THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
IRA J. BELL Employee	OEA Matter No. 1601-0020-03
	Date of Issuance: March 15, 2006
D.C. DEPARTMENT OF HUMAN SERVICES Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Mr. Bell ("Employee") worked as a Youth Corrections Officer at the Oak Hill Youth Center ("Oak Hill") with the Department of Corrections ("Agency"). On May 14, 2002, Employee was working his scheduled shift at Oak Hill. During his shift, Employee went out to his car to retrieve a Play Station video game. Employee underwent an initial, customary search by personnel and was allowed to enter the facility with the video game. As he was walking to his duty station, Employee was approached by Mr. George Perkins, the Deputy Administrator for Secure Programs at Oak Hill. Mr. Perkins informed Employee that he had been randomly selected for a more thorough search and needed to

proceed to the Central Administration Building.

Agency officials performed a pat down of Employee's person.[1] During the search, the Play Station video game was discovered. According to Agency, a video game is considered contraband. Possession of contraband violates Agency's policy prohibiting the presence of such items at the Oak Hill facility.[2] Officials also felt a metal object in Employee's groin area during the search. Employee informed them that it was a part of his back brace. Officials still requested that he remove the object.[3] Employee refused and requested a union representative. However, before the union representative arrived, Employee left the facility.

On December 3, 2002, Agency issued a letter to Employee removing him from his position. The removal was based on an adverse action charge of insubordination. On January 7, 2003, Employee filed a Petition for Appeal. The petition alleged that the random search conducted by Agency was not authorized by the collective bargaining agreement. Additionally, Employee argued that Agency lacked probable cause to perform the search.

The Administrative Law Judge ("ALJ") issued an Initial Decision on May 7, 2004. The ALJ reasoned that the Play Station video game that Employee brought into

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[1] *Hearing Transcript*, p. 19-20 (November 12, 2003). Mr. Perkins ordered that correctional officers conduct a random search where every fourth or fifth person is given a pat down search.

[2] *Id.*, Agency Exhibit #5 (November 12, 2003). In a memo, Agency lists items that are considered contraband. Video games do not appear on the list, but Agency asserts that it is covered under the "catch all" definition listed on the second page of the memo. The "catch all" section defines contraband as "any item, article or thing [ ] not issued or purchased from the facility/institutional canteen, or not specifically authorized for use by residents or staff by the Superintendent or Program Manager."

[3] *Hearing Transcript*, p. 54-57 (December 11, 2003). According to Employee's testimony, removal of the brace would have required him to remove his uniform pants and his underpants.

Oak Hill was a de minimus violation of Agency's contraband policy and rendered Employee only mildly insubordinate. The ALJ further reasoned that the incident standing alone was not a sufficient basis for Employee's removal.[4] The ALJ held that Agency must have had probable cause that there was contraband in Employee's pants for it to perform a strip search of his person. The Initial Decision provided that although Agency alleged that the search was a random, pat-down search, it escalated to a strip search that would have required Employee to be naked from the waste down. The ALJ found that Employee was well within his right to refuse subjection to a strip search and was, therefore, not insubordinate for leaving before the search was completed or before a union representative arrived.[5] Moreover, the ALJ found that Employee was singled out and the victim of disparate treatment.[6]

On June 16, 2004, Agency filed a Petition for Review arguing against the ALJ's decision to reverse Employee's termination. Agency provided that the ALJ did not apply the proper standard in this case. It argued that the standard for review for this type of case is reasonableness and not probable cause. Agency claimed that the Play Station video game was contraband and Employee's possession of contraband is considered misconduct. As a result of this misconduct, a reasonable basis to conduct a more thorough search of Employee was warranted.[7]

This Board agrees with Agency's argument that reasonableness is the applicable

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[4] *Initial Decision*, p. 22 (May 7, 2004).
[5] *Id.*, p. 24-25.
[6] *Id.* at 27.
[7] *Agency's Petition for Review*, p. 6 (June 16, 2004).

standard. The Court in *O'Connor v. Ortega*, 480 U.S. 709 (1987), held that the Fourth Amendment protects the right of the people to be secure in their person against unreasonable searches and seizures. As a result, individuals do not lose their Fourth Amendment rights merely because they work for the government. [8] The Court found that "the constitutionally protected privacy interests of government employees for nonivestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all circumstances." Under this standard, the search must be justified at its inception and reasonably related to the circumstances which justified the intrusion.[9] According to the Court, reasonableness is determined by a balance of the invasion of the employee's legitimate expectation of privacy against the government's need for supervision, control, and the efficiency of the workplace.[10]

Similarly, the Court in *Profitt v. District of Columbia*, 790 F.Supp. 304 (1991) held that reasonableness is the standard for searches of government employees.[11] However, this Court went further in its analysis and reasoned that strip searches of correction officers within correctional facilities are not per se violations of an employee's Fourth Amendment rights. It found that correction officers fall within the exception for the warrant requirement because there is a legitimate governmental purpose of maintaining

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[8] *O'Connor v. Ortega*, 480 U.S. 715-717.
[9] *Id.*, 725-726. The Court in *Wiley v. Department of Justice*, 328 F.3d 1346 (2003) applies the reasonableness test outlined in Ortega. *Wiley* also distinguishes between searches based on work-related misconduct from a search seeking evidence of criminal misconduct.
[10] *Id.*, 719-720.
[11] In *Profitt*, the Court lists factors that must be considered to determine if a search is reasonable. Those factors include "the scope of the intrusion; the manner in which the search is conducted; the justification for initiating the search; and the place in which the search is conducted."

correctional facilities. This legitimate governmental purpose outweighs a correction officer's diminished expectation of privacy.[12]

The aforementioned clearly shows that the Administrative Law Judge improperly applied the probable cause standard to this case. Instead the ALJ should have applied the reasonableness standard to the findings of facts already established during the evidentiary hearing. Accordingly, we hereby grant Agency's Petition for Review and remand this matter to the Administrative Law Judge to apply the facts of this case using the proper standard.

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[12] *Id.* at 306 quoting *Security and Law Enforcement Employees v. Carey*, 737 F.2d 187 (2d Cir. 1984). The Court in *Security and Law Enforcement Employees* also provided that visual body cavity searches are unreasonable and violate employee's constitutional rights if the employee is not suspected of bringing contraband into the correctional facility.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **GRANTED** and the matter is **REMANDED** for further review.

FOR THE BOARD:

Brian Lederer, Chair

Horace Kreitman

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.