

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

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| _____ |) | |
| In the Matter of: |) | |
| |) | |
| ARTHUR E. PITTMAN |) | OEA Matter No. 1601-0115-08 |
| Employee |) | |
| |) | |
| v. |) | Date of Issuance: March 17, 2010 |
| |) | |
| D.C. DEPARTMENT OF |) | Rohulamin Quander, Esq. |
| PARKS AND RECREATION |) | Senior Administrative Judge |
| Agency |) | |
| _____ |) | |

Kevin Turner, Esq., Agency Representative
Arthur E. Pittman, Employee, *pro se*

INITIAL DECISION

INTRODUCTION

On July 16, 2008, Employee, a Maintenance Worker, DS 6, Step 3, with the D.C. Department of Parks and Recreation (the "Agency") filed a petition for appeal with the D.C. Office of Employee Appeals (the "Office" or "OEA"), challenging Agency's final decision, effective June 16, 2008, removing him from his position for allegedly committing on-duty or employment related acts that interfered with the efficiency or integrity of government-related operations. The charges and specifications are enumerated below.

I convened a Pre-Hearing conference on October 29, 2008, and an Evidentiary Hearing on January 6, 2009. At the conclusion of the hearing, I directed that the parties file by February 23, 2009, a Proposed Final Order, to include proposed findings of fact, legal analysis, and conclusions of law. Employee filed his proposed final order in a timely manner. However, Agency did not file a timely Order as directed. In response to this Administrative Judge's (the "AJ") inquiry of status, on February 24, 2009, Agency subsequently filed a Motion for Enlargement of Time, requesting that Agency be granted until March 4, 2009, to file the document. The motion was granted. However, Agency failed to comply, and never filed its closing proposed final order. The record is now closed.

JURISDICTION

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

CHARGES AND SPECIFICATIONS

- Charge 1: Employee Misconduct (Sexual Harassment) – DPM 1619.1(5)(c)
- Charge 2: Careless and/or Negligent Work Habits – DPM 1619.1(6)(c)
- Charge 3: On Duty or Employment Related Reason for Corrective or Adverse Action (Drunkenness on duty) – DPM 1619.1(7)

The Specifications, as prepared by John R. Webster, Acting Association Director of Facilities Management, are the following:

Specification 1: On February 29, 2008¹ I received a call from Facilities Manager, Ellouise Johnson to report an incident of Employee Misconduct of a sexual nature. Ms. Johnson informed me that you greeted her with a hug and put your tongue in her ear. At that time, Ms. Johnson detected a strong odor of alcohol on your breath. Your supervisor then met with you to inform you that your behavior was inappropriate in the workplace and that your advance was not welcomed.

Specification 2: On that same date, Michelle McCray notified the Human Resources Manager that she would like to speak with her and document the behavior of a maintenance employee. Upon her arrival, she told the HR Manager that you entered her office, appeared to be intoxicated, and were, as she characterized it “fantasizing about Ellouise Johnson.” Ms. McCray stated that you touched your crotch area in an inappropriate manner and stated that you “feel like fucking somebody.” Ms. McCray stated that she felt uncomfortable so she walked outside to smoke a cigarette. You followed and said “You even look good.” Ms. McCray also stated that she was concerned because you told her earlier that day that you were going to get a beer. Ms. McCray admitted that she never saw you drink any beer but did smell alcohol on you.

Specification 3: On the morning of March 25, 2008, I asked you to submit your daily report to me for review. You advised me that you were working on it. I returned over 3 hours later and found you to be in a state of incoherence and disoriented. Your speech was slurred and your breath had a strong odor of alcohol. At that time, fearing for your safety and the safety of other DPR employees, I directed Stan Dickson and Leon Harris to take you to the Emergency Room immediately. You were taken to the Veterans Administration Hospital.

Specification 4: On two separate occasions, February 29, 2008 and March 6, 2008, I offered to allow you to seek counseling through the Employee Assistance Program (COPE) for any problems you may be having. On the later date, I even offered to place you on two (2) weeks paid administrative leave to allow you to seek counseling without any time restrictions. On both occasions, you rejected the offer

¹ Although the Specification Statement recited “February 29, 2008” as the date of the sexually explicit incidents, the record reflects that the incidents occurred on February 19, 2008. It appears, however, that Employee was subsequently counseled on February 29, 2008.

and stated that you did not need to participate in the Employee Assistance Program.

After Webster's statement enumerated the above-noted Specifications, he added an additional paragraph, as follows:

Mr. Pittman, given your recent behavior and as an employee of the Facilities Management Division in the Department of Parks and Recreation, it is imperative that you are aware of your surroundings and coherent at all times. Your disorientation and appearing for work under the influence of alcohol may present a danger to you as well as other DPR employees. Intoxication in the workplace is not tolerated in District of Columbia Government. The safety of our employees is of paramount importance.²

CONTENTIONS OF THE PARTIES

The Agency contends that Employee was guilty of committing several on-duty or employment related acts that interfere with the efficiency or integrity of government-related operations.

Employee contends that Agency's cause is not supported by substantial evidence of any wrong-doing by him and that Agency's penalty of removal should be overturned as excessive, given Employee's illness and health challenges which only temporarily interfered with his on the job efficiency.

BURDEN OF PROOF

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

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

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

OEA Rule 629.3 *id.* states:

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

ISSUES

² See Webster's Advance Written Notice of Proposed Removal, issued to Employee on March 26, 2008, Agency Exhibit #3; also Tab #2.

The issues to be decided are:

1. Whether Agency's decision to terminate Employee was supported by substantial evidence.
2. Whether there was harmful procedural error.
3. Whether Agency's action was done in accordance with applicable laws or regulations.

SUMMARY OF WITNESS TESTIMONY

A/ Agency's case

Testimony of Ellouise Johnson: Tr. 11 – 48

Ellouise Johnson ("Johnson") is a Facilities Manager for DPW, assigned to the Department of Track and Management Asset ("TMA"). She supervised Employee while serving in that management capacity. In late February / early March 2008, Employee sat on the arm of her chair, and leaned towards her. Unsure whether it was accidental or intentional, when he leaned forward, she felt something warm on her ear, and smelled alcohol on his breath. *Tr. 12-16*. Being new to the job and not knowing Employee that well, Johnson was not certain whether his deliberateness and slow moving around the work place was a natural phenomenon, or perhaps evidence of some other influence. Employee left the immediate area, and went downstairs. A few minutes later, a co-worker³ came to Johnson and reported certain inappropriate conduct by Employee. Johnson immediately called Employee into the office, where, in the co-worker's presence, she confronted him about what had allegedly just occurred. Johnson continued to observe Employee's conduct and behavior, which was a cause for great concern. Uncomfortable about what had just occurred, involving two different employees, herself included, Johnson prepared a written statement about what had occurred. *See Ag. Exhibit #1; see also Ag. Tab. #2, 2-19-08, Incident Report prepared by Johnson.*

On cross examination by Employee, *pro se*, he read significant portions of Ag. Exhib. #1 into the record, followed by his asking Johnson if Employee's apology for making her (Johnson) feel uncomfortable seemed to be remorseful. Answering in the affirmative, Johnson accepted the apology as being sincere. *Tr. 24.*

Having heard as much from other employees about Employee's recent on the job conduct, Johnson was concerned that this conduct might be related to being under the influence of alcohol while on the job. About one week after Johnson relocated to the worksite, she personally observed Employee face down on his desk, asleep. On a subsequent occasion, she confronted him after others raised the issue as well, only to be told by Employee that his slow moving pace was not related to alcohol, but rather the direct result of medication, which representation she doubted. *Tr. 18-21.*

³ Identified later in the proceedings as Michelle McCray.

Subsequently, Johnson, in the presence of Stan Dickson, a co-worker, had another conversation with Employee concerning his alcohol-related challenges, and suggested that he be referred to the COPE program for troubled D.C. Government employees. Employee demurred, saying that he did not need the help. Johnson determined to make an incident report to upper management, especially since Ms. McCray had indicated that she was going to advise her husband, who also worked at the Agency, of Employee's inappropriate conduct towards her, the effect of which might cause future altercations or other workplace-related problems. *Tr. 30-32.*

Being new to the D.C. Government, and initially uncertain how to proceed with this unfolding scenario, she contacted Gilbert Davidson ("Davidson"), upper management staff, and advised him of what had just occurred. Shortly thereafter, Johnson spoke with Ms. Roberts, as Staff Assistant with the Agency, who came to Johnson's office to report on Employee's ongoing conduct in another quadrant of the building. It was then that Ms. McCray initiated the first of several calls, complaining about Employee having just made some inappropriate sexual-related direct comments to her, plus some third party sexual references about Johnson. Johnson then testified that McCray reported to her that Employee said that he felt like fucking, and that he might as well start with her (McCray). *Tr. 35-36.*

In addition to this incident, other employees came to Johnson and did mention to her their concerns about Employee's apparent alcohol-related conduct on the job. Not wishing to pander to gossip or third party reporting, she elected not to personally confront Employee about what had been reported. She elected to defer to Mr. Davidson, Mr. Webster, and Ms. Roberts, all members of Agency's upper management. *Tr. 39-40.*

Testimony of Joyce Roberts, Tr. 48 – 64

Joyce Roberts ("Roberts") is a Staff Assistant with the Agency and worked with both Employee and McCray. On the February 2008 date in question, McCray reported to Roberts that Employee had inappropriately come on to her. *Tr. 50.* She had conversations with other DPW workers concerning their reports of Employee's apparent change in behavior when he appeared to have been drinking. From Roberts' perspective, however, Employee was a serious worker as a rule, very professional, not the very carefree person, as reported by others, when he appeared to be under the influence of alcohol. She never personally smelled alcohol on his breath, and disagreed with a statement in Johnson's report to the effect that she (Roberts) too had smelled alcohol. *Tr. 53-55; 62.*

Roberts initially had a poor recollection about the interaction between McCray and Employee on the date of the incident, February 19, 2008. Initially, she claimed to have not ever heard of any prior incidents or adverse conduct on Employee's part, stating that she was unsure how much time transpired between the alleged incident and the time that McCray related it to her. However, in response to a series of direct questions from Agency's counsel, she admitted that McCray has told her that Employee rubbed his penis and stated that he felt like fucking somebody. Then, while rubbing his crotch, he allegedly said to McCray that he felt like fucking her. Immediately after this conversation between McCray and Employee, McCray came into Roberts' office and told her about Employee's comments. Although McCray appeared not to be

particularly upset by Employee's remarks, perhaps even a bit jovial while relating the incident to Roberts, McCray certainly was not joking while reporting what had just occurred. *Tr. 55-58.*

On cross examination Roberts asserted that this above-noted incident was the only one of this kind that she was aware of, and that she was subsequently quite surprised to learn that Employee, whom she considered to be a valued asset to the Agency, had been discharged from employment as a result. *Tr. 63.*

Testimony of John R. Webster, Tr. 65-97.

At the time that Employee was terminated, Webster was a supervisor working in facilities management. Employee was one of the subordinate employees in the unit. In February or March 2008, Webster learned of the incident in which Employee allegedly licked a co-worker's ear. At about the same time, Employee's alleged alcohol-related and behavior problems came to light, including his drinking on the job, his inappropriate sexual comments to Ms. McCray, and his touching himself in a sexual manner while using vulgar, sexually inappropriate language. *Tr. 65-67.*

Both Ms. Johnson and Ms. McCray separately brought their respective incidents to his attention. He then contacted Richelle Marshall, the Human Resources Director, and advised her of the ear licking complaint. With regard to Ms. McCray, she related to Webster that Employee had made several suggestive comments while rubbing his groin area, stating that he was going to give "this" to her. Webster stated that McCray advised him that Employee said to her, "I'm going to give you this. I'm going to fuck you!" *Tr. 68-70.*

McCray's husband also worked at the Agency. He was called in by Webster and advised of the situation. Webster requested him to let the incident be handled through personnel channels, and to not take the matter into his own hands. McCray's husband, who was well aware of the details of the incident, was very upset at the gross disrespect that has been shown to his wife. Webster was seeking to avoid even a verbal confrontation between the two men, which might have degenerated into some physical confrontation. *Tr. 70-72.*

During this same time frame, and all on the same day, March 25, 2008, Employee failed to file a mandated daily report, despite having been initially asked, and then directed to do so. The report was requested three times, but was never submitted.⁴ His speech became slurred, and Employee seemed unfocused. Webster did not smell alcohol on Employee's breath on that particular occasion. Not too many days after the failed report incident, the ear licking and other

⁴ The witness noted that, looking back at Employee's work product shortly before this major incident, that he missed filing his daily report on one or two occasions shortly before the March 25th incident. The daily reports are significant to the ongoing flow of Agency's work, as they monitor progress of work and reflect the ongoing carpentry, plumbing, landscaping, and custodial and basic repairs that are integral to the smooth operation of the Agency. The reports are significant as Agency handles its work load and plans its work assignments on a daily and longer term basis. *Tr. 86-87.*

inappropriate sexual advances incidents occurred.⁵ Webster began to receive information about those events on the day of the events, and by the next day was fully informed. The following morning, when Webster determined to have Employee report to Agency headquarters, located on 16th Street, N.W., Employee was found to have alcohol on his breath. *Tr.* 73-76.

On another occasion, not too far removed from the above noted incidents, Employee was observed with slurred speech, leaning back in his chair. When another employee came to escort Employee out, Employee's gait was wobbly, staggering, and generally unsteady on his feet. The witness personally observed Employee's conduct, but was not close enough to determine if there was the smell of alcohol on his breath.⁶

On at least two separate occasions, February 29, and March 6, 2008, after having individually met with this witness and another supervisory person, Employee declined efforts to enroll him into the COPE Employee Assistance Program, even to the point of denying that he had an alcohol-related problem. *Agency Exhib. #3. Tr.* 76-78; 88-89; 100-102. Beyond the above-referenced incidents, there were several other generic allegations concerning Employee's alleged alcohol-related conduct, including an ambulance called when Employee either passed out at work or was having some shortness of breath; a fall that occurred, perhaps off the job, but which left a highly visible scar; and allegations of drinking on the job, generally from some container other than a liquor bottle. *Tr.* 82-84. Prior to this behavioral meltdown, Employee was very reliable, and his work product was an accurate indicator of progress and the completion status of ongoing projects. *Tr.* 98-99.

On cross examination, Employee queried Webster whether, in his supervisory capacity, he had ever faced a situation(s) where he was called upon to implement progressive discipline. Replying in the affirmative, Webster stated that he had implemented some stage of progressive discipline on two or three prior occasions, not related to this Employee or to the matter at hand. *Tr.* 94-95. As regards this matter, Webster met with Employee and informally counseled him shortly after the March 25th incident initially became a matter of record. Although no formal notice of counseling was filed with Agency's personnel office, Webster created a less formal written note, to document that a counseling session had occurred. *Tr.* 96-97.

⁵ Although Webster's testimony of what occurred is supported by the record, the AJ takes note that the sequence of events is probably reversed, in that the sexually explicit incidents both occurred on February 19, 2008, while the missed reports seemed to have occurred after that date.

⁶ Agency produced from the official case file the Advanced Written Notice of Proposed Removal, dated March 26, 2008, citing it as the first step in the termination process. Agency noted that Specification #3, initiated by Webster, specifically recited that he personally observed the smell of alcohol on Employee's breath during the March 25th incident. The witness, who initially noted the one year time lapse since the incident occurred, clarified his testimony, stating that what appears in the notice, as Specification #2, including the reference to the smell of alcohol, is more accurate, and better reflects what exactly occurred, than his belated recollection during his testimony in this proceeding, convened more than one year after the incident in question. *Tr.* 80-81; 91-92.

B/ Employee's Case

Testimony of Arthur E. Pittman, Sr. Employee, Tr. 115-170.

Arthur E. Pittman, *pro se*, (“Employee”) testified on his own behalf. He challenged the administrative and personnel-related propriety of how Agency handled this entire matter, noting that he was suffering from severe depression at the time in question. He was under the care of a staff psychiatrist at the Veterans Administration Hospital, and being treated for severe depression. Further, the level of dosage of the Wellbutrin medication that had been his mainstay, was no longer effective, leading to some problems related to whether the dosage should be increased or the medication changed to something else. *Tr. 116-118.*

He challenged whether Agency ever implemented any progressive disciplinary steps in his case, asserting that Agency watched Employee’s deterioration within a very short time frame, and then rushed to include every allegation of supposed misconduct into one key document, in order to relieve him of his duties and to propose termination. Instead, Agency should have implemented documented progressive discipline and even offered him a chance to take medical leave while he attempted to get himself back in order.⁷ *Tr. 118* While Employee admitted that he inappropriately used the work “fuck,” he denied that he directed the term towards Michelle McCray or any particular person, noting that the office atmosphere was one in which a lot of profanity and course language was commonplace. *Tr. 121.* Employee asserted that Ellouise Johnson, Agency’s first witness, would sometimes hug him in the office, which hugs were not initially reciprocated, since Employee and she did not know one another that well. He considered her conduct to be out of order, despite his later behavior which involved his tongue on her ear. *Tr. 122.*

Employee denied ever drinking alcohol on the job, tracing the alcohol smell to drinks imbibed the prior evening, complicated by his failure to eat breakfast before coming to work, plus on-the-job perspiration. Further, references to him stating to a co-worker that he was going out to buy a beer was only a joke. *Tr. 123.*

The AJ queried Employee, who was hired in 2004, whether he had established for the benefit of his personnel record, that he had a potential medical situation (depression) that might need to be monitored, in the event of some unanticipated health-related challenge. Employee responded that, although he did consider doing so at any earlier time, the work site was too gossipy. Therefore, he elected not to make his situation known because he thought that the disclosed information would not be secure, based upon what he had heard about other peoples’ business. He considered this situation to be most unprofessional. He elected to keep quiet and seek to deal with his depression on his own, hoping not to be faced with any situations in which his stability would be called into question. If such did occur, however, he intended to go to the

⁷ Employee’s statement is in direct contradiction to sworn testimony from both Marshall and Webster, that on two separate occasions they offered Employee the opportunity to seek professional medical treatment, while being retained on staff in a paid administrative leave capacity, which opportunity he declined.

Veterans Administration Hospital (the “VA”) for treatment, since his records were there and they could help him, without having to make the matter a public record at the Agency. *Tr. 124-125.*

Although Employee elected not to enroll in COPE’s two-week outpatient program, he did enroll himself into a daily outpatient treatment program at the VA. That program commenced in April 2008, after he had been suspended from duty, and was completed in August 2008. June 16, 2008, was the effective date of his termination. *Tr. 128-130.* In December 2007, a few months before the problems that resulted in termination, Employee sensed that he was about to encounter some emotional problems. He sought psychiatric help from the VA staff about getting into an alcohol counseling program. However, because he was not actively drinking at that time, he was declined and not recommended for enrollment. *Tr. 131-132.*

Employee insisted that he was a most valued employee, very good in his job duties, and fully depended upon by his co-workers to ensure the smooth operations of their office and the upkeep and maintenance of Agency’s facilities, which were spread across the city. He attributed his *spirit de corps* and the manner in which he approached his job duties and completion of assignments to his military training in the U.S. Air Force, with 10 years of service, discharged in 1984. His depression actually started during his Air Force service, although he has no established service-connected disability on record. He also noted that after he was separated from employment, Agency never paid him for his earned annual leave. *Tr. 135-136; 138-139.*

On cross examination, Employee denied that he and Webster had discussed Employee’s on-the-job problems, characterizing Webster’s testimony to the contrary as “totally false.” Further, he did not have much recall of the incidents that led to his termination, i.e. the tongue, crotch, or vulgar language events that were attributed to him. Rather, he acknowledged that his recollection is largely attributed to what he has either read about the incidents or been told by others, much of which was related to him in a rumor context. He cited the alleged involvement and knowledge by other persons as the typical example of why he preferred not to make his business a matter of public record at the Agency. *Tr. 142-150.*

Employee elected to remain above the fray, and did not discuss what had occurred, engage in any conversations with co-workers, or otherwise involve himself in what was pending behind the scenes. Further, after the allegations that grew out of the February 19, and March 25, 2008, incidents, Employee did not engage in any conversations with the alleged victims or management about the supposed incidents. Subsequently, the first time that he heard from management was several weeks later, when he received the Advanced Written Notice of Proposed Removal, dated March 26, 2008. *Tr. 155-156.*

FINDINGS OF FACT

Based upon the documentary evidence of record, sworn testimony of multiple witnesses, and evaluation of their credibility and demeanor, I make the following findings of fact:

1. Beginning on September 11, 2004, until June 16, 2008, the date of his termination, Employee was employed as a Maintenance Worker by the D.C. Department of Parks

and Recreation (“Agency”).

2. For several years Employee worked in his job capacity without incident. However, beginning in late 2007, Employee began to experience some personal problems, characterized by depression and subsequent degeneration due to alcohol abuse. Although Employee denied drinking on the job, he admitted to imbibing after work, drinking in the morning before coming to work, often without eating, and claimed that job-related perspiration contributed to the strong smell of alcohol about his person. Further, he is also a diabetic, and not eating violated his food protocol as well.
3. On February 19, 2008, Employee was involved in two sexually suggestive incidents. In the first incident, while in her office, Employee drew very close to Ellouise Johnson, hugged her, and put his tongue on her ear. When he was immediately rejected, he left her office, went downstairs to the environs of Michelle McCray, another co-worker, and while holding his crotch, made several coarse remarks to the effect that he felt like fucking someone, followed by a reference that “this” (his penis) was coming to get her. McCray immediately left the environment, and reported Employee’s conduct to a supervisor.
4. On February 29, 2008, Employee met with Richelle Marshall, Human Resources Director, who counseled him about his outrageous, impermissible on the job behavior, and offered to refer him to COPE, the District’s Employee Assistance Program (“EAP”), likewise notifying him of the sexual harassment allegations that had been made against him. Employee declined to enroll in the counseling program.
5. On March 6, 2008, Employee met with John R. Webster, Acting Associate Director for Facilities Management, at which time the counseling referral and options were revisited. Webster offered Employee enrollment in the program, with administrative leave and full pay extended. Once again, Employee declined to enroll in the counseling program.
6. In addition to the above-noted counseling meetings, there were other prior occasions when management spoke to him in a less formal setting. These informal meetings were indicative of Employee being valued as an employee, with management making reasonable attempts to help him address his personal problems, while seeking to overcome whatever challenges he was facing during this time.
7. On March 25, 2008, Employee was observed to be in an extremely intoxicated state while on the job. Out of concern for his personal health and safety, as well as concern for the personal safety of the staff, Employee was taken to the VA emergency room as a precaution, at the directive of Webster.
8. On March 26, 2008, Agency issued to Employee an Advanced Written Notice of Proposed Removal, based upon the above-noted allegations of misconduct. Employee was immediately placed on administrative leave, and did not return to the work site prior to his ultimate date of termination, June 16, 2008.
9. Agency appointed Michael Williams as the designated administrative review hearing officer, to conduct an administrative review of the proposed removal action and to assemble additional documents, if any, for the record, upon which to base a proposed recommended final decision and outcome. Although notified of the appointment, and being given the opportunity to respond to the allegations, Employee filed no timely response to the allegations, other than submission of a third party’s letter, which stated

- that Employee was depressed.
10. Subsequently, on May 6, 2008, Williams issued his Findings and Recommendations Report, which recommended that Agency's proposed termination be upheld.
 11. On June 16, 2008, Agency issued a Notice of Final Decision: Summary Removal, effective June 16, 2008, the same date.
 12. Based upon the nature and details of incidents of record and Employee's conduct, including a concern for Employee's personal safety and the safety of his many co-workers, Agency's recommendation for removal, and subsequent removal, was consistent with the disciplinary guidelines as enumerated in Chapter 16 of the District Personnel Manual.
 13. Employee maintained that Agency never paid him for his accumulated earned annual leave at the time of his termination.
 14. Agency's three exhibits and Employee's eight exhibits got separated from the record or the official evidentiary hearing transcript and appear to be lost. However, all three of Agency's exhibits were contained in Agency's comprehensive Answer, and previously filed under Agency's Tabs #1 and #2 (two documents), and likewise preserved for the record. Employee's Exhibits #1 and #2 were likewise reflected under Agency Tabs #1 and #3. Employee's Exhibits #3 through #8, while admitted into the record, all reflect some action taken by Employee after Agency's determination to remove him had been set in process or after the removal had taken effect. Although it is deeply regrettable that these exhibits could not be located, they had no bearing on the final outcome of this matter.
 15. The following Exhibits were presented for consideration and admitted into the record:
 - a. *Agency Exhibit #1 - 2-19-08, Incident Report prepared by Ellouise Johnson, Tr. 19; also Ag. Tab #1;*
 - b. *Agency Exhibit #2 – 2-18-08, Richelle Marshall Incident Report, based on Michelle McCray's report to her of incident with Employee, Tr. 42; also Ag. Tab #2;*
 - c. *Agency Exhibit #3 – 3-26-08, Advanced Written Notice of Proposed Removal, from John R. Webster, Acting Associate Director of Facilities Management, Tr. 78; also Ag. Tab #2;*
 - d. *Employee Exhibit #1- 2-20-08, statement of Gilbert Davidson, Acting Support Services Manager, to Richelle Marshall, Human Resources Director, referring to Employee's conduct on 2-19-08, Tr. 26; also Ag. Tab #1;*
 - e. *Employee Exhibit #2 – 3-4-08, Memorandum from Richelle Marshall, placing Employee on two weeks of administrative leave, Tr. 104; also Ag. Tab #3;*
 - f. *Employee Exhibit #3 - 8-21-2008, substance abuse Certificate of Completion from the VA Hospital for period 4-08 to 8-08, Tr. 132;*
 - g. *Employee Exhibits: #4 – 3-25-08, radiology report, submitted to verify depression and self-medication; Tr. 159;*
 - h. *Employee Ex. #5 – 11-26-08, DOES related to E's claim of entitlement to leave related compensation, Tr. 162;*
 - i. *Employee Ex. #6 -11-4-08 – e mail to Ray Clark, inquiring why still no payment for accused leave, and Clark's response, Tr. 163;*
 - j. *Employee Ex. #7 -1-5-09, e mail from Employee to Rita Britt, inquiring re status of*

- monies due, as referenced in #6, above, Tr. 165; and*
- k. *Employee Ex. #8- 7-13-2008, Employee's 2-page weekly timesheet and pay stub, which reflect both annual and sick leave balances at the time of termination, Tr. 166.*

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Whether Employee's actions constituted cause for adverse action

D.C. Official Code § 1-616.51 (2001) requires the Mayor, for employees of agencies for whom the Office of the Mayor is the personnel authority, to “issue rules and regulations to establish a disciplinary system that includes,” *inter alia*, “1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken.” The Agency herein is under the Mayor’s personnel authority.

On September 1, 2000, the D.C. Office of Personnel (DCOP), the Mayor’s designee for personnel matters, published regulations entitled “General Discipline and Grievances” that meet the mandate of § 1-616.51. *See* 47 D.C. Reg. 7094 *et seq.* (2000). Section 1600.1, *id.*, provides that the sections covering general discipline “apply to each employee of the District government in the Career Service who has completed a probationary period.” It is uncontroverted that Employee falls within this statement of coverage.

Section 1603.3 of the regulations, 47 D.C. Reg. at 7096, sets forth the definitions of cause for which a disciplinary action may be taken. Pursuant thereto, cause has been defined at 47 D.C. Reg. at 7096, §1603.3 as follows:

[A] conviction (including a plea of *nolo contendere*) of a felony at any time following submission of an employee’s job application; a conviction (including a plea of *nolo contendere*) of another crime (regardless of punishment) at any time following submission of an employee’s job application when the crime is relevant to the employee’s position, job duties, or job activities; any knowing or negligent material misrepresentation on an employment application or other document given to a government agency; any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the 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. [*Emphasis added.*]

In an adverse action, this Office's Rules and Regulations provide that the agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." OEA Rule 629.1, 46 D.C. Reg. 9317 (1999).

The question before me is whether Agency presented sufficient substantial evidence such that would justify a cause for adverse action and the decision to terminate Employee from his position with Agency. It is clear from the evidence that Employee was a valued employee, but faced a series of critical incidents within a short time span. Consequently, beginning with his admission that he began drinking again, at least from about December 2007, but more particularly during the months of February and March 2008, Employee engaged in grossly inappropriate conduct of a sexual nature with two female co-workers. Further, he missed preparing and submitting daily work reports, which were mandated and integral to Agency's day-to-day operations. The smell of alcohol was pervasive, well known, and well documented. Then, on or about March 25, 2008, he was so visibly inebriated that he was taken to the VA as a precaution.

While Employee claimed that he elected to not disclose that he was suffering from a recurrence of his long term personal depression, which was complicated by alcohol abuse, the latter element was well known among his co-workers who had witnessed his meltdown within a short time frame. Employee claimed that, rather than accept Agency's offer of assistance through the COPE/EAP program, the confidentiality of which he questioned in light on gossipy co-workers, he elected to quietly pursue off-site depression and alcohol-related counseling through the VA's own program. His failure to disclose in a timelier manner that he was allegedly pursuing counseling and assistance through the VA program, and likewise declining two separate Agency-initiated efforts to help him, is reflected as an outright refusal of counseling and assistance on his part. Employee asserted that his efforts were rebuffed by VA when, in about December 2007, he felt that the depression and alcohol conditions were returning. However, the fact that he allegedly made this effort did not emerge until well after the incidents complained of had occurred, and certainly too late to have any beneficial effect upon preserving his employment status.

Consequently, the record reflects that Agency was totally unaware that Employee had inquired and sought counseling at the VA until after the issuance of the March 26, 2008, letter of Advanced Written Notice of Proposed Removal. By then, the separation process had already begun. The multiple incidents that led towards Employee's removal from his job were well documented. Employee was placed on administrative leave on that date, and his contact with Agency was either reduced or eliminated, pending a final determination.⁸

⁸ This was the second and final administrative leave, as Richelle Marshall had imposed a prior two-week administrative leave, effective on or about March 6, 2008.

I conclude that Employee's employment related acts, i.e., of a sexual nature, neglecting his work assignments as directed, and alcohol influenced conduct in the discharge of his daily assignment, adversely and materially affected the efficiency of government operations or the employee's performance of his duties. I further conclude that Agency acted correctly when it was determined that Employee's grossly inappropriate conduct between February 19, 2008, and March 25, 2008, reflected an on-duty or employment-related reason for corrective or adverse action. Therefore, the decision to implement termination was neither arbitrary nor capricious. Accordingly, I conclude that the Agency has met its burden of establishing cause for taking adverse action.

Whether the penalty of removal was appropriate under the circumstances

The remaining question is whether Agency's penalty of electing termination was appropriate. In *Employee v. Agency*,⁹ this Office held that it would leave a penalty undisturbed when it is satisfied on the basis of the charge(s) sustained, that the penalty is within the range allowed by law, regulation, or guideline, and is not clearly an error of judgment.

Effective February 22, 2008, the Council of the District of Columbia, at 6 DCMR, Chapter 16, General Discipline and Grievances, implemented a comprehensive Table of Appropriate Penalties, which enumerated the discipline to be meted out to D.C. Government employees upon a determination of the commission of certain offenses which resulted in adverse action.¹⁰ Included in the cited offenses which qualified for the imposition of disciplinary action were all of those committed by Employee, as noted below.

- Charge 1: Employee Misconduct (Sexual Harassment) – DPM 1619.1(5)(c)
- Charge 2: Careless and/or Negligent Work Habits – DPM 1619.1(6)(c)
- Charge 3: On Duty or Employment Related Reason for Corrective or Adverse Action (Drunkenness on duty) – DPM 1619.1(7)

For Charge 1, removal from employment is the first offense remedy provided for violation of the EEO laws, to include sexual harassment involving physical threats and touching. Employee's act of placing his tongue on Johnson's ear, followed by his highly threatening and overtly sexual actions taken against McCray, both in word and deed, constituted Employee misconduct of a sexual harassment nature.

For Charge 2, reprimand to removal is the first offense remedy provided for the commission of careless or negligent work habits.

⁹ OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

¹⁰ See 55 D.C. Reg. 1783-1786 (2000).

For Charge 3, reprimand to 15-day suspension is the first offense remedy for drunkenness on duty and the use of abusive and offensive language.

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."¹¹ When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."¹² I am satisfied that Agency has properly exercised its managerial discretion, and that its chosen penalty of removal is reasonable and is not clearly an error of judgment. I am likewise satisfied that Agency made reasonable efforts to assist Employee with his problems, but that the efforts were rebuffed, for whatever reason. That Employee supposedly had another plan, approach, or agenda towards solving his problems, was neither known nor relevant at the time that Agency was forced to make a decision about what to do. Accordingly, I conclude that Agency's action should be upheld.

ORDER

This matter having been fully considered, it is hereby

1. ORDERED that Agency's action of removing the Employee for cause is UPHELD; and it is
2. FURTHER ORDERED, that Agency promptly determine whether Agency owes Employee for any outstanding earned annual leave, and if so, calculate and pay Employee for said outstanding annual leave within 30 days; and it is
3. FURTHER ORDERED, that Agency file a report with this Office within 30 days, to reflect that Agency has complied with the directive of this Order with regard to Employee's claim for earned annual leave compensation.

FOR THE OFFICE:

/ s /
ROHULAMIN QUANDER, ESQ.
Senior Administrative Judge

¹¹ *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

¹² *Employee v. Agency*, OEA Matter No. 1601-0158-81, *supra*.