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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

\_\_\_\_\_  
In the Matter of: )  
)  
PAMELA HOFFLER MANNING )  
Employee )  
)  
)  
v. )  
)  
DEPARTMENT OF HUMAN SERVICES )  
Agency )  
\_\_\_\_\_)

OEA Matter No. 1601-0071-98

Date of Issuance: September 26, 2005

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

The Department of Human Services (“Agency”) removed Pamela Hoffer Manning (“Employee”) from her position at the Oak Hill Youth Center based on the cause of discourteous treatment of the public, a supervisor, or other employee. Specifically Agency charged Employee with fighting, threatening, or inflicting bodily harm on another; engaging in rude or boisterous play or conduct; and using abusive or offensive

language or discourteous or disrespectful conduct toward another employee. Employee's removal took effect February 13, 1998.

The incident which gave rise to the removal occurred on October 29, 1997. Employee worked as a shift leader in the culinary unit at Oak Hill and was due to report to work on that day at 5:00 a.m. When Employee's supervisor, Linda Flowe, reported to work at 8:00 a.m., she was told by another employee that Employee had not reported to work on time. Ms. Flowe then went to Oak Hill's superintendent and asked him whether Employee had been granted leave for the time she was absent that day. When he responded that she had not, Ms. Flowe thought that the appropriate course of action would be to charge Employee with being absent without leave. Ms. Flowe informed Employee of what she intended to do.

At some point later on that morning, Employee and Ms. Flowe encountered each other in the culinary leader's office. Ms. Flowe had in her hand a sheet of paper that listed the dates on which overtime was available. Employee, wanting to see the overtime list, snatched the paper out of Ms. Flowe's hand. Ms. Flowe then snatched it back from Employee. According to the testimony of other employees who witnessed this encounter, Employee then pushed Ms. Flowe into the door and began screaming and shouting obscenities at her. Another employee stepped between Ms. Flowe and Employee and helped Ms. Flowe leave the room. As a result, Agency removed Employee from her position.

Employee filed a Petition for Appeal with this Office. In an Initial Decision issued October 1, 2001, the Administrative Judge found that, based on the consistent testimony of the employees who witnessed the incident and the unbelievable and inconsistent

testimony of Employee, Agency had proven its case. Further, because the penalty of removal was allowable under these circumstances even for a first offense, the Administrative Judge held that removal was an appropriate penalty and not an error in judgment. Thus, the Administrative Judge upheld the removal.

Employee timely filed a Petition for Review. The crux of Employee's argument on appeal is that the penalty of removal is excessive and inappropriate. Employee contends that the Administrative Judge erred when she relied upon the testimony of two of the eyewitnesses to the incident in reaching the conclusion that Agency had proven the charge it brought against Employee. Further Employee contends that Agency's decision to terminate her was an error of judgment that should not have been upheld by the Administrative Judge especially in light of several *Douglas* factors.<sup>1</sup> Employee's final argument is that the Administrative Judge erred when she failed to consider the Disinterested Designee's report; the prior complaints Employee brought against her supervisor; and Employee's claim of disparate treatment. According to Employee, had the Administrative Judge considered these items, the penalty of removal could not have been properly upheld.

The Administrative Judge held an evidentiary hearing in this matter on May 17, 2001. Two of the eyewitnesses to the incident testified on behalf of Agency. The Administrative Judge had the opportunity to observe the demeanor of these witnesses and also how they conducted themselves on cross-examination. Moreover, the Administrative Judge had the same opportunity with respect to Employee when she

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<sup>1</sup> The *Douglas* factors refer to the mitigating factors established by the Merit Systems Protection Board in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

testified. Based on her observation, the Administrative Judge concluded that the testimony of the eyewitnesses proved consistent with other agency witnesses who had knowledge of the incident. Furthermore, the Administrative Judge found that Employee was unbelievable and that she contradicted herself when testifying on various aspects of the incident. Assessments made by an administrative judge regarding the credibility of a witness are given deference in the absence of any evidence in the record that could contradict the administrative judge's assessments. We find no evidence in the record that would contradict the Administrative Judge's findings in this matter.

The District of Columbia Court of Appeals stated in *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985), that this Office's primary responsibility in assessing a penalty is "simply to ensure that 'managerial discretion has been legitimately invoked and properly exercised.'" The Administrative Judge was aware that this was her duty when she found that Agency had followed the guidelines contained within the Table of Penalties. The Table of Penalties permitted the removal of an employee who had fought, threatened, or inflicted bodily harm on another. This was the allowable penalty even for a first offense. The Administrative Judge concluded that the "penalty was appropriate [and] was not an error in judgment." *Initial Decision* at 7. Lacking any evidence that Agency abused its discretion, we will not substitute our judgment for that of Agency.

The Administrative Judge had in the record before her the Disinterested Designee's report and Employee's statements regarding her prior complaints against her supervisor. A Disinterested Designee's report is merely a recommendation and thus, is not binding on an agency. Obviously, the Administrative Judge did not find the report to be convincing or persuasive. Nor was the Administrative Judge persuaded by Employee's

statements regarding her prior history with her supervisor. Aside from the report and Employee's self-serving statements, Employee has failed to present any evidence that would compel us to find that the Administrative Judge erred in this regard.

An employee who claims that the penalty he or she received was more severe than the penalty received by another employee involved in the same incident bears the burden of proving such. We stated in *Huntley v. Metropolitan Police Department*<sup>2</sup>, that to establish a claim of disparate treatment an employee must show that he or she worked in the same organizational unit as the comparison employee and that they were subject to discipline by the same supervisor. Employee claims that she was treated disparately from Ms. Flowe.

Employee states that she and Ms. Flowe "served in comparable supervisory roles" and that Ms. Flowe received a "simple letter of counseling." *Petition for Review* at 4. The record, however, reflects that Ms. Flowe was *Employee's supervisor*. Agency's superintendent testified that although Employee had some supervisory duties, Ms. Flowe "serve[d] as the lead supervisor" and Employee "serve[d] as [Ms. Flowe's] subordinate." *Transcript* at 103-104. Thus, contrary to Employee's assertion, Employee and Ms. Flowe *did not* work in the same organizational unit. For this reason, Employee's claim of disparate treatment must fail. Because there is substantial evidence in the entire record to support the Initial Decision, we deny Employee's Petition for Review and uphold the Initial Decision.

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<sup>2</sup> OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), \_\_ D.C. Reg. \_\_ ( ).

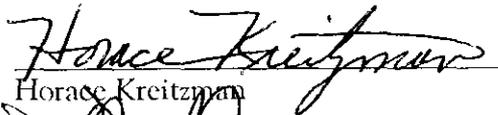
ORDER

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

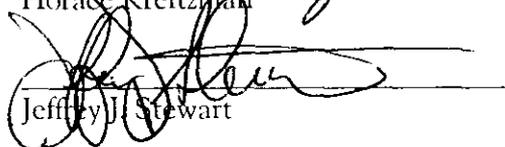
FOR THE BOARD:



Brian Lederer, Chair



Horace Kreitzman



Jeffrey J. Stewart



Keith E. Washington

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.