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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

\_\_\_\_\_  
In the Matter of: )  
)  
MICHAEL DUBOSE ) OEA Matter No. 1601-0030-07  
Employee )  
) Date of Issuance: October 19, 2007  
)  
) Lois Hochhauser, Esq.  
DISTRICT OF COLUMBIA DEPARTMENT ) Administrative Judge  
OF CORRECTIONS )  
Agency )  
\_\_\_\_\_  
James E. McCollum, Jr., Esq., Employee Representative  
Fred Staten, Mr., Agency Representative

**INITIAL DECISION**

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition with the Office of Employee Appeals (OEA) on December 1, 2006, appealing Agency’s final decision to remove him from his position as a Correctional Program Specialist. At the time of his removal, Employee was in permanent career status.

This matter was assigned to me on or about January 15, 2007. The prehearing conference took place on February 16, 2007. Status conferences took place on April 11, 2007 and April 27, 2007. The hearing was conducted on May 15, 2007, May 16, 2007 and July 31, 2007.<sup>1</sup> Following the submission of closing arguments, the record closed on October 1, 2007.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

<sup>1</sup> Witnesses testified under oath. The transcript is cited as “Tr” followed by the page number. Exhibits are cited as “A” if introduced by Agency and “E” if introduced by Employee, followed by exhibit number. Employee’s motion to admit Employee’s Exhibit 26 was taken under advisement. The Administrative Judge finds that the exhibit has little if any probative value and it is not admitted into this record.

ISSUE

Did Agency meet its burden of proof in this matter?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

On July 26, 2006, Agency issued Employee a notice of summary removal, effective as of close of business on that date. (Ex E-10). Agency issued a written notice proposing that the summary removal be sustained on August 24, 2006. (Ex A-7). The final Agency notice confirming the summary removal was issued on November 1, 2006. The removal was based on a charge of negligence. (Ex A-11). The rationale for the removal was provided in the final Agency notice issued by Devon Brown, Agency Director, who stated in pertinent part::

The charge of negligence is upheld based on the following: On June 3, 2006, two inmates, both violent offenders, both with pending Murder I related charges, both co-defendants with separation orders from each other, escaped together while one of them was on detail approved by you on February 14, 2006. The record shows that there were two separation orders in the institutional files requiring the two escapees be kept apart, one dated August 26, 2005 and one dated March 22, 2006. Jail protocol requires that inmates with separation orders or violent criminal histories be denied detail assignments; these inmates had both. As the last checkpoint for authority in a process of checks and balances to ensure that details are not erroneously approved, your review of the detail was the final opportunity to avert the breaches of security and protocol. Your role as the acting Deputy Warden approving the detail placed you in a position of ultimate responsibility. On that basis, the fact that two subordinates failed to appropriately check the institutional file does not vitiate your culpability, but compounds it, because you should not have assumed the responsibility of approving the inmate detail if you lacked the prerequisite knowledge in the procedures. In fact, you unilaterally usurped responsibility of this critically important duty that was delegated to someone else charged with that duty and trained to perform it properly who was available in the facility. Whether you were negligent in undertaking the authority or negligent in its execution, the fact is that your negligence was a significant contributing factor to the escapes and had you exercised ordinary care in compliance with security practices and procedures, the escapes would not have occurred.

Furthermore, your negligence supported summary removal insofar as your conduct threatened government operations and posed an immediate hazard to the agency, to other District employees, or to you and was detrimental to public safety. Your failure to exercise due care in critical security practices, provided freedom of movement to an inmate, in a manner that allowed him and his accomplice to escape into the community...where law enforcement officers and law abiding citizens and families were exposed to them, unaware that they were desperate fugitives with violent pasts. Moreover, your employment in the Jail under the circumstances

posed a continued threat in the facility, thus jeopardizing correctional staff responsible for maintaining the safety, security and order of the facility.

### Undisputed Findings of Fact

1. Employee's position of record at the time of his removal was Correctional Program Specialist, DS-13, in the Office of Compliance Accreditation. (Tr, 295). He was in permanent career status. (Agency's Closing Argument, p. 1). In approximately January 2005, he was given a temporary promotion to Correctional Institution Administration, DS-14. (Ex E-8). In this position, he served as Acting Deputy Warden for Support Services at the Central Detention Facility (CDF or D.C. Jail) and he remained in that position until his removal.

2. Agency "Manual of Regulations and Orders" states in pertinent part:

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 held responsible for the understanding and compliance with all documents posted on official Bulletin Boards.

1.3 *Authority and Chain-of-Command:* Employees must regard themselves as directly responsible to their immediate superior. Obedience to all orders is mandatory and all orders must be followed with promptness and efficiency. (Ex A-8).

3. The Non-Industrial Pay System (NIPS) governs procedures for inmates to work on-unit or off-unit. The request for assignment to work on-unit or off-unit is contained in a Personnel Action Request Form (PARF). The April 19, 2002 Post Order related to NIPS states in pertinent part:

2. The NIPS Coordinator and Casemanager shall screen all inmates seeking consideration for applicable detail assignments. The Casemanager shall initiate a "Request for Personnel Action" Form after all criteria have been met in Section 4.

4. Eligibility [for off-unit assignment]: (in pertinent part only):

(3) Felons: Convicted felons are eligible. Sentenced Felons whose total sentence does not exceed five years are eligible (20 months to 5 years).

(5) Inmates with Separation Orders from other inmates housed at CDF are not considered appropriate for placement. Inmates assigned to R&D must be free of Separation Orders.

(6) Parole Violators who are within two (2) years of a scheduled release date and who have obtained minimum custody status.

4. A Separation Order is a directive, usually issued by a court or U.S. Attorney's Office, that identifies inmates who should be separated from one or more named inmates. A Separation Order

may be issued because these inmates are enemies, co-defendants or may conspire with each other. An inmate may not be assigned to an off-unit detail if he has a Separation Order in order to avoid any possibility of contact with the separatee, i.e., the inmate from whom he is to be kept apart. (Tr , 127-129). The Separation Order is placed in the inmate's institutional file and in the Jail and Community Corrections System (JACCS). However, if the separatee is no longer in the facility, the inmate may be approved for an off-unit detail even with the Separation Order. (Tr, 148-149).

5. On August 26, 2005, a Separation Order was issued at the request of the U.S. Attorney's Office for the District of Columbia directing that inmates Joseph Leaks and Ricardo Jones "be kept separated from each other at all times, including transportation to and from court and while in the courts' cell block". (Ex A-4). The Separation Order was placed in Leaks's and Jones's institutional files as well as the JACCS. (Ex A-1, p. 5).

6. The primary responsibility of the Correctional Treatment Specialist (CTS) also known as the Case Manager, is to classify the inmate. Part of the classification is determined by "flags" such as protective custody, mental health, special handling and/or Separation Orders. (Tr, 140). Case Managers are directed to review each inmate's classification at least once every 90 days (Tr, 141-142). Case Managers utilize the institutional file, JACCS and the Pretrial Realtime Information System Manager (PRISM).

7. The CTS is the first employee required to review and approve a PARF. The PARF must then be reviewed and approved by the NIPS Coordinator. Both the NIPS Coordinator and Case Manager are required to review the inmate's file before signing the PARF to ensure there is nothing that would preclude the inmate from a work assignment. (Tr, 461).

8. The Deputy Wardens were responsible for the final approvals for work assignments. The Deputy Warden for Programs gives final approval for off-unit and off-site PARFs. The Deputy Warden for Support Services gives final approval for on-unit PARFs.

9. On February 13, 2006, Patricia Temoney, Deputy Warden for Programs sent an email to Warden Dennis Harrison, Employee and others, stating that she would be away from the CDF for several days and delegated her authority to Leona Bennett. (Ex A-6). At the time, Ms. Bennett was Chief Case Manager and Ms. Temoney was her supervisor. (Tr, 150).

10. On or about February 14, 2006, Sergeant (Sgt.) James Johnson, Jr., NIPS Coordinator, presented a PARF for Employee's approval and signature to allow Inmate Leaks to work off-unit. The Form contained a handwritten notation which stated "separation attached". (Ex A-3).<sup>2</sup>

11. Inmate Leaks worked off-unit until June 3, 2006 . On that date, he and Inmate Jones escaped from the CDF. They were recaptured the following day. According to Agency's Investigative Report, undertaken after the escape, there was "strong evidence...that staff intentionally aided and abetted in the planning and execution of the escapes". (Ex A-1, p. 4). Inmate Leaks told investigators

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<sup>2</sup> Agency contends that the Separation Order was attached. Employee argues that it was not attached. Since that fact is in dispute, it is not resolved in this portion of the Decision.

that Agency employees aided in the escape by leaving a supply locker unsecured, providing Jones with passes, and providing clothing to them. (Ex A-1, p. 14). Employee is not accused of intentionally aiding or abetting the inmates.

12. As part of its investigation, Agency interviewed Employee on June 21, 2006. He was placed on paid administrative leave on June 23, 2003. (Ex E-9). He was summarily removed on July 26, 2006. (Ex E-10). On August 24, 2006, Stanley Waldren, Acting Warden, issued a written notice proposing that the summary removal be sustained. (Ex A-7).

13. The Office of Administrative Hearings (OAH) conducted an administrative review of the proposed summary removal pursuant to D.C. Official Code §1-616.51(4). Principal Administrative Law Judge Ann Yahner concluded that “the facts relief upon by the Government, reasonably believed to be true, do not support the proposal to summarily remove [Employee] from his position.” (Ex A-10, p. 17).

14. The official notification of the final Agency decision sustaining the removal was issued on November 1, 2006 by Agency Director. (Ex A-11).

#### Positions of the Parties and Summary of Evidence

Agency contends that Employee was negligent both by signing the PARF when he was not authorized to do so, and by signing the PARF which contained a Separation Order.

Leona Bennett was Chief Case Manager during this period. Patricia Temoney, Deputy Warden for Programs who was her supervisor, had designated to her to act as Deputy Warden for Programs pursuant to an email sent at 7:12 p.m. on February 13, 2006. (Tr, 135, Ex A-6). She testified that the Deputy Warden for Programs is responsible for approving requests for off-unit assignments. She stated she was at work on February 14 except for brief periods when she left the facility to go to lunch and then to buy a greeting card. (Tr, 149-150). Ms. Bennett stated that it is the Case Manager’s responsibility to classify inmates, and that Inmate Leaks had been misclassified by his Case Manager. She also testified that Case Managers should review an inmate’s eligibility for a work detail monthly. (Tr, 157). As Chief Case Manager, she supervised all case managers at the time. She was not proposed for disciplinary action as a result of the escape. (Tr, 153-154).

Stanley Waldren testified that on February 14, 2006, he was either a Major or Deputy Warden and that he remained in one or those positions through June 3, 2006. As Deputy Warden, he had no supervisory responsibilities over Employee. (Tr, 187-188). He became Acting Warden on August 12, 2006. Mr. Waldren stated that all employees are responsible for knowing the regulations and rules contained in Agency’s Manual. (Ex A-8).

The Deciding Official, Devon Brown has been Agency Director since January 10, 2006. He stated that as a result of the June 3 escape, he determined that 11 employees had “played a role through negligence of performance in the actions leading to those escapes”. (Tr, 200). Employee was removed

because he signed the PARF despite the Separation Order and because he was not familiar with the pertinent regulations. (Tr, 201).

Employee's position is that on February 14, 2006, when he signed the PARF he was "operating under specific instructions and directions from [his] immediate supervisor" that authorized him to sign the document. (Tr, 322). He stated that he was familiar with the requirement that inmates with Separation Orders could not be assigned but that he had been assured that the separatee was no longer at the D.C. Jail.

Employee testified he had no supervisory responsibilities over Case Managers or the NIPS Coordinator. One of his responsibilities as Acting Deputy was approval of in-unit assignments. (Tr, 308, Ex A-5). Off-unit assignments for inmates who provide services outside of the cell blocks, were normally approved by the Deputy Warden for Programs, Ms. Temoney. (Tr, 309). Employee testified that in July or August 2005, David Harrison who was Warden between January 2005 and February 2006, instructed him and Ms. Temoney that "if either of us was not available for signature, then the other could sign off on it", referring to a PARF.. (Tr, 310, 403).

Employee stated he would only sign off on a PARF, if it had been approved by the Case Manager and NIPS Coordinator, since they were responsible for ensuring that that the proper screening had been completed. He stated he was not responsible for reviewing the inmate's institutional file. (Tr, 312). During his tenure as Acting Deputy Warden, he stated he signed off on several thousand PARFS. (Tr, 313).

On February 14, 2006, Sgt. Johnson brought several PARFs to him for off-unit assignments. He said it was not unusual for Sgt. Johnson to bring off-unit requests for his signature, and that he regularly signed off on such PARFs. He stated that Sgt. Johnson told him Ms. Bennett was not available at the time. (Tr, 320). He stated that no Separation Order was attached to the PARF for Inmate Leaks, but that he saw the word "separation" on it and reacted to it:

I saw the word "separation" on it and I asked...Johnson, Jr., you're not having me sign my life away by signing on this separation.

He said no, Mr. Dubose, I reviewed—me and Bryant<sup>3</sup> have reviewed this and this man does not have a separatee in the jail. So I signed off on it. (Tr, 316).

Employee stated that Sgt. Johnson told him that Mr. Bryant had checked JACCS and that the separatee was not listed as someone in the facility. (Tr, 318).

Employee denied that he had ever been a threat to the integrity of government operations or a hazard to Agency, as stated in the final Agency notice, noting that he was called back to Agency to instruct the Deputy Director and Deputy Warden on setting up programs he had developed while on Administrative Leave. ( Tr, 380, 432, Ex E-24). Prior to his removal, he had never been the subject

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<sup>3</sup> He identified Mr. Bryant as the Case Manager in this matter. (Tr, 317).

of any type of disciplinary action and his evaluations had always been outstanding or excellent. (Tr, 304, Exs E-1, E-2, E-4, E-6).

Employee testified that he had not seen the NIPS Post Order dated April 15, 2002 prior to February 14, 2006. (Tr, 354, Ex E-5). However, he stated that he knew the criteria that should be used before approving a PARF, and , being in an “acting” position, he was “guided through the day-to-day activities of [his] immediate supervisor”. (Tr, 404). He stated that although he may not have been familiar with the NIPS Order, he was familiar with portions of that policy. (Tr, 408). Employee testified that he was familiar with the policies and procedures concerning the placement of inmates on work detail. (Tr, 409). Employee stated he had reviewed Agency’s Manual of Regulations and Orders (1960) during his initial orientation with Agency in 1994. (Tr, 376). He stated he was authorized by then Warden Dennis Harrison to sign PARFs consistent with Regulation 1.3 of the Manual. (Tr, 377).

Dennis Harrison, Sr., testified that while he was Warden, he instructed Employee to take over Ms. Temoney’s responsibilities in her absence. (Tr, 569). He stated that by the time the PARF was presented to the Deputy Warden, the request should have already been investigated. Although he could not recall the email from Ms. Temoney appointing Ms. Bennett to act in her stead, Mr. Harrison stated it was still appropriate for Employee to sign the PARF. He stated that his directive to Employee took precedence over a directive from Ms. Temoney because he was her superior. He stated if Ms. Bennett, acting in Ms. Temoney’s place, was not present, then it was appropriate for Employee to sign the PARF. (Tr, 512). Mr. Harrison stated that the NIPS Coordinator would not have brought it to Employee if the Acting Deputy for Programs was present. (Tr, 482).

The witness testified that if a PARF had “separation” on it, the Deputy Warden “should look to see where the separation orders are so that [he] can find out the units and the placement of the inmates”. (Tr, 486, Ex A-3). However, even with the NIPS Post Order , Mr. Harrison stated that an inmate with a Separation Order was not automatically excluded from working off the unit, depending on where the separate was located. (Tr, 492). When asked if he would have approved Leaks for detail, he answered that it would depend “on where Jones is”. (Tr, 495). He stated that it was appropriate for Employee to rely on the recommendations and evaluations of Mr. Bryant, the Case Manager, and Sgt. Johnson, the NIPS coordinator, since both were experienced individuals with Mr. Bryant having at least ten years of experience as a Case Manager and Sgt. Johnson having more than five years as NIPS Coordinator. (Tr, 496). He stated that if the NIPS coordinator and Case Manager had told him that JACCS and/or PRISM indicated that Inmate Jones was no longer in the facility, then it was appropriate to approve Inmate Leaks for off-unit work. (Tr, 511).

### Analysis, Findings and Conclusions

This Office has jurisdiction to hear this matter pursuant to Section 101(d) of The Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124 which became effective on October 22, 1998. D.C. Official Code § 1-616.51 (2001) provides that the Mayor “issue rules and regulations to establish a disciplinary system that includes...1) a provision that disciplinary actions may be taken for cause... [and]... 2) A definition of the causes for which a disciplinary action may be

taken” for those employees of agencies for whom the Mayor is the personnel authority. Agency is under the Mayor’s personnel authority.

An employee may be disciplined only “for cause” pursuant to 6 DCMR 1603.2. Cause is defined as “any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations.” 6 DCMR 1603.3. Negligence is included as a “cause” for which an employee can be disciplined. To establish Employee was negligent or neglected his duty, Agency must establish that the employee had an actual duty, that the employee neglected the duty, and that the neglect was inexcusable. *Richardson v. Department of Corrections*, OEA Matter No. 1601-0095-95 (December 11, 1995), \_\_\_D.C. Reg.\_\_\_\_\_( ).

Agency contends that Employee was negligent in two respects: first, he was “negligent in undertaking the authority” of signing the PARF, and second, he was or “negligent in its execution”, i.e., by signing the PARF even if he had authority to do so. Agency alleges that his negligence was a significant contributing factor to the escapes and had he exercised ordinary care in compliance with security practices and procedures, the escapes would not have occurred.

It is understandable that Agency wants to take significant and immediate action against employees who contributed, through negligence or action, for the egregious escape from the Jail on June 3, 2006. However, after a careful review of the record, the Administrative Judge concludes that Employee should not have been one of the individuals against whom such action was taken.

With regard to Employee’s authority to sign the PARF for Inmate Leaks’s off-unit assignment in Ms. Temoney’s absence, former Warden Harrison supports Employee’s contention that he directed that Employee and Ms. Temoney sign PARFs that the other would normally sign, if other was absent. This would hold true even if Ms. Bennett was acting in Ms. Temoney’s place, since the Warden’s instruction take precedence over Ms. Temoney’s delegation. Even if Ms. Bennett had the authority at that time to sign off-unit PARFs, she was not on the premises at the time Sgt. Johnson brought the PARF for Employee’s signature. Agency did not present any evidence that it was improper for Employee to approve PARFs for off-unit assignments, as instructed by the Warden. I therefore conclude that Agency did not establish that Employee was negligent for undertaking to sign the PARF for Leaks’s off-unit assignment on February 14, 2006.

The second aspect of the negligence charge is that Employee signed the PARF, despite the notation “Separation” or the presence of the Separation Order. There is some dispute as to whether the PARF which Employee received had the Separation Order attached. Whether it was physically attached or not, the PARG noted that there was a “Separation” and that alone required additional inquiry. However, Employee’s undisputed testimony is that he made the requisite inquiry of Sgt. Johnson and that Sgt. Johnson assured him that the separatee was no longer housed in the CDF.

According to Agency’s investigative report, when Inmate Leaks entered the CDF on August 18, 2005, he was correctly identified as requiring “maximum” custody level. He had three charges pending: accessory after the fact to a first degree murder, 2005-Fel-004700, and a parole violation, which related to a 1998 assault with a deadly weapon charge. He “had a noted history of escape.



Leaks and Jones were co-defendants on a felony charge (2005-Fel-004700) as well as an assault with intent to kill investigation in North Carolina". (Ex A-1, p. 5). According to Agency's Offense Severity Scale, escape from an institution or officer-security facility "shall be classified with the highest offense level". Inmate Leaks was also committed to the CDF as a U.S. Parole Violator. He was sentenced to serve 24 years for the underlying assault charge and was released on September 24, 2003 on parole with 4,383 days remaining to be served. (Ex A-1, p. 23).

The evidence supports the conclusion that Inmate Leaks was misclassified in more than one area and on more than one occasion. Leaks's first reclassification took place on December 1, 2005. At that time, the severity of current offense was reduced from high (5) to moderate (3), history of escapes or attempts to escape was reduced from 1 to 0, and the number of disciplinary reports was reduced from 1 to 0. His custody level was then reduced from maximum to medium. (Ex A-1, pp. 6-7). The investigator concluded that the CTS who conducted the initial re-classification on December 1, "committed a "monumental mistake in judgment" by failing to review Leaks's institutional file which would have revealed his "prior history of escape from the CDF, a secure facility should have heightened his security threat and possible placement on special handling status". The investigator also concluded that Leaks's violation of his parole coupled with his history of escape undoubtedly make him an extreme security risk". (Ex A-1, p. 21). He remained at a medium custody level when reclassified on March 11, 2006 and May 15, 2006. (Ex A-1, p. 8). He was placed in North One housing unit on March 29, 2006. The North One housing unit is "designated to house inmates assigned to various work details within and around the confines of the CDF complex. Inmates with medium or lower custody levels only, are considered for this assignment. His custody level should have remained maximum at all times." (Ex A-1, pp. 5, 9, 21-22).

The investigation concluded that JACCS did not identify Inmate Leaks and Inmate Jones as enemies who required separation. The report stated, in pertinent part:

Inmate Jones oldest Booking #27082600, instead of his most recent Booking #2005-04850, was selected as the Enemy record. At that point, inmate Leaks' Booking #2005-11400 showed Inmate Jones as an enemy (in red because it was Jones's released record).....

On August 26, 2005 at 8:55 p.m. inmate Jones was booked into JACCS (Booking # 2005-11784). The correct booking procedure was followed which included restoring the most recent released Booking #2005-04850 from history into the new record. Because the Enemy Information was previously entered on Inmate Jones' older record instead of the new Booking #2005-04850, the Enemy Information was not carried forward to inmate Jones' new Booking 2005-11785 (in fact Jones' new Booking showed no enemies at that point). Inmate Leaks' Booking #2005-11400 still showed Inmate Jones as an enemy but as a red (released) record.

JACCS functions that check for Enemies, such as the Housing Assignment Screen, display the Enemy Alert Window when the Enemy record is an active (Black)

record. No Enemy Alert Window was displayed for either inmate when their housing was assigned.... (Ex A-1, p. 23).

The CTS who approved Inmate Leaks for a detail assignment did not check the status of the Separation Orders from the institutional files. He utilized the JACCS and PRISM systems to determine the inmate's eligibility. He stated he was aware of the Separation Order, but when he accessed the JACCS Enemy Alert Screen, the names of inmates listed as inmate Leaks's enemies were highlighted in red, which indicated that they were no longer housed in the CDF.

It is unlikely that these errors and misclassifications could have been discovered without the type of review that was undertaken after the escape. There was no evidence presented that Employee was required to conduct this type of investigation in order to approve a PARF. The April 19, 2002 NIPS Post Order states that the responsibility for screening inmates for consideration for applicable detail assignments is with the NIPS Coordinator and Casemanager. (Ex A-1, *infra*). Even if Employee had not accepted the NIPS Coordinator's word that the separate was no longer housed at the Jail, and had reviewed documentation himself, there was no evidence that he would have discovered the errors at the level of review required of him.

Employee is also charged with failing to be familiar with the April 19, 2002 Post Order. While Employee stated he was not familiar with the specific language of the Order, he testified that he was familiar with the requirement that inmates with Separation Orders could not work off-unit. However, as Warden Harrison, testified without contradiction, even that rule had an exception. The exception was that if the separatee was no longer housed in the CDF, then the inmate could work off-unit. That exception appeared to exist in this matter, *albeit* erroneously. Employee was familiar with the requirements of the Post Order although he was not familiar with its specifics. This failure is, at most, a *de minimis* violation. The District of Columbia Code provides that an employee cannot be "subject to a corrective or adverse action...for a *de minimis* violation of the cause standard contained in this section". Section 1603.6, 46 D.C. Reg. 7096.

The function of this Office is not substitute its judgment for that of an agency, but rather it is to ensure that managerial discretion "has been legitimately invoked" and "properly exercised". *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). The Office will reverse an agency decision only if it lacks evidentiary support, there is harmful procedural error or the decision is not in accordance with law or regulations. 27 D.C. Reg. 5449 (1980). Agency is required to prove its case by a preponderance of evidence. Preponderance is defined as "that degree of relevant evidence which the reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue". OEA Rule 629.1, 46 D.C. Reg. 9317 (1999). After carefully considering the record in this matter, and for the reasons stated above, the Administrative Judge concludes that Agency was unable to meet its burden of proof by a preponderance of evidence that Employee was negligent.

#### ORDER

It is hereby

ORDERED:

1. Agency's decision is to remove Employee from his position is reversed.
2. Agency is directed to reinstate Employee, issue him the back pay to which he is entitled and restore any benefits he lost as a result of the removal, no later than 30 calendar days from the date of issuance of this Decision.
3. Agency is directed to document its compliance no later than 45 calendar days from the date of issuance of this Decision.

FOR THE OFFICE:

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LOIS HOCHHAUSER, ESQ.  
Administrative Judge