with respect to Officer Morris, between 1:47 p.m. and 1:56 p.m. Accordingly, I find that Officers Ball, Eggleston and Morris violated South Two Post Order §V-10(g) when all three were in the Control Module for more than a few moments without circumstances that might warrant their presence in the bubble. It is likely that S.C. was assaulted by other inmates during this period when all three officers assigned to the JHU were in the bubble. Under all of these circumstances, the Agency has met its burden of proof that all three officers were appropriately subject to discipline for this charge.

With respect to the charge that Officer Ball was eating on the Unit in violation of Open Letter DOC-OL04-28, I note that there is no evidence that Officer Ball was given notice that staff is "restricted from bringing food onto the operational areas of the facility where inmates are housed." This Open Letter was issued on October 6, 2004, before Officer Ball began working for the Agency and there is no evidence that he was ever provided a copy. Officer Ball testified that he was unaware of this proscription. Sgt. Hall testified that eating in the bubble is acceptable when officers are forced to self-relieve. Officers Eggleston and Morris also were charged with permitting Officer Ball to eat on the unit in violation of former Director Odie Washington's Open Letter. The Open Letter restricted officers from bringing food onto the housing units. However, the record shows that this restriction was not consistently enforced, particularly when officers were required to provide self-relief as was the case on December 25, 2007. That Officer Ball was completing his lunch period and eating his lunch in the bubble because the Unit was ordered to self-relieve merits consideration.[7] Under these circumstances, I find a de minimus violation of Open Letter OL04-28 with respect to the charge that Officer Ball was eating in the bubble and that Officers Eggleston and Morris permitted Officer Ball to eat in the bubble.

Officers Ball and Morris were charged with being in the Case Manager's Office for 22 minutes when they "should have been conducting routine security patrol on the housing unit tiers", and Officer Eggleston was charged with permitting Officers Ball and Morris to have access to the Case Manager's office for 22 minutes. The Hearing Officer's reports do not reflect evidence that Officers Ball and Morris spent 22 minutes in the Case Manager's office or that

[7] Although Officers Eggleston and Ball were able to take lunch breaks, Officer Morris did not take any other break due to the need to self-relieve. Under these circumstances, the Agency's assertion that Officer Ball could have taken a full lunch period and did not need to return to eat in the Control Module is not fully persuasive.

Officer Eggleston permitted them to do so. Nor does the record reflect that either Officer Ball or Morris spent 22 minutes in the Case Manager's office. Rather, in accordance with the CMP's request, Officer Morris allowed inmates to make phone calls because it was Christmas Day. Video of the Case Manager's Office show Officers Ball and Morris coming in and out of the office monitoring inmates who were permitted to make phone calls, but made attempts to use the computer and to review a logbook on the desk in addition to using the telephone. Although the juvenile inmates attempted to take advantage of the opportunity to make phone calls for Christmas when Ball and Morris were occupied with S.C., neither Officer Morris nor Officer Ball were in the Case Manager's office for 22 minutes. Consequently there is insufficient evidence that their occasional presence in the Case Manager's office while overseeing inmate phone calls kept them from routine security patrols of the unit. These charges are not supported by the record and are dismissed.

Turning to the charges that Officers Ball, Eggleston and Morris failed to insure that S.C. received medical care and that Officers Ball and Morris failed to report an alleged assault to Officer Eggleston as the OIC, Officers Ball and Morris both learned that Officer Eggleston thought S.C. was agitated and asked them to check on him. When Officer Ball stopped at S.C.'s cell while making a security inspection, S.C., who was lying on his bed with the light off, told Officer Ball that he was fine.

When Officer Morris went to S.C.'s cell to check on him, S.C. repeated that he was okay, that he was alright. According to Officer Morris, he noticed a smudge of blood on S.C.'s tee shirt. Officer Morris asked S.C. if he had been in a fight and summoned Officer Ball so that a strip search could be performed. In his statement to Mr. Collins, the OIA investigator, Officer Morris performed "a visual body search of the inmate's face and body" and "did not see any swelling cuts or abrasions." Finding no injury, Officer Morris instructed S.C. to dress and he escorted S.C. to the sallyport where he again asked S.C. whether he had been in a fight. According to Officer Morris, S.C. repeated that he was fine and then asked to be moved to the other side of the unit away from inmates D.P., A.D. and M.V. Officer Morris then advised S.C. that he would be placed on involuntary protective custody and escorted S.C. back to his cell (number 65) to retrieve his belongings and moved him to cell 38 on the other side of the unit.

In contrast, S.C. told the OIA that he had shown the cut on the inside of his lip to Officer Morris and asked to be taken to the infirmary. According to S.C., Officer Morris indicated that they "needed to sort something out first."

Based upon the medical records from the infirmary, showing that S.C. had bruises and a cut inside his upper lip, it is likely that an altercation in S.C.'s cell led to his injuries. Given that Officers Ball and Morris were checking on S.C. within moments of those injuries, it is likely that swelling and bruises were not yet

apparent. Officer Morris indicated that he looked inside S.C.'s mouth, but a visual inspection might not reveal a cut on the inside of the upper lip. Under such circumstances, with S.C. refusing to tell Officers Ball and Morris that there had been a fight and with the other inmates who Morris had interviewed all indicating that everything was fine, Officer Morris reached the conclusion that S.C. did not receive an injury. However, the smudge of blood on S.C.'s tee-shirt together with S.C.'s request to have his cell moved and the denial by all of the inmates interviewed that *anything* occurred should have been sufficient to alert Officer Morris that *something* had occurred.

Accordingly, I find that Officer's Ball and Morris did not fail to insure S.C. received medical care and accordingly did not fail to inform Officer Eggleston that S.C. was in need of such care. However, I do find that Officers Ball, Eggleston and Morris should have made a notation in the logbook and/or completed a DCDC-1 recording the unusual situation with S.C. and the subsequent lockdown. Although their view of the situation with S.C. might not rise to the level of an unusual or extraordinary incident, Officers Ball and Morris' failure to note the unusual occurrences as well as S.C.'s cell movement created questions and concerns for the next shift. In accordance with Program Statement 1280.2C, at Major Brinson's request, all three officers completed DCDC-1's on December 26, 2007.

Additionally, Officer Eggleston's failure to call the Compliance office or enter the incident with S.C. and his subsequent transfer to a different cell in the logbook left confusion as to why S.C. was in a different cell when a security inspection was conducted at the beginning of the next shift. As the Officer-in-Charge, Officer Eggleston was responsible to make logbook entries. According to South Two Post Orders V.27(a), the logbook is a "written record of events occurring on the unit and listed chronologically on a daily basis." Whether or not Officers Ball and Morris were able to conclude that S.C. was assaulted or had been in a fight, all three officers were aware that something unusual had occurred with S.C. Officer Eggleston noticed that he was agitated. Officers Ball and Morris observed a spot of blood on his tee-shirt, and S.C. told Officer Morris that he wanted to be moved to a different cell. All three officers were aware that S.C. wanted to move to a different cell. Taken together, this information is sufficiently out of the ordinary to merit the completion of a DCDC-1 in accordance with Program Statement 1280.2C.

Addressing the charge that no security inspections were completed or entered into the logbook between 12:50 p.m. and 3:10 p.m. on December 25, Officer Ball testified that he was conducting a security inspection shortly after 2:00 p.m. when he stopped at S.C.'s cell to check on him. That security inspection is not entered into the logbook. South Two Post Orders §V.10 (c)(1) require that officers conduct and record a security inspection every 30 minutes "unless emergencies or scheduled activities ... inhibit such." Although the

incident with S.C. and subsequent flooding of the unit and attempted hanging by D.S. may have delayed a security inspection, the incident with S.C. did not arise until after 2:00 p.m. and there is no apparent reason for the omission of logbook entries between 12:50 p.m. and 2:00 p.m.

The failure to conduct security checks and/or to enter such checks in the logbook is a violation of the South Two Post Orders § V.27(a). However, review of the South Two logbook from November 9 through December 31, 2007 shows that security checks were conducted and/or recorded in the logbook every thirty minutes less than half the time. Deputy Warden Harper testified that there is no consistent or standard level of discipline for failure to make logbook entries every thirty minutes. Under the circumstances present here, this violation of the Post Orders technically merits discipline, but appears to be a common infraction for which discipline is not always issued. Under such circumstances, the failure to complete the logbook, by itself would be considered de minimus, but must be considered along with all the other circumstances surrounding the incident with S.C.

Officer Eggleston also is charged with failing to call and inform Compliance that S.C. had been moved from cell 65 to cell 37. After some equivocation, Officer Eggleston acknowledged that although she had completed an index card for the panel inside the Control Module reflecting his move, she had not contacted Compliance. Officer Eggleston acknowledged further that she could have contacted Compliance before the D.S. began flooding the unit, but she did not do so. Officer Eggleston also acknowledged that because she was preoccupied with D.S., she did not notify Lt. Thomas when he was on the Unit after D.S. created a flood and tried to hang himself. Section V.9(b)of the South Two post orders provides that "inmates are not to be moved from cell to cell without approval from a supervisor and the compliance officer." Under these circumstances, I find that Officer Eggleston violated Section V.9(b) because she had adequate opportunity to notify both the Compliance Officer and Lt. Thomas.

Officer Eggleston is also charged with failing to meet the responsibilities of the Officer-in-Charge because she failed to properly manage the unit and to ensure that "subordinates were conducting themselves in adherence to agency policy." The Agency has not demonstrated that Officer Eggleston had the responsibility to manage the unit or to supervise Officers Ball or Morris. Accordingly, there is insufficient support for this charge and it is dismissed.

In sum, the Agency has proven, by a preponderance of the evidence, that Officers Ball, Eggleston and Morris remained in the Control Module for an extended period in violation of South Two Post Orders § V.10(g) and failed to submit incident reports regarding the incident with S.C. The Grievants did violate South Two Post Orders and Program Statement 1280.2C, but their omissions as required by Program Statement 1280.2C were not willful. The Grievants'

misconduct in remaining in the Control Module for an extended period in violation of the Post Orders violated Basic Regulations for Agency Employees 1.1 and 1.4. Additionally, the Agency has proven by the preponderance of the evidence that Officer Ball committed a de minimus violation of Open Letter DOC-OL04-28. The Agency has also proven, by a preponderance of the evidence, that Officer Eggleston failed to make proper notification to her supervisor and to Compliance regarding the incident with S.C. and his being moved to a different cell in violation of South Two Post Orders §§ V.9(b) and V.9(f) and that Officer Eggleston failed to place entries in the logbook from 12:50 p.m. to 3:10 p.m. in violation of South Two Post Order § V.27(a). The remaining charges were not proven by a preponderance of the evidence and are dismissed.

As noted herein, Director Brown relied upon the apparent "cover-up" detailed in the OIA report as well as the sum of all of the charges in his determination that termination was warranted even when the mitigating factors of the Grievants' length of service and unblemished disciplinary records were considered. However, review of the record as a whole shows that most of the evidence supporting the apparent "cover-up" was either incorrect or unsubstantiated. Additionally, several of the charges were not proven by the preponderance of the evidence. Under all of these circumstances, and when the Grievants' length of service and clean records are considered as mitigating circumstances, progressive discipline rather than termination is likely to prove corrective and is warranted for Officers Ball, Eggleston and Morris.

However, all three Officers did violate South Two Post Orders § V.10(g) and Program Statement 1280.2C. Officer Ball committed a de minimus violation of Open Letter DOC-OL04-28. Additionally, Officer Eggleston violated South Two Post Orders § V.9(b), V.9(f) and § V.27(a) Under all of the circumstances present in this case, the terminations of Officers Ball and Morris are converted to ten (10) working day suspensions and the termination of Officer Eggleston is converted to a fifteen (15) working day suspension.

Officers Ball, Eggleston and Morris shall be reinstated with back pay, less interim earnings, benefits and seniority, including compensation for applicable night differentials and any involuntary overtime that each officer would have worked. All personnel, training and other records concerning Officers Ball, Eggleston and Morris shall be amended to reflect that their terminations have been converted to suspensions and to reflect only the charges that have been proven. Officers Ball, Eggleston and Morris shall not be subject to retaliation as a result of this pursuing their rights to challenge their terminations.

The Union asks that I award attorney's fees. Without prejudice to the respective arguments of both parties on any issues concerning payment of attorney's fees, if the parties are unable to agree regarding this issue, the Union may apply for payment of attorney's fees.

I retain jurisdiction in this case solely as to issues regarding the implementation of the remedy and any questions concerning attorney's fees.

## AWARD

The charges against Officers Felix Ball, SaTonya Eggleston and Roman Morris are sustained in part and reversed in part. The charges are sustained to the extent that the Agency has cause to discipline Officers Felix Ball, SaTonya Eggleston and Roman Morris. The charges are denied to the extent that the Agency did not have cause to terminate Officers Felix Ball, SaTonya Eggleston and Roman Morris. The termination of Felix Ball is modified to a ten (10) working day suspension. The termination of SaTonya Eggleston is modified to a fifteen (15) working day suspension. The termination of Roman Morris is modified to a ten (10) working day suspension.

Officers Felix Ball, SaTonya Eggleston and Roman Morris shall be reinstated with back pay less interim earnings, benefits and seniority, including compensation for any applicable night differential and involuntary overtime that each officer would have worked. All personnel, training and other records concerning Officers Ball, Eggleston and Morris shall be amended to reflect that their terminations have been converted to the above suspensions and to reflect only the charges that have been substantiated.

The arbitrator shall retain jurisdiction solely for purposes of implementation of the remedy and resolving any question of attorneys' fees.

Dated: October 23, 2009
Sea Girt, New Jersey

Joyce M. Klein

State of New Jersey }
County of Monmouth } ss:

On this 23rd day of October, 2009, before me personally came and appeared Joyce M. Klein to me known and known to me to be the individual described in and who executed the foregoing instrument and she acknowledged to me that she executed same.

Gretchen L. Boone
Notary Public of New Jersey
Commission Expires 04/30/2014

B-

Arbitration between:

Fraternal Order of Police/DOC Labor Committee,
*Union,*

and

D.C. Department of Corrections,
*Employer,*

regarding the discharge of Sergeant Ronald Adams, Corporal Lewis Dickens, Corporal Anthony Harris and Acting Lieutenant Angelo Logan.

FMCS Case No. 080527-0391-T



BEFORE: PAUL GREENBERG, Arbitrator

*Appearances:*
*For FOP/DOC Labor Committee and the Grievants:*
Ann-Kathryn So, Esq.; Charles Cate, Esq.; J. Michael Hannon, Esq., *Hannon Law Group, Washington, D.C.*

*For D.C. Department of Corrections:*
James Langford, Esq.; Jonathon O'Neill, Esq.; Natasha Campbell, Esq., *D.C. Office of Labor Relations and Collective Bargaining, Washington, D.C.*

## DECISION AND ORDER

This case involves the March 20, 2008, decision of the D.C. Department of Corrections (Department or DOC) to discharge four front-line Corrections Officers for misconduct in connection with an incident of alleged mistreatment of a prisoner, Inmate B, on January 29, 2007. The four Corrections Officers are Sergeant Ronald Adams, Corporal Lewis Dickens, Corporal Anthony Harris and Acting Lieutenant Angelo Logan (collectively, "Grievants"). At the time of their termination, each of the Grievants had worked for the Department for 10 years or more, and apparently had clean disciplinary records.

Grievants are members of a bargaining unit represented by the Fraternal Order of Police Department of Corrections Labor Committee (FOP or Union). Challenges to the discharges were filed, and an evidentiary hearing to explore the appeals was convened before this Arbitrator on May 18, 19, 27 and 28, 2009. Post-hearing briefs subsequently were submitted.

Neither the Grievants nor anyone else who was present during the January 2007 incident testified at the arbitration hearing. However, the incident promptly was investigated by DOC's Office of Internal Affairs (OIA), and Grievants and many other witnesses provided sworn statements to OIA investigators. OIA subsequently compiled a comprehensive report of the incident, and this OIA report was relied upon heavily by decision makers at each stage of the disciplinary process and is the foundation for the discipline that ultimately was imposed

The individual statements made by the four Grievants to the OIA investigators were submitted to this Arbitrator and are part of the record in this grievance, but the statements provided by other witnesses to the OIA investigators were not provided. In the record developed before this Arbitrator, therefore, the OIA report stands as the most comprehensive description of the incident. At no point in the proceeding did the Grievants challenge the accuracy of OIA's factual recounting of the incident, and this Arbitrator therefore relies upon it.

In addition to the OIA report and the Grievants' individual statements to the OIA investigators, a portion of the January 2007 incident was observed by a surveillance video camera and recorded. A copy of the video recording was provided to this Arbitrator and is part of the record.

## BACKGROUND

### A. The events of January 29, 2007.

The specific involvements of the individual Grievants in the events of January 29 are considered in the Discussion section of this Decision, *infra*. However, it is helpful to begin with a general description of what occurred.

In January 2007, Grievants were working at the District's Central Detention Facility (CDF or Jail) located on the eastern fringe of Capitol Hill. One of the units within the Jail is the "South (1)" housing unit. South (1) is used to house "special status" inmates, *i.e.*, high profile inmates, inmates with a history of attempted escapes, inmates with a history of assaultive or disruptive behavior, inmates with a history of contraband violations, etc. Operations within South (1) are governed by a specific Post Order. Union Exhibit (UX) 6.

Inmates in South (1) are subject to rigorous controls. For example, inmates may only leave South (1) if they are fully restrained (handcuffs, belly chain and leg irons). Inmates are strip searched prior to being removed from their cells, and they also are strip searched whenever they enter or leave the South (1) unit. Inmates leaving the unit must be guided by a Corrections Officer (CO) "hands on" (*i.e.*, with a CO holding onto the inmate's arm). *Id.*

Inmate cells in South (1) are subject to random "shakedowns," *i.e.*, searches for contraband items. During these searches, each inmate is required to disrobe and his clothing is searched. The inmate is directed to turn in a circular motion for a visual body inspection. As part of the search, the inmate is required to bend at the waist and spread his buttocks. When the strip search is completed, the CO then places the inmate in restraints and orders the cell door opened. The inmate is secured just outside the cell while the CO searches ("tosses") the cell. After the search, the inmate reenters the cell. If any contraband is found, it is documented and the inmate charged accordingly. *See* Agency Exhibit (AX) 79 p. 3.

A shakedown of the South (1) unit was called on the afternoon of January 29, 2007,

around 3:30 PM. A group of Search Team Officers (STOs) was assembled. The Search Team included both COs normally assigned to the South (1) unit, and also other COs who normally were assigned to work other portions of the CDF. Among the COs participating in the shakedown was Cpl. Harris, who normally was assigned to the North 1 unit. Cpl. Harris previously had worked on South (1) in the past.

The first cell Cpl. Harris approached was occupied by Inmate B. According to the investigative report later compiled by OIA, Inmate B's most recent period of incarceration at the CDF had begun in August 2006, when he was charged with a parole violation. AX 79. He initially was housed in the Northwest 3 and Southwest 1 units. However, in December 2006 Inmate B was discovered harboring contraband (a cell phone, cell phone charger, cigarette lighter, and tube of superglue), which prompted his transfer to South (1). In early January 2007, he was discovered with two relatively minor items of contraband – a tube of shaver gel, and a set of hair clippers. A couple days later Inmate B was charged with assaulting a Corrections Officer when he squirted an unknown substance on the CO. When this occurred, the CO ordered Inmate B to drop the container containing the liquid that had been squirted; when Inmate B refused to comply, the CO disbursed a chemical agent into Inmate B's cell.

As part of the shakedown of January 29, Cpl. Harris directed Inmate B to remove all his clothing and place it in a box. Inmate B complied with the directive; Cpl. Harris checked the clothing and returned it to the box. Cpl. Harris then instructed Inmate B to turn around so Cpl. Harris could perform a visual body search, which included a directive to Inmate B to bend over and spread his buttocks to expose his anal area for inspection. According to Cpl. Harris, Inmate B refused to comply with his order to turn around and expose his anal cavity and instead placed his hand between his buttocks and shoved something into his rectum, a practice known in the corrections field as "slamming." Throughout this initial phase of the interaction, Inmate B was within his locked cell, naked, with Cpl. Harris standing outside. Although not known to Cpl. Harris at the time, Inmate B later would acknowledge that the contraband item was a tobacco product.

Cpl. Harris alerted Acting Lieutenant Logan to the situation. Lt. Logan was the supervisor on the shakedown. Another CO, Sgt. Adams was working nearby; Sgt. Adams also heard Cpl. Harris tell Lt. Logan of the contraband situation with Inmate B.

Lt. Logan joined Cpl. Harris outside Inmate B's cell. Lt. Logan questioned Inmate B and ordered him to turn around and bend over. This time, Inmate B complied. Both COs – still outside Inmate B's cell, with Inmate B inside and unclothed– could see some clear plastic protruding from Inmate B's anus. Lt. Logan instructed Inmate B to pull the contraband from his rectum and surrender it. According to Lt. Logan, he issued this instruction several times, but Inmate B refused to comply and instead backed further into his cell and attempted to shove the contraband further into his rectum. Inmate B began to tell the COs that he did not have any contraband, and he became combative.

Standing outside the locked cell, Lt. Logan disbursed chemical agent (mace) into the cell onto Inmate B. In a statement subsequently made to DOC investigators, Lt. Logan explained his use of the chemical agent was justified because he believed Inmate B "was an immediate threat to himself and the security operation of the unit and the policies and procedures of the D.C. jail [by] concealing contraband." UX 61 at 7-8.

By this time, as many as four COs may have been on the scene at Inmate B's cell: Cpl. Harris, Cpl. Dickens, Lt. Logan and Officer M. Although Sgt. Adams was not at the cell, he was close enough that he was aware of the evolving situation and could overhear some of the conversation. Cpl. Harris contacted the South (1) control module (the "bubble") and asked that the cell be unlocked. Three officers – Cpl. Harris, Officer M and Cpl. Dickens – went into the cell and restrained Inmate B with handcuffs, with Inmate B's hands handcuffed behind his back. Cpl. Harris at this point was suffering from the effects of exposure to the chemical agent, and left the area of the cell and went to a restroom to get himself cleaned up. Officer M also left. UX 23 at 5.

At Lt. Logan's instruction, Inmate B was extracted from his cell – still naked, with hands handcuffed behind his back – and was brought to "the TV room," a nearby common area where inmates sometimes watch television. There is a video surveillance camera in the TV room, and the subsequent activity was observed "on camera" and recorded. As noted, the video recording was presented to this Arbitrator.

Upon entering the TV room, Inmate B again bent at the waist and Lt. Logan observed his anal area. According to Lt. Logan, Inmate B continued to refuse the instructions to surrender the contraband and Inmate B was resisting. Lt. Logan instructed the other COs present in the TV room to place Inmate B on the floor; in Lt. Logan's view, Inmate B would constitute less of a risk to himself and to the Corrections Officers if he were on the floor than if he remained standing. The Corrections Officers implemented Lt. Logan's instruction and brought Inmate B to the floor. Around this time Sgt. Adams entered the TV room and began to assist his co-workers.

Inmate B continued to resist while lying face-down on the floor, and the COs struggled to subdue him. Sgt. Adams knelt on Inmate B's back, between his shoulder blades. Cpl. Dickens and another CO (identified in the OIA report as Sgt. W) held Inmate B's arms. Lt. Logan stood over Inmate B, and attempted to restrict Inmate B's kicking by locking Inmate B's feet with his (Lt. Logan's) legs; at some point, it appears Lt. Logan actually stepped on Inmate B's calf to try to subdue him. During this struggle, yet another CO, Cpl. G, entered the TV room and began to assist in subduing Inmate B. Although the witness statements are not fully consistent, it appears Cpl. Dickens and Cpl. G engaged in a joint effort to separate Inmate B's buttocks with their hands, allowing a better view of Inmate B's anal area. At some point, Cpl. G relinquished this task to Cpl. Dickens (whose hands were gloved) and Cpl. Dickens used both his hands to spread Inmate B's buttocks. In his statement to the OIA investigators, Cpl. Dickens testified he was acting at Lt. Logan's direction when he manually spread Inmate B's buttocks.

After a few moments of struggle on the floor, Inmate B told Lt. Logan that he (Inmate B) was willing to relinquish the contraband, which Inmate B identified as a "roll up." About this time, Sgt. Adams – who was feeling bad from the chemical exposure – left the room. At Lt. Logan's direction, Inmate B was assisted to his feet and the COs stepped away, allowing Inmate B an opportunity to comply with his offer and surrender the contraband. However, rather than retrieving the contraband from his rectum, Inmate B attempted to push it in even further. Yet another CO, Cpl. C, entered the TV room. Lt. Logan decided to bring Inmate B to the floor a second time, which was done by Lt. Logan, Sgt. Adams, Cpl. Dickens and Cpl. C. Cpl. Dickens was told to hold Inmate B's hands. No contraband was retrieved, and Inmate B was raised up again.

Lt. F entered the TV room. Inmate B again bent over at the waist and Lt. F visually inspected his anal area. Cpl. Harris returned around this time, also. Inmate B subsequently claimed Lt. F slapped him in the face. There is some dispute whether this occurred. Several of the officers involved deny having observed Lt. F strike Inmate B, but others stated they observed Lt. F strike Inmate B. One of the COs later would tell OIA investigators he did not personally observe Inmate B being struck, but he heard Inmate B complain immediately to Lt. F that "You didn't have to hit me like that." Additionally, Inmate B's allegation that he was struck by Lt. F was corroborated in a statement by a second inmate who occupied a cell near the TV room, and who claimed to have observed the entire incident.[1] The OIA report suggests Cpl. C, Lt. Logan and Sgt. Adams observed Lt. F strike Inmate B.

At this point, the effort to recover the contraband ended. Inmate B was supplied with a jumpsuit; Cpl. Harris uncuffed him briefly, and Inmate B put the jumpsuit on.

Inmate B was escorted first by Cpl. Harris and a second CO (Officer A) to the Receiving and Discharge (R&D) unit to shower. After showering, Inmate B was escorted to the medical unit so medical personnel could attempt to retrieve the contraband. Along the way, however, Inmate B advised the COs that he (Inmate B) needed to use the restroom. Officer A took Inmate B to the restroom, while Cpl. Harris waited. While in the restroom, it appears Inmate B somehow disposed of the contraband. According to Officer A, while walking to the infirmary Inmate B alleged that he had been "violated" by the COs; Officer A suggested to Inmate B that he contact the Department's Sexual Misconduct Hotline.

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[1] Sgt. Adams later denied to DOC investigative staff that he saw Lt. F strike Inmate B, and also stated he did not hear Inmate B complain of being struck by Lt. F. UX 25. Although Capt. Nora Talley's statement to DOC investigators about the January 29 incident was not included in the record provided to this Arbitrator, there is a suggestion in the record that Capt. Talley reported Sgt. Adams had admitted to her that he (Sgt. Adams) was aware that Lt. F had struck Inmate B and also that Sgt. Adams actually had observed this occur. *See* UX 30. Although Sgt. Adams never personally submitted a statement denying Capt. Talley's report of their conversation, a statement filed on Sgt. Adams's behalf by the FOP asserted Sgt. Adams had not seen Lt. F strike Inmate B, and alleged Capt. Talley had "twisted" the facts. UX 28.

In the medical unit, Inmate B was examined by Dr. Kimball Beck. Inmate B complained to Dr. Beck that he (Inmate B) had been sexually assaulted by the staff. Dr. Beck examined Inmate B's rectum and did not observe any gross tearing, but Dr. Beck noted there was a small streak of blood on the toilet tissue that Inmate B used to wipe his anal cavity. Inmate B also claimed he had experienced other minor injuries at the hands of the Corrections Officers. He also told Dr. Beck the COs had conducted a rectal cavity search, and that he (Inmate B) wanted to file sexual assault charges. Dr. Beck later would report to OIA that Inmate B acknowledged he had been hiding a tobacco product in his rectum, and Inmate B also told Dr. Beck that he later swallowed the contraband tobacco.

Lt. F made a visit to the medical unit to check on the status of Inmate B. He spoke with the infirmary staff. Lt. F returned to the Command Center in South (1) and, with Capt. Talley, reviewed the video recording of the incident as it had transpired in the TV room. Lt. F reported to Capt. Talley that Inmate B was alleging he had been sexually assaulted. Capt. Talley advised Lt. F to file an incident report, which he did. Separately, Lt. Logan also filed an incident report (Form DCDC-2) on January 29, less than an hour after the incident had occurred. UX 65.

**B. The Department's internal investigation, and referral to Warden Smith.**

News of the incident involving Inmate B was communicated rapidly to senior DOC officials, including DOC Director Devon Brown. Director Brown referred the matter to the Office of Internal Affairs to conduct an administrative investigation.

OIA conducts a large number of inquiries each year, involving a range of issues that come to the attention of Department management from a variety of sources. Some inquiries involve allegations of relatively low-level infractions, while others are major.

Wanda Patten serves as head of OIA, and holds the title "Supervisory Criminal Investigator." Although SCI Patten has several investigators working for her within OIA, she took primary responsibility for the investigation into the Inmate B incident and served as Lead Coordinating Investigator. SCI Patten has been with the Department four years, having served previously as an investigator with the Metropolitan Police Department and the D.C. Public Schools. Her professional background and education is in law enforcement; she has not personally worked as a Corrections Officer. SCI Patten testified she was aware of the incident involving Inmate B relatively early, when she received a phone call from Lt. F and Capt. Talley.

SCI Patten and her staff conducted an extensive inquiry, interviewing a large number of witnesses. Sgt. Adams was interviewed February 2; Lt. Logan and Cpl. Dickens, February 1; and Cpl. Harris, January 31. The inquiry culminated in an investigative report that was submitted to Director Brown. SCI Patten concluded that nine corrections officers involved with the incident involving Inmate B had violated various Department regulations or policies, or had violated the

D.C. Criminal Code.[2] With respect to the Grievants, SCI Patten concluded:

- Lt. Angelo Logan's use of chemical agent on [Inmate B] was in direct violation of accepted use of force policy and procedure of the DOC.

- Lt. Angelo Logan displayed poor judgment and supervision of the Search Team Officers assigned to conduct the mass shakedown of the South (1) Housing Unit of the Central Detention Facility on January 29, 2007.

- Lt. Angelo Logan witnessed Cpl. Lewis [Dickens] and [a second CO, Cpl. G], both subordinate Officers, commit a violation of the Inmate strip search policy, and failed to take appropriate action. Further, Lt. Logan violated DC Criminal Code 22-204.

- Cpl. Lewis Dickens violated established DOC policy as it pertains to the strip search of Inmates. Further, Cpl. Dickens violated DC Criminal Code 22-404.

* * * *

- Sgt. Ronald Adams and [a second CO] violated the DC Criminal Code 22-404, when they assisted in restraining [Inmate B].

* * * *

- . . . Cpl. Lewis Dickens, Cpl. Anthony Harris . . . Sgt. Ronald Adams [and two other COs] were present when [Inmate B] was assaulted and failed to report it on January 29, 2007, in violation of DOC Code of Silence Directive.

* * * *

- All STO who participated in the South (1) Housing Unit mass shakedown on January 29, 2007 were previously provided mandatory training on Program Statement 3350.2D, Sexual Misconduct against Inmates.

- On January 29, 2007, there was adequate DOC policy in place concerning the use of force, the proper search of Inmates, and the reporting of sexual misconduct complaints. Members of the Search Team, under the leadership of Lt. Logan[,] failed to display adequate self control, discipline and an adherence to established policy, practices and directives in their handling of [Inmate B].

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[2] Relevant portions of the D.C. Code, DPM Regulations, DOC Program Statements, etc., are found as an Appendix to this Decision.

AX 79 (emphasis supplied).

According to SCI Patten, she submitted several preliminary drafts of the OIA report to Director Brown for his review before the final version was approved. SCI Patten testified Director Brown is rigorous in reviewing reports for spelling, grammar, etc., and it is his routine practice to edit draft OIA reports. She testified, however, that Director Brown's review and critique focuses only on style issues, and he never has suggested she change the substance of her report, and specifically did not change the substance of the OIA report in the Inmate B inquiry. Director Brown corroborated SCI Patten's characterization of his review practices.

Once the OIA report was completed on March 26, it was forwarded to CDF Warden William Smith for his consideration. Warden Smith testified he reviewed the report in detail, and concluded each of the four Grievants[3] should be terminated based on their participation in the strip search of Inmate B. Individual memoranda from Warden Smith to Joan Murphy (Special Projects)[4] were prepared for each of the Grievants, describing their participation in the incident and explaining the basis for Warden Smith's removal recommendations. UX 19 (Adams), UX 34 (Dickens), UX 46 (Harris), UX 57 (Logan). In turn, detailed "advance notices of proposed removal" were prepared for Warden Smith's signature and then forwarded to each of the charged Corrections Officers, describing the individual CO's involvement in the January 29 incident and charging violations of identified Department Program Statements and the Code of Silence Directive.[5] The charges against Sgt. Adams, Cpl. Dickens and Lt. Logan were characterized as "malfeasance," while the charge against Cpl. Harris was characterized as "negligence." The advance notices were forwarded to the Grievants on April 30, 2007. UX 20, 35, 47, 58.

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[3] It is this Arbitrator's understanding that disciplinary action also was contemplated or proposed for the other Corrections Officers involved with the Inmate B matter, but most of the other involved employees either retired or resigned prior to the imposition of discipline.

[4] From the testimony of several Department Managers, it is evident Ms. Murphy and her staff play a significant coordinating role in administering the Department's Human Resources system. For example, it is Ms. Murphy's unit that sends out notifications to employees of proposed and final disciplinary actions, and also identifies and appoints the Disinterested Designees/Hearing Officers who conduct the administrative hearings that take place between the initial discipline proposal and the final decision issued by Director Brown.

[5] Although the OIA report concluded Lt. Logan's, Cpl. Dickens' and Sgt. Adams' conduct violated D.C. Code 22-404, the District of Columbia's criminal assault statute, this allegation was not included among the charges alleged in the notices of termination.

**C. Administrative review by Disinterested Designees/Hearing Officers.**

Both the labor agreement (Article 11) and District Personnel Manual (DPM) Section 1612 require that proposed removal actions be reviewed administratively by a Disinterested Designee/Hearing Officer. The Hearing Officer is to be appointed by the agency head, although within DOC this task has been delegated to Joan Murphy. The Hearing Officer is to be an individual Grade DS-13 or higher who is outside of the chain of command between the proposing and deciding official, and who has no direct personal knowledge of the facts underlying the removal. The DPM encourages agencies to appoint attorneys to serve as Hearing Officers, although this is not uniformly required. DPM §1612.2(e).

Each of the advance notices of proposed removal advised the Grievants that Keith Godwin had been appointed to serve as Hearing Officer (H.O.). Godwin is identified in the record as the Department's Chief of Network Operations and as a Supervisory Computer Specialist. Management Liaison Specialist Denise Shell – a member of Joan Murphy's staff – testified she (Shell) made the decision to assign Godwin to serve as Hearing Officer, selecting him from a list of about 10 DOC staff who have been trained to perform this function. The notices invited each of the Grievants to submit statements to H.O. Godwin identifying any defense they might have to the charges made by Warden Smith.

The Grievants did not respond personally to the invitation to submit position statements, but FOP Vice Chairperson John Rosser submitted statements to Godwin on their behalf in early June 2007. UX 28 (Adams), 45 (Dickens), 48 (Harris), 56 (Logan). The Union defended generally the actions of the Corrections Officers, arguing they followed accepted guidelines, denying that any improper body cavity search took place, denying any sexual misconduct occurred, and denying Grievants improperly failed to report wrongdoing by their co-workers (the Code of Silence charge) because (a) nothing improper occurred, and (b) supervisory personnel were on the scene and promptly filed reports.

The District Personnel Manual provisions relating to administrative review do not normally contemplate that Hearing Officers will conduct an adversarial proceeding. Consistent with this policy, H.O. Godwin therefore did not conduct an evidentiary hearing but instead reviewed the record that had been forwarded to him by the Department, along with the Grievants' position statements (as supplied by FOP's Rosser). On September 26, 2007, he submitted his recommendation to Director Brown.

H.O. Godwin's September 26 report to Director Brown is found at UX 24. It is a single report covering all four of the Grievants (plus a fifth CO, Cpl. G, whose case was not submitted to this Arbitrator).[6] After reviewing the events of the January 29 shakedown, H.O. Godwin

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[6] There is an odd error in H.O. Godwin's September 26, 2007, report. In the "subject" line of the report, Godwin indicates he is addressing charges against the four Grievants and Cpl. G. However, at the conclusion of his report, H.O. Godwin does not address any charges that might have been filed against

identified three issues: (a) whether Lt. Logan violated Program Statement 5009.2A (Searches of Inmates) or D.C. Code 22-404 (Aggravated Assault) by using chemical agents on Inmate B; (b) whether Program Statement 5010.9C (Use of Force) was violated, and (c) whether one of the Corrections Officers who escorted Inmate B to the infirmary (Cpl. A) violated Program Statement 3350.2D (Sexual Misconduct Against Inmates) because he failed to report Inmate B's claim that he had been sexually abused, but instead suggested Inmate B use the DOC Sexual Misconduct Hotline when he returned to his housing unit. (Because the charges against Cpl. A are not before this Arbitrator, Godwin's discussion of this issue is not relevant to the matter before me).

H.O. Godwin rejected the charges against the four Grievants. With regard to the allegations regarding the allegedly improper search of Inmate B, H.O. Godwin first analyzed the Supreme Court's decision in *Bell v. Wolfish*, 441 U.S. 520 (1979), in which the Court concluded that the constitutionality of inmate strip searches involves a balancing of multiple concerns and that routine strip searches are not *per se* violative of the Fourth Amendment. Additionally, H.O. Godwin offered the following observation addressing whether an improper cavity search of Inmate B had been conducted:

> By definition during the manual body cavity searches, body orifices are probed using fingers or instruments. The OIA investigation clearly established that only [Inmate B's] buttocks were force[d] apart. [Inmate B] stated that at some point during the shake down he attempted to hide contraband in his body. The search of [Inmate B] can only be categorized as a visual cavity search by use of force and would not be considered constitutionally unreasonable.

UX 24 (emphasis supplied).

With regard to the allegation that Lt. Logan violated the Use of Force program standard, Godwin exonerated Lt. Logan, stating:

> Section 10(a) Procedures of Program Statement 5010.9C states "Any use of force shall begin at the lowest practical level of the force continuum and escalate as needed in response to the level of resistance and severity of the threat encountered."
>
> This policy clearly allows the steps of the Force Continuum to be start[ed] and executed in the order necessary for a particular situation. Physical Presence, Verbal Commands and a Show of Force [were] executed before

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Cpl. G, but instead provides two paragraphs exonerating a different CO, Cpl. A. Because any charges that may have been proffered against either Cpl. G or Cpl. A were not submitted to this Arbitrator for review, the error is not of consequence to this Decision. However, this error points to some of the weaknesses in H.O. Godwin's review.

> a Chemical Agent was discharged. In accordance with other requirements of this program statement[,] a Lieutenant or higher official supervised this Use of Force.
>
> Lt. Logan displayed sound judgment by not utilizing Physical Control Techniques, which would have exposed [the] Officers and the Inmate to possible serious injury. I have found that Lieutenant Logan did not violate any provisions set forth in Program Statement 5010.9C and [recommend] the charges be dismissed.

*Id.* (emphasis supplied).

H.O. Godwin forwarded his report and penalty proposal to Director Brown, who concluded the analysis was deficient and decided to remand the matter to the Hearing Officer for further consideration. Citing *Stokes v. District of Columbia*, Director Brown criticized Hearing Officer Godwin for conducting independent research and basing his major finding on his analysis of the Supreme Court's *Bell v Wolfish* decision. In addition, Director Brown chastised Godwin for being insufficiently deferential to Warden Smith's decision to discharge the Grievants:

> In rendering your decision as the hearing examiner, you researched and cited a U.S. Supreme Court case, to wit, Bell v. Wolfish that found that a visual body cavity [search] of an inmate by correctional officers as part of a strip search is not an unreasonable invasion of the personal rights of an inmate. You state in your analysis that "by definition during manual body cavity searches, body orifices are probed using fingers or instruments." On that basis, you state that you "cannot agree with the recommendation to terminate the (officers) for violation of DOC Program Statement 5009.2A or D.C. Criminal Code 22-404." Please be reminded that it is not the role of the hearing examiner to "substitute its judgment for that of the agency." Its role is to ensure that managerial discretion has been legitimately invoked and properly exercised. Stokes v. District of Columbia, 502 A. 2d 1006, 1010 (D.C. App. 1985). Under the rules, the agency decision must be upheld unless there is no reasonable basis for it. It is not overturned because the hearing examiner would have exercised a different judgment or conclusion, or because in the opinion of the hearing examiner, the U.S. Supreme Court has held that an inmate does not have a privacy interest in being free from body cavity searches.
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> * * * *
>
> The role of the [Hearing Officer's] Report and Recommendation is not to determine whether the proposed termination is proper, but whether the government has provided both credible and reasonable grounds for it. In order to do so, the hearing examiner must base the decision upon the standard and facts proposed by the proposing official. Based on the foregoing, I ask you to reconsider your recommendation and conduct

> your analysis on whether there was a reasonable basis for disciplinary action based solely on the policy, without reference, reliance or referral to independent legal research.
>
> * * * *
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> Please relssue your decisions without reliance on independent legal research, relying on Program Statement 5009.2A Searches of Inmates, section 10(e)(1) as the basis for the removal. Please also issue your decisions in a separate report for each employee.

UX 25 (underscoring added). In his testimony, Director Brown commented that the incident involving Inmate B was unrelated to any constitutional questions, and therefore Hearing Officer Godwin's constitutional analysis simply was misplaced. Tr. 275-76. Instead, Director Brown was concerned that H.O. Godwin had not taken into account a variety of Program Statement elements applicable to the Inmate B matter, including the Continuum of Force policy, the Inmate Search Program Statement, the requirement that written reports be submitted to document non-routine occurrences, and that cell searches be video recorded. Tr. 270-71.

In response to the remand from Director Brown, on December 18, 2007, Hearing Officer Godwin issued four new reports and recommendations, one for each of the Grievants. UX 26 (Adams), UX 40 (Dickens), UX 51 (Harris), UX 62 (Logan). These "reports and recommendations on remand" essentially were the same as his first report September 26 report, but with the *Bell v. Wolfish* analysis removed. With regard to the key charge proffered against all four Grievants – *i.e.*, violation of the Inmate Search Program Statement – the new reports were short and conclusory, repeating the text of the first recommendations and without meaningful analysis:

> By definition during the manual body cavity searches, body orifices are probed using fingers or instruments. The OIA investigation clearly established that only [Inmate B's] buttocks were force[d] apart. [Inmate B] stated that at some point during the shake down he attempted to hide contraband in his body. The search of [Inmate B] can only be categorized as a visual cavity search by use of force and would not be considered constitutionally unreasonable.
>
> Therefore I cannot agree with the recommendation to terminate [the Corrections Officer] for violation of DOC Program Statement 5009.2A or DC Criminal Code 22-404 and [recommend] the charges be dismissed.

Emphasis supplied. H.O. Godwin again exonerated each of the Grievants and recommended that no disciplinary action be imposed.

Once again, Director Brown reviewed H.O. Godwin's reports and the recommendations that none of the Grievants be disciplined or dismissed. Director Brown concluded "further

consideration" was needed. However, around December 2007 Godwin was away from work on an extended medical leave. Director Brown wrote to H.O. Godwin asking whether he (Godwin) objected to the cases being reassigned to a different Hearing Officer. UX 27. Godwin responded that he did not object to the reassignment.

DOC Training Administrator Elbert Henderson was selected to serve as the new Hearing Officer around December 22. Henderson was a relative newcomer to the D.C. Department of Corrections, having begun working for the agency in July 2006 after retiring from the Maryland correctional system. According to Henderson, he received the assignment from Joan Murphy. Tr. 423. Unlike Hearing Officer Godwin, who had no personal experience as a Corrections Officer, Henderson previously had worked as a line CO before rising through the ranks into management positions.

There is no evidence suggesting the Grievants received formal notice of the assignment of a new Hearing Officer, and in his testimony Director Brown expressed the general view that there is no requirement that charged employees be informed of remands or reassignment of administrative review hearings. Hearing Officer Henderson did receive a call from Sgt. Adams about the remand on or about January 3, 2008, and according to Henderson, Sgt. Adams initially expressed an interest in participating in a hearing. So it is evident that news of the second remand and the appointment of Henderson somehow managed to reach at least one of the Grievants. Capt. Walter Coley testified he notified the Grievants of Henderson's appointment. *See* AX 83. A short time after H.O. Henderson spoke with Sgt. Adams, he (Henderson) received a call from FOP Chairperson Nila Ritenour; according to Henderson, Ritenour either expressed objections to the process or indicated that the matters already had been resolved. Tr. 423-24.

Hearing Officer Henderson testified he reviewed the following documents when performing his analysis: OIA SCI Patten's investigative report; Warden Smith's request for disciplinary action; the advance notices of proposed termination sent to the Grievants; the individual interviews with each Grievant conducted by OIA; photos of the Corrections Officers; and the Program Statements. Additionally, Hearing Officer Henderson reviewed the video recording of the events in the TV room. Tr. 422-23. Henderson testified he did not review the prior reports and recommendations prepared by Hearing Officer Godwin. Tr. 425. Although not expressly addressed in his testimony, it appears Hearing Officer Henderson also did not review copies of Director Brown's correspondence with Hearing Officer Godwin describing the standard of review purportedly governing DOC Hearing Officers and citing the *Stokes* case. In addition, there is no evidence suggesting H.O. Henderson received copies of the individual statements on behalf of each Grievant that the FOP had sent to Hearing Officer Godwin expressing the position of Grievant's position.

Hearing Officer Henderson issued his recommendations on the discharge proposals on January 14, 2008. UX 29 (Adams); UX 41 (Dickens); UX 52 (Harris); UX 63 (Logan). With regard to each of the Grievants, H.O. Henderson concluded the penalty proposed by Warden

Smith – *i.e.*, discharge – was appropriate, based on violations of the Program Statements and the Code of Silence directive. Generally, Henderson concluded the COs improperly used force against Inmate B; violated the inmate search policy by conducting an improper body cavity search; and failed to provide proper notice to Department superiors of the unusual incident.[7]

**D. Director Brown's final agency decisions.**

Director Brown received the reports and recommendations from Hearing Officer Henderson. Lengthy letters were prepared to each of the Grievants outlining their involvement in the events of January 29, Director Brown's analysis of their infractions, and his conclusion that discharge was the appropriate penalty.[8] UX 30 (Adams), UX 42 (Dickens), UX 53 (Harris), UX 64 (Logan). With regard to performing a *Douglas* factors analysis, Director Brown stated he considered *Douglas* factors (1), (2), (5) and (6) in connection with all four of the Grievants. These factors are:

1. The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or advertent, or was committed maliciously or for gain, or was frequently repeated;

2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties;

6. Consistency of the penalty with those employed on other employees for the same or similar offenses.

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[7] Not surprisingly, Hearing Officer Henderson relied heavily on the OIA report and its analysis of the events of January 29, along with the video recording. However, with regard to his description of Sgt. Adams's involvement in the search of Inmate B, the narrative in Henderson's report is materially inaccurate in several respects. For example, Henderson's report states Sgt. Adams "restrained and escorted a nude [Inmate B] from one tier to another section of South One." However, Inmate B was transferred from his cell to the TV room by Lt. Logan and a second CO, but not Sgt. Adams (who came to the TV room a short time later when he heard a commotion). When questioned on cross-examination, Henderson conceded there were inconsistencies between OIA's account of Sgt. Adams' involvement and his own narrative. Tr. 424-32.

[8] Director Brown also incorporated *verbatim* extensive excerpts from Hearing Officer Henderson's reports. As a consequence, some of the factual errors contained in H.O. Henderson's reports also reappear in Director Brown's final decisions.

Additionally, with respect to Sgt. Adams and Lt. Logan, Director Brown also indicated he considered *Douglas* factor (9):

> 9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.

This grievance followed.

## ISSUE PRESENTED

Whether Grievants were discharged for cause? If not, what shall be the remedy?

## DISCUSSION

### A. Preliminary comments.

Several observations should be made at the outset of this discussion.

**First**, although this Arbitrator has no first-hand experience in the corrections field and claims no particular expertise, it is apparent to this Arbitrator that the situation involving Inmate B and his contraband was very badly mishandled by the Corrections Officers, and in a manner that violated either the letter or the spirit of multiple regulations with which the COs were acquainted. In his testimony, Warden Smith noted the importance of maintaining discipline and order among the Corrections Officer staff, observing that when Corrections Officers are undisciplined and violate regulations, the inmate population quickly perceives its situation as "helpless and hopeless," which can create a volatile atmosphere within the detention facility. Tr. 299-301. As Director Brown observed, inmates are sent to detention "as punishment," and not "to be punished" by the detention center staff. Tr. 202. As Director Brown further observed, it is unacceptable for Corrections Officers to engage in conduct that does not clearly distinguish them from the inmates – a population that often has a history of preying on other people. Tr. 203-04.

**Second**, it bears noting that the Grievants did not testify at the grievance arbitration hearing. The Department urges this Arbitrator to draw a negative inference from their failure to testify, citing jury instructions in criminal cases and also a court decision suggesting the failure of a defendant to testify sometimes may be viewed as an admission.

It is not uncommon for labor arbitrators to draw negative inferences from the failure of an available witness to testify. In this case, however, I note the Department (in the OIA report) had expressed its belief that the Grievants might have been guilty of criminal conduct, and at various times during the proceeding the Union's counsel attempted to ascertain whether any criminal

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charges against Grievants might be under consideration by prosecutors. Under such a cloud, this Arbitrator is not surprised the Grievants might choose to avoid testifying in the arbitration proceeding. Although I therefore decline to "draw negative inferences" from their failure to testify, it must be noted the Department's version of what occurred on January 29, 2007 (as reflected primarily in the OIA report) basically stands unrebutted.

**Third**, it is clear that a variety of motivations are intertwined in the January 29 event. On the one hand, the goal of the COs – at least initially – was to conduct a shakedown and retrieve any contraband. This was their job and their duty. Inmate B was in possession of contraband and trying to hide it – clumsily. On several occasions during the incident, the matter could have been brought to a quick close if Inmate B simply had complied with the orders of the COs; instead, he was non-compliant and combative.

I do not offer this observation in an effort to excuse the mistakes of the COs, or to suggest that Inmate B bears much responsibility for what occurred. The Grievants all are trained professionals with substantial experience in corrections work. Part of their responsibility is the humane treatment of inmates, and the protection of inmate safety – even inmates who are actively combative or resistant. Corrections Officers properly should be held to a high standard.

Having reviewed the full record, including the videotape of the incident, this Arbitrator concedes it is unclear at times whether the COs were seeking to recover Inmate B's contraband, or instead trying to subdue Inmate B – or even to punish him for his resistance. Or some combination of the three.

If the goal was to retrieve the contraband, there plainly were better tools available to the COs, *e.g.*, simply confining Inmate B to a dry cell and waiting for the contraband in his rectum to pass through, or transferring Inmate B to the medical unit so the contraband could be extracted by medical professionals. If the goal was to subdue Inmate B, it appears to this Arbitrator that the goal was more or less achieved at various stages of the incident, *e.g.*, when Inmate B successfully was extracted from his cell and brought to the TV room, and also at the point when Inmate B apparently volunteered to turn over the contraband and was lifted from the TV room floor for the first time.

With regard to Inmate B's combative response and refusal to release the contraband – indeed, his apparently continuing efforts to push the contraband further up his rectum – it is a bit of a mystery what he thought he could accomplish, if he had the capacity to think through his situation clearly. However, even though Inmate B's strategy in attempting to keep the contraband plainly was foolish and not very rational, it must be recognized that the situation he confronted when he was brought to the TV room must have been quite terrifying. He had just been maced, and still was in contact with the chemical agent. The level of chemical agent was sufficiently great that several COs who had not been sprayed directly with the substance (Harris, Adams) found it intolerable; one can only imagine how much more distress was being experienced by Inmate B. And while experiencing the effects of the chemical exposure, he had

been taken to an adjacent room – naked, and with his hands cuffed behind his back – and then brought to the floor and physically restrained by several COs, including a supervisor who forcibly was keeping his legs spread while a second CO spread his buttocks. One can only imagine the level of Inmate B's terror, not knowing what the COs might do next. Although many inmates might simply buckle under such stress – which probably would be the wiser strategy, anyway – it also is not surprising that some inmates might become even *more combative* under such situations and try to defend themselves.

Thus while the COs initially may have had a proper motive (recovering contraband), the situation steadily devolved as the result of a series of poor choices by the Grievants (particularly the officer in charge, Lt. Logan), as well as Inmate B.

**Fourth**, although this Arbitrator finds the treatment of Inmate B by the Grievants and their co-workers to have been very disturbing – even shocking – the Department seems to have responded to the incident simply by branding all the involved Corrections Officers as "bad actors" meriting the ultimate disciplinary sanction. This is troublesome in several respects:

- The level of involvement of the four Grievants varied a great deal. Some of the Grievants were present and active participants throughout the entire incident, while others had much lesser degrees of contact. Some were directing the activity and giving orders, while others were following – and, arguably, *obligated* to follow orders issued by their superiors or risk being disciplined for insubordination. In this Arbitrator's view, the situation was more complex, and the involvement of the various Corrections Officers more nuanced, than the Department seems to acknowledge.

- Although this grievance involves only four of the Corrections Officers, the OIA investigation actually identified approximately 9 COs as having some level of culpability in the incident. Although several incident reports were filed (Lt. Logan, Lt. F), and although it appears several of the COs admitted in their statements to OIA that they knew it was improper for COs to be conducting searches of an inmate's anal area by spreading the inmate's buttocks with their hands, it does not appear generally that the COs were shocked by the incident. Additionally, most of the COs who did not file incident reports did not appear to feel that they had erred – either because the incident did not seem extraordinary, or because they believed it was unnecessary for the non-supervisory COs to file a report because COs at the lieutenant level were involved and presumably were reporting the incident to higher-level management.

  Based on this Arbitrator's review of the record, it does not appear the lower-ranking COs consciously were covering-up or avoiding reporting wrongdoing by their superiors or peers – the kind of non-response targeted by Director Brown's "Code of Silence" letter – but instead believed either that the conduct of their co-workers was not outside the bounds of accepted procedures at the Central Detention Facility, or

that their personal reporting was not essential because they knew Management was aware of the situation. To this Arbitrator, the somewhat uniform response of the COs (*i.e.*, their non-reporting) suggests there may be systemic problems within the Central Detention Facility, with the COs honestly not knowing precisely what Management expects, and with COs engaging in penal practices that are outside the letter of what is mandated by the Program Statements – practices which are being tolerated or even directed by supervisors.[9] To the extent COs routinely are not conforming to the letter of DOC Program Statements, this is problem that normally should be addressed through training and through corrective and progressive discipline (warnings, reprimands, suspensions, etc.), rather than discharge for a first offense.

## B. Challenges raised by the Union and the Grievants.[10]

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[9] As noted *supra*, in early January 2007 (*i.e.*, just weeks before the January 29 incident), Inmate B had been sprayed with chemical agent after he squirted a liquid onto a Corrections Officer. In addition, according to a June 2008 Final Order in Cpl. Harris' unemployment compensation appeal issued by an administrative law judge, Investigator Benjamin Collins – a member of SCI Patten's staff, and a witness called by the Department at the unemployment compensation hearing – allegedly testified the use of mace was allowed under DOC rules to prompt an inmate who had refused to obey a CO's order. UX 54 at 9. Although this Arbitrator draws no "hard and fast" conclusion from these two examples (both are hearsay accounts, and the facts surrounding the "sprayed liquid" incident are undeveloped in the record of this case), the incidents suggest the use of chemical agent is more common and tolerated than would be suggested by the Continuum of Force Policy.

[10] Although not raised by the parties, I note there are real hazards to the fairness of the disciplinary process when an investigative office such as OIA "overcharges" employees as part of an investigative report, as this Arbitrator believes occurred in this case when OIA concluded many of the COs involved in the January 2007 incident violated the District's criminal assault statute, D.C. Code 22-404.

In this Arbitrator's experience, there are a variety of approaches that government agencies use when conducting internal investigations. Many internal investigators are charged merely with investigating the facts and then reporting and summarizing this information for agency decision makers, without reaching any ultimate conclusions as to the culpability of the conduct in question. Other agencies adopt a more prosecutorial approach, with the investigators reporting their findings and then providing their analysis and conclusions regarding culpability.

The OIA investigative report produced in connection with the January 29 incident falls into the latter category. In addition to concluding that various Corrections Officers violated the Program Statements governing strip searches and the use of force and chemical agents, and also failed to report these infractions (thus violating the Code of Silence letter), the OIA report also was notable in concluding definitively that Lt. Logan, Sgt. Adams and Cpl. Dickens (as well as several other Corrections Officers whose conduct is not at issue in this grievance) violated D.C. Criminal Code 22-404 (the assault statute). I emphasize the OIA report did not suggest the *possibility* that the Criminal Code had been violated (*e.g.*, "The conduct of Corrections Officer X *may* have been a violation of the Criminal Code"), which would cue subsequent decision makers in the disciplinary review process to evaluate independently whether an

The Grievants did not testify at the arbitration hearing, nor did they personally provide statements to H.O. Godwin when their proposed terminations were first referred to a Hearing Officer for consideration. OIA SCI Patten's investigative report largely is drawn from the statements of the Grievants and their co-workers; although there seems to have been initial reluctance on the part of some of the witnesses to acknowledge fully their actions, ultimately the COs appear to have provided to the investigators fairly truthful and candid accounts of what they

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assault had occurred; instead, the OIA report reads like a prosecutor's indictment, flatly declaring that criminal conduct occurred.

D.C. Code 22-404 does not include a statutory definition of "assault," but the criminal offense has been defined in the District of Columbia as "an attempt with force of violence to do a corporal injury to another; and may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person." *Watson v. United States*, 979 A.2d 1254 (D.C. 2009), citing *Harris v. United States*, 201 A.2d 532, 534 (D.C. 1964). Additionally, "'violence' in its ordinary meaning is not a necessary element of assault, for an attempt to do unlawfully to another any bodily injury however small constitutes an assault[.]" *Harris* at 534.

Unquestionably, the Grievants and their fellow Corrections Officers were very rough in handling of Inmate B, and they were very physical with him. If an ordinary civilian engaged in this kind of behavior with another person in a non-consensual context, it reasonably could be characterized as an assault. However, it is well-recognized that Corrections Officers and similar public safety employees such as law enforcement officers enjoy a qualified immunity from prosecution under the assault statutes, because their public functions may legitimately require them to engage in physical interaction with other citizens. So long as this physical contact is reasonable and in furtherance of their public function, this Arbitrator believes it is extremely unlikely such conduct would be viewed as an assault under the criminal statutes. In addition, with the exception of the alleged face-slapping by Lt. F., I note there is nothing in the record that would lead this Arbitrator to conclude the COs intended any bodily injury toward Inmate B.

As discussed elsewhere in this Decision, it is this Arbitrator's view that the actions of Lt. Logan, Sgt. Adams and Cpl. Dickens were extremely ill-advised and violated various Department policies – and, in a final irony, the actions ultimately were completely ineffective. Inmate B was maced, he was taken to the floor while in the TV room on multiple occasions, his arms were restrained, Lt. Logan stepped on his calf several times, and his buttocks manually were spread open on multiple occasions by various Corrections Officers. However, it also is clear to this Arbitrator that all these actions were directed toward the legitimate goals of recovering contraband and restraining a combative inmate.

To his credit, Warden Smith seems to have recognized that charging the Grievants with criminal assault in connection with the disciplinary process was problematic, and it is notable that the "assault" charge does not appear in the Advance Notice[s] of Proposed Termination. But it is difficult to gauge what influence OIA's declaration that the COs engaged in criminal conduct nonetheless may have had on subsequent actors in the disciplinary process. For example, even though Warden Smith did not charge any of the Grievants with violating the District's criminal assault statute, all the recommendation memos generated by both H.O. Godwin and H.O. Henderson make reference to a possible criminal assault charge.

did and saw.

The Grievants' defense focuses on a series of concerns. Some are due process concerns prompted by the disciplinary procedure used by the Department, others challenge the Department's interpretation of its governing Program Statements and the Code of Silence letter, and other aspects of the Union's case are more tied to the merits of the charges. The points raised by the Union and the Grievants are addressed in this section. Although it is this Arbitrator's view that many of the concerns raised by the Union have a degree of merit, for the most part I find the irregularities do not rise to a level that requires summary reversal of the disciplinary actions purely on a due process theory. The notable exceptions, however, relate to (1) the Union's challenge to the process used by Director Brown when assessing the level of discipline, *i.e.*, the *Douglas* factors analysis, and (2) the charge that the Grievants violated the Code of Silence policy.

*1. Whether a prohibited "body cavity search" was performed.*

Both during the arbitration hearing and in the post-hearing briefs, a great deal of attention was focused on the definition of a "body cavity search" and whether the Grievants participated in a "prohibited" body cavity search on January 29, 2007. The FOP post-hearing brief devotes 13 pages to this issue (Union br. at 22-35), ultimately arguing that the Grievants merely performed a permissible strip search of Inmate B.

Strip searches and body cavity searches are addressed in Program Statement 5009.2A:

> 9. **Definition.** For the purpose of this program statement, the following definitions shall apply:
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> * * * *
>
> d. **Strip Search** – An examination of an inmate's naked body for weapons, contraband, and physical abnormalities. This also includes a thorough search of all of the individual's clothing while it is not being worn.
>
> 10. **SEARCHES OF INMATES.** The following searches may be conducted to ensure the safe, secure and orderly operation of the CDF and to control contraband and provide for its disposition.
>
> * * * *
>
> b. **Strip Searches**
>
> 1) Staff may conduct a strip search when there is a reasonable belief that contraband may be concealed on the person, a good opportunity for concealment has occurred or there is increased

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need for security. . . .

* * * *

4) The least invasive form of search shall be conducted.

* * * *

e. **Manual or Instrument Searches**

1) A manual or instrument inspection of body cavities may be conducted only be qualified health care personnel in private upon written approval of the Warden or designee and when there is reasonable belief that an inmate is concealing contraband in or on his/her person.

Boldface supplied, italics added.

There really is no question that it was appropriate for the Grievants to conduct a strip search. Strip searches are a routine fact of life in South (1), and a normal part of the shakedown protocol. The question is whether Inmate B was subjected to an impermissible "body cavity search" when Lt. Logan on two occasions ordered Cpl. Dickens to spread Inmate B's buttocks with his (Cpl. Dickens') hands, and Cpl. Dickens complied.

Senior DOC staff, including notably Director Brown and OIA SCI Patten, acknowledged in their testimony that nowhere in the Department regulations are the terms "body cavity" or "body cavity search" defined. As detailed in the Union's post-hearing brief, a succession of witnesses struggled to define both terms, offering a variety of views.

This matter of definitions is important in several respects. First, there is the question whether what occurred in the TV room "in fact" constituted a body cavity search. Second, if it constituted a body cavity search, there is a question whether it was a body cavity search that was prohibited under Program Statement 5009.2A (Searches of Inmates, Inmate Housing Units, Work and Program Areas). Third, even if the action constituted a prohibited body cavity search, in light of the Department's failure to define the term "body cavity search," there is a question whether the Grievants were on notice that this specific conduct was prohibited.

Program Statement 5009.2A (at §10) identifies five types of searches that may be used: (a) pat searches, (b) strip searches, (c) non-intrusive searches (magnetometers, electronic sensors, trace detection systems), (d) canine searches, and (e) manual and instrument searches of body cavities. The last of these searches – manual and instrument searches of body cavities – may only be conducted by health care personnel with approval of the Warden or his/her designee.

"Strip search" is defined in Program Statement 5009.2A (at §9(d)), although DOC's

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definition is not particularly helpful. Under the DOC Program Statement, a "strip search" is defined as "an examination of an inmate's naked body for weapons, contraband, and physical abnormalities. This also includes a thorough search of all of the individual's clothing while it is not being worn." DOC's definition does not expressly state that some form of body cavity search is incorporated into the term "strip search" or, if so, precisely what the parameters of the authorized body cavity search may be.

This is not merely an academic question. Black's Law Dictionary (7th ed.1999) defines "strip search" as "[a] search of a person conducted after that person's clothes have been removed, the purpose being to find any contraband the person might be hiding." In some contexts, the term "strip search" has been defined very literally as a mere visual inspection of an unclothed detainee or inmate. For example, the Seventh Circuit has defined a strip search as "a visual inspection of a naked inmate *without intrusion into the person's body cavities*." *Peckham v. Wisconsin Dep't of Corrections*, 141 F.3d 694 (7th Cir.1998) (emphasis added).

The First Circuit offered that

> A "strip search," though an umbrella term, generally refers to an inspection of a naked individual, without any scrutiny of the subject's body cavities. A "visual body cavity search" extends to visual inspection of the anal and genital areas. A "manual body cavity search" includes some degree of touching or probing of body cavities.

*Blackburn v. Snow*, 771 F.2d 556, 561 n.3 (1st Cir. 1985) citing *Security & Law Enforcement Employees v. Carey*, 737 F.2d 187, 192 (2d Cir.1984). Interestingly, the First Circuit definition of a "visual body cavity search" focuses exclusively on inspections of the *anal* and *genital* areas, which suggests that visual inspection of body cavities that generally are viewed as less personally sensitive (mouth, nose, ears, arm pits) might be acceptable even in the context of a basic strip search.

In this Arbitrator's view, a "body cavity" includes areas of the human body that would not typically be visible to an observer if the person being examined was standing naked. Logically, these would be areas where a person might attempt to hide contraband items. Body cavities include both the body orifices (mouth, nostrils, ears, vagina, anus) as well as other portions of the body that are not readily visible if the subject is standing freely and relaxed (*e.g.*, arm pits, crotch, anal area between the buttocks, area under a man's foreskin, etc.).[11]

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[11] FOP argues to the Arbitrator that the controlling definitions of the terms "body cavity search" and "strip search" are to be found in *Washington v. United States*, 594 A.2d 1050 (D.C. 1991). I disagree. The *Washington* case involved the constitutionality of a strip search that had been performed by police officers working for the Metropolitan Police Department. As part of its decision, the court merely quoted definitions of these two terms that had been included in MPD regulations. Nowhere does the court adopt those definitions as its own; indeed, the court ultimately holds that even a strip search that comports with the letter of facially-valid regulations may nonetheless violate constitutional safeguards "when the scope

That being said, it also is true that not all body cavities are treated equal. A high level of privacy is associated with body cavities in the genital and anal areas, while lesser degrees of privacy attach to other parts of the body.[12]

It also is clear that some "body cavity searches" are considered part of a routine DOC strip search, as noted by the Grievants and the FOP. Thus a normal strip search at the Central Detention Facility includes visual examinations of the interior of the mouth, nostrils, ears, crotch, anal cavity, etc. Significantly, however, these body cavity searches normally are accomplished by a Corrections Officer directing the inmate to open his mouth, lift his arms, spread his buttocks, etc. These body cavity searches are not performed through the use of physical force by the Corrections Officer, but essentially are the result of voluntary compliance by the inmate. Significantly, the body cavity searches can be accomplished without any touching of the body cavity area by the Corrections Officer.

Under Program Statement 5009.2A, "manual and instrument" body cavity searches are to be performed only by DOC medical personnel. In this case, Lt. Logan directed Cpl. Dickens to use his own hands to spread Inmate B's buttocks so the COs could search his anal cavity. As noted, there was nothing wrong *per se* with the COs visually surveying Inmate B's anal cavity as part of the strip search, but it plainly was improper and inconsistent with DOC protocols for the COs to touch Inmate B's buttocks in this manner.[13] Thus when H.O. Godwin strangely characterized the search of Inmate B as a "visual cavity search *by use of force*" and then apparently concluded there had been no violation of DOC regulations, it is this Arbitrator's view that H.O. Godwin's conclusion simply was wrong.

This is not to say that the Department's position in this case with regard to the "unauthorized body cavity search" question does not have problems. As noted, the mere fact that the Program Statement does not define "body cavity search" is problematic, because it does raise questions whether the Grievants were on "clear notice" of the Department's expectations. To this Arbitrator, the Program Statement's reference to "manual" body cavity searches (which could suggest merely "touching") – as opposed to a "digital" body cavity search (which connotes "probing") – also is somewhat unclear. Moreover, as FOP correctly notes, during the arbitration hearing this Arbitrator specifically invited the Department to provide for the record copies of any

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of the search is unjustified and the method used shocks the conscience." *Id.*

[12] The Eleventh Circuit offered a useful guidepost when it observed there are three factors which "contribute to the personal indignity endured by the person searched: (1) physical contact between the searcher and the person searched; (2) exposure of intimate body parts; and (3) use of force." *United States v. Vega-Barvo*, 729 F.2d 1341, 1346 (11th Cir. 1984), *cert. denied* 496 U.S. 1088 (1984).

[13] It should be noted – and emphasized – that the evidence shows only that Inmate B's buttocks were spread by Cpl. Dickens in an effort to expose contraband that might be visible in Inmate B's anal cavity. There is nothing to suggest Inmate B's anus was touched by Cpl. Dickens or any of the COs, or that there was any intention of performing an invasive search of Inmate B's rectum.

DOC training materials used with Corrections Officers that might clarify what the COs are taught regarding the parameters of a permissible body cavity search, and the Department did not provide any such materials.

Notwithstanding these weaknesses, which the Department would be well-advised to correct, it is this Arbitrator's view that the Department's standards for strip searches and body cavity searches were not so opaque that it was a denial of due process for the Department to find the COs "guilty" of violating policies when Inmate B's anal cavity was manually and forcibly exposed. I reach this conclusion based on the statements of the Grievants themselves, most of whom clearly recognized that manhandling of an inmate's buttocks in order to perform an anal cavity search was not permitted.[14]

*2. Whether DOC's "force continuum" rules were violated.*

The Department charged three of the Grievants (Lt. Logan, Sgt. Adams and Cpl. Dickens) with violating the "use of force continuum" found in Program Statement 5010.9C (Use of Force and Application of Restraint), and charged all four Grievants with violating PS 5010.9C's directive that "all affected persons" who have been exposed to chemical agents shall (a) be removed from the affected area and (b) provided with a shower and change of clothing.

The Program Statement's Force Continuum provision states:

> a. **Force Continuum.** Any use of force shall begin at the lowest practical level of the force continuum and escalate as needed in response to the level of resistance and severity of the threat encountered. The following options constitute the force continuum:
>
> 1) Physical Presence,
> 2) Verbal Commands,
> 3) Show Force,
> 4) Physical Control Techniques (i.e., defensive tactics, holds/bars, active countermeasures),
> 5) Chemical Agents (OC, CN, CS),
> 6) Impact Weapons,
> 7) Less Than Lethal Munitions,
> 8) K-9's, and

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[14] I note also that the forced examination of Inmate B's anal cavity not only violated DOC regulations, but it also was pointless. When Inmate B was brought to the TV room, Lt. Logan and the other COs already suspected Inmate B had inserted contraband into his rectum. Even if they had succeeded in their efforts to observe more clearly the tell-tale piece of plastic they believed had been hidden in Inmate B's rectum, it clearly would have been outside their role to extract it. In light of the availability of non-forcible means for determining whether Inmate B was hiding contraband – a trip to the infirmary, the dry cell – it is hard to understand what the COs hoped to accomplish.

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9) Firearms.

UX 7, ¶10. It is clear from the Program Statement that "physical control techniques" are to be utilized before chemical agents. In the January 29 incident, Inmate B was maced by Lt. Logan after he (Inmate B) refused to comply with Lt. Logan's orders to turn around and "spread his cheeks." At the time, Inmate B was naked and locked in his cell, with Lt. Logan and Cpl. Harris standing outside. There is no evidence indicating Inmate B constituted an immediate physical threat to either Corrections Officer, nor did the Corrections Officers attempt to use any physical controls. In fact, although Inmate B was being non-compliant with the orders of the COs, and may have been *verbally* combative, there is no indication at all that he was being *physically* combative when he was sprayed with chemical agent. Nor at that point did Inmate B represent a physical threat to himself or other inmates.

In support of the claim that the Grievants' use of chemical agent was consistent with the force continuum directive, the Union points to two sources. One is the in-person testimony of Sgt. Malcolm Spain during the arbitration hearing, while the second is a description of testimony of offered by OIA Senior Investigator Benjamin Collins at Cpl. Harris' unemployment compensation hearing.[15]

FOP relies on Sgt. Spain's testimony to urge a finding that the force continuum policy was not violated. Union Br. 35-38. Sgt. Spain has very extensive experience with DOC, having worked for the agency for more than 21 years. Although FOP offers that "Sgt. Malcolm Spain served in the nature of an expert witness on behalf of the Officers," Union Br. at 29, I note Sgt. Spain was not really qualified as an expert in penology – which in this grievance would be the true definition of an "expert witness." Instead, Sgt. Spain's testimony provides some background regarding actual practices within DOC facilities, based on his long experience with the agency.

Sgt. Spain expressed the view that when an inmate was trying to hide contraband in the genital area, it was appropriate for COs to use physical force to retrieve it ("If you know they had contraband laying right there in the genital areas and they wouldn't give it to you, you wouldn't just let him keep it because he has it in his genital areas. As a sworn officer, you would remove it." Tr. 543). According to Sgt. Spain, it might be appropriate to use two or three officers to subdue the uncooperative inmate using physical force. He acknowledged, however, that in a situation where a baggie had been inserted into an inmate's rectum, the Corrections Officers would need to take the inmate to medical to have the contraband retrieved. Tr. 543-44.

With regard to the use of chemical agents, Sgt. Spain acknowledged Program Statement 5010.9C normally requires the use of physical force to compel inmate compliance prior to using chemical agents. However, he expressed the opinion the use of chemical agents actually was preferable because it was non-lethal, and using chemical agents avoided placing Corrections

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[15] Investigator Collins participated actively in the OIA investigation into the incident involving Inmate B.

Officers in positions where they would be physically injured while trying to restrain an inmate. Tr. 546-48.

In his testimony in Cpl. Harris' unemployment compensation hearing, the administrative law judge reports that Investigator Collins stated the force continuum policy found in Program Statement 5010.9C was not in place at the time of the January 29, 2007, shakedown. UX 54 at 9. Further, the ALJ reported that Investigator Collins testified Corrections Officers at that time were allowed to use mace "if to prompt an inmate who refused to obey an order." *Id.*

This Arbitrator is not persuaded by the sources cited by the Union. With regard to the ALJ's report of Investigator Collins' testimony, this is problematic in multiple respects. First, the information is hearsay as it is being used in this grievance (*i.e.*, it is a report of the *ALJ's* understanding of what she heard Investigator Collins say, and not a direct report of Investigator Collins' actual words). Second, because the Union did not call Investigator Collins as a witness, the Department did not have an opportunity to cross-examine Collins about his alleged statements in the unemployment compensation case, perhaps allowing him to explain his answers more-fully as they would apply to the case before this Arbitrator. Finally, because the report of Investigator Collins' testimony has limited context, it is not really possible for this Arbitrator to assess fully the circumstances that Collins was addressing in his testimony.[16]

With regard to Sgt. Spain's contention that it is preferable to use chemical agents in lieu of physical control techniques because they reduce possible harm to all involved, this is largely beside the point in this case. Even if one concedes there may be room for honest debate whether it may be more effective or humane to employ chemical agents to subdue inmates (compared with the use of physical control techniques), the Program Statement nonetheless reflects official DOC policy and Corrections Officers are obligated to comply with it until it is changed.

On the "force continuum" issue, the bottom line is simple. First, Program Statement 5010.9C indicates that physical control techniques must be utilized before resort to chemical agents, and this clearly was not done by Lt. Logan in this case. Second, the Program Statement also provides that chemical agents are to be used "to incapacitate persons who pose a direct threat to safety and security of staff, inmates and/or the general public." At the time Inmate B was maced, he clearly did not constitute a threat to the staff, the general public or other inmates – he was naked and locked in his cell – and even if he was "slamming" contraband it is questionable that he constituted an immediate or direct threat to himself. Under the circumstances, I find the force continuum policy was violated.

With regard to the second issue tied to Program Statement 5010.9C, *i.e.*, whether the COs

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[16] For example, the ALJ's report that Investigator Collins testified PS 5010.9C was "not in place" in January 2007 is baffling, since the Program Statement was promulgated in January 2004. The ALJ decision expressly mentions the January 2004 date of the Program Statement, yet fails to explain "how" the Program Statement somehow would be viewed as "not in place" in January 2007.

violated the chemical agent protocol with regard to providing a shower, the Union argues no violation of the Program Statement occurred because Inmate B eventually was provided with a shower and change of clothing, albeit only after he was taken from his cell to the TV room, and also after he was brought to the floor (twice) and searched. The Union notes the Program Statement nowhere states that the opportunity to shower must be provided to the chemically-exposed person "immediately."

Although the Union is correct that the word "immediately" does not appear in the Program Statement, I find the Program Statement nonetheless was violated. Again, the Program Statement provides that chemical agents are to be used "to incapacitate persons who pose a direct threat to safety and security of staff, inmates and/or the general public." While the parties did not make a presentation regarding the effects of chemical agent, it is clear the reaction can be severe. For example, with regard to the January 29 incident, both Cpl. Harris and Sgt. Adams had such strong reactions to the chemical agent that they had to leave the TV room even while Lt. Logan was continuing the examination of Inmate B. In this Arbitrator's view, once the "direct threat to safety and security" was resolved (assuming *arguendo* that a direct threat ever existed), the COs had an obligation to assist Inmate B by providing him with access to shower facilities as soon as possible. In this kind of situation, the physical care of the inmate takes precedence over the recovery of contraband.

3. *Whether the Department erred when the final decision maker (Director Brown) was involved in the development of the initial investigative report, and when the proposals to discipline the Grievants were remanded twice to Disinterested Designees/Hearing Officers.*

As noted *supra*, Warden Smith's recommendations that the Grievants be discharged were initially assigned to H.O. Godwin for his review and recommendation. H.O. Godwin is a manager in the Department's information technology operation. Consistent with D.C. government procedures, H.O. Godwin did not conduct an evidentiary hearing, but he invited the Grievants to "tell their side of the story" by providing position statements. The Grievants did not respond personally to H.O. Godwin's invitation, but written statements on their behalf were provided by FOP Vice Chairperson Rosser.[17]

H.O. Godwin initially provided a report to Director Brown exonerating the Grievants,

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[17] There is an inconsistency between the provisions of DPM §1612.5 and the collective bargaining agreement, Article 11, §9.B. Whereas the DPM suggests in-person evidentiary hearings are not normally conducted, the labor agreement states hearings are to be held if requested by the employee. This disparity is not consequential in this grievance, because when the Grievants first were advised of Hearing Officer Godwin's appointment, they elected to file written statements (through Vice Chairperson Rosser) and no hearing request was made. In this Arbitrator's view, this served to waive any right to an in-person hearing.

relying on *Bell v. Wolfish* to conclude that the search of Inmate B did not violate constitutional standards. Director Brown rejected H.O. Godwin's initial recommendation, and remanded the cases to H.O. Godwin, commenting that the primary question to be resolved was not the constitutionality of the COs' search but whether the search violated DOC policies (*i.e.*, the Program Statements). In addition, when remanding the matter Director Brown incorrectly instructed H.O. Godwin that he (Godwin) was to be guided in his analysis by *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).[18]

On remand, H.O. Godwin simply stripped the references to *Bell v. Wolfish* from his recommendation, and then concluded again that the COs' conduct was acceptable and recommended that no disciplinary action be taken against them. As to Director Brown's admonition that he be governed by the standard of review articulated in *Stokes*, Godwin appears (correctly) to have ignored entirely this aspect of Brown's remand memorandum.

When Director Brown again remanded the matter, it turned out Godwin was unavailable because of medical problems and Godwin acceded to the transfer of the cases to a second hearing officer. The matter then was assigned to DOC Training Director Henderson, who reviewed the record that was provided to him, but also did not conduct an in-person evidentiary hearing. H.O. Henderson concluded the Grievants had violated the Department's policies and recommended their discharge.

The Union argues the Department's handling of the "disinterested designee" review was tainted in several respects. As the Union notes, under the D.C. Personnel Regulations (DPM §1613) and the collective bargaining agreement (Article 11 §9), the deciding official is prohibited from increasing the penalty recommended by the disinterested designee. In this case, the Union argues, Director Brown effectively performed an "end run" around this protection by repeatedly remanding the charges against the Grievants until he finally received the result that he wanted

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[18] In its Post Hearing Brief (at pp. 15-16), the Union argues Director Brown erred in suggesting to H.O. Godwin that the disinterested designee was obligated to defer to Warden Smith's proposal to discharge the Grievants if DOC met the standards articulated in *Stokes*. The Union clearly is correct in this regard. The *Stokes* decision addresses the standard of review which the District's Office of Employee Appeals must apply to the final disciplinary decisions of D.C. agencies, and does not relate in any manner to the independent review function performed by disinterested designees. Although it plainly is proper for disinterested designees to give careful consideration to the reasons for discipline articulated by proposing officials like Warden Smith, this Arbitrator is unaware of any basis for asserting that Hearing Officers are obligated to defer to proposing officials. To the contrary, it is apparent to this Arbitrator that disinterested designees are to exercise independent judgment, which is the heart of the review process.

Additionally, it is this Arbitrator's understanding the standard of OEA review of agency disciplinary actions articulated in *Stokes* (agency action will be upheld by OEA unless "arbitrary and capricious" and "an abuse of discretion") subsequently was superseded through regulation, with a directive that agency disciplinary action should be upheld by OEA if supported by "substantial evidence." *See, Hutchinson v. D.C. Office of Employee Appeals*, 710 A.2d 227, 231 n. 4 (D.C. 1998).

from the start, *i.e.*, a discharge recommendation.

Further, the Union argues H.O. Henderson was not truly independent. The Union notes both Henderson and Director Brown previously worked for many decades within the Maryland correctional system, suggesting they had some level of personal ties. Further, the Union notes that during the period when the charges against the Grievants were being considered by Henderson, Henderson also was a candidate for election to become mayor of Baltimore, which is a partisan political race. The Union suggests Henderson's candidacy – while simultaneously working as a D.C. Government employee – was a violation of the Hatch Act. In the Union's view, the Department – and particularly Director Brown – "looked the other way" and allowed Henderson to continue his DOC job while engaging in partisan politics. Ergo, because Henderson's employment by the Department was dependent on Management (*i.e.*, Director Brown) ignoring his allegedly illegal conduct, Henderson lacked the independence to function as a disinterested designee in this case.

In many respects, the Union's description of the disciplinary process as being corrupted by a Department Director intent upon imposing his personal views has a measure of coherence. Certainly, Director Brown demonstrated a very strong personal involvement in every stage of the procedure. Although the Union's argument focuses on the work of the disinterested designees/ hearing officers, Director Brown's very active personal interest in this event goes back to the initial investigative stage, with OIA SCI Patten testifying Director Brown personally reviewed and edited multiple iterations of her OIA investigative report before she was allowed to issue it in final form. After the report was issued and recommendations of discharge were issued by Warden Smith, Director Brown twice rejected the analysis and recommendations provided by H.O. Godwin, who effectively exonerated the Grievants and recommended that no discipline be imposed. Director Brown offered inaccurate legal instruction to Hearing Officer Godwin with regard to the legal standard governing Godwin's evaluation, suggesting that Godwin was not to provide an independent or *de novo* recommendation but instead was obligated to defer to the discipline proposed by the Department's recommending official, *i.e.*, Warden Smith's proposal that each of the Grievants be discharged. After Godwin's second report and recommendation, again exonerating the Grievants, the matter was remanded to a new Hearing Officer (Henderson) who – like Director Brown – had worked most of his career in the Maryland correctional system, and who was engaged in very public conduct (running for mayor of Baltimore) that may have been legally questionable.

Given these facts, it is easy to understand how some might try to "connect the dots" and might conclude the checks and balances of the disciplinary process had been subverted and the Grievants' due process rights, or their rights under D.C. personnel regulations or the collective bargaining agreement, had been violated. But although this Arbitrator agrees that the process looks bad, and perhaps could have been handled much better, I am not persuaded the protections of the disciplinary process actually were violated.

- Although it is somewhat surprising that a person at Director Brown's level would be so

heavily involved in reviewing and editing SCI Patten's investigative report, his interest in the incident does not necessarily signal an intention to control the outcome of the disciplinary process, as the Union seems to imply. Both SCI Patten and Director Brown testified the investigation was entirely under SCI Patten's control, and the *substance* of the report was entirely the responsibility of OIA, with Director Brown merely offering comments for improving the organization and style of the report. Their testimony on this point is not contested anywhere in the record. This suggests Director Brown's goal essentially was to insure that OIA produced the most professional and articulate report possible, but not that he was trying to control the outcome of the OIA investigation.

- The DPM and the collective bargaining agreement both give the deciding official the option to remand disciplinary recommendations for further consideration. Although it is understandable that the Union and the Grievants might view the "remand option" as a big "loophole" that can be used to eviscerate the provision prohibiting a deciding official from increasing a recommended penalty, remands nevertheless are permitted and are not improper *per se.*

  Remands provide an opportunity for agency heads to insure that disinterested designees perform their work thoroughly. It is this Arbitrator's view that Director Brown's two remands were proper. In his first recommended decision, H.O. Godwin essentially concluded that the Corrections Officers had not violated Inmate B's constitutional rights when they conducted a strip search, citing *Bell v. Wolfish.* I agree with Director Brown that this was not really the question that had been posed in the charges proffered against the Grievants, and therefore it was not incorrect for Director Brown to remand the case with instructions to the Hearing Officer to analyze the facts in the context of DOC Program Statements.

  In his second recommended decision, H.O. Godwin really did not perform any substantial analysis of the Grievant's actions with reference to requirements of the Department's Program Statements, but instead in a conclusory manner Godwin merely offered that the Grievants had performed a permissible "visual cavity search by use of force." But there is nothing in the Program Statements suggesting the use of force normally is appropriate when conducting body cavity searches, and the concept of a "forced" "visual" body cavity search simply is difficult to comprehend. Thus, there was a substantial gap between the analysis Godwin had been asked to perform and the conclusory and somewhat illogical result he achieved. In this Arbitrator's view, it was not unreasonable for Director Brown also to remand H.O. Godwin's second recommended decision for additional work.

- It is clear to this Arbitrator that Director Brown erred in his first remand to H.O. Godwin when he instructed Godwin that his independent deliberations were governed by the standards articulated in *Stokes.* However, although this was error, it appears this error was harmless under the facts of these grievances, because (1) H.O. Godwin apparently ignored Director Brown's admonition anyway, and (2) H.O. Henderson testified he never

saw Director Brown's remand memo to Godwin (and thus, presumably, was not swayed by its analysis).

- Although the Union insinuates H.O. Henderson was selected as the second disinterested designee because he allegedly had ties to Director Brown and presumably could be relied upon to produce the recommendation (discharge) Brown allegedly sought, there is no support for this in the record. Stated differently, while the Union flings a fair amount of mud in H.O. Henderson's direction, none of it sticks.

  It should be noted first that efforts initially were made to remand the case yet a second time to H.O. Godwin, who by happenstance was unavailable to accept the assignment because of medical problems. Only when it was determined that Godwin was unavailable for the remand was the matter reassigned, and when that occurred it appears H.O. Henderson was asked to take on the matter through a routine administrative process, and this administrative reassignment apparently took place without any input from Director Brown.

  Additionally, although both Director Brown and H.O. Henderson previously had worked for the Maryland corrections system and had some familiarity with each other, it appears their prior professional dealings had not been particularly close. There is no evidence Director Brown had any communication with Henderson in this matter urging that he (Henderson) reach a particular result (discharge) after his review of the record. Although the allegations regarding Henderson's bid to become mayor of Baltimore and possible Hatch Act violations are interesting, there is no evidence Director Brown or H.O. Henderson ever consciously perceived there was a violation of the statute,[19] or that Henderson's continued employment by the Department during his candidacy was a factor that influenced and tainted Henderson's performance of his responsibilities as a disinterested designee. Very simply, there is no evidence that Henderson's recommendation was anything less than his independent assessment based on the record he reviewed.[20]

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[19] I expressly offer no opinion regarding the merits of the Union's claim that Henderson's candidacy violated the Hatch Act.

[20] In addition to challenging H.O. Henderson's impartiality, the Union argues Henderson erred by not providing the Grievants an opportunity to appear before him during in-person evidentiary hearings.

There are conflicting accounts whether the Grievants were advised of the second remand of the proposed disciplinary actions to H.O. Henderson, but it appears three of them (Sgt. Adams, Cpl. Dickens and Lt. Logan) received phone calls from Capt. Walter Coley informing them of this development. AX 83, Tr. 561-63. FOP was aware of the second remand, and FOP's President, Sgt. Nila Ritenour, spoke with H.O. Henderson immediately after his appointment. Apparently FOP expected to receive written notification of the new Hearing Officer's appointment, which normally is done when a Hearing Officer is first assigned to a disciplinary matter. Tr. 509-15. In this particular remand, however, it appears formal

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In sum, I agree with the Union that several important aspects of the process used to develop and review the charges against the Grievants were questionable, and created an environment where the legitimacy of the process appeared suspect. Moreover, some significant mistakes actually occurred, notably Director Brown's incorrect instruction to H.O. Godwin regarding the proper role of the disinterested designee. Ultimately, however, I am not persuaded that Grievants' due process rights, or their rights under DCPM Chapter 16 or the collective

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written notification was not done. However, no party has identified any authority requiring notification of a remand or reassignment.

H.O. Henderson testified he offered several dates to FOP Chairperson Ritenour "for the gentlemen to put together whatever information that they [the Grievants] had." However, according to Henderson, Ritenour indicated the disciplinary matters already had been resolved, and "if [the Department] pursued it that she would carry it to court." Tr. 423-24. Ritenour flatly disputed H.O. Henderson's testimony on this point, indicating she advised Henderson the disciplinary actions were handled within the FOP by Vice Chairperson Rosser, who was unavailable at the moment because of an illness in the family. Tr. 516-19.

Although the Supreme Court's decision in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), mandates that government entities may not discharge public workers without first providing employees some measure of due process, this due process requirement can be met by giving the employee a meaningful opportunity to provide the employee's explanation for his or her actions. In this sense, "due process' does not necessarily require that a full evidentiary hearing be conducted in every discharge case, and the District Personnel Manual states evidentiary hearings are not routinely conducted in discharge cases. *See* DPM 1612.5.

As a consequence, basic due process requirements were met when H.O. Godwin invited the Grievants to provide statements of their position. As noted, the Grievants did not personally respond to Godwin's invitation, but instead statements were submitted on the Grievants' behalf by FOP Vice Chairperson Rosser.

If there is any due process infirmity that might be detected, it might be found in H.O. Henderson's testimony listing of the information that he was provided when he was assigned to perform his evaluation. According to Henderson, he *did not* receive copies of H.O. Godwin's decisions or Director Brown's remand memorandum. This is a good thing, because it means H.O. Henderson was not swayed by H.O. Godwin's earlier analysis, or – more importantly – by Director Brown's erroneous articulation of the standard governing the work of the disinterested designee/hearing officer. However, when listing the documents he reviewed, Henderson *did not* indicate he reviewed copies of the position statements that had been provided on Grievants' behalf by FOP's Vice Chairperson Rosser. The statements submitted by Rosser constituted the Grievants' "defense" to the charges.

It is possible H.O. Henderson received and reviewed the statements provided by Rosser, but forgot to list them during his testimony when he described the record that was forwarded to him. However, even assuming Henderson *did not* receive the statements, it this Arbitrator's view the FOP statements – which merely asserted generally that the Grievants did not violate Department policies and were not culpable – would not have been persuasive to Henderson anyway.

bargaining agreement Article 11, Section 9.D, were violated. To the extent mistakes were made, I find the Grievants were not actually harmed.

*4. The allegations that the Grievants violated the Department's Code of Silence policy.*

The Code of Silence policy is not promulgated as a Program Statement – the Department's normal route for implementing binding policy – but instead is in the form of a March 29, 2006, "open letter" from Director Brown to all DOC employees. Generally, the Code of Silence letter denounces situations where public safety personnel (including DOC staff) avoid reporting illegal or improper conduct by other employees. The Code of Silence letter states DOC employees must report "relevant information that a reasonable person would conclude to be proper to report," including (1) illegal acts; (2) acts that could pose an immediate threat to the safety, security, and welfare of staff, visitors and inmates; and (3) violations of post orders, department rules, regulations, policies and procedures. The letter does not identify a time frame for reporting possible wrongdoing. With regard to the reporting mechanism, the letter states "the responsibility to report is greater than the responsibility to follow the chain of command," advising staff they "always" are authorized to report wrongdoing to a DOC special investigator, manager, ethics liaison officer or a member of the DOC executive staff. UX 15.

Both H.O. Henderson and Director Brown concluded each of the Grievants violated the Code of Silence policy by witnessing or participating in various violations of DOC policies, but failing to report these violations properly. FOP contests these conclusions, largely by challenging the Code of Silence policy itself. In FOP's view, the policy merely is precatory, lacking a structure, guidelines or established parameters outlining the Department's expectations. Moreover, FOP notes:

> Accepting, arguendo, the validity of the Agency's position that an employee's violation of the Code of Silence makes that employee subject to termination, such a penalty is not warranted here. Two of the four Officers completed reports following this incident, as required by the Agency. One was immediately placed on administrative leave, and had no opportunity to complete a report before leaving the premises. The fourth did not do a report because supervisors were present and he believed he was not required to prepare a report unless ordered to do so. Moreover, with respect to assertions that one or more of the Officers "violated" the Code of Silence for not reporting the use of force against the inmate, either as a whole or in terms of specific events, the Officers (individually and collectively) did not witness or participate in any event that they believed warranted an excessive use of force report, much less rose to the level of any type of criminal assault.

Union br. at 39-40.

Reviewing the letter as a whole, it is this Arbitrator's clear understanding that it is aimed at stopping situations where DOC staff might "turn a blind eye" to misconduct by co-workers and not report such misconduct to Management. There are mitigating factors that lead me to conclude it is error for the Department to apply the policy against the Grievants in this instance.

First and foremost is the fact the Department knew of the incident involving Inmate B almost immediately. Reports were funneled to DOC Management from Capt. Ritenour and the infirmary staff, and both Lt. Logan and Lt. F submitted written incident reports. Each of the Grievants – and many of their co-workers – were interviewed by OIA investigators within days of the incident. So I do not believe this was a situation where any of the Grievants knowingly "sat" on information. It was clear very quickly that information was being submitted by supervisory personnel concurrent with the incident. Where it is apparent to an employee that Management has been alerted to an incident, it is unclear to this Arbitrator whether it is reasonable to conclude the Code of Silence policy requires each individual Corrections Officer to submit individual reports. If that is Management's expectation, the policy needs to be clarified with greater enforcement details.

Additionally, although I conclude in this Decision that several Department policies were violated by Grievants, some credence must be given to the Union's claim that the Grievants honestly may have believed they did not witness any incident that constituted an excessive use of force or illegal conduct, and thus may not have believed a "reportable" event under the Code of Silence policy had occurred. Based on anecdotal information in the record, it appears the use of chemical agents at the CDF may be more common than previously was recognized by Management. And while the effort to subdue Inmate B and somehow compel him to turn-over his contraband may have been fundamentally misguided, from the perspective of some of the Corrections Officers (especially personnel who were not present throughout the entire incident, and who therefore may not have understood fully how a non-compliant inmate somehow ended up handcuffed and naked on the floor of the TV room), what they observed may have appeared to be a good-faith effort to subdue a combative inmate.

Further, it should be noted that Hearing Officer Godwin, whom *the Department* chose as its first Disinterested Designee, apparently did not believe the actions of the Corrections Officers was "out of bounds." Although this Arbitrator does not agree with H.O. Godwin's ultimate conclusions, or even his rationale, the fact that the Department's chosen Hearing Officer was untroubled by what occurred lends some measure of support for the Grievants' possible

I do not agree with the Union's implicit position that the Code of Silence letter is so vague that it cannot be enforced, or that the policy's announcement in an open letter (rather than a Program Statement) somehow renders it deficient. Although one can debate whether the form and content of the Code of Silence Letter could be improved, I find it is sufficient to constitute a policy promulgated by Department management. It was communicated to the DOC staff, and can be enforced.

More problematic, however, is the application of the policy to the facts of this case. Reviewing the letter as a whole, it is this Arbitrator's clear understanding that it is aimed at

conclusions that no report was not necessary because they did not perceive Department protocols had been violated.

For these reasons, I find the Department has not proven the Grievants violated the Code of Silence policy.

5. *Director Brown's misapplication of the Douglas factors when determining the discharge penalties.*

Section 1603.9 of the DPM states:

> Unless otherwise required by law, in selecting the appropriate penalty to be imposed in a corrective or adverse action, consideration shall be given to any mitigating or aggravating circumstances that have been determined to exist, to such an extent and with such weight as is deemed appropriate.

In implementing this requirement, the District of Columbia has incorporated the *Douglas* factors, and has directed proposing and deciding officials, and also disinterested designees/hearing officers, to consider the *Douglas* factors when determining both the proposed remedy and the final penalty. *See* D.C. Department of Human Resources, HR III – Management's Guide to Progressive Discipline, Appendix I.

The *Douglas* factors were promulgated by the federal Merit Systems Protection Board when deciding *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981). The underlying purpose of a *Douglas* factors review is to insure that an agency weighs fairly the seriousness of the alleged misconduct against the track record of the employee and the potential for rehabilitation, recognizing that discipline ordinarily should be progressive and corrective (rather than punitive). The *Douglas* factors approach – primarily a checklist for weighing the gravity of the employee's offense against the employee's prior contributions to the workplace, but also factoring-in other considerations – purports to add a measure of objectivity to the process of setting discipline, although as a practical matter this a very rough science. While one can debate the strengths or weaknesses of the *Douglas* factors approach, the fact remains that a *Douglas* factors analysis is required pursuant to the DPM. See, *D.C. Dep't of Public Works v. Colbert*, 874 A.2d 353 (D.C. 2005).

Director Brown clearly was aware of the *Douglas* factors requirement when he issued his final decisions advising the Grievants they were being removed. With regard to all four of the Grievants, Director Brown's letters state he arrived at his decisions to discharge the employees after consider *Douglas* factors (1), (2), (5) and (6). In addition, Director Brown added that when

B-36

deciding to discharge Lt. Logan, he also took into consideration *Douglas* factor (9).[21] UX 30 (Adams), 42 (Dickens), 53 (Harris), 64 (Logan).

Conspicuously, nowhere in his letters discharging the Grievants does Director Brown suggest he took into consideration *all* of the *Douglas* factors. Although he clearly points to the factors which he believed weighed *against* the Grievants' continued employment with the Department, there is no indication he considered or gave any weight to several *Douglas* factors which might have weighed in favor of the Grievants, notably:

- (3) The employee's past disciplinary record (it appears the Grievants all had clean disciplinary records);

- (4) The employee's past work record, including length of service, performance on the job, ability to get along with other co-workers, and dependability (it appears the Grievants had good work histories, and relatively long years of service with the Department); and

- (10) Potential for the employee's rehabilitation (an employee with a good work history and a clean disciplinary record presumptively would be viewed a good candidate for rehabilitation).

The Union argues the Department's *Douglas* factors analysis therefore was deficient. This Arbitrator agrees. Although normally this Arbitrator would give substantial deference to an agency's weighing of aggravating and mitigating factors when deciding on a penalty for misconduct, no such deference is owed when the agency has failed to deliberate correctly. While the failure of a decision maker to give adequate consideration to both aggravating and mitigating factors when assessing a penalty for discipline does not *per se* require the reversal of the

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[21] Per the DPM, the *Douglas* factors relied upon by Director Brown are:

1. The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intention or technical or advertent, or was committed maliciously or for gain, or was frequently repeated;

2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties;

6. Consistency of the penalty with those employed on other employees for the same or similar offenses;

9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.

disciplinary action, it is appropriate for the reviewing entity to conduct an examination of the penalty *de novo*, applying the *Douglas* factors correctly. *See, e.g., Cloutterbuck v. Dep't of Labor*, 85 M.S.P.R. 684, 688 (2000) (finding it was appropriate for the arbitrator to mitigate the penalty imposed by an agency where the agency failed to give appropriate weight to mitigating factors in a *Douglas* analysis).

**C. The merits of the Department's findings of culpability by the Grievants, and the appropriateness of the penalties.**

As even the Department acknowledges, the Grievants each placed a distinctly different role in the incident of January 29, 2007. In this section, I address the extent of the misconduct proved by the Department. Additionally, because I have found the Department's assessment of the mitigating and aggravating considerations (the *Douglas* factors analysis) was seriously deficient, I review *de novo* the penalties.

As noted, the Department proffered slightly different charges against each of the Grievants, based on their differing roles in the incident. The initial charges were lodged by Warden Smith, and then reviewed by Hearing Officers Godwin and Henderson, with H.O. Henderson's recommendation finally serving as the basis for Director Brown's decision. The Department charged Sgt. Adams, Cpl. Dickens and Lt. Logan with "malfeasance," while it charged Cpl. Harris with "negligence."

This Arbitrator is not entirely convinced the errors of the four Grievants necessarily reflect "malfeasance" or "negligence," but the Department has proven that, in various ways, each participated in conduct that violated DOC policies and therefore each committed "on-duty or employment-related act[s] . . . that interfere[d] with the efficiency or integrity of government operations." DPM §1603.3. The Department has proven it had cause to impose discipline on each of the Grievants.

*1. Discipline of Cpl. Harris, Sgt. Adams and Cpl. Dickens.*

To some extent, the offenses of Cpl. Harris, Sgt. Adams and Cpl. Dickens are the unfortunate result of their willingness to follow the lead of Lt. Logan. This is not a simple dilemma, inasmuch as Lt. Logan was the individual the Department placed in a leadership role during the January 2007 shakedown of South (1), and to a considerable extent subordinate staff should be expected to comply with directions of supervisors or team leaders. What is disappointing is that each of these Corrections Officers observed and/or participated in conduct which they knew or should have known violated established Department protocols, and it appears none of them even had the presence of mind to suggest to Lt. Logan that rules were being broken, or the treatment of Inmate B was inappropriate. Specifically, based on the record before me, it appears none of the Corrections Officers suggested to Lt. Logan that Inmate B should be given an opportunity to clean up after being maced. Similarly, with regard to the ill-fated effort to "get a closer look" at Inmate B's anal cavity and perhaps prevail on him to surrender the

contraband, it appears none of the COs spoke up to even to suggest "Lieutenant, perhaps the inmate should be transferred to the infirmary, " or "Lieutenant, would it be appropriate to use the dry cell?" The Department and the District reasonably should expect more from experienced corrections professionals.

Of the three subordinate COs, Cpl. Harris arguably had the least-extensive involvement with the worst aspects of January 29 incident. Cpl. Harris was the CO who first alerted Lt. Logan to Inmate B's efforts to hide contraband, and he was present when Lt. Logan maced Inmate B (which I have found violated the force continuum policy). Cpl. Harris was present during the cell extraction and most likely was aware that Lt. Logan was not planning to provide Inmate B with an opportunity to clean up immediately from the effects of the chemical exposure, which I have found also was a violation of the chemical agent provisions of PS 5010.9C. However, soon after Inmate B was extracted from his cell, Cpl. Harris left the area to get cleaned up, and did not join the others in escorting Inmate B to the TV room. By the time Cpl. Harris arrived at the TV room several minutes, the repeated examinations of Inmate B pretty much had ended, without Cpl. Harris' involvement.

It appears neither Sgt. Adams nor Cpl. Dickens were present at Inmate B's cell when he was maced by Lt. Logan, but Cpl. Dickens was present at the cell soon thereafter and participated in bringing Inmate B to the TV room – naked, handcuffed, and suffering the effects of chemical exposure. Both Sgt. Adams and Cpl. Dickens participated in the repeated efforts to "take Inmate B to the floor," with Cpl. Dickens complying with Lt. Logan's instructions to manually spread Inmate B's buttocks, which I have found to be an improper body cavity search. I find Sgt. Adams and Cpl. Dickens participated in activities that violated the Inmate Search Program Statement, PS 5009.2A, and also participated in activities that violated the chemical agent provisions of PS 5010.9C.

As noted *supra*, I have concluded the Department did not prove any of the Grievants violated the Code of Silence policy, as had been charged.

Having found these three Corrections Officers violated Department policies, I find the Department has shown it had cause to impose discipline. What, then is the proper penalty?

Reviewing the *Douglas* factors, I find several of the factors to be aggravating considerations:

1. **The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or advertent, or was committed maliciously or for gain, or was frequently repeated.**

   The handling of the incident with Inmate B was seriously flawed. Even though Cpl. Harris, Sgt. Adams and Cpl. Dickens arguably were obliged to follow direct orders

from Lt. Logan, they appear to have made no effort to guide the ill-conceived situation in a more appropriate direction. As seasoned professionals, this reflected a serious lapse in judgment. With regard to this specific aggravating condition, I find the participation of Sgt. Adams and Cpl. Dickens to be somewhat more serious than the participation of Cpl. Harris.

**2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.**

Although not working in a supervisory role on January 29, Cpl. Harris, Sgt. Adams and Cpl. Dickens were experienced corrections professionals with the duty to comply with Department policies.

**5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties.**

The treatment of Inmate B, and the participation of Cpl. Harris, Sgt. Adams and Cpl. Dickens, reasonably could raise concerns among Department managers relating to their professional judgment.

**8. The notoriety of the offense or its impact upon the reputation of the agency.**

Although the incident involving Inmate B apparently did not generate any publicity, it easily could have. Moreover, the record suggests Inmate B raised the possibility he would file suit against the District as the result of the incident.

**9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.**

I find this to be a slightly aggravating factor. As discussed at length, *supra*, the Department's regulations relating to strip searches and body cavity searches certainly could be clearer, as well as its policy relating to caring for inmates after exposure to chemical agent. However, it is this Arbitrator's view that – given their many years of experience working for the Department – Cpl. Harris, Sgt. Adams and Cpl. Dickens knew or should have known that Lt. Logan's course of conduct was improper, as was their unquestioning participation in these actions.

I find the following factors to be neither aggravating nor mitigating:

**6. Consistency of the penalty with those employed on other employees for the same or similar offenses.**

This Arbitrator is unable to gauge whether the discharge penalty proposed by the Department is consistent with the penalties imposed upon other employees for similar offenses.

**7. Consistency of the penalty with any applicable agency table of penalties.**

This issue was not addressed by the parties.

I find the following factors to be mitigating considerations:

**3. The employee's past disciplinary record.**

Cpl. Harris, Sgt. Adams and Cpl. Dickens apparently have clean disciplinary records.

**4. The employee's past work record, including length of service, performance on the job, ability to get along with [other] co-workers, and dependability.**

Although not explored in detail, it appears Cpl. Harris, Sgt. Adams and Cpl. Dickens have good work histories with the Department.

**10. Potential for the employee's rehabilitation.**

In light of Cpl. Harris', Sgt. Adams' and Cpl. Dickens' clean disciplinary record and good work history, it is this Arbitrator's view there is a strong likelihood they will learn from this experience and not repeat similar misconduct in the future.

Based on the foregoing analysis, it is this Arbitrator's view that discharge is too severe a penalty for the misconduct that has been shown. The penalties shall be reduced. Cpl. Harris shall be suspended without pay for 30 days. Sgt. Adams and Cpl. Dickens shall be suspended without pay for 60 days.

*2. Discipline of Lt. Logan.*

As the lead person and central decision-maker relating to the incident involving Inmate B, it is this Arbitrator's view that Lt. Logan shoulders a heavy burden of culpability for the multiple mistakes that were made. It was Lt. Logan who initiated the process by choosing to use chemical agent in an effort to compel Inmate B to surrender the contraband, which I have found to be violation of the force continuum policy. It was Lt. Logan who decided to deny Inmate B the

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immediate opportunity to seek relief from the chemical exposure, even when Inmate B had been removed from his cell and handcuffed, and did not constitute a present threat. It was Lt. Logan who made the decision to march Inmate B from his cell to the TV room, naked and handcuffed. It was Lt. Logan who decided to take physical action against Inmate B in an effort to convince him to surrender the contraband, twice ordering Inmate B to the floor, directing Corrections Officers to forcibly restrain him, and directing Cpl. Dickens to use his hands to expose Inmate B's anal cavity.

Reviewing the *Douglas* factors, I find several of the factors to be aggravating considerations:

1. **The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or advertent, or was committed maliciously or for gain, or was frequently repeated.**

   As discussed above, this situation was seriously mishandled. Lt. Logan was given leadership responsibility, charged with conducting himself in a manner consistent with DOC policies and also charged with safeguarding his subordinate Corrections Officer staff and also protecting the safety of inmates, even Inmate B. Lt. Logan repeatedly made poor decisions that violated Department policies.

2. **The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position.**

   As the lead person involved with the incident, and the principal decision-maker, this factor weighs strongly against Lt. Logan.

5. **The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties.**

   Lt. Logan's multiple serious mistakes in the handling of the Inmate B incident reasonably would raise doubts among Department managers relating to Lt. Logan's judgment and his ability to perform his work.

8. **The notoriety of the offense or its impact upon the reputation of the agency.**

   As noted, although the incident involving Inmate B apparently did not generate any publicity, it easily could have. Moreover, the record suggests Inmate B raised the possibility he would file suit against the District as the result of the incident.

**9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question.**

As with Cpl. Harris, Sgt. Adams and Cpl. Dickens, *supra*, I find this to be a slightly aggravating factor. The Department's articulation of its policies could be better. However, it is this Arbitrator's view that Lt. Logan knew or should have known that his actions were improper and violated DOC policies.

I find the following factors to be neither aggravating nor mitigating:

**6. Consistency of the penalty with those employed on other employees for the same or similar offenses.**

**7. Consistency of the penalty with any applicable agency table of penalties.**

**10. Potential for the employee's rehabilitation.**

Although Lt. Logan's clean disciplinary record and good work history arguably might suggest a potential for rehabilitation, the degree of poor judgment displayed by Lt. Logan argues otherwise. I therefore conclude this factor is neither an aggravating or mitigating consideration.

I find the following factors to be mitigating considerations:

**3. The employee's past disciplinary record.**

Lt. Logan apparently has a clean disciplinary record.

**4. The employee's past work record, including length of service, performance on the job, ability to get along with [other] co-workers, and dependability.**

Although not explored in detail, it appears Lt. Logan also has a good work history with the Department.

Based on the foregoing, and particularly considering the central role Lt. Logan played in directing the events of January 29, 2007, I conclude the penalty of discharge is appropriate.

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## CONCLUSION

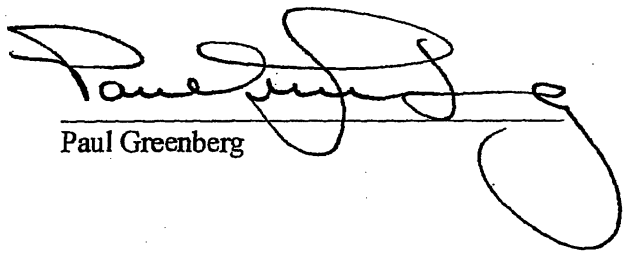
The grievance is granted in part, and denied in part.

With respect to all the Grievants, the Department has shown it had just cause to impose discipline.

The penalties imposed on Cpl. Harris, Sgt. Adams and Cpl. Dickens are reduced, with Cpl. Harris' penalty reduced to a 30-day suspension, and the penalty imposed on Sgt. Adams and Cpl. Dickens reduced to a 60-day suspension. Cpl. Harris, Sgt. Adams and Cpl. Dickens shall be reinstated and made whole for lost wages and benefits, less interim earnings and unemployment compensation.

With respect to Lt. Logan, the penalty of discharge is sustained.

**SO ORDERED.**



Paul Greenberg

March 26, 2010

B.44

## APPENDIX

## RELEVANT PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT, STATUTES, REGULATIONS, POLICIES, PROGRAM STATEMENTS, ETC.

**D.C. Code § 22-404. Assault or threatened assault in a menacing manner; stalking.**

(a) (1) Whoever unlawfully assaults, or threatens another in a menacing manner, shall be fined not more than $1,000 or be imprisoned not more than 180 days, or both.

(2) Whoever unlawfully assaults, or threatens another in a menacing manner, and intentionally, knowingly, or recklessly causes significant bodily injury to another shall be fined not more than $3,000 or be imprisoned not more than 3 years, or both. For the purposes of this paragraph, the term "significant bodily injury" means an injury that requires hospitalization or immediate medical attention.

**DOC Program Statement 5010.9C** (January 30, 2004)
**Use of Force and Application of Restraint**

9. **REQUIREMENTS**

a. **Force.** Force may be used for the following reasons:

1) Self Defense,
2) Defense of Another Person,
3) To Prevent Escapes,
4) To Prevent or Quell a Riot or Disturbance,
5) To Protect Government Property,
6) To Maintain Control and Enforce Regulations, and/or
7) To Recapture Escapee's *(sic)* and Other Wanted Persons Under the Jurisdiction of the Department of Corrections.

10. **PROCEDURES**

a. **Force Continuum.** Any use of force shall begin at the lowest practical level of the force continuum and escalate as needed in response to the level of resistance and severity of the threat encountered. The following options constitute the force continuum:

1) Physical Presence,
2) Verbal Commands,
3) Show Force,
4) Physical Control Techniques (i.e., defensive tactics, holds/bars, active countermeasures),
5) Chemical Agents (OC, CN, CS),
6) Impact Weapons,
7) Less Than Lethal Munitions,
8) K-9's, and
9) Firearms.

b. **Planned Use of Force.** Any planned use of force such as a cell extraction shall be directly supervised by a Lieutenant or higher ranking official who shall:

1) Provide direction to staff with regard to the use of force options available and the security equipment to be used.

2) Direct the activities of staff in the use of force and applicable restraints.

3) Ensure that the use of force and application of restraints is videotaped from beginning to end. In situations where videotaping is not possible the supervisor shall submit a report explaining why the incident was not videotaped.

4) Initiate post-incident medical, notification, and documentation procedures.

* * * *

e. **Use of Chemical Agents**

3. Chemical agents may be used to incapacitate persons who pose a direct threat to safety and security of staff, inmates and/or the general public.

4) Chemical agents shall never be used as a form of punishment.

5) The following steps shall be taken when chemical agents are used:

a) All affected persons shall be removed from the contaminated area.

b) All affected persons shall be instructed to breathe normally.

c) Inmates shall be provided with a shower, change of clothing and bedding.

d) All areas and articles, which have been exposed to the chemical agent, shall be thoroughly decontaminated.

e) All affected persons shall be provided medical examination and treatment.

* * * *

12. **REPORTING REQUIREMENTS**

a. A shift supervisor shall make written and verbal notification and submit reports in accordance with the provisions of PS 1280.2B in all cases involving the use of force, the application of restraints or use of chemical agents.

b. Any staff member who is involved in or witnesses a use of force shall notify a supervisor as soon as possible following the incident.

c. All staff members who are involved in or who witness a use of force incident shall submit a written report in accordance with the provisions of DO 1280.2B.

B-4;

**DOC Program Statement 3350.2D** (July 10, 2002)
**Sexual Misconduct Against Inmates**

6. **DEFINITIONS.** For the purpose of this directive, the following definitions shall apply:

a. **Sexual Misconduct.** Sexual behavior by an DCDC employee that is directed towards inmates under the care, custody, and supervision of the Department. Sexual misconduct toward inmates includes acts or attempts to commit acts of sexual abuse, sexual harassment or invasion of privacy.

b. **Sexual Abuse.** Sexual abuse is a criminal felony offense [citation] . . . and is defined as any forced or coerced sexual act or sexual contact between an employee and inmate. Sexual contact shall include, but not be limited to, the touching of any clothed or unclothed body part for sexual reasons. . . .

* * * *

d. **Invasion of Privacy.**

1) Observing, attempting to observe, or interfering in an inmate's activities, which are of a personal nature, without a sound penological reason.

* * * *

**RESPONSIBILITIES**

**a. Employees**

1) Each employee shall strictly adhere to this directive by ensuring that his/her conduct does not constitute or promote sexual misconduct.

2) Each employee who receives any information, from any source, concerning sexual misconduct or who observes incidents of sexual misconduct, is required to immediately report the information or incident directly to the affected Director/Administrator/Office Chief or to the highest ranking official on duty at the time of the incident.

3) Employees who fail to report an allegation or any facts and

circumstances that would lead a reasonable person to believe that sexual misconduct is occurring or has occurred, shall be subject to disciplinary action in accordance with the provisions set forth in . . . the District Personnel Manual.

**DOC Program Statement 5009.2A** (December 30, 2005)
**Searches of Inmates, Inmate Housing Units, Work and Program Areas**

9. **Definition.** For the purpose of this program statement, the following definitions shall apply:

   a. **Dry Cell** – A cell that is free of hiding places and equipped with only a bed, has a door with proper observation panels to protect the staff and to allow unobstructed observation and windows with a security screen to prevent loss of contraband.

   b. **Mass Shakedown** – A search involving an entire housing unit, zone, building or area of the CDF.

   * * * *

   d. **Strip Search** – An examination of an inmate's naked body for weapons, contraband, and physical abnormalities. This also includes a thorough search of all of the individual's clothing while it is not being worn.

10. **SEARCHES OF INMATES.** The following searches may be conducted to ensure the safe, secure and orderly operation of the CDF and to control contraband and provide for its disposition.

   * * * *

   b. **Strip Searches**

      1) Staff may conduct a strip search when there is a reasonable belief that contraband may be concealed on the person, a good opportunity for concealment has occurred or there is increased need for security. . . .

   * * * *

4) The least invasive form of search shall be conducted.

* * * *

e. **Manual or Instrument Searches**

1) A manual or instrument inspection of body cavities may be conducted only be qualified health care personnel in private upon written approval of the Warden or designee and when there is reasonable belief that an inmate is concealing contraband in or on his/her person.

* * * *

11. **DRY CELL STATUS.** When there is reasonable belief that an inmate has ingested contraband or concealed contraband in a body cavity and other methods of search are inappropriate or likely to result in physical injury to the inmate, the Warden or designee may authorize the placement of an inmate in a dry cell to allow staff to closely observe the inmate. The inmate shall be held in the dry cell until the inmate has voided the contraband or until sufficient time has elapse to preclude the possibility that the inmate is concealing contraband.

**An Open Letter to DC Department of Corrections' Employees from Director Devon Brown**

**DOC-0L06-13 – March 29, 2006**
(Code of Silence)

In public safety agencies, the term, "Code of Silence," is used to describe the unspoken rule that encourages people to lend a blind eye, a deaf ear, and a mute tongue to unethical, immoral or illegal actions on the part of others. The code is an invisible barrier to the free flow of communication and constitutes a major impediment to correctional professionalism. It leads to an unsafe environment, injuries, and lawsuits. It also costs otherwise good employees their jobs, reputations, and livelihoods. With this in mind, we want to make clear the expectations for the conduct of every employee, contractor, and volunteer of the District of Columbia Department of Corrections.

* * * *

. . . [I]t is not possible to hold offenders accountable for their actions if we do not hold ourselves accountable for our own behavior as well. That is why, as members of the public safety community, we are held to a higher standard than others.

**The Department of Corrections' (DOC) Code of Ethics makes our responsibilities clear and speaks of our core values of honesty, truthfulness, and adherence to high personal as well professional standards. Accordingly, each of us have a responsibility in obeying the law, following the regulations of the department, and reporting dishonest or unethical conduct.**

## COLLECTIVE BARGAINING AGREEMENT

### ARTICLE 11, DISCIPLINE (CORRECTIVE/ADVERSE ACTIONS)

Both parties recognize the exclusive rights of Management to discipline employees for cause, as defined in the DPM. Discipline shall be imposed for caused, as provided in D.C. Code §1-617.51 and defined In Chapter 16 of the District Personnel Manual.

* * * *

**Section 9:**

**A.** Except in the case of summary discipline, an employee against whom adverse action is proposed shall be entitled to advance written notice of twenty (20) days. The notice shall inform the employee of the causes and the specific reasons for the proposed action; . . . ; the right to an administrative review by a hearing officer appointed by the agency ahead, as provided in DPM Section 1612, when the proposed action is removal; and the right to a written decision.

* * * *

**B.** Disinterested Designee/Hearing Officer shall review the proposed action, receive and review all relevant statements, conduct a hearing if a hearing is requested by the employee and issue a recommendation to the

B. 5.

Deciding Official . . .. The Hearing Officer must be a DS-13 or higher and have no direct or personal knowledge of the matter contained in the disciplinary case, and not be in the chain of command between the proposing and deciding officials.

**D.** Deciding Official shall issue a final decision after reviewing the recommendation of the Disinterested Designee/Hearing Officer. The deciding official may sustain[,] reduce the penalty recommended by the Disinterested Designee, remand the matter for further consideration by the Hearing Officer, or dismiss the charge but may not increase the penalty recommended by the Disinterested Designee/Hearing Officer.

* * * *

**Section 14:** The Employer agrees that disciplinary action shall not be punitive but based on conduct or performance deficiencies. The selection of the appropriate penalties shall be based on progressive discipline principles consistent within the department. Consideration shall be given to any mitigating or aggravating circumstances that have been determined to exist.

B-5c

## D.C. PERSONNEL REGULATIONS, CHAPTER 16

### 1603 Definition of Cause: General Discipline

* * * *

1603.9 Unless otherwise required by law, in selecting the appropriate penalty to be imposed in a corrective or adverse action, consideration shall be given to any mitigating or aggravating circumstances that have been determined to exist, to such extent and with such weight as is deemed appropriate.

### 1612 Administrative Review of Removal Actions: General Discipline

1612.1 The personnel authority shall provide for an administrative review of a proposed removal action against an employee.

1612.2 The administrative review shall be conducted by a hearing officer, who shall meet the following criteria:

(a) Be appointed by the agency head;

(b) Be at grade levels DS-13 and above or equivalent;

(c) Not be in the supervisory chain of command between the proposing official and the deciding official, nor subordinate to the proposing official;

(d) Have no direct and personal knowledge (other than hearsay that does not affect impartiality) of the matters contained in the proposed removal action; and

(e) Be an attorney, if practicable, or if required pursuant to section 1612.7.

1612.3 The hearing officer shall be responsible for keeping the proposed removal action moving to a conclusion at the earliest practicable date.

1612.4 In conducting the administrative review, the hearing officer shall:

(a) Review the notice of proposed removal action;

(b) Review the employee's response, if there is one; and

(c) Conduct an adversary hearing when required in accordance with section 1612.5.

1612.5 An adversary hearing, including the confrontation of witnesses, shall be conducted only when both of the following conditions are met:

(a) When the hearing officer determines that a decision based on a preponderance of the evidence cannot be made because the written record is inadequate for this purpose; and

(b) The personnel authority grants approval to the hearing officer to conduct a hearing.

1612.6 Failure by an employee to respond to a charge or specification raised in the advance written notice shall not constitute a reason to conduct an adversary hearing.

* * * *

1612.10 After conducting the administrative review, the hearing officer shall make a written report and recommendation to the deciding official, and shall provide a copy to the employee

**GOVERNMENT OF THE DISTRICT OF COLUMBIA**
**REFERENCE GUIDE**
**DEPARTMENT OF HUMAN RESOURCES**
**HR III – Management's Guide to Progressive Discipline**

**Appendix I, Adjudication Process**
**General Discipline**

**5. Mitigating or Aggravating Circumstances: The Douglas Factors**

Section 1603.9 of the DPM states:

*Unless otherwise required by law, in selecting the appropriate penalty to be imposed in a corrective or adverse action, consideration shall be given to any mitigating or aggravating circumstances that have been determined to exist, to such an extent and with such weight as is deemed appropriate.*

B-5

As proposing and deciding officials, you are required to consider mitigating and/or aggravating factors in determining both the proposed remedy and the final penalty. The Douglas Factors were established through a court case and provide guidelines for managers to use that can assist in determining the appropriate penalty for misconduct. You are required to use these factors in your roles as proposing and deciding officials and hearing officers.

**The Douglas Factors**

1. The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or advertent, or was committed maliciously or for gain, or was frequently repeated;

2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

3. The employee's past disciplinary record;

4. The employee's past work record, including length of service, performance on the job, ability to get along with [other] co-workers, and dependability;

5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon the supervisor's confidence in the employee's ability to perform assigned duties;

6. Consistency of the penalty with those employed on other employees for the same or similar offenses;

7. Consistency of the penalty with any applicable agency table of penalties;

8. The notoriety of the offense or its impact upon the reputation of the agency;

9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

10. Potential for the employee's rehabilitation;

11. Mitigating circumstances surrounding the offense such as unusual job

B-5

tensions, personality problems, mental impairment, harassment, or bad faith, malice, or provocation on the part of others involved in the matter, and;

12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employees or others.

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS



REPLY TO:
955 L'Enfant Plaza, S.W.
Suite 2500
Washington, DC 20024
(202)727-0004
FAX (202)727-5631

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA



TYEAST WILLIAMS,
Petitioner,

v.

DISTRICT OF COLUMBIA
DEPARTMENT OF CORRECTIONS,
Respondent.

Case No. 2017 CA 001997 P(MPA)

Judge Michael L. Rankin

## CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Tyeast Williams v. District of Columbia Department of Corrections,* OEA Matter No. 1601-0137-15. The record consists of one volume containing seventeen (17) tabs.

Wynter Clarke
Wynter Clarke
Paralegal Specialist

LASHEKA BROWN BASSEY NOTARY PUBLIC MY COMMISSION EXPIRES 6/14/2021 DISTRICT OF COLUMBIA

District of Columbia: SS
Subscribed and Sworn to before me
this 9th day of April, 2018

Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

**SUPERIOR COURT OF THE DISTRICT OF COLUMBIA**
**CIVIL DIVISION**
**Civil Actions Branch**
**500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001**
**Telephone: (202) 879-1133 • Website: www.dccourts.gov**



GUY VALENTINE
Vs. C.A. No. 2018 CA 001652 P(MPA)
DISTRICT OF COLUMBIA FIRE AND EMERGENCY MEDICAL S et al

# INITIAL ORDER AND ADDENDUM

Pursuant to D.C. Code § 11-906 and District of Columbia Superior Court Rule of Civil Procedure ("Super. Ct. Civ. R.") 40-I, it is hereby **ORDERED** as follows:

(1) Effective this date, this case has assigned to the individual calendar designated below. All future filings in this case shall bear the calendar number and the judge's name beneath the case number in the caption. On filing any motion or paper related thereto, one copy (for the judge) must be delivered to the Clerk along with the original.

(2) Within 60 days of the filing of the complaint, plaintiff must file proof of serving on each defendant: copies of the summons, the complaint, and this Initial Order and Addendum. As to any defendant for whom such proof of service has not been filed, the Complaint will be dismissed without prejudice for want of prosecution unless the time for serving the defendant has been extended as provided in Super. Ct. Civ. R. 4(m).

(3) Within 21 days of service as described above, except as otherwise noted in Super. Ct. Civ. R. 12, each defendant must respond to the complaint by filing an answer or other responsive pleading. As to the defendant who has failed to respond, a default and judgment will be entered unless the time to respond has been extended as provided in Super. Ct. Civ. R. 55(a).

(4) At the time and place noted below, all counsel and unrepresented parties shall appear before the assigned judge at an initial scheduling and settlement conference to discuss the possibilities of settlement and to establish a schedule for the completion of all proceedings, including, normally, either mediation, case evaluation, or arbitration. Counsel shall discuss with their clients **prior** to the conference whether the clients are agreeable to binding or non-binding arbitration. **This order is the only notice that parties and counsel will receive concerning this Conference.**

(5) Upon advice that the date noted below is inconvenient for any party or counsel, the Quality Review Branch (202) 879-1750 may continue the Conference **once**, with the consent of all parties, to either of the two succeeding Fridays. Request must be made not less than seven business days before the scheduling conference date.
No other continuance of the conference will be granted except upon motion for good cause shown.

(6) Parties are responsible for obtaining and complying with all requirements of the General Order for Civil cases, each judge's Supplement to the General Order and the General Mediation Order. Copies of these orders are available in the Courtroom and on the Court's website http://www.dccourts.gov/.

Chief Judge Robert E. Morin

Case Assigned to: Judge ROBERT R RIGSBY
Date: March 9, 2018
Initial Conference: 10:00 am, Friday, June 08, 2018
Location: Courtroom 201
500 Indiana Avenue N.W.
WASHINGTON, DC 20001

CAIO-60

**ADDENDUM TO INITIAL ORDER AFFECTING ALL MEDICAL MALPRACTICE CASES**

In accordance with the Medical Malpractice Proceedings Act of 2006, D.C. Code § 16-2801, et seq. (2007 Winter Supp.), "[a]fter an action is filed in the court against a healthcare provider alleging medical malpractice, the court shall require the parties to enter into mediation, without discovery or, if all parties agree[,] with only limited discovery that will not interfere with the completion of mediation within 30 days of the Initial Scheduling and Settlement Conference ("ISSC"), prior to any further litigation in an effort to reach a settlement agreement. The early mediation schedule shall be included in the Scheduling Order following the ISSC. Unless all parties agree, the stay of discovery shall not be more than 30 days after the ISSC." D.C. Code § 16-2821.

To ensure compliance with this legislation, on or before the date of the ISSC, the Court will notify all attorneys and *pro se* parties of the date and time of the early mediation session and the name of the assigned mediator. Information about the early mediation date also is available over the internet at https://www.dccourts.gov/pa/. To facilitate this process, all counsel and *pro se* parties in every medical malpractice case are required to confer, jointly complete and sign an EARLY MEDIATION FORM, which must be filed no later than ten (10) calendar days prior to the ISSC. D.C. Code § 16-2825 Two separate Early Mediation Forms are available. Both forms may be obtained at www.dccourts.gov/medmalmediation. One form is to be used for early mediation with a mediator from the multi-door medical malpractice mediator roster; the second form is to be used for early mediation with a private mediator. Both forms also are available in the Multi-Door Dispute Resolution Office, Suite 2900, 410 E Street, N.W. Plaintiff's counsel is responsible for eFiling the form and is required to e-mail a courtesy copy to earlymedmal@dcsc.gov. *Pro se* Plaintiffs who elect not to eFile may file by hand in the Multi-Door Dispute Resolution Office.

A roster of medical malpractice mediators available through the Court's Multi-Door Dispute Resolution Division, with biographical information about each mediator, can be found at www.dccourts.gov/medmalmediation/mediatorprofiles. All individuals on the roster are judges or lawyers with at least 10 years of significant experience in medical malpractice litigation. D.C. Code § 16-2823(a). If the parties cannot agree on a mediator, the Court will appoint one. D.C. Code § 16-2823(b).

The following persons are required by statute to attend personally the Early Mediation Conference: (1) all parties; (2) for parties that are not individuals, a representative with settlement authority; (3) in cases involving an insurance company, a representative of the company with settlement authority; and (4) attorneys representing each party with primary responsibility for the case. D.C. Code § 16-2824.

No later than ten (10) days after the early mediation session has terminated, Plaintiff must eFile with the Court a report prepared by the mediator, including a private mediator, regarding: (1) attendance; (2) whether a settlement was reached; or, (3) if a settlement was not reached, any agreements to narrow the scope of the dispute, limit discovery, facilitate future settlement, hold another mediation session, or otherwise reduce the cost and time of trial preparation. D.C. Code§ 16-2826. Any Plaintiff who is *pro se* may elect to file the report by hand with the Civil Actions Branch. The forms to be used for early mediation reports are available at www.dccourts.gov/medmalmediation.

Chief Judge Robert E. Morin

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
*Civil Division*

GUY VALENTINE )
515 MAIN STREET
LAUREL, MARYLAND 20707 )

Petitioner )

v.

) **Docket No.:** 2018 CA 001652 P(MPA)

OFFICE OF EMPLOYEE APPEALS
FOR THE DISTRICT OF COLUMBIA )
955 L'ENFANT PLAZA, SW, SUITE 2500
WASHINGTON, DC 20024 )

f/b/o )
D.C. FIRE AND EMERGENCY
MEDICAL SERVICES DEPARTMENT, )
2000 14th STREET, NW, 5th FLOOR
WASHINGTON, DC 20009

Respondent/Agency ).

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**PETITION FOR REVIEW OF AGENCY DECISION**

Pursuant to S.C. Agency Review R. 1 and D.C. Code §§ 1-606.03(d) and 2-510(a), notice is hereby given that the Petitioner, Guy Valentine, appeals to the Superior Court of the District of Columbia from the decision of the Office of Employee Appeals for the District of Columbia (f/b/o, and affirming the decision of) the District of Columbia Fire and Emergency Medical Services Department, issued on the 2nd day of January, 2018 (an Initial Decision, which became final 35 days after said issuance, on or about February 9, 2018, pursuant to D.C. Code § 1-606.03(c)). A copy of said Order / Decision (the "Decision") is attached to this Petition.

Said Decision ordered that the District of Columbia Fire and Emergency Medical Services Department's ("DCFEMS") action and decision against Petitioner, including any disciplinary action and adverse findings, as well as the action of assessing a $5000 fine / penalty against Petitioner be, and was, upheld.

Petitioner and DCFEMS briefed the case involving Petitioner before Administrative Judge Michelle R. Harris, Esquire at the Office of Employee Appeals ("OEA"). Judge Harris rendered the Decision on or about January 2, 2018, affirming the adverse actions and decisions taken by DCFEMS against Petitioner, including the DCFEMS' assessment of a $5000 penalty / fine against Petitioner. Petitioner contends that said Decision, as well as the actions and decisions by DCFEMS, is and are not supported by substantial evidence in the record as a whole and, furthermore, is and are clearly erroneous as a matter of law. S.C. Agency Rev. R. 1(g).

Petitioner now hereby appeals said Decision of the OEA to this Honorable Court for a review of the record and furthermore requests that this Court reverse, remove, or modify said Decision, or to take other appropriate action the Court may deem necessary, pursuant to D.C. Code § 1-606.03(d), and to hold said Decision unlawful and set aside any actions and decisions against Petitioner for any of the grounds as enumerated in D.C. Code § 2-510(a)(1)-(3). Petitioner prays that this Honorable Court reverse the Decision of the OEA and that of DCFEMS.

Respondent Agency: Office of Employee Appeals
District of Columbia
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

f/b/o (other party to the Agency's proceedings):

District of Columbia Fire and Emergency Medical Services Department
2000 14th Street, NW, 5th Floor
Washington, DC 20009

c/o (represented by):
Office of the Attorney General
441 4th Street, NW, Suite 1180N
Washington, DC 20001

Names and Addresses of Parties or Attorneys to be Served:

Office of Employee Appeals
District of Columbia
Sheila G. Barfield, Executive Director
Lasheka B. Bassey, General Counsel
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

and

District of Columbia Fire and Emergency Medical Services Department
Office of the Attorney General
Personnel and Labor Relations Section
Andrea G. Comentale, Esquire (Section Chief)
Rahsaan J. Dickerson, Esquire
441 4th Street, NW, Suite 1180N
Washington, DC 20001

A copy of the Agency's Decision / order sought to be reviewed is attached hereto.

Respectfully Submitted,

/s/ Brian R. Bregman
Brian R. Bregman, Esquire (#502701)
*Attorney and Representative for Petitioner (Employee)*
515 Main Street
Laurel, Maryland 20707-4117
Phone: 301-362-0009
Fax: 301-362-0020
Email: bbregman@gmail.com

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of March, 2018, a copy of the foregoing Petition for Review of Agency Decision was electronically filed with the Court's filing system and mailed, via first-class mail, postage prepaid, to:

Rahsaan J. Dickerson, Esquire (*Agency Representative*)
Andrea G. Comentale, Esquire (*Section Chief*)
Assistant Attorney General
Personnel and Labor Relations Section
441 4th Street, NW, Suite 1180N
Washington, DC 20001

Lasheka B. Bassey, General Counsel
Office of Employee Appeals
955 L'Enfant Plaza, SW, Suit 2500
Washington, DC 20024

/s/ Brian R. Bregman
Brian R. Bregman (Bar No. 502701)

IN THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
*Civil Division*

| | | |
|---|---|---|
| GUY VALENTINE | ) | |
| Petitioner | ) | |
| v. | ) | **Docket No.:** |
| OFFICE OF EMPLOYEE APPEALS FOR THE DISTRICT OF COLUMBIA | ) | |
| f/b/o D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT, | ) | |
| Respondent/Agency | ) | |

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**PETITION FOR REVIEW OF AGENCY DECISION**

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District of Columbia
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024

f/b/o (other party to the Agency's proceedings):

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2000 14th Street, NW, 5th Floor
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Sheila G. Barfield, Executive Director
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Washington, DC 20024

and

District of Columbia Fire and Emergency Medical
Services Department
Office of the Attorney General
Personnel and Labor Relations Section
Andrea G. Comentale, Esquire (Section Chief)
Rahsaan J. Dickerson, Esquire
441 4th Street, NW, Suite 1180N
Washington, DC 20001

A copy of the Agency's Decision / order sought to be reviewed is attached hereto.

Respectfully Submitted,

/s/ Brian R. Bregman
Brian R. Bregman, Esquire (#502701)
*Attorney and Representative for Petitioner (Employee)*
515 Main Street
Laurel, Maryland 20707-4117
Phone: 301-362-0009
Fax: 301-362-0020
Email: bbregman@gmail.com

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of March, 2018, a copy of the foregoing Petition for Review of Agency Decision was electronically filed with the Court's filing system and mailed, via first-class mail, postage prepaid, to:

Rahsaan J. Dickerson, Esquire (*Agency Representative*)
Andrea G. Comentale, Esquire (*Section Chief*)
Assistant Attorney General
Personnel and Labor Relations Section
441 4th Street, NW, Suite 1180N
Washington, DC 20001

Lasheka B. Bassey, General Counsel
Office of Employee Appeals
955 L'Enfant Plaza, SW, Suit 2500
Washington, DC 20024

/s/ Brian R. Bregman
Brian R. Bregman (Bar No. 502701)

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS



REPLY TO:
955 L'Enfant Plaza, S.W.
Suite 2500
Washington, DC 20024
(202)727-0004
FAX (202)727-5631

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

| | |
|---|---|
| GUY VALENTINE,<br>Petitioner,<br><br>v.<br><br>DISTRICT OF COLUMBIA FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT et al.,<br>Respondents. | Case No. 2018 CA 001652 P(MPA)<br><br>Judge Robert R. Rigsby |

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Guy Valentine v. D.C. Fire and Emergency Medical Services Department,* OEA Matter No. J-0049-16. The record consists of two volumes containing twenty-six (26) tabs.

Wynter Clarke
Wynter Clarke
Paralegal Specialist

LASHEKA BROWN BASSEY NOTARY PUBLIC MY COMMISSION EXPIRES 6/14/2021 DISTRICT OF COLUMBIA

District of Columbia: SS
Subscribed and Sworn to before me
this 20th day of April, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021