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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0009-20
)	
Employee)	
)	Date of Issuance: November 16, 2021
v.)	
)	ARIEN P. CANNON, ESQ.
D.C. DEPARTMENT OF PUBLIC WORKS)	Administrative Judge
Agency)	
_____)	

Theresa Cusick, Esq., Employee Representative
Milena Mikailova, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) on November 19, 2019, challenging the District of Columbia’s Department of Public Works (“Agency” or “DPW”) decision to remove her from her position as a Parking Enforcement Officer, effective at the close of business on October 25, 2019. Agency filed its Answer on December 20, 2019. The undersigned was assigned this matter on July 17, 2020.

Following an October 29, 2020 prehearing conference, an evidentiary hearing was initially scheduled for January 12-13, 2021. On November 20, 2020, Agency filed a brief asserting that OEA lacked jurisdiction to consider Employee’s retaliation claim. Employee subsequently submitted a brief addressing her retaliation claim and after consideration of the briefs, a January 22, 2021 Order was issued finding that OEA had jurisdiction to consider Employee’s retaliation argument. An evidentiary hearing was ultimately held on June 3rd and 4th, 2021. Both parties subsequently submitted their written closing arguments. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action for the following: (1) Conduct Prejudicial to the District Government: On-duty conduct that an employee should reasonably know is a violation of law or regulation, DPR 1607.2(a)(4); (2) False Statements/Records: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations, DPR 1607.2(b)(2); (3) Knowingly and willingly making an incorrect entry on an official record or approving an incorrect official record, DPR 1607.2(b)(3); (4) Knowingly and willfully reporting false or misleading material information or purposely omitting material facts, to any superior, DPR 1607.2(b)(4); and (5) Conduct Prejudicial to the District Government: Assaulting, fighting, threatening, attempting to inflict or inflicting bodily harm while on District property or while on duty, DPR 1607.2(a)(15)
2. If so, whether the Agency's decision to remove Employee from service was the appropriate penalty under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.¹ "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.

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.²

SUMMARY OF TESTIMONY

The following represents a summary of the relevant testimony given during the evidentiary hearing held on June 3rd and 4th, 2021, as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding.³ During the evidentiary hearing, I was able to observe the witnesses' poise and demeanor. As a result, I was able to determine the credibility of the witnesses.

Agency's Case-in-Chief

Gail Heath ("Heath") Tr. Vol. I, pp. 13-81

¹ 59 DCR 2129 (March 16, 2012).

² OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

³ This evidentiary hearing was convened virtually via WebEx. Tr. Vol. 1 denotes the first day of the hearing, June 3, 2021, while Tr. Vol. 2. denotes the second day of the hearing, June 4, 2021. The summary of relevant testimony reflects the witnesses' testimony as of June 3rd and 4th, 2021—the dates of the evidentiary hearing.

Heath currently works for the Office of Labor Relations and Collecting Bargaining as an Attorney Advisor and at the time of the evidentiary hearing had held this position for thirteen (13) months. In May of 2019, Heath was the Employee and Labor Relations Advisor for DPW, where she began in December of 2015 and departed at the end of April 2020. In this capacity, Heath served as the ADA coordinator, EEO Officer, and was responsible for advising all levels of management, from front line supervisors through the Director, on disciplinary matters.

Heath was involved in the proposal to terminate Employee in the instant matter. As part of her duties, Heath began an internal investigation of Employee, who was a Parking Enforcement Officer (“PEO”), regarding an incident that occurred on May 17, 2019 (“May 17th incident”). At the onset of her investigation, Heath was informed that the D.C. Office of Risk Management (“ORM”) was also investigating Employee, prompting Heath to suspend her investigation until ORM concluded theirs.

Heath’s investigation revealed that Employee claimed that she was responding to a customer service request and she was confronted by an irate citizen who assaulted her while attempted to issue a parking ticket. The allegations surrounding this incident were captured on a nearby surveillance camera from a community center where the incident is alleged to have occurred. Heath testified about the content of this footage which does not include audio. The footage was provided by the community center and was entered as Agency’s Exhibit 1.⁴

The white van parked in front of the cones in the video was identified as the vehicle assigned to Employee on May 17, 2019. A gentleman dressed in all black with headgear who began walking in the street in the direction towards Employee’s white van was later identified as Shaun Brown (“Brown”) who was believed to have lived in the same neighborhood as Employee. At the 3:41 mark into the footage, it appears that Mr. Brown is outside the driver’s side door speaking to Employee because it appears that Employee’s car window is rolled down. Heath also described what appears to be Employee’s left arm out of the window making part of her uniform shirt visible.

The black vehicle with dark tinted windows parked on the opposite side of the street from the community center was later identified as the vehicle belonging to Mr. Brown. At the 4:03 mark in the surveillance footage, Employee drives away after having a verbal interaction with Mr. Brown. Heath describes several individuals who were captured in the surveillance video engaging in different interactions throughout the footage.

Heath describes the interaction with Brown and Employee where the two appear to be interacting at the back of Brown’s vehicle. Employee then walks away, and Brown goes towards the front of his vehicle while Employee goes towards the backside of Brown’s car. Brown then goes towards the back of his vehicle where he and Employee are in close proximity to each other. Heath described seeing a hand go forward from Employee towards Brown, shoving him. Heath continued to describe the surveillance footage as the interaction between Employee and Mr. Brown plays out.

⁴ This surveillance video is 14 minutes and 41 seconds.

Heath found the footage very disturbing and described what appears to be a verbal altercation between Employee and Mr. Brown and then an assault against Brown by Employee. Heath further testified that PEOs receive training on the proper protocols for when they feel threatened and that they also have a Standard Operating Procedure. Part of the training includes “verbal judo training” which helps them de-escalate confrontations and other various situations that arise while performing their duties.⁵ If a PEO is in fear for their safety, they should go back to their vehicle if they have one, or into a building if they have access to a building. Here, Employee should have gone into her vehicle or into the community center if she was in fear for her safety. Based on Heath’s observations, Employee did not follow the proper protocols.

Heath testified that as part of her investigation, she reviewed a police report and a DPW internal incident report and found that Employee’s narrative in the police report and DPW incident report was not consistent with what she observed in the surveillance video.⁶

Agency Exhibit 6 was marked and identified as a copy of the police report filed by Employee regarding the incident. The report was completed on May 17, 2019 at 9:59 a.m. by MPD Officer Ryan Ward. The offense reported was Assault on a police officer, simple assault under D.C Code provisions, with the location being 4001 13th Street, SE, Washington, D.C. Employee indicated on the police report that the suspect was unknown. In the police report, Employee stated that the suspect (later identified as Brown) pushed her twice to get her away from his car and then she walked away and call 911. However, Heath observed that the surveillance footage does not show Brown pushing Employee. The narrative section of the police report does not indicate that Employee was struck in the neck.

Heath also testified about Employee’s statement provided in the Initial Incident Form used by Agency’s Parking Enforcement Administration that was completed by Employee.⁷ Heath testified that Employee’s police report and Initial Incident Form submitted to Agency was different in several ways. In particular, the statement that the citizen (Mr. Brown) approached Employee and hit her in the neck with his elbow was not in the police report. The statement that the citizen followed Employee and pushed her again was also not in the police report. Heath observed from the surveillance video that Mr. Brown did not follow Employee after she exited the view of the video camera for the last time. Employee also did not indicate in the initial incident report that she made any physical contact with Mr. Brown.

ORM shared with Heath that they did not find Employee’s worker’s compensation claim credible because it was not supported by the video evidence. Heath stated that after learning of ORM findings and recommendations, she spoke with the Parking Enforcement Management Administrator, Johnny Gaither, about the report, recommendations, her concerns, and evidence, and recommended that Employee be terminated. Gaither, who was the proposing official, accepted Heath’s recommendation. Heath then drafted the proposal for Gaither’s review and approval, which contained five separate causes for Employee’s termination.⁸ Heath’s termination

⁵ Tr. Vol. 1 at 31.

⁶ The incident was capture on surveillance footage which was admitted as Agency’s Exhibit 1-A. Agency’s Exhibit 1-B is a continuation of the surveillance footage; however, it was only admitted for the doctrine of completeness.).

⁷ See Agency Exhibit 8.

⁸ See Agency’s Exhibit 13.

recommendation was based solely on the May 17th incident.

After the proposed termination went through the administrative review process with a hearing officer, who submitted a report to Agency's then-Director Geldart, Heath also drafted the final decision of termination for Geldart's approval. Prior to drafting the final decision, Heath had a long discussion about the recommendation and evidence with Geldart prior to him executing the final decision. The Final Notice also included a Douglas factor analysis.⁹

On cross-examination, Heath testified that she made her recommendation based on ORM's investigation in addition to the video and other documents in her possession. The testimony that Mr. Brown was Employee's neighbor was information that originated with ORM's investigational report based on an interview with Mr. Brown himself.

At some point, Heath became aware that Employee filed a sexual harassment complaint against her supervisor, Alex Weaver; however, Heath was not responsible for conducting that investigation. From Heath's understanding, the police report was written by the police officer based on his understanding of what was described to him.

*Ayyisha Turner-Ullah ("Turner")*¹⁰ Vol. 1, pp 82—101

Turner is employed at the Wheeler Creek Community Center in Washington, D.C., where she has been an employee since 2004. She serves as the Officer Manager/Intake Coordinator and her duties include overseeing the custodians and greeting customers that come into the center.

Prior to the May 17th incident, Turner had one interaction with Employee, who lives next door to her parents across from Wheeler Creek Community Center. On May 17, 2019, as Turner was waiting for someone to come out of a parking space in front of the community center so that she could park, she recalls seeing Employee speaking with Gregory Miles, a custodian at the community center. As Employee was speaking with Miles, Turner walked into the conversation as Employee was saying that they could not put the cones in the street to block off parking spaces. Employee told them that she received a call complaining about the placement of the cones and advised them that the space with the cones was a 15-minute parking space and she was going to come back and check to see if cars are there every 15 minutes. Turner stated that Employee came back later and she ended up moving her car because she did not want to get a ticket. After Turner went into the building, Employee, Mr. Miles, and another young lady from the day care were still outside, when Mr. Brown pulled up.

While inside, Turner testified that she witnessed Employee have a physical altercation with Brown. She recalled seeing Employee either hit or shove Brown but did not see Brown make any physical contact with Employee during the altercation. Mr. Miles also observed the altercation according to Turner. Turner testified that the community center had surveillance cameras and the incident was captured on camera. She believed that Michelle Williams, the center's Chief Operating Officer at the time, provided this footage to Agency.

⁹ See Agency Exhibit 15.

¹⁰ Turner provided her hyphenated last name during her testimony—Turner-Ullah. However, because she is referred to as Ms. Turner throughout the record, she will be referenced as "Turner" in this decision for consistency.

On cross-examination, Turner testified that when the ORM investigators interviewed her as part of their investigation, she told them that Mr. Brown was a friend of her family and frequently visited her family's home, but he did not live there.

Turner recalls watching the surveillance footage a few days after the incident and testified that Mr. Brown asked at some point whether the cameras on the building were working because he wanted to report Employee and requested to obtain a copy. Turner told him that she could not provide him the footage but that he could speak with Ms. Williams about obtaining a copy.

Jessika Boone (“Boone”) Tr. Vol. 1, pp. 103—179

Boone serves as an investigator with the D.C. Office of Risk Management (ORM) and has held this position since November of 2018. In this role, she investigates workers' compensation and tort claims against the District of Columbia. Boone investigated the worker's compensation claim filed by Employee relating to the May 17th incident.

Boone became involved in this investigation after a claims examiner found the incident “questionable.”¹¹ At the conclusion of ORM's investigation, Boone drafted a memorandum outlining her findings, which were submitted as Agency's Exhibit 11. This memorandum was forwarded to the claims examiner and the examiner's supervisor. At the onset of the investigation, Boone went to the scene where the incident occurred and visited the community center where she learned that they had surveillance footage of the incident. Boone was able to interview witnesses to the incident, including Mr. Turner, Mr. Gregory Miles, Mr. Brown, and Employee.

Employee initially told Boone that she was unable to identify her assailant but that she had seen him in the neighborhood and had ticketed his car. Boone also interviewed Turner, who was identified in the surveillance video as wearing a pink turban or shirt and was parking her vehicle. The interview was recorded with Turner's permission and admitted as Agency's Exhibit 3. Boone also interviewed Mr. Miles who appeared in the surveillance footage wearing a white hooded shirt and blue jeans. This interview was also recorded and admitted as Agency's Exhibit 4.

Boone also conducted a recorded interview with Mr. Brown, along with a fellow investigator, Audrey Townsend.¹² Turner was also present as the interview was held in the community center's conference room. Boone asserted that Brown stated that he knew Employee prior to the incident and had numerous run-ins with her. Additionally, Brown stated to Boone that his family lives in the house adjacent to Employee's and they share a driveway which has led to numerous altercations over parking. Regarding the May 2019 incident, Brown stated that Employee was walking around his car to get his license plate or VIN number and he walked around to block her from getting those numbers. Brown stated that Employee got angry and shoved him.¹³ Boone stated that she found the witnesses she interviewed—Mr. Brown, Mr. Miles, and Ms. Turner—credible based off what she saw in the surveillance video and their statements being consistent with the footage.

¹¹ Tr. Vol.1 pp. 106-107

¹² This interview was admitted as Agency's Exhibit 5.

¹³ Tr. Vol. 1 p.129.

Boone testified about ORM Form 1, Employee's Notice of Injury and Claim for Continuation of Pay, which is a form that an employee completes when a workers' compensation claim is initiated stating what occurred, the date and time of the incident, and what body part was injured.¹⁴ Boone asserted here, that the indicated cause of the injury was "assaulted by citizen" and the nature of the injury stated that Employee was struck in the neck by a citizen, and experiencing muscle spasms and severe headaches.¹⁵

Boone further testified that she reviewed MPD's police report which indicated that Employee was pushed by a citizen.¹⁶ There was no mention of Employee being hit in the neck in this report and it does not indicate that Employee pushed Brown at any point. Boone also reviewed the incident report filed by Employee with DPW, which was admitted as Agency Exhibit 8. This report also does not reference Employee shoving or pushing Mr. Brown.

Additionally, Boone reviewed a recorded statement by Employee to the Claims Examiner assigned to her worker's compensation case.¹⁷ In this statement, Employee stated that Brown was blocking her vehicle so she could not move and when she approached Brown's car, he shoved and elbowed her in the neck. Boone found this statement to be inconsistent with the video footage. Based on the police report, the DPW incident report, as well as Employee's statement to ORM, Boone did not find Employee's statement consistent nor credible. The only thing she found consistent was that there was no mention that Employee shoved Brown during the altercation. Ultimately, Boone concluded that Employee's worker's compensation claim surrounding the May 17, 2019 incident was fraudulent and the claim was denied.¹⁸ This finding was based on all the documents Employee submitted and based on the video footage from the surveillance camera.

On cross-examination, Boone acknowledged that she did not conduct an in-person interview with Employee, but she did have a phone conversation with her. Prior to Boone being assigned as the investigator to Employee's case, Agency had already obtained a copy of the surveillance footage from the community center. Boone was aware that Brown did not live in the house next to Employee, but she did learn that Brown was somehow connected to the family that lived there and he frequented the house. It was revealed that the house next to Employee's was a relative of Ms. Turner—the community center's office manager. Turner was the one who identified Mr. Brown during the investigation.

Alex Weaver ("Weaver") Tr. Vol. 1 pp.179—208

Weaver has been employed with Agency for 16 years. Currently, he serves as a supervising parking officer with Agency's Parking Enforcement Management Administration and has held this position since May of 2019. Weaver once served as Employee's supervisor for a little over a year, including in May of 2019.

¹⁴ Agency Exhibit 10.

¹⁵ Tr. Vol.1 pp. 134-135; *See also* Agency Exhibit 10, Bates Stamp 17-18.

¹⁶ Agency Exhibit 6

¹⁷ Agency Exhibit 2

¹⁸ *See* Agency Exhibit 10, Bates Stamp 14-16.

Weaver became aware of the May 2019 incident when Employee called him that morning and stated that she had been involved in an incident with a citizen. Immediately after receiving the phone call, he notified his supervisor, Wayne Means, and went to the location, which he estimated was 30-40 minutes away. When Weaver arrived on the scene, he observed two other parking officers within his squad already on location. Employee was also observed speaking with a MPD officer. Weaver did not speak to anyone else on scene other than his parking officers. Employee declined going to the hospital and stated she did not need any medical assistance at the time. Employee then followed Weaver back to the office building.

Upon returning to the office building, Weaver had Employee generate an incident report in her own handwriting detailing what occurred.¹⁹ Weaver testified that Ms. Turner was the first person from the community center to contact him and indicated that the incident was caught on camera; however, Turner stated that she could not send him the footage. Ms. Williams, the center's Chief Operating Officer at the time, followed up with Weaver via email with a copy of the surveillance footage. He received the footage approximately two to four days after the incident, and subsequently forwarded the footage to Preston Moore, Wayne Means, Associate Administrator Raymond Hingworth, Gail Heath, and Safety Officer Mark Cancelosi. Weaver also completed an incident and reporting form regarding the incident involving Employee.²⁰ Weaver was not involved in proposing the termination of Employee.

On cross-examination, Weaver testified that he was unaware that Employee had filed a sexual harassment complaint against him.

Johnny Gaither (“Gaither”) Tr. Vol. 1 pp. 209—231

Gaither is the Parking Administrator for Agency's parking enforcement division. Gaither was the proposing official for Employee's termination. In reaching his proposed termination decision, Gaither reviewed all the information provided to him regarding the allegations and used the *Douglas*²¹ factors to decide on the proposal of Employee's discipline. Prior to proposing Employee's termination, Gaither conferred mainly with Preston Moore, Agency's Parking Manager. Gaither also reviewed ORM's findings which also had an impact on his decision in proposing Employee's termination.

On cross-examination, Gaither testified that he heard about Employee's sexual harassment complaint from Preston Moore, a Branch Manager with Agency. Gaither further testified that once he was made aware of the complaint, Agency followed procedure and sent the information to their sexual harassment officer for investigation. Gaither was never interviewed as part of this investigation and to his knowledge, no remedial action was taken as a result of the sexual harassment complaint.

Gaither was not sure why Employee was placed on a walking route after the May 2019 incident but stated that parking officers are placed on walking routes and sometimes on driving

¹⁹ See Agency Exhibit 8.

²⁰ See Agency Exhibit 7. It is noted that this document is dated for March 2019; however, Weaver testified that this was a typo, and the document should have been dated for May 2019.

²¹ *Douglas v. Veteran Administration*, 5 M.S.P.B. 313 (1981).

route, depending on their assignments for that day. Gaither also stated that Agency also does not have an official policy regarding assigning parking officers to beats where their homes are located but they try to avoid making such assignments.

Chris Geldart (“Geldart”)²² Tr. Vol. 2, pp. 27—36

Geldart is currently a Deputy Mayor for the District Government and previously served as the Director for DPW from February 2019 through January 2021. Geldart served as the deciding official in the instant case.

Geldart testified regarding Agency’s Exhibit 12, which is a copy of ORM’s Memorandum of Investigation about Employee’s workers’ compensation claim. Geldart reviewed the document prior to signing the final decision to terminate Employee, which was based on five separate causes. The causes were based on Agency’s position that Employee assaulted a citizen and falsified documents in various reports.

Employee’s Case-in-Chief

Preston Moore (“Moore”) Tr. Vol. 2, pp. 9—22

Moore serves as a branch manager of DPW’s parking enforcement division and has held this position since 2016. Moore testified that once a sexual harassment complaint is received it should be referred to the sexual harassment officer. Moore was aware that Employee filed a sexual harassment complaint against Weaver because when Employee’s complaint was referred to the sexual harassment officer, Nancy Harvin, Harvin asked Moore whether he knew anything about the situation. Harvin interviewed Moore about the sexual harassment allegations prior to the May 17, 2019 assault incident, however, Moore was unaware if any remedial actions were taken in connection with this complaint.

Moore testified that Employee never asked to be transferred from Weaver’s crew and was not aware that Employee’s house was on her enforcement beat. Moore further testified that if an officer informs Agency that they live in the area in which they are assigned to patrol then they will move them to a different route.

Moore testified about an email from Employee’s supervisor, Mr. Dixon, whose squad Employee was placed in after the May 17th incident.²³ The email described a separate incident that Employee had with a citizen on August 5, 2019, and Employee asking to be given a vehicle instead of being placed on a walking route because she was having flashbacks of the May 17th incident. On cross-examination, Moore testified that Employee’s transfer to a walking beat after the May 17th incident was not done punitively.

(“Employee”) Tr. Vol. 2, pp. 37—107

²² Because of scheduling conflicts, Geldart was called to testify after Employee began her case-in-chief.

²³ See Employee’s Exhibit 3.

Employee was a Parking Officer while working with Agency, where she had been employed for 16 years. This case was the first disciplinary action that Employee faced during her time with Agency. Employee's chain of command as a Parking Officer included Alex Weaver as her supervisor; Wayne Means was Weaver's supervisor; Preston Moore, was Means' supervisor; and Johnny Gaither was Moore's supervisor. Weaver was Employee's supervisor a little over a year prior to her termination.

Employee testified that she lived on her parking enforcement beat which she had been assigned to for a little over one year. While Weaver was Employee's supervisor, she testified that she began experiencing inappropriate questions from him a couple of months before the May 17th incident, which led to her filing a sexual harassment complaint. Employee went through the chain of command first reporting her allegations of sexual harassment to Means and then met with Moore. She also "vaguely" discussed the matter with Gaither.²⁴ When Employee met with Moore, she asked to be transferred from Weaver's squad prior to the May 17th incident.

During Employee's testimony, she narrated the surveillance footage and described what was captured on video. She further testified that the citizen, identified as Mr. Brown, began verbally abusing her and telling her to "Get the F away from the street."²⁵ Employee also stated that Brown began threatening her and saying harsh things.

The origination of the customer service request that Employee responded to on the morning of May 17, 2019, was regarding a dispute over parking between a daycare facility and employees of the community center. While Employee was about to issue a parking ticket, she testified that Brown was following her aggressively and got in front of her and shoved and pushed her with his body.²⁶ When Brown pushed Employee, she pushed back and when he went to strike her, Employee put her hands up in a defensive posture.²⁷ Brown also began folding his tags so that Employee could not see his tag numbers. When Employee went back to her vehicle to call 911, Brown got back in his vehicle and left.

Employee further testified that she had seen Brown prior to this incident but that she does not know him personally. After the incident, Employee's supervisor and a MPD officer arrived on scene shortly thereafter. Employee explained that she spoke with the police officer about the incident and the police officer took a report and provided his card.

Upon Employee's return to work following the May 17th incident, she wrote a letter which was admitted as Employee's Exhibit 6. Employee did not go to the hospital or get medical treatment on May 17th; however, she did seek medical treatment on June 3, 2019, on the advice of her union representatives and those handling her workers' compensation claim. She was treated at Concentra Medical Centers and was diagnosed with a neck sprain and was also referred to a therapist.²⁸

²⁴ Tr. Vol. 2 at 40.

²⁵ Tr. Vol. 2 at 46.

²⁶ Tr. Vol. 2 at 51.

²⁷ *Id.*

²⁸ See Employee Exhibit 4; See also Tr. Vol. 2 pp. 72-73

On cross-examination, Employee reasserted that she shares a driveway with Ms. Turner's parents and that she has seen Brown over there before.²⁹ Employee also maintained that she did not shove, push, or strike Brown in during the May 17th incident.³⁰ When asked to clarified which part of Brown's body made physical contact with her, Employee responded "the chest."³¹ She also did not report to the MPD officer, in Agency's internal report, nor to ORM's investigators, that she shoved or pushed Brown on May 17th. Employee asserts that Brown struck her in the neck while they were engaging at the back of Brown's car. While they were engaging at the front of Brown's car, Employee asserts that Brown shoved her with his chest.³²

Rhonda McPherson ("McPherson") Tr. Vol. 2, 108—126

McPherson has known Employee for a year or two from their interactions in the neighborhood. However, she did not know Employee prior to the May 17th incident and she was not aware that Employee was a parking enforcement officer until then. McPherson was a witness to the incident and observed a gentleman using a lot of profanity towards Employee.³³ McPherson also testified that she heard Employee state, "oh, you put your hands on me," but did not hear Employee using any profanity.³⁴ McPherson is also familiar with Turner through their involvement with the homeowners' association; however, she did not see Turner on the day of the incident.

McPherson is familiar with the community center and asserted that there are no windows at the front desk. However, she further testified that there are double glass doors entering the building. McPherson provided a written statement surrounding the incident which was admitted into evidence as Employee's Exhibit 11. On cross-examination, McPherson stated that she did not observe any physical altercation been Employee and Brown during the May 17th incident.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Agency's action of terminating Employee stems from five separate causes: **(1) Conduct Prejudicial to the District Government: On-duty conduct that an employee should reasonably know is a violation of law or regulation, DPR 1607.2(a)(4); (2) False Statements/Records: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations, DPR 1607.2(b)(2); (3) Knowingly and willingly making an incorrect entry on an official record or approving an incorrect official record, DPR 1607.2(b)(3); (4) Knowingly and willfully reporting false or misleading material information or purposely omitting material facts, to an superior, DPR 1607.2(b)(4); and (5) Conduct Prejudicial to the District Government: Assaulting, fighting, threatening, attempting to inflict or inflicting bodily harm while on District property or while on duty, DPR 1607.2(a)(15).**

All five charges are based on allegations that Employee assaulted a citizen while performing her duties and providing false or misleading statements regarding the investigations

²⁹ Tr. Vol. 2 at 83.

³⁰ Tr. Vol. 2, pp. 83-84.

³¹ See Tr. Vol. 2, pp. 93-95.

³² Tr. Vol. 2, pp. 94-95.

³³ Tr. Vol. 2 at 113.

³⁴ Tr. Vol. 2 at 114.

(MPD investigation, ORM investigation, and Agency's internal investigation) into the assault, as well as false or misleading statements regarding a workers' compensation claim filed by Employee stemming from the May 17th incident.

Causes 1 and 5

Cause 1: Conduct Prejudicial to the District Government: On-duty conduct that an employee should reasonably know is a violation of law or regulation, DPR 1607.2(a)(4)

Cause 5: Conduct prejudicial to the District government: assaulting, fighting, threatening, attempting to inflict or inflicting bodily harm while on District property or while on duty

Surveillance footage from the Wheeler Creek Community Center captured the incident between Employee and Brown that is the center of this case.³⁵ The footage does not contain audio but provides a clear image of the scene. The one-on-one interaction between Employee and Brown occurs in the distance at the edge of the video frame; however, the ability to discern the two individuals is present. Between the 10:45 minute mark of the footage and the 14:00 minute mark—the time when Brown drives off—Brown does not leave the frame of the camera.³⁶ During this time is when Agency asserts that Employee assaults Brown. The undersigned agrees.

Employee gave conflicting testimony regarding her physical contact with Brown. On direct examination, Employee testified that when Brown pushed her, she pushed back and when he went to strike her, she put her hands up in a defensive posture.³⁷ Later on cross-examination, Employee asserts that she did not shove Brown, and seemed to have abandoned her earlier assertion of self-defense.³⁸ Additionally, Agency impeached Employee's assertion that she did not shove Brown by introducing Employee's prehearing statement which states that, "Employee shoved [Brown] in self-defense..."³⁹ Despite Employee insisting on cross-examination that she did not shove Mr. Brown during the May 17th incident, she contradicts herself in her direct examination asserting that, "I pushed back."⁴⁰ Employee's inconsistent testimony is best addressed in the security camera footage that captured the incident between Employee and Brown in front of the community center.

The entire one-on-one interaction between Employee and Brown was captured on video except for a few seconds when Employee walks out of the video frame. Brown remains in the video frame for the duration of the one-on-one interaction. The undersigned was able to view the video footage during the evidentiary hearing and several times in-camera after the conclusion of the hearing. Based upon the testimonial evidence, in conjunction with viewing the surveillance footage, it is clear that Employee shoves/pushes Brown in his back causing him to bend forward,

³⁵ Ten minutes and 45 seconds into the surveillance footage begins the one-on-one interaction between Employee and the citizen, identified as Mr. Brown. (Agency Exhibit 1). Over at 14 mm.

³⁶ Despite a few cars passing by, the top part of Brown's body is still visible.

³⁷ See Tr. Vol. 2 at 51

³⁸ See Tr. Vol. 2 at 83-84; 88.

³⁹ See Employee's Prehearing Conference Statement, at 2 (October 12, 2020); Employee's Prehearing Statement was also introduced as Agency's Exhibit 17 during the evidentiary hearing and was submitted with its written closing arguments.

⁴⁰ See Tr. Vol. 2 at 51

and at no point did Brown's elbow or chest make contact with Employee. Even if Employee were to maintain her self-defense argument, the evidence does not support that her physical contact with Brown was justified.⁴¹ Accordingly, I find that Agency had cause to take adverse action against Employee for any "on-duty conduct that an employee should reasonably know is a violation of law or regulation" because of her assault on Brown.

Causes 2, 3, and 4

(2) False Statements/Records: Misrepresentation, falsification or concealment of material facts or records in connection with an official matter, including investigations, DPR 1607.2(b)(2).

(3) Knowingly and willingly making an incorrect entry on an official record or approving an incorrect official record, DPR 1607.2(b)(3);

(4) Knowingly and willfully reporting false or misleading material information or purposely omitting material facts, to any superior, DPR 1607.2(b)(4);

After the May 17th assault incident, Employee made a police report with the Metropolitan Police Department, an Initial Incident report with Agency (internal report), and a statement to the D.C. Office of Risk Management regarding a workers' compensation claim. Employee does not indicate that she pushed or shoved Brown—in self-defense or otherwise—in any of the reports to these three entities.⁴² Agency notes that the most glaring omission in these reports was the fact that Employee shoved Brown during their interactions. The video evidence, in fact, supports the fact that Employee shoved Brown.

Again, Employee gave conflicting testimony regarding her physical contact with Brown at several points during her testimony. During Employee's testimony on direct examination, she states that when Brown pushed her, she pushed back.⁴³ However, Employee denied pushing or shoving Brown during her cross-examination.⁴⁴ When asked to affirm that she did not report pushing or shoving Brown to the Office of Risk Management, she responded that she did not report doing so "because it didn't happen."⁴⁵ I found Employee's credibility throughout her testimony to be severely impaired. The video surveillance footage, in tandem with the testimony provided by the witnesses on scene, provided the best evidence of the interaction between Employee and Brown. This evidence debunks Employee's claim that she did not shove or push Brown, and in fact, shows that she did shove Brown causing him to bend forward.

⁴¹ No witnesses, including Employee's own witness, McPherson, testified that they observed Brown push, shove, or make any other physical contact with Employee.

⁴² See Agency Exhibit 6 (Bates Stamp 1-7); Agency Exhibit 8 (Bates Stamps 8-10); Agency Exhibit 10 (Bates Stamp 17-18).

⁴³ Tr. Vol. 2 at 51.

⁴⁴ See Tr. Vol. 2 at 83-84; 88.

⁴⁵ Tr. Vol 2 at 90.

As a result of Employee's claim that she was elbowed in the neck and assaulted by Brown, she filed a Initial Incident/Accident Report Form with DPW⁴⁶ and a workers' compensation claim with the D.C. Office of Risk Management.⁴⁷ In her Initial Incident Form submitted to DPW on the same day as the incident, Employee reported that an irate citizen pushed her, hit her on the right side of her neck with his elbow "hard and forceful," and then followed her and pushed her again as she walked away. Employee further stated the Brown followed her to her vehicle as she was walking away. In Employee's workers' compensation claim form, she maintained that she was assaulted by a citizen and struck in the neck. The video evidence does not support the claims submitted by Employee on the Initial Incident form submitted to DPW or the workers' compensation claim submitted to ORM.⁴⁸

In addition to refuting Employee's claim that Brown assaulted her, the surveillance footage also contradicts several other allegations made by Employee regarding the May 17th incident. Particularly, Employee states in her audio recorded statement with ORM, that she could not move her vehicle because Brown was blocking it.⁴⁹ The video evidence shows this to be an inaccurate statement. Employee also asserted that Brown followed her to her vehicle after striking her in the neck with his elbow. The evidence does not support Employee's narrative that she was struck in the neck by Brown or that Brown followed her to her vehicle. Based on the inconsistencies provided by Employee in her written statements and testimony, versus the video evidence and testimony of those on scene, I find that Employee made false statements and misrepresented material facts in connection with an official matter. Accordingly, I further find that Agency had cause to take adverse action for "false statements/records: misrepresentation, falsification or concealment of material facts or records in connection with an official matter."

Retaliation

Employee maintains that Agency's action of terminating her was retaliatory because she filed a sexual harassment claim against her supervisor, Weaver. Agency challenged OEA's jurisdiction to consider Employee's retaliation claim; however, in a January 22, 2021 Order⁵⁰, the undersigned determined that OEA could consider Employee's cognizable pretextual defense that Agency's action of terminating her was retaliatory. Agency filed an Interlocutory Appeal of this order to the OEA Board, which issued an Opinion and Order on Motion for Interlocutory Appeal on March 25, 2021, denying Agency's appeal and upholding the undersigned's finding that OEA could consider Employee's retaliatory defense. As such, Employee's retaliation claim is addressed below.

To establish a retaliation claim, the party alleging retaliation must demonstrate the following: (1) she engaged in a protected activity by opposing or complaining about employment

⁴⁶ Agency Exhibits 8

⁴⁷ Agency Exhibits 10

⁴⁸ It is noted that Employee also provided a narrative which was set forth in a police report, introduced as Agency Exhibit 6. The narrative in the police report closely aligns with Employee's Initial Incident Report and workers' compensation claim; however, because the Initial Incident Report and workers' compensation claims were submitted directly by Employee, they were given greater consideration in determining credibility under this cause.

⁴⁹ Agency Exhibit 2 at 01:50-01:55.

⁵⁰ The Order is incorrectly dated for 2020; however, the Order was issued on January 22, 2021.

practices that are unlawful under the District of Columbia Human Rights Act (“DCHRA”); (2) her employer took an adverse action against her; and (3) there existed a causal connection between the protected activity and the adverse personnel action.⁵¹ A prima facie showing of retaliation under DCHRA gives rise to a presumption that the employer's conduct was unlawful, which the employer may rebut by articulating a legitimate reason for the employment action at issue.⁵²

It is uncontroverted that Employee made a sexual harassment complaint against her supervisor, Weaver, which is considered protected activity. The sexual harassment complaint was corroborated through testimony by Moore.⁵³ However, the outcome of the complaint was unclear based upon the testimony and documents of record. It is also undisputed that Agency took adverse action against Employee; however, the third and final element of establishing a retaliation defense is absent here. Employee’s sexual harassment claim is far removed from Agency’s decision to terminate Employee. The May 17th incident was an isolated incident with a citizen and did not involve Weaver, apart from him responding to the scene as Employee’s supervisor. The evidence shows no relation or causal connection with Employee’s sexual harassment claim and her misrepresentations and assault on a citizen. To the extent that Employee asserts that the penalty of removal was too harsh and was retaliatory in response to Employee’s sexual harassment claim, I find this argument to be without merit. In no way did Agency influence Employee’s actions to assault a citizen or misrepresent the events that unfolded during the May 17th incident. I find no nexus between Employee’s sexual harassment claim and the May 17th incident and the subsequent actions of Employee. Accordingly, Employee’s retaliation claim must fail.

Appropriateness of Penalty

In determining the appropriateness of an agency’s penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency. Agency has the primary discretion in selecting an appropriate penalty for Employee’s conduct, not the Administrative Judge.⁵⁴ The undersigned may only amend Agency’s penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.⁵⁵ When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.⁵⁶ As explained above, I find that Agency had cause to take adverse action against Employee for all five causes cited.

Chapter 16 § 1607.2 of the District Personnel Manual (Table of Illustrative Actions) (May 17, 2019)⁵⁷ provides the appropriate range of penalty for the charges against Employee as follows:

⁵¹ *Vogel v. District of Columbia Office of Planning*, 944 A.2d 456 (D.C. 2008).

⁵² *Id.*

⁵³ Tr. Vol. 2 at 9-22.

⁵⁴ *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ 6-B DCMR § 1607.2.

- (1) On-duty conduct that an employee should reasonably know is a violation of law or regulation—penalty for a first occurrence ranges from a reprimand to removal.
- (2) Misrepresentation, falsification or concealment of material facts or records in connection with an official matter—penalty for a first occurrence ranges from reprimand to removal.
- (3) Knowingly and willingly making an incorrect entry on an official record or approving an incorrect official record—penalty for a first occurrence ranges from counseling to removal.
- (4) Knowingly and willfully reporting false or misleading material information or purposely omitting material facts, to any superior—penalty for a first occurrence ranges from a 7-day suspension to removal.
- (5) Assaulting, fighting, threatening, attempting to inflict or inflicting bodily harm while on District property or while on duty—penalty for a first occurrence ranges from a 14-day suspension to removal.

The record reflects this being Employee's first disciplinary matter during her time with Agency. As set forth above, a first-time offense for each charge against Employee provides an appropriate penalty up to removal. Further, Agency used the *Douglas* factors in assessing the appropriateness of the penalty in both the Advance Written Notice and Notice of Final Decision on Removal.⁵⁸ Accordingly, I find that Agency reasonably concluded that Employee's removal was an appropriate penalty under the circumstances.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's termination action against Employee is UPHeld.

FOR THE OFFICE:

ARIEN P. CANNON, ESQ.
Administrative Judge

⁵⁸ See Agency Exhibits 13 and 15.