THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
GEORGE KOLLIE,	)	
Employee	)	OEA Matter No. 1601-0140-08
	)	
v.	)	Date of Issuance: November 16, 2009
	)	
DISTRICT DEPARTMENT OF TRANSPORTATION,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge

Clifford Lowery, Union Representative
Melissa Williams, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On December 17, 2007, George Kollie ("Employee") was involved in an altercation which would form the basis behind which the District Department of Transportation ("DDOT" or "Agency") would effectuate his removal from service. On July 21, 2008, Employee received from DDOT a Notice of Final Decision which informed him that he was being removed from service based on his participation in the alleged altercation. According to this notice, the effective date of Employee's removal was July 25, 2008. On August 7, 2008, Employee timely filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting DDOT's removal action. I was assigned this matter on or around December 3, 2008. Thereafter, a Prehearing Conference and a Status Conference were held in this matter. As a result, I determined that there existed a factual dispute that could only be resolved with an Evidentiary Hearing, which was originally scheduled for March 17, 2009. Due to certain unforeseen logistical problems, that date was postponed until July 22, 2009. At the conclusion of the Evidentiary Hearing, the parties submitted their respective written closing arguments. Afterwards, the record was closed effective on October 30, 2009.

JURISDICTION

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

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

1. Whether Agency's adverse action was taken for cause.

2. If so, whether the penalty was appropriate under the circumstances.

SUMMARY OF RELEVANT TESTIMONY

Agency's Case in Chief

Tracey Ellington

Tracey Ellington ("Ellington") testified, in relevant part, that she is currently employed by DDOT as a Traffic Control Officer. Ellington recalled that she had a fine working relationship with Employee, although, their relationship was not always ideal. She recalled one incident between Employee and herself where "words" were exchanged. *See generally,* Transcript[1] at 12 – 14. This exchange was seemingly minor. Ellington never reported it to an Agency supervisor and otherwise no other incidents transpired between Employee and herself.

Ellington was one of the eyewitnesses to the incident in question on December 17, 2007. During direct examination, Ellington disclosed that she did not see the beginning of the fight between Employee and Raymond Minor ("Minor"), particularly who hit whom first, but that she did witness some of the incident. *See generally*, Tr. at 14. On the morning of the incident, Ellington recalled that she was driving the van that was tasked with transporting Employee, Minor, and others from their various work sites

[1] Hereinafter, all references to the transcript shall be denoted as "Tr.".

across the city to the Agency's headquarters. At that time, Minor may have directed a derogatory comment of "something stinks" at Employee as he was leaving the van to go to his work site. However, no names were exchanged, so Ellington was unsure to whom the comment was directed towards. *See*, Tr. at 16 and 23. At that time, she recalled that Employee left the van without incident. That afternoon, while eating lunch, Ellington was directed, by Paul Carraway, to pick up Employee in the van and bring him back to Agency's headquarters. She then contacted Employee and asked that he meet her at the intersection of 14th and I Streets, N.W., Washington, D.C. Waiting at the van with her was Quintina Butler Graham and Joseph Marrow ("Marrow"). Ellington then contacted Minor and informed him that he needed to cover the post at 14th and I. Minor then came to the van in order to pick up some belongings he had left their previously, before Ellington was to leave with the van.

Ellington did not see who hit whom first. She only recalls hearing someone say "don't be putting your hands on me." Tr. at 17. She then discovered Employee and Minor on the ground fighting with each other in the area right beside the parked van. After the two were separated by Marrow, Ellington noted that Employee then called the police to report the incident. *See*, Tr. at 17 – 19. Ellington believed that Employee would have tried to continue the fight if he had not been restrained by Marrow. However, she then related that, while Employee was waiting for the police to respond to the scene, he no longer needed to be restrained. *See generally*, Tr. at 20 -21. Ellington then left before the police responded to the scene. Ellington also noted that Employee and Minor never touched each other after being separated by Marrow. *See*, Tr. at 26 – 27.

Paul Carraway

Paul Carraway ("Carraway") testified, in relevant part, that he is currently employed by DDOT as an SIOD Inspector, Construction Representative. At the time of the alleged incident in question, his then position title was Traffic Control Officer Supervisor. At the time of the incident, he was Employee's supervisor. Carraway also noted that James Strange is his supervisor.

Carraway described his working relationship with Employee as generally fine but challenging on occasion. *See*, Tr. at 34 – 25. Relative to the incident in question, Carraway had initially granted Employee's request to take sick leave and had instructed him to take the van back to Agency's headquarters. Later on, Carraway received a telephone call that an altercation had occurred between Employee and Minor near the van that Employee was taking back to Agency's headquarters. Carraway then went to the scene of the incident. Carraway described the incident as "wrestling" between Employee and Minor. Carraway did not witness the event firsthand, but rather gleaned his understanding of events through his interactions and subsequent interviews of the participants, the responding police officers, and the Agency employees who happened to witness the event. When questioned by Carraway, both Employee and Minor claimed the other person initiated the altercation. *See*, Tr. at 39 – 44. The following excerpt from Carraway's testimony is relevant to this matter:

> Q: And did you observe [Employee] ever trying to initiate another fight at the point that you arrived?
>
> A: No, they didn't get that close, they didn't get that close…
>
> Tr. at 43.

Prior to the incident in question, Employee had complained to Carraway that Minor and another Agency employee, Tim Robinson ("Robinson"), had verbally insulted him. *See*, Tr. at 46 - 50. At that point, Carraway and James Strange decided that it would be best to separate Employee from Minor and Robinson by having them ride separate vans to and from their respective work sites and by having them work at separate work locations. It was hoped that they would not encounter each other. Prior to the altercation, Carraway never thought that Employee was in any potential physical danger. *See*, Tr. at 49 – 56.

Quintina Butler Graham

Quintina Butler Graham ("Graham") testified, in relevant part, that she is currently employed by DDOT as a Traffic Officer. *See*, Tr. at 74. Graham admitted that Employee was a colleague of hers but that their on-the-job contacts were limited to riding in the van together, on occasion, to and from Agency headquarters. Graham was an eyewitness to the incident in question that occurred on December 17, 2007. She did not witness who hit whom first. She heard someone exclaim, "Why did you bump me?" Tr. at 78. Graham could not recall who made that statement. She only noticed that Minor and Employee were on the ground wrestling and that Marrow was the one who intervened to break-up the altercation. Immediately after Employee and Minor were separated, both men were, in her opinion, very agitated. *See generally*, Tr. at 79 – 82. Graham recalled that Employee was extremely incensed after being separated but she went on to explain that "I don't know who hit who first. I'm saying if it was me and someone was to hit me or bump me and I started to fight and someone jumped in it and grabbed me away from the other party, I would be aggressive towards them and everyone else around me, as well" Tr. at 81. Regardless with what was said between Employee and Minor, Graham recalled that the fight ceased and no one else was harmed after Employee and Minor were separated by Marrow. *See*, Tr. at 85 – 86.

James Strange

James Strange ("Strange") testified, in relevant part, that he is currently employed by DDOT as a Program Manager for the Traffic Control Division. His on-the-job duties "…include staffing human resources, budget, day-to-day operations, future planning…" *See*, Tr. at 93. Employee was one of the traffic control officers that Strange managed. Also, Carraway is Strange's subordinate who was charged with supervising Employee, among others.

Prior to the incident in question, Strange had received reports, from Employee, that some Agency employees had threatened him and had made derogatory comments regarding his ethnicity and alleged body odor. *See*, Tr. at 109 and 127- 131. It was theorized by Carraway and Strange that some of these comments were a result of Employee allegedly "snitching" on some of his fellow colleagues who were allegedly not working while on-the-job. Strange testified that he took action to resolve the complaints and that both he and Carraway agreed that it would be best to geographically separate Employee and Minor in an effort to avoid any future problems. *See*, Tr. at 130 – 132. However, according to Strange, both men were still assigned to the same shift and roll call. *See*, Tr. at 132.

Regarding the incident in question, Carraway notified Strange that an altercation had occurred between Employee and Minor. *See*, Tr. at 103. After said incident, both Employee and Minor were brought back to the Agency and questioned about the incident. Strange told both Employee and Minor that fighting will not be tolerated within the District government. He then had both men write down their respective statements of what occurred. Strange was not an eyewitness to any of the salient events that are in question.

Strange was questioned regarding Agency Exhibit No. 8, an e-mail seemingly sent by Employee to Strange's work e-mail address. In this email, dated December 13, 2007, four days before the fight occurred, Employee makes several serious accusations for Strange's review. Most prevalent among those accusations are the following:

1. Employee was allegedly verbally attacked by Robinson.

2. Carraway refused to listen to Employee's concerns during morning roll call regarding Robinson's alleged conduct.

3. On December 10, 2007, Employee was forced to stridently alert Carraway to the fact that his father had just passed away. This was due to Carraway's alleged lack of respect for Employee.

4. Employee was fearful of physical reprisals from some of his colleagues because he had been accused of "snitching" to management regarding their not working when they should be.

5. Employee asked to schedule a meeting between himself, Strange, and Carraway[2] to discuss his concerns.

Regardless of all appearances being to the contrary, Strange denied having received this e-mail prior to the onset of the incident in question.

[2] The e-mail specifically asks for a meeting between the "three of us". By implication, I assume that Employee was referring to Strange and Carraway.

Employee's Case in Chief

George Kollie ("Employee")

Employee testified, in relevant part, that prior to his removal, he worked for DDOT as a Traffic Control Officer. *See*, Tr. at 154. On December 17, 2007, Employee related that he had reported for work in a "bereaved" state of mind because of his father's recent passing. In spite of his mournful outlook, he reported to work so that he would have enough bereavement leave for the date of the then upcoming funeral. *See generally*, Tr. at 155 – 156. Employee alleges that on December 17, 2007, immediately after the morning roll call at the Agency, Minor made disparaging comments relative to Employee's ethnicity and alleged body odor. Employee then relates that he was transported to his work site via DDOT's van and that while working that morning he was not feeling well as his thoughts turned to his recently departed father. He then contacted Carraway and told him "I'm grieving too much, I need to go home for the day." Tr. at 157. Carraway instructed Employee to contact Ellington, the van driver, and have her transport him back to DDOT. Ellington told Employee to meet her at 14th and I Street, N.W., in front of the TD Waterhouse bank. Employee alleges that as he approached the waiting van, the following occurred:

> [Minor] came behind and attacked me, pulled me down to the floor and my right foot went down on the street and my left feet were on the sidewalk, trying struggling to get up (*sic*)…
>
> So Mr. Marrow came past the other side and took Minor from on top of me. Then I got up. Because when he hit me on the floor, myself and everything went dropping. So when I woke up, Mr. Marrow came towards me and said "Kollie, calm down,"…
>
> I said, "No," … This is not right." … "I've been complaining, I've complained a lot and I've not done anything to him. I came to work, I don't bother at all (*sic*). I come, I don't disturb anybody and he came and attacked me. For what reason?"
>
> Tr. at 158 – 159.

Employee admitted that he was visibly upset after regaining his footing when Marrow's intervened to help break-up the altercation. *See*, Tr. at 165 – 166. Employee also admitted that Marrow had to restrain him for approximately 40 seconds before he regained his composure. *Id.* Employee asserts that after Marrow stopped restraining him that he did not go after Minor. *Id*. Further, Employee explained that any body motion that was directed towards Minor was a reflexive action. *See*, Tr. at 167. After he regained his composure, Employee then proceeded to gather his dropped belongings and called the police in order to report the incident. *See*, Tr. at 159 – 160. After reporting the incident to the police, Carraway arrived and inquired as to what happened. Next, Carraway personally transported Employee back to DDOT. After arriving at DDOT,

Employee was questioned by Strange about the incident. *Id*.

Employee asserted that prior to the incident in question, he had alerted DDOT management to ongoing problems that he was having with some of his fellow employees, including Robinson and Minor. He further asserted that he sent Agency Exhibit No. 8 to Strange on the date indicated in the e-mail. *See*, Tr. at 171. Employee called Strange several times over the next few days to inquire whether he had received the e-mail. When he was able to confront him a few days later, Employee relates, generally, that Strange was dismissive regarding his receipt of the e-mail. *See generally*, Tr. at 172.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of the Employee's appeal process with this Office. The sole circumstance that led to Employee removal stemmed from an altercation, between Minor and himself, that occurred on December 17, 2007.

Agency generally contends that fighting between employees working for DDOT simply cannot be condoned. Generally speaking, I agree with this supposition. As a result, both Minor and Employee were removed from service for their alleged participation in the aforementioned fight. Agency further proffers that even if I find that Employee did not instigate the initial contact, his actions after being separated by Marrow would make him an aggressor and would thereby establish that Agency had proper cause to institute the instant adverse action. During the evidentiary hearing, I had the opportunity to hear and consider the testimony as presented by both parties. Aside from Employee, there were only two eyewitnesses to the fight – Ellington and Graham, who testified before the undersigned. They both readily admitted that on the afternoon of December 17, 2007, there was a physical struggle between Minor and Employee. Said struggle occurred at a busy downtown intersection right beside a DDOT van tasked with transporting Agency employees to and from their respective job sites and Agency headquarters. They both also explained that they only witnessed the fight after it had begun and that they did not see who started the altercation. Ellington and Graham also testified that fellow employee Marrow assisted in breaking up the fight. They also noted that both combatants were visibly upset after being separated and that Employee was physically agitated to the point that Employee *may* have continued the fight if not for Marrow's intervention. Lastly, neither Ellington nor Graham was injured as a result of the fight.

Employee's rendition of the event somewhat deviates from Ellington and Graham's limited viewpoint. As for the cause of the altercation, Employee posits that it was a result of his alleged snitching, several weeks prior, to management about the poor work habits of some of his fellow colleagues. He further explained that he had, prior to the fight, received various threats of physical violence and other verbal gibes regarding his ethnicity and hygiene and that he had alerted Strange to his predicament, via e-mail[3],

[3] Agency Exhibit No. 8.

several days before the incident occurred. Further, Employee alleges that he received no actionable response from Strange regarding his concerns. On another note, Employee was, at the time, grieving the passing of his father which added a further layer of complexity to Employee's then emotional state. Employee counters that, at all times relevant to this matter, he was not an aggressor. He further contends that any alleged act of aggression was either a reflex action or self-defense. Further, he asserts that when taking into consideration all of the relevant facts and circumstance, his actions on December 17, 2007, do not legally justify his removal from service.

Agency alleges that it swiftly and aptly responded to Employee's concerns by separating Employee from Minor and Robinson. Agency accomplished this by sending them to different work sites that were not within view of one another. On the date in question, there was an unexplained breakdown in this separation plan. One of the regrettable conclusions was the altercation that is at the heart of the instant matter.

Agency also asserts that even if Employee was not the initial aggressor, he became the aggressor after he was separated by Marrow. Further, Employee's acts of aggression could have resulted in injury to himself or others. This is a scenario which the Agency cannot tolerate in its employees.

After considering the circumstances as presented by the parties and utilizing the opportunity of the evidentiary hearing to hear and assess the parties' testimony and other evidence, I credit Employee's testimony as generally being forthright, honest, and very credible. Employee credibly testified that he did not start the fight but rather was an unwitting participant due to Minor's unwarranted physical aggression. Agency presented no credible evidence that Employee was the initial aggressor. I also take into account that immediately after the altercation concluded, Employee regained his composure and then called the police in order to report the fight. I credit this as a reasonable reaction of a victim of an assault, not an aggressor. Accordingly, I find that Employee was not the initial aggressor of the fight in question.

Agency, in effectuating Employee's removal, determined that Employee became an aggressor after Marrow intervened to stop the fight. Agency buttresses this argument with the collective testimony of Ellington and Graham, who both testified that Employee was still physically volatile and agitated after he was initially separated from Minor. I also take note that no one was injured by Employee's retaliatory actions although it bears noting that injury was a possibility.

I find that Employee's testimony was forthright and credible. He explained that his retaliatory actions were a form of self-defense or a reflex action. Further, Employee credibly explained that he did not start the fight but rather was an unwitting participant due to Minor's unwarranted physical aggression.

The courts recognize the right of self-defense. However, the amount of force that can be used depends upon many factors, such as, the nature of the assault, conduct of the assailant, whether the slayer provoked or continued the difficulty, and the reasonableness

of retreat. This latter element is summarized in *Laney v. U.S*., 294 F. 412 (D.C. Cir., 1923); "It is a well-settled rule that, before a person can avail himself of the plea of self-defense against the charge of homicide he must do everything in his power, consistent with his safety, to avoid the danger and avoid the necessity of taking life. If one has reason to believe that he will be attacked, in a manner which threatens him with bodily injury, he must avoid the attack if it is possible to do so, and the right of self-defense does not arise until he has done everything in his power to prevent its necessity. In other words, no necessity for killing an assailant can exist, so long as there is a safe way open to escape the conflict…"

The substance of a claim of self-defense is the same in both criminal and civil litigation; only the burden of proof differs.[4] The District of Columbia Court of Appeals has defined "self-defense" as "the use of reasonable force to repel a danger which a person reasonably believes may cause him imminent bodily harm."[5] In the District of Columbia, the right of self-defense is not conditioned upon a duty by the individual to retreat or otherwise avoid the confrontation.[6] However, an individual's failure to avoid the confrontation can be considered, along with all the other circumstances, in determining whether the case is truly one of self-defense.[7] Moreover, the right of self-defense arises only when the necessity begins and equally ends with the necessity.[8]

After being attacked, the undersigned can understand that a normal person would not immediately calm down until they had taken a moment in which to regain his/her composure. From Employee's testimony, I gather that the fight was a harrowing ordeal and that Employee may not have composed himself at all times with the decorum expected of a calm Agency employee. However, given the instant circumstances, I find that Employee was placed in a situation not of his own choosing. I also find that he did not do anything untoward to instigate the fight at any stage. Given the circumstances, Employee's response was a normal reaction to being attacked and I credit Employee's rectitude, by not acting egregiously, in an attempt to escalate the matter. I find that Employee's acted in self-defense when he was attacked by Minor. I further find that whatever error Employee's committed as part of his response to being attacked by Minor to be *de minimis* in nature.

Under the provisions of § 1603.5 of the D.C. Personnel Regulations, 47 D.C. Reg. 7097 (2000), no employee may be subject to corrective or adverse action for a *de minimis* violation of the cause standard. Although *de minimis* is not defined in the Regulations,

---

[4] *Moor v. Licciardello*, 463 A.2d 268, 272 (Del. 1983).

[5] *Gezmu v. United States*, 375 A.2d 520, 523 (D.C. 1977), *Josey v. United States*, 135 F.2d 809, 810, 77 U.S. App. D.C. 321 (1943).

[6] *Gillis v. United States*, 400 A.2d 311, 312 (D.C. 1979).

[7] *Gillis, id, 313; Cooper v. United States*, 512 A.2d 1002 (D.C. 1986).

[8] *United States v. Peterson*, 483 F.2d 1222 (D.C. Cir. 1973), *cert. den.* 414 U.S. 1007 (1973).

Black's Law Dictionary, Fifth Edition, defines it as "very small or trifling matters." It is no small or trifling matter for any employee to lay hands upon another in anger or agitation. However, I recognize that a person has a right to defend himself from an assault. Further to allow a penalty of removal to stand, given the instant circumstances, would endorse an exercise of managerial discretion without a fair consideration of the total circumstances. I conclude that given the aforementioned findings, the Agency's action of removing the Employee from service should be reversed.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of removing the Employee from service is **REVERSED**; and

2. The Agency shall reinstate the Employee to his last position of record; and

3. The Agency shall reimburse the Employee all back-pay and benefits lost as a result of his removal; and

4. The Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

___/s/_____
ERIC T. ROBINSON, Esq.
Administrative Judge