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**THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS**

_____)	
In the Matter of:)	
)	
██████████,)	
Employee)	
)	OEA Matter No. 1601-0035-20
v.)	
)	Date of Issuance: September 22, 2021
D.C. DEPARTMENT OF PUBLIC)	
WORKS,)	
Agency)	MICHELLE R. HARRIS, ESQ.
_____)	Administrative Judge
Vanessa Dixon Briggs, Employee Representative)	
Barry Carey, Employee Representative)	
Jhumur Razzaque, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On February 27, 2020, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Department of Public Works’ (“DPW” or “Agency”) decision to terminate him from service effective January 31, 2020. On, May 1, 2020, Agency filed its Answer to Employee’s Petition for Appeal.

Following a failed attempt at mediation, I was assigned this matter on September 30, 2020. On October 6, 2020, I issued an Order Scheduling a Prehearing Conference for October 28, 2020. During the Prehearing Conference, I determined that an Evidentiary Hearing was warranted, as a result, I issued an Order Convening an Evidentiary Hearing for December 16, 2020. During the Prehearing Conference, witnesses were discussed by the parties and approved by the undersigned to testify at the hearing. On October 29, 2020 I issued an Order Convening an Evidentiary Hearing for December 16, 2020, which included the approved list of witnesses and indicated a deadline of November 9, 2020 to request any subpoenas if needed. Of those approved witnessed, Mr. Stewart Lovett was approved as an Agency witness.

On the afternoon of December 14, 2020, Agency’s representative emailed the undersigned, copying Employee’s representative, requesting an extension of time to subpoena its witness Stewart Lovett, citing that he was a key witness and that they had not been able to confirm his appearance. Employee’s representative responded and noted Agency’s request was not reasonable and should be denied. Given the timing of the request, I advised the parties that I would make a ruling on Agency’s request during the scheduled Evidentiary Hearing. During the Evidentiary Hearing on December 16, 2020, the undersigned denied Agency’s request for an extension/additional hearing day to subpoena

Lovett citing to the untimely nature of Agency's request. Additionally, I found that given the timing for which Lovett had been terminated (a year prior on December 6, 2019) and the scheduling of this matter for an Evidentiary Hearing, that Agency's request was untimely in that it waited less than 48 hours before the scheduled hearing to indicate an issue with the witness. The undersigned cited that earlier notice, even a week prior would have been warranted. For those reasons, the undersigned denied Agency's request for an extension.

The Evidentiary Hearing proceeded on December 16, 2020. However, the hearing encountered substantial technical difficulties during witness testimony which resulted in delays past the close of business. Accordingly, the undersigned had to continue the hearing for a second day and the matter was scheduled to continue on February 10, 2021. At the close of the first day, Agency made an oral Motion for Reconsideration to subpoena Lovett. Employee's representative noted its objections to this request. Accordingly, the undersigned directed Agency to submit a written Motion on or before December 30, 2020. Employee's response to Agency's Motion was due on or before January 13, 2021. Both parties complied with the deadline. On January 21, 2021, I issued an Order granting Agency's request to subpoena Lovett. It was noted that this request was granted only as a measure to ensure a complete record. The undersigned found that Agency's reasons for its failure to subpoena Lovett previously and in accordance with the deadlines set forth in the October 29, 2020 Order Convening the Evidentiary Hearing to be unpersuasive upon consideration of the time frames in this matter. However, it was noted that since a second date had to be convened that the request was granted to ensure a complete record.

During the Evidentiary Hearing, both parties presented testimonial and documentary evidence. Following the Evidentiary Hearing, I issued an Order on March 9, 2021, requiring both parties to submit their written closing arguments on or before April 9, 2021. On April 7, 2021, Agency noted that there were portions of the transcript that were not legible. As a result, on April 7, 2021, I issued an Order extending the time to submit closing arguments. An additional extension order was issued April 19, 2021 due to the transcript not yet having been updated by the court reporting service. Accordingly, closing arguments were due on May 7, 2021. Both parties submitted their written closing arguments by the prescribed deadline. On May 17, 2021, Agency filed a Motion to Strike portions of Employee's closing argument citing that evidence not entered into the record was included with the submission and that it was improper. Employee submitted their response on May 27, 2021. The record is now closed.

JURISDICTION

The 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 against Employee; and
2. If so, whether termination was the appropriate penalty under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) 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 628.2 *id.* states:

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.

SUMMARY OF TESTIMONY

On December 14, 2020, and February 10, 2021, an Evidentiary Hearing was held before this Office.¹ The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as “Tr.”) which was generated following the conclusion of the proceeding. Both Employee and Agency presented testimonial and documentary evidence during the Evidentiary Hearing to support their positions.

Agency’s Case-In-Chief

Leroy White (“White”) – Tr. Vol. I pages 34 -106

White is a sanitation supervisor at the Department of Public Works and has been in that capacity for approximately 20 years and currently supervises nine (9) employees. His duties as a sanitation supervisor include monitoring employees responsible for street and alley cleaning. The street and alley teams conduct mechanized and manual cleaning. Mechanized cleaning includes the uses of street sweepers, while the manual cleaning includes employees physically cleaning and removing trash.

On August 15, 2019, White was Employee’s supervisor and at that time had been his supervisor for approximately two (2) or three (3) years. White explained that Employee was a driver with a Commercial Drivers’ License (CDL), so he drove the compactor trucks. White testified that Employee’s assignments for duties would be given out in the morning and that a crew of nine (9) would go out to do the street cleaning. White recalled an incident involving Employee on August 15, 2019, near Fairlawn Street in Southeast Washington. White testified that he authored an incident report noting an altercation between Employee and Stewart Lovett. White said that he was at the office and was called by Employee to come out to the site. White noted that Employee had told him that the other employees were not working and were just sitting in the van. White stated that when he arrived at the scene, the other employees were sitting in the van as Employee had indicated. White indicated that after his arrival, the employees got out and started to do their work. Approximately 15 minutes later, White said that another employee, McManus told him he needed to come because it appeared that Employee and Steward Lovett were “about to get into it.” White explained that he has a physical condition and that he asked another employee, Bateman to go ahead and try to prevent anything from happening. White said he interpreted McManus to mean that Employee and Lovett were involved in a physical altercation. White testified that his physical condition caused him to move slowly, and when he arrived at the scene, Employee and Lovett were entangled on the ground.

White testified that he and Bateman were able to separate Employee and Lovett. White stated that he got in between the two of them and they separated. He then told both Employee and Lovett that he was

¹ Vol. I denotes the first day of the Evidentiary Hearing held on December 16, 2020, and Vol. II represents the second day held on February 10, 2021.

going to have to write them up. White called his immediate supervisor and was instructed to bring both involved to the location on Fenwick Street. White said he overheard both men saying things to each other and going “tit for tat”. White said he noticed minor injuries on both Lovett and Employee. He indicated that he saw something on Lovett’s head and that Employee’s shirt had been torn. It looked like they were both in a scuffle. White said he assumed the incident was because of the work assigned and that Lovett was emptying trash cans that day. White explained that he was not 100% sure of the reason for their issues that day, but assumed it had to do with the dumping of the trash cans. White said that he did not notice that Employee was angry but noted that the altercation occurred sometime soon after Lovett had dumped the cans. White said that Employee was on one side of the truck and Lovett was maybe about a block or so ahead. He said he saw Lovett “jog” back toward Employee and that’s why McManus told him he needed to come to where the employees were. White testified that Bateman and Sanders were at the scene of the incident.

White recalled providing a statement to Gail Heath regarding the incident and indicated that his statement was accurate. White noted that he testified that Lovett jogged back to Employee, but that his statement indicated that he jogged back to the packer. White explained that these events happened a while ago and he could not recall word for word about whether Lovett jogged back to the packer but noted that Lovett did end up back where Employee was located. White testified that he believed that Lovett jogged to Employee. White explained that the turning over of the trash was done to make it easier to put in the packer. White indicated that his statement that, following Lovett’s turn of trash cans that McManus told him he needed to come because Employee and Lovett were arguing. When White arrived in the alley, Employee and Lovett were “tussling” and he and Bateman tried to separate them. White did not recall any issues between Lovett or Employee. White said that after the incident, he reported it to his supervisor, David Bowling. Once they arrived at the yard, White explained the incident again and both Employee and Lovett were sent home. White recalled following the review of exhibits of statements he took from Lovett and Employee. White testified that he did not review any other statements provided. White also testified that he did not take any statements from anyone else there. No one reported any use of offensive language from Employee to White. White iterated that no one came and told him that Employee had been offensive to them.

On cross-examination, White testified that he saw Lovett jogging back toward the packer. White reiterated after he witnessed Lovett jogging back, shortly thereafter, Employee and Lovett were arguing. White explained that the turning over of the trash cans can be a problem if they have a strong odor. Typically, they would not turn over a trash can that had a foul odor. White testified that Lovett and Employee were not friends, but that he had seen them have happy moments. He said that the job brings out the good and bad. The work is very “taskful” and is not the cleanest job and they also work in hot temperatures at times. White explained that Employee was a sanitation driver and essentially is a lead for the assigned duties for that day. White noted that Employee could be counted on to ensure where they were going and what was assigned for work, and that there were not many others who could be given that much responsibility. White explained that he did performance evaluations and that Employee’s evaluations reflected those sentiments. White had known Employee for some time and had been his supervisor for approximately two years or so. White noted that Employee would be responsible for ensuring the assignments were complete at a location. White testified that on the day of the incident, that Employee called him and said that his coworker “they weren’t doing anything.” When White got to the scene, he observed the other workers sitting in a van. He noted that it didn’t necessarily mean anything per se, because they may have been working two and a half hours with no break, but he came out to the scene anyway, and found exactly what Employee had said. White explained that it’s the driver’s responsibility to ensure the work gets done because that person must report back to the supervisor whether it was complete, how much was done and so on. Drivers do help and pick up whatever needs to be picked up. Additionally, White noted that it’s the driver’s responsibility to “correct” any incorrect work being done. He noted it should be done in a “tactful” way and be respectful. White said that

Employee had told him he had received another position in collection and would be leaving to go there soon. White testified that he did not hear Employee use any profanity on the day of the incident and no one told him that Employee had used profanity.

On redirect, White testified that to his knowledge, the only thing that was done incorrect/wrong was regarding the trash can with the foul odor. White explained that once turned over, they would have to deal with the smell of that for the remainder of the workday hours and it would have been unpleasant for everyone. White testified that Employee was not Lovett's supervisor. On additional cross examination, White testified that assignments are relayed to the workers from him. White testified that if the job is done incorrectly, then it falls on him. He would hold drivers responsible, unless they had a plausible reason why they were not able to complete an assignment.

Michael Bateman ("Bateman") – Tr. Vol. I. Pages 116 – 176

Bateman testified that he is a maintenance worker with Agency and has been there for 20 years. His duties include collection of items out of alleys, street sweeping, leaf and snow removal. Bateman explained that he is assigned by others and his supervisor is Leroy White. Bateman said he was working on August 15, 2019 at Fairlawn Avenue Southeast and recalled an incident involving Employee. Bateman said that it seemed to him that Employee was mad. He came to the truck and said they were some "lazy MFs (later clarified as mother fuckers)" and that others in the van said they don't know who he was talking to. Bateman said Employee walked away and got back in the truck and drove to the next pile of trash. Bateman did not think it was directed to anyone specifically and Employee was outside of the van when he said it. Bateman testified that by then everyone had then gotten out of the van and started to pick up trash and the van had also moved to the next pile of trash. Bateman did not know what happened after that because he walked away and went to start raking trash up next to the pile. Bateman said that White was not on the scene when Employee used the language he heard. Bateman did not know if Employee called White to the scene. Bateman said he didn't know if Employee was kidding or not when he used the language and that he paid no attention to it. Bateman testified that Employee did not use any racial or derogatory language.

Bateman explained that Employee moved the packer and they got back in the van to go about a half block. When they got out to get the trash, he heard arguing. He heard someone say "he just threw it out of the truck on the steps of the truck and said mother fucker. Bateman said he didn't know who he was talking to, but that "Black (nickname for Lovett)" was the worker who turned the can over. Bateman said the can had water and other substance in it and that is what is usually done. Employee walked to Black aka Lovett and said, "are you going to get all this shit up" and that he used the term mother fucking and said you can throw trash on the ground. Bateman stated that they both started walking up to each other like they were going to fight. Bateman explained he interjected and said "y'all stop this and let's get the work done." Bateman then said Employee said let's go to the alley and he told Lovett not to go, but he was mad and jerked away from him and went to the alley.

Bateman said he was still picking up trash and then went into the alley and Employee and Lovett were tussling and rolling on the ground, but he didn't see any punches thrown. Bateman said he told White to grab one and he would grab the other. Bateman said that Lovett and Employee were young, and they couldn't do anything with them. He said he grabbed Employee and Employee said, "motherfucker don't grab me when I'm fighting, I'll kick your ass." Bateman said he was too old for this and walked away and got in the van. Bateman testified that he is "damn near 70 years old and ain't got time for that" and that Employee and Lovett were back there with White and he didn't know what had happened from there.

Bateman said that Employee told Lovett that "motherfucker you can't turn over the cans". Bateman testified that they always turn cans over when they're too heavy and then shovel the contents

into the truck. Bateman averred that Employee asked Lovett to go into the alley. Bateman said when he turned around, they were wrestling, not fighting. Bateman ran back there and that's when he told White to get one and he the other. He grabbed Employee and said Employee said, "get your hand off me or we can go with it." Bateman said he doesn't know what he said, but it went past him at the time, and he said, "look here I'm too old to be fighting". Bateman said that Employee was mad. Bateman testified that White was around when this was happening.

Bateman said the whole crew was on duty that day, but that no one else was in the alley, just him and Mr. White. Bateman said when Employee first said something to people in the van that he thought maybe Chris Bynum and Ernie Hooks may have been there, but he wasn't for sure because he "wasn't looking for nobody." Bateman testified that in the alley it was only him and Mr. White. Bateman said that White did not ask him to go into the alley to stop the fight. Bateman said he went to the alley because he was the oldest one in the van and he was trying to make peace and get them to stop, as they're young guys and need their job. Bateman said they were both mad with each other. Bateman did not notice any injuries to Lovett or Employee. Bateman had been working with Employee for two years and indicated they were not friends outside of work. He said Employee has a bad temper, and he doesn't know if it was because the other guys would kid him about his size because he is short. Bateman said he doesn't take the joking on him well, but he is fine with joking about others. Bateman said Employee worked at a pace and he told him one time that he was older and couldn't keep up. He said Employee laughed and said ok you're right. Bateman said Employee was a good guy but that his temper could just explode. Bateman said that Employee was not a hostile guy but would get mad if people were just sitting around and not working, and he would say something about that, but that he was not hostile. [page 149 transcript witness cursing] Bateman recalled being interviewed by Gail Heath and providing a statement.

On cross examination, Bateman maintained that Employee told Lovett to go to the alley. Bateman noted that he has known Employee for approximately two years, and they are not friends. Bateman said that their job entailed picking up trash. He said that Employee was a driver/sanitation worker and that there is no difference in positions, except that Employee drives. Bateman said he did not see who started the "tussling" in the alley. Bateman said that he and Mr. White went over, and that he tried to grab Employee and Mr. White grabbed Lovett. Bateman said that he did not tell his supervisor, Mr. White any of Employee's use of profanity. [Tr. Page 170 -Witness becomes frustrated with questioning, indicates that he has been asked the same thing over and that he had been up 18 hours/worked twelve hours and he was ready to go home]. Bateman did not know who called the supervisor to the job site that day. Bateman did not know when he arrived and said he saw his truck after he came out of the alley. On redirect, Bateman testified that he did an interview with Gail Heath and that she asked him questions similar to what was being asked during the hearing. Bateman explained that he did not write a statement, but that Gail Heath wrote the statement. [Witness apologized to Ms. Dixon for his frustration pg. 173]

Donald Mackell ("Mackell") Tr. Vol I. Pgs. 177- 207

Mackell is a motor vehicle operator with Agency and has been in this position for five years but has worked with agency off and on for approximately 15-20 years. Mackell explained that he drives the trash truck, snow truck and leaf vac. If he is not driving, then he is throwing things on the truck, to include trash, leaves or anything out in public spaces. Mackell testified that his supervisor Mr. White gives assignments for duties. Mackell said that he was a part of the crew on August 15, 2019, but that he was not the driver that day. Mackell remembered that others present that day were Employee, Lovett, McManus, Hooks and Bynum. Mackell indicated that Employee was driving the truck that day. Mackell recalled the incident that day and indicated that he and another worker were turning trash cans over and he was behind the truck helping clean it up. Mackell said that he and Employee got one can up and they went a little further and another can was turned over. Mackell did not remember what happened after the second trash can was turned over. He believes he walked a couple of blocks down the street, away from Employee. Mackell said that Lovett was working that day, and that he believed that Lovett was turning

over trash cans. Mackell said he was helping clean up whatever was turned out of the cans. Mackell said he did not see any type of altercation that day. Further, Mackell said that he didn't hear Employee use profanity that day. [Tr Page 192]. When asked whether he was paying attention to Employee, Mackell indicated that because the job that day was messy, he was concentrating more on that.

Mackell recalled giving a statement to Gail Heath, following a review of his statement, he indicated that it was inaccurate, specifically the "part where it says Mr. Mackell said someone told him [Employee] had called the crew bitch mother fuckers." Mackell stated that he did not hear [Employee] say that. (Tr. Pg. 195). When asked if someone told him that, he said that no one had told him that and he did not hear those words until after he came in. Mackell further explained that Gail Heath was the one who brought those words to his attention and that he was shocked and surprised. Mackell reiterated that it was inaccurate that "someone told him" and that no one told him that Employee had called the crew that term. Mackell said that if anything he wasn't paying attention because he was trying to keep his clothes clean. The only time he heard those words was when Gail Heath brought it up. Mackell said that the statement indicating that he was out of the van was accurate, as well as that the trash needed to be cleaned because they contained water and other refuse in them. Mackell said he was shocked to hear those words come out of Gail Heath's mouth and maintained that the first he heard about it was from her. Mackell testified that he had no knowledge of what went on between Employee and Lovett that day.

On cross-examination, Mackell testified that he did not hear Employee use profanity during the time in which they worked together on the day of the incident. Mackell said that the supervisor came out that day and noted that he was close enough to Employee to hear him and did not hear him use profanity. Mackell explained that the first time he heard the term "bitch motherfuckers" was when Gail Heath said it. He reiterated that the statement she did was inaccurate because he did not say that anyone told him that, and that if anything he wasn't paying any attention in an effort to keep his clothes clean because it was a trash can full of feces. Mackell went on to say that the government had been "harassing" all year long about a statement. [The remainder of the testimony regarding harassment was stricken from the record]. On redirect, Mackell reiterated that he did not hear Employee say bitch motherfuckers and that he was concentrating on stay clean that day. Mackell also iterated that he was close to Employee and did not hear him use profanity that day.

Eddie Sanders ("Sanders") Tr. Vol. I. Pgs. 212-235

Sanders is a motor vehicle operator and has been at Agency approximately 20 years. His responsibility includes cleaning whatever is left behind for the sweeper to pick up. Sanders drives the sweeper/street cleaner. He explained that assignments are given by the supervisor, Mr. White. Sanders recalled an incident on August 15, 2019. He testified that he saw Lovett get in Employee's face and argue with him at the packer and that was all he saw. Sanders said that Lovett kicked a trash can over and from the odor, the driver didn't want it to be out because they typically only did alley ways while they're cleaning up. He said that Lovett kicked over a can and the driver (identified as Employee) was upset because he said he didn't have to kick all of that out in the street and spreading it all over the place. After that, he saw them arguing and he went back to his truck because he did not want to be involved. He did not hear what was being said because the sweeper was a little way back from where the packer was. Sanders explained that he was in his sweeper most of the time. He said that when he arrived at the scene, he was in his sweeper and Employee was by the packer. He said at the time it was him, Lovett and maybe Bynum that were around. Sanders testified that he did not see any physical altercation between Employee and Lovett and that he only saw them arguing. When he went back to the sweeper, Sanders explained that he just began sweeping the street again. Sanders said he has known Employee since he joined the crew and that they didn't "hang out" or anything like that outside of work. Sanders explained that he got along with both Employee and Lovett to a certain extent. Sanders reviewed a statement he gave to Gail Heath. He explained that he did not remember what they said because he went back to his truck. Sanders agreed that his statement to Heath was accurate.

On cross examination, Sanders testified that he saw Lovett in Employee's face at the packer. Sanders further explained that they were arguing. Sanders said that his statement was accurate and iterated that he did not hear any profanity but heard them arguing. Sanders said he doesn't know who called the supervisor, but that he did come to the site that day. Sanders said that he had been working with Employee for approximately four (4) years and said he was a good worker/worked very hard. On redirect examination, Sanders explained that he was mostly in his sweeper and was not out around his coworkers that much on August 15, 2019. Sanders reiterated that he saw Lovett and Employee arguing in each other's face. He saw that each of them was arguing. On re-cross, Sanders testified that it was Lovett who got in Employee's face and not vice versa.

Gail Heath ("Heath") – Tr. Vol 1 Pgs. 235-286; Tr. Vol. II Pgs. 68 - 118

Heath currently works as an attorney advisor for the Office of Labor Relations and Collective Bargaining. Prior to that, she was the Employee and Labor Relations advisor at the Department of Public Works for approximately four and a half years. Her responsibilities at DPW included advising management on discipline and regulations. She also reviewed and drafted disciplinary actions, served as ADA coordinator, and EEO officer. Heath also conducted disciplinary investigations involving misconduct and performance issues. Heath also was the subject matter expert for labor relations at DPW. Heath testified that she had been working in labor relations since 2004. She worked with unions and was a representative for employees, worked as a management representative and served as agency representative in arbitrations. Heath testified that she had significant legal training and experience in labor and employment law.

Heath testified that she investigated a disciplinary matter involving Employee. A complaint went to the agency safety officer and then was referred to her. She also explained that she was requested to investigate this matter by the Solid Waste Management Administrator, Valentina Ukwuoma. Heath testified that she authored the investigation report related to this matter. Heath explained that she requested the incident report and any statements from all the parties that were present and the status of all employees so that she could interview them. Heath testified that she interviewed persons who were witnesses/present at the time of the event. Heath interviewed eight (8) people. She got a written statement from Employee and Lovett. She also received an incident report and notes from Leroy White of his initial conversation with Employee and Lovett. Heath attached emails that were submitted to her that reported the incident and were related to the investigation.

Heath said that she believed that an incident report dated August 15, 2019, was provided to her by either Leroy White, or Anthony Duckett. Duckett was the association administrator of the street and alley cleaning division at that time. Included in the report were written statements from Employee and Lovett, as well as pictures that she took during the investigation. The pictures documented an injury to Employee's knee, in that Heath cited that Employee alleged his knee was swollen. Also was a picture of an alleged cut to Lovett's head and a scratch on his knee and arm. Heath noted that Employee submitted documentation from Kaiser Permanente indicating that he received medical treatment for injuries sustained during the incident. Heath said that her review of the documents did not indicate that the injuries were from a physical altercation.

Heath also testified that other attachments to her investigative report included an acknowledgement form of Agency's policies, including the EEO, anti-discrimination policy, employee conduct policy, vehicle operated accountability and safety policies, accident incident notification procedures, uniform attire and issuance and mobile electronic communications policies. Heath explained that these documents were relevant to her report because it was found that Employee had violated the Employee conduct policy. Heath indicated that Christopher Bynum was not interviewed because he was not identified to be present to be a potential witness to the incident. Heath said that she asked who was out on the crew assigned that day and that that information was provided to her by the management.

Heath recalled that McManus was a part of the crew and was the person who alerted Leroy White of the argument between Employee and Lovett. Heath testified that McManus told her that by the time White arrive, the verbal argument had escalated, and the men had started a fight. Heath testified that she took detailed notes of her interviews, as was her normal process and that there was no audio recording of the interviews. Heath interviewed all the witnesses one time. Heath recalled that during her interview with Donald Mackell, that he told her he was on the crew. Mackell told her that if there had been any comments made, that he did not hear them. Heath stated that Mackell told her what was reported to him and he also explained to her about the process of turning over full trash cans. Heath noted that if she recalled correctly that if Mackell reported to her that someone told him that Employee called the crew bitch motherfuckers, that she would have to investigate to find the source. Heath did not recall if that was reported to her by Mackell but said that it came out as she was preparing to conduct investigations. Heath believed she asked Mackell what was said and that he acknowledged that was said but did not acknowledge that he heard it himself. Heath did not perceive Mackell to be shocked upon hearing that language.

In talking with Michael Bateman, Heath testified that he told her that there was a conflict between Employee and Lovett. Heath cited that Bateman said it was because of the terms that Employee had said to the crew and that Lovett said that he shouldn't be talking to them like that. She also explained that Bateman told her that he was asked by White to break apart Lovett and Employee after the start of the physical altercation, and that it ended up taking both to break it up. Heath said that in her interview with Ernie Hooks that he told her he did not see or hear anything. She testified that Eddie Sanders said he heard them arguing but not what was being said and that he told her he saw them go into the alley but not what happened after. Lovett told Heath that they were dumping overflowing cans onto the ground to get the trash in the packer. Lovett said to her that after he turned over a can, Employee called him a "bitch nigga" and then told him to meet him in the alley. Heath testified that Lovett said he went to the alley and that he told Employee "this isn't for us" and that Employee then tackled him, and they started to wrestle. Heath testified that Lovett told her he was trying to get Employee off him and that even after they were separated, he still wanted to fight. Heath said that Lovett described injuries to his left eye, knees and elbow and then told her that he should not have gone into the alley. Heath also noted that Lovett said he and Employee had not had any previous conflict. Heath testified that she found Lovett's statements to be credible. Heath explained that the statement she received that was provided by Lovett was received before she interviewed Lovett and that it was consistent with what he said during her interview with him. Heath also noted that the content of his statement was the basis for her questions.

Heath also interviewed Employee but noted that she found him to be "all over the place." She testified that she made an investigator note in her report to clarify because she was trying to document what was said during the investigation. She cited that she did this because she thought that if you read it doesn't flow, and she wanted to make the note that the information was provided as it was given to her as the interviewer. Heath said that Employee told her that he was doing service requests with the removal of trash and bulk items, and when she asked him what happened after the van came to the site, that he gave her what she deemed as a "varied explanation" about the other employees not getting of the van. Heath testified that Employee told her that Lovett and another employee were dumping trash cans. Heath also said that Employee noted that he called the supervisor, White because employees wouldn't get out of the van and said that Lovett was ignoring hm. Employee told Heath that White was a few vehicles behind when Lovett approached him and allegedly had spit come out of his mouth and poked him in the chest .

Heath said that Employee told her that Lovett threatened him by saying he would knock him out and that he went into the alley. Heath also noted that Employee said Lovett kicked him in the groin "like Bruce Lee" and that they started to wrestle. Heath testified that Employee also noted that White and Bateman came into the alley and that Bateman physically grabbed his arm and told him to let go and that when Bateman grabbed his arm, that Lovett started to swing on him and that coming out of the alley,

Lovett was still saying things. Heath also said that Employee expressed that he was surprised Lovett did this with the supervisor on site, and that he feared for his safety and that he wasn't going to fight until he was swung on and that Lovett charged him which led to them "tussling." Heath also said Employee told her that no one saw Lovett punch him but that he had blood on his shirt and that he went to the doctor regarding his knee.

Heath testified that she asked more specific questions and said that Employee indicated that Lovett would not "lay down" and get out of the van and that he would always have to call the supervisors about it because he was responsible for keeping the packer moving. Heath also noted that Employee said they were going up Pennsylvania Avenue and said that Lovett had told him to write a statement so that theirs would match. Employee also told Heath he didn't call anyone a bitch ass nigga and he stayed in his truck. Employee asked her who said what and to present them because those were false allegations. He also told her he never called the crew bitch motherfuckers and he did not ask Lovett to come into the alley. He responded to her and said why would he call him into the alley. Heath testified that Employee had two union representatives present and one of them asked him was his answer yes or no [tr. Pg. 269]. Heath said that Employee "affirmatively said yes, it was all false." Heath also said Employee "laughed when [she] asked him if he had tackled Mr. Lovett first and then said he didn't." Heath testified that Employee told her that he wanted to call the police, but that his supervisor told him to go home. Heath further testified that "as a whole" that she did not find Employee to be credible and documented the basis of her credibility assessment in her report. Heath recalled that she followed up on Employee's statement by asking Lovett about the allegation of the statement matching.

Heath testified that she did not find anything to substantiate those allegations. Heath also noted that Employee's written statement did not match his verbal statement. Heath noted several inconsistencies that led to her credibility determinations. She found that employee's statement about being punched and then kicked in the groin was inconsistent based on three separate occasions documenting the events. The three instances were his interview on the date of the incident, his written statement and then her interview with him conducted as part of the investigation. Heath also note that she identified all the inconsistent statements that were made. She made note about Lovett turning over trash cans, that he said Lovett spit in his face, but also said that spit was coming out of his mouth as they were arguing. Heath also identified that Employee said he was in the truck and Lovett was dumping trash in the street and that Lovett came back and yelled at him. She said Employee told her during his interview with her that he said that he was cleaning up debris with another employee. She also said that Employee told White that they tussled after Lovett threatened him but said in his statement that he told Lovett to back away and that Lovett stepped back and yelled to knock him out. Heath also identified the statement about Employee indicating he walked away to inspect the alley and that Lovett leaped and punched him in the face and kicked him in the groin. Heath said that during the investigation, Employee said Lovett kicked him like Bruce Lee. Additionally, Heath testified that Employee said during the investigation that he was not going to fight until Lovett swung at him. He said in his statement that he was not able to return to work on August 16 due to injuries, busted nose, abrasions to knees, right shoulder blade and lower back. Heath further testified that because of all these, she concluded that his statements were inconsistent and that made his version not credible.

Heath explained that the charges she indicated were based upon the DPM. Heath maintained that they were fighting and that it was undisputed that there was a physical altercation. Heath said that based upon her review of the case, interviews et cetera, that she determined that Employee was the aggressor and that he was in violation of the chapter 16 provisions. Heath said that no one was disagreeing that there was a physical altercation, and that part of her responsibility was to try to determine who was the aggressor and she determined that Employee was. Heath said that based on her experience, to violate these DPM provisions, there doesn't have to be a physical altercation. An attempt to inflict bodily harm is sufficient as it is also a part of the definitions of the charge. Heath noted that someone involved in

“wrestling” would qualify as a violation. Heath noted that the charge of using language was based on her conclusion that she heard from repeated persons that said Employee was using inappropriate language and that there was a verbal argument. She also based it on another employee notifying the supervisor that Employee and Lovett were arguing. Heath also said based on her experience, that the language didn’t have to be curse words, but that based on the DPM that even speaking in a raised voice that is causing others to not be able to focus on what they’re doing is distracting/creating a disturbance.

When asked about what led Heath to levy this charge when there were witnesses who said they didn’t hear or see anything, Heath said that Employee calling crew members names to include “bitch motherfuckers”, “bitches” and “lazy asses” was what led to the charge. She said that even without curse words that a verbal altercation could be considered a violation as well. Heath testified that the third charge related to discriminatory practices was based on the use of language of the words “bitch” and “nigga.” Heath said that Bateman and Lovett told her that they heard Employee say these words. Heath found their statements to be credible because they were consistent. She also noted that their non-verbal actions, like eye contact, lack of hesitation and confidence in repetition were noted in her interview and led to her credibility determinations. Heath testified that following the completion of her report, she forwarded it to Ms. Ukwuoma and Mr. Wright since they had requested the investigation. Following Ms. Ukwuoma’s review, Heath explained that her report was sent to the Hearing Officer, because Ukwuoma wanted to move forward with the removal. Heath said the hearing officer agreed with the proposal for removal. Following the Hearing Officers review and agreement with removal, Heath said that she was responsible for sending the documents to the hearing officer after they were served on Employee.

Heath said she drafted the Advanced Notice of Proposed Removal at the request of Ms. Ukwuoma and then submitted to her for her review. Heath testified that Ukwuoma reviewed the document and they discussed the basis for the charges, and the Douglas factor analysis that is required for the proposed removal. Heath also reminded Ukwuoma of the next steps, including the hearing officer review and the final decision by the director. Once Ms. Ukwuoma signed it, Employee was placed on administrative leave. Heath noted that the hearing officer found that there was enough evidence to support the proposed removal. Following this, she discussed the report and drafted a final decision on behalf of the director and then met with the director for a review. Heath said that the director agreed with her recommendations to move forward with removal.

Heath noted that Employee’s actions were determined to have violated the DPM upon consideration of the totality of the circumstances. He was charged with three separate offenses, and as a result removal was warranted given the serious nature of the behavior. Heath indicated that she considered comparative discipline in her Douglas Factor analysis and noted that similar cases that employees were terminated. Heath also cited that Employee’s SF 50 reflected a final termination date of January 31, 2021. Heath testified that she was responsible for the creation of the DPW Policy Acknowledgement form distributed and signed by employee in 2016. The signed forms indicated policies and Heath testified that language used by Employee on August 15, 2019 violated those policies.

On cross examination, Heath testified that she worked with labor and employment for over 15 years. Heath explained that in her interviews she writes down what witnesses say and that witnesses do not sign her notes. Heath also noted that she does not write interpretations, but documents what is said to her in an interview. Heath asserted that she does not have a transcript, but just documents what is said to her in an investigation. Heath iterated that her reports document what a witness says to her during her investigation. Heath explained that she is a trained investigator and that there is no best practice that requires documentation of interviews by audio recording nor is there a best practice regarding anyone signing personal notes taken during an interview. Heath said that in the hundreds of interviews she has done, that there has not been a witness today that stated that what she reported they said was incorrect.

Heath said that she concluded that Employee had started the fight based on her investigation. Heath said that there was nothing in the investigation report to say that no one saw who started the fight, but that there was a verbal argument prior to a physical altercation. When asked about conflicting statements, specifically about the trash can that was dumped, Heath explained that it was a compilation of statements that were inconsistent and that there were variations of the story to include the written statements submitted to White, the investigation she did and the in-person interview that she found inconsistencies with Employee's statements. Heath reiterated that her findings regarding inconsistencies were based on a compilation. On redirect Heath testified that she did not paraphrase what witnesses said in her report but noted what was said to her. On additional cross examination, Heath indicated that she did not know Crystal Roberts.

Stewart Lovett ("Lovett") Tr. Vol II. Pgs. 9 – 67

Lovett was employed at Agency as a sanitation worker for fourteen years until 2018 (later indicated his employment with agency ended in 2019). Lovett recalled an incident with Employee in August 2019. Lovett said that at that time in August 2019, he was a crew chief and that his responsibilities included ensuring that all the equipment worked and that the everyone working knows what they were doing on a particular day. He recalled being on the block of Fairlawn on August 15, 2021. Lovett testified that this day was a special cleanup that day and that they had to clean the whole area around schools. Lovett said that Employee wanted to go "further down and grab a trash can from out of the woods and that it had all types of species [it is noted that the witness likely was referring to feces] , bacteria water and all types of other stuff...[a]nd he decides he wanted to turn it over and when he turned it over it smelled so bad everybody walked away from it." (Tr. at Page 12). Next Lovett said that Employee jumped out of the truck and called everybody "bitch ass niggers" "faggot motherfuckers" and said they were lazy and that they "don't want to do shit". Lovett stated that there were no comments after that and that they went to the van to do work.

Lovett testified that Employee picked up the trash himself and that they went down the street. There was another trash can that had newspapers and water in it. Lovett asserted that he was draining water out of that trash can and that Employee jumped out the truck and called him a "bitch ass nigger" and said why did he turn the trash over, that it was some "stupid ass shit to do" and "fuck this and fuck that." Lovett says that he told Employee he would get it himself and Employee told him nobody was getting it out. Lovett testified that Employee then said, "what you want to see me, to go in the alley or something", to which Lovett explained that he said, "this stuff is not for us." Lovett described himself as the type of person to try to make sure others don't get in trouble, so he explained that he knew the words to try to calm a person down. Lovett testified that he turned the trash can over and told Employee it's not for us. Lovett said Employee responded saying "no fuck this shit, you want to see me nigger we can go in the motherfucking alley nigger."

Lovett said that his coworker Ricardo McManus, another coworker (female) named Debbie and "actually all my coworkers" came and got him and told him to just go back to the truck. Lovett explained that the truck just so happened to be in the alley and then said that Employee left the truck in the middle of the street. Lovett said the alley had to be a half a block away and that Employee followed him all the way to the alley. Lovett testified that when Employee got there, that he just ran up and started tackling him. Lovett testified that Employee grabbed his legs and that they were rolling all around gravel. Lovett testified that he was getting cherry picked and scratches over his forehead and arms and knees as he was "trying to get this little joker" off him. Lovett explained that by then, his coworker Bateman had come into the alley and he was telling Employee to let him up. Lovett testified that Employee told Bateman that he better "get the fuck away from me man, I'll fuck you up too." Lovett asserted that Employee made a move like he was going to hit Bateman and said that Bateman was an older man. Later, Lovett explained that their supervisor, White, came around and asked what happened. Lovett said that the supervisor took

Employee out there and that he guessed called his supervisor who told him to bring them back to the yard and let them go for the day.

Lovett testified that Employee was cursing at everyone and wasn't specifically cursing at him at first. Lovett stated that Employee cursed at him on the "second try." Lovett also testified when Employee was at the trash can that he was cursing at everyone and called everyone "bitch ass niggers" and saying that they were some "lazy ass dudes" and that they acted like they did not want to do any work. Lovett explained that Employee splashed the contents of the trash can on another old man and that he had to take off his work jumper because his clothes smelled bad. Lovett noted that Employee "attacked the trash can and dumped it over like he was mad at the world." Lovett said it was Employee who turned over the foul-smelling trash can. Lovett said that he did not want to turn his trash can over and that Employee jumped out of the truck and he guessed that's when Employee got mad. Lovett explained that Employee was yelling and calling all of them weak.

Lovett testified that the people around were a female worker named Debbie, and then Bateman, James Clarke, Ernie Hooks, Donald Mackell and Chris Bynum. Lovett said that the whole team made an agreement not to bother that trash can and that Employee jumped out and called them "all types of you know whatever." Lovett said that Employee used the term "bitch ass nigger" multiple times. Lovett stated that he asked his supervisor a couple of times not to be in the truck with Employee because he's a road rage. He also indicated that he thought Employee had a "filthy mouth." Lovett explained that Employee worked hard, but that he was there longer than Employee. He said that Employee drove the packer and he could lead the crew. Lovett also said he would have no problem doing work, but not things they're not authorized to do. Lovett said they were only responsible to be in the street and alley and pick up trash and bulk. Lovett also stated that if they disagreed with Employee, then he would call them "bitch ass niggers."

Lovett testified that he did not curse at Employee at any time, citing that it was not his "dossier or MO." Lovett said that "he knows how to talk to people without cursing and that profanity is not in my level." [Tr. Page 24]. Lovett maintained that he did not get argumentative and that he only told Employee that "this is not for us." Lovett testified that Employee asked him to go into the alley. Lovett said that he did not start a physical fight because his "knees aren't that quick." Lovett said that Mr. White did come and stop the fight and that when Bateman tried to pull them apart, that Employee was aggressive to him. Lovett testified that he did not spit on Employee, and that it was hot out there that day and you need all your spit. Lovett also said that while they were in the alley, he told Employee "this wasn't for us" but that Employee kept saying "fuck that."

Lovett also testified that he did not leap in the air and punch Employee in the face. Lovett said that when they got in the alley that Employee was a "short dude and went straight for my legs." Lovett maintains that once Employee tackled him, he could not do anything, and that Employee was holding on for dear life. Lovett stated that he got scratches from the ground, and got injuries on his forehead, eyebrows, both knees, shoulders and elbows. Lovett recalled talking to Gail Heath. Lovett also testified that he did not approach Employee and ask him to compare the story or for them to have similar stories to Ms. Heath. Lovett maintained that when he walked in, he said good morning to Employee, and signed in the desk and that Heath was telling him to come in. Lovett said that he did not poke Employee in the chest on the day of the incident. Lovett reiterated that Employee use the term bitch nigger and bitch motherfucker. Lovett stated that his relationship with Employee prior to this incident was "on 100." Lovett explained that this meant that they worked together, did not have any confusion and did not have any previous fights. Lovett said that Employee also cursed but had not previously cursed at him and had shown him respect. Lovett stated that he himself does not use curse words.

On cross examination, Lovett explained that as crew chief, he knew the streets and alleys and he was like a navigator for the crew. Lovett said that as the packer driver, Employee was the crew leader,

but that he was the crew chief. Lovett explained that the leader sets up the work and the crew chief navigates for when they must go on a certain day. Lovett said August 15, 2019 was a special day and that his title was “technician” and that on the 15th he did not do any navigating, but that his supervisor did that on that day. Lovett said that the crew leader can override what a crew chief has said to a team. Lovett further explained that Employee was a driver, but that everyone was a team, and that all their positions were as “techs”. Lovett testified that before this incident, he and Employee got along. Lovett said that Employee did not give any instructions on the day of August 15th.

Lovett said that there was a trash can with feces in it and that the team left the trash can there. They saw Employee spill it all over “the old man (later indicated to be Donald Mackell).” Lovett said once Employee got it on the old man they knew not to go over there and that they walked back to the truck and that’s when Employee started cursing at all of them. Lovett said the person who got dirty was Donald Mackell. When asked to review White’s report, Lovett said that the meaning of the “too aggressive with his wording” was that the whole team noticed this nasty trash can with feces and maggots etc., so they walked away and that’s when Employee was aggressive with his words calling them names. Lovett said Mackell said he would go and help Employee. Lovett testified that he did not tell his supervisor about the curse words Employee said because “my supervisor was—you know--, getting the next line of work for us to do.”

Lovett stated that White wasn’t there to hear all “the stuff and the words” Employee said. Later Lovett explained that he did tell the specific words, but it is not in the statement. Lovett also noted that he did not know White had written a statement. Lovett stated that his crew van was parked in the alley and that after Employee started cursing, he then said you want to go in the alley. Lovett maintained that he said, “this is not for us.” Lovett said that Employee started coming toward him and cursing and saying that they were going to go to the “motherfucking alley” and Lovett said, “no I’m not.”

Lovett said that his coworkers pulled him and told him to go back to the truck, so that Employee may have assumed but that “he knows damn well I wasn’t going in no alley to fight him.” Lovett stated that’s how he ended up in the alley to go to the van. Lovett testified that once they let him into the van, that Employee came to him and said, “come on nigger /motherfucker let’s go behind here.” Lovett testified that he said “wait [Employee] this shit is not for us,” and that [Employee] the little fucker just tackled [him].” Lovett did not remember jogging back to the packer. Lovett said that “as soon as he touched the trash can that Employee drove to him and got out of the truck and told this old man “don’t turn that motherfucking trash can over and other words. Lovett explained that he looked in the trash can and only saw water, so he said he would just pour the water out. Lovett said that Employee then said, “motherfucker didn’t you hear me, I’m not going to pick up that shit.” Lovett testified that he responded and said, “man fuck then man, I’ll do it.” Following that, Lovett said that that’s when Employee “done jumped his happy ass, drove from down the street and jumped out of the packer all the way over there to me.” Lovett said that the crew took him to the truck and Employee came around and then tackled him. Lovett briefly explained that service requests were the requests to come and pick up certain items. The administrative judge inquired as to whether Lovett could recall the last name of the crew member named “Debbie” that he indicated was a part of the crew on the day of the incident. Lovett did not recall her last name.

Valentina Ukwuoma (“Ukwuoma”) – Tr. Vol. II Pages 121 – 143

Ukwuoma is employed at Agency as the Administrator of the Solid Waste Management Administration and has held that position for approximately three (3) years. Her responsibilities include the planning, direction and coordination of all activities as it relates to the solid waste management for the District. She also oversees close to 800 employees from five divisions. The divisions include collections and recycling, streets and alleys, cleaning, education and enforcement and tenant disposal. Ukwuoma testified that she was familiar with Employee and that he was in the Street and Alley division. Ukwuoma

explained that there are about four levels of supervision between her and Employee. Ukwuoma was aware of an incident involving Employee in 2019. She explained that the matter came to her attention by way of an incident report noting that there had been a verbal assault. Ukwuoma testified that she forwarded the report to Gail Heath to do an investigation. Ukwuoma said that Heath discussed the matter with her once she concluded the investigation and presented her with a draft notice of removal. Ukwuoma attested to her signature on the notice and noted that she agreed with the conclusions in the document because of the seriousness of the action and the conduct that was found, to include the physical and verbal assault upon a colleague by Employee. Ukwuoma cited that the incident happened during work hours while in uniform. Further, she found that it was unapologetic in nature and that it was initiated and engaged in by Employee. Ukwuoma testified that the Agency went with removal instead of a lesser penalty because the conduct was serious and aggravating and that it went to an abuse of trust. Ukwuoma said that Employee was aware of the conduct and disciplinary policies related to violence at the workplace. She found that his actions were contrary to the policies and were prejudicial to the District Government. w said the Agency has a zero-tolerance policy for violence and physical action.

On cross-examination, Ukwuoma noted that she was aware of Employee's work record. She indicated that she was not aware of outstanding performance evaluations but indicated that she recalled that the last evaluation of record cited that he was rated a marginal performer. Ms. Ukwuoma was unable to recall what year she thought Employee may have had a marginal performance evaluation. Ms. Ukwuoma was unaware of Employee's advanced training, certificates and awards. On redirect, Ukwuoma noted that an employee's past recognitions or awards does not change Agency's decision to terminate for the violation of charges referenced in the notice of removal that she signed.

Employee's Case-in Chief

Employee Tr. Vol. II. Pgs. 144- 267

Employee worked for Agency and other organizations. He has a high school diploma and received training through other various positions. He started working with Agency in 2007 but was not a permanent employee until he returned to Agency at a later date. To Employee's knowledge, his last performance evaluation noted marginal performance, but said his supervisor, Leroy White, said he did not do that. Employee also noted that he received awards during his tenure at Agency. He became a temporary supervisor in 2017 for a six-month period and that ended in 2018. In 2019, Employee said a position came open for trash removal as a crew chief and that he applied for and received the job, but then the incident occurred.

Employee explained that he does his best to follow all instructions and polices and to do a good job. Employee testified that on August 15, 2019, he was a motor vehicle operator. He explained that his duties included making sure service requests were followed and he would have a conference with the supervisor before leaving the yard to ascertain what their duties were for that request. There is a van, packer and sweeper driver, and he receives a map. All of those vehicles follow the packer (trash compactor). His duties include cleaning streets and removal of bulk items, and may include cleaning other things, depending on what was in the service request. Employee instructed the crew as to what they are supposed to be doing. Employee noted that the service request is only given to the compactor driver, which was him. Employee stated that Lovett's duties were as a sanitation worker and he was supposed to clean and follow other instructions. Employee said that Lovett was not a leader but that Mr. Ricardo [McManus] was the crew leader and that it was his job to tell the workers what to do. Employee asserted that Lovett never wanted to follow instructions.

Employee testified that on August 15, 2019, he and Eddie Sanders, who drove the sweeper, were the first on site, around 9:45am. Their assignment that day was a service request to clean up around schools. Employee said that the other workers were turning cans over, and he instructed them not to do

that and that he had the paper [service request] in his hand. He told them there were enough of them to lift the cans and throw the contents away. He said there were about seven men, so that they could lift the cans up without pouring manure all over the street. Employee said that Lovett pushed the cans, and that it got on Mr. Mackell. Employee testified that he did not turn over one can, but when he saw them doing that, he got out of the truck. Employee said Mackell told him that they got all this stuff all over him. He said he asked them why they did that.

Employee indicated that at some point during the day, he called the supervisor. He said that when they got there, the others were sitting in the van (driven by McManus) and weren't getting out to work. Employee said he asked them to get out of the van to work and help with the assignment and they responded that they were tired. Employee said that when they did get out of the van, Lovett and Bateman turned over the can. Employee said that he has had to call the supervisor on multiple occasions about the other workers. Employee testified that he did use profanity that day but did not say what Lovett accused him of. Employee explained that when they would not get out of the van, that he said, "that's some lazy shit", and that he was going to call the supervisor, which he did. When he said that, Lovett, Bateman, Mackell and Sanders were by his truck. They were still in the van when the supervisor arrived and then jumped out and Lovett and Bateman started turning over cans. Employee also said he told them not to do this because vehicles were behind them and that they were also going too far, because they had a specific range for this assignment. Employee said the instructions indicated for them not to go toward Pennsylvania Avenue and they had a three-block radius from the 1600 -1900 block of Fairlawn.

Employee said that he did not go into any woods while they were on the Fairlawn area and that only Anacostia park was nearby and there weren't any woods. Employee does not know why Lovett said he went into the woods. Employee asserted that Lovett and Bateman were "buddies." Employee also noted that while working, they do not turn cans over into the middle of the street. Contents of trash may include nails and glass which can cause flat tires, so that's something they don't do. Additionally, the sweeper is not able to clean all of it up, so it would require them to manually try to rake it or get a broom and shovels to pick it up. Employee said cars behind them were honking their horns and fussing about the holdup of the truck.

Employee said that he was at the trash compactor when Lovett turned over the can and that he and Mackell were cleaning up the trash. Lovett ran back toward him and got in his face, spitting and acting aggressive. Employee said that he asked Lovett to get out of his face and that Lovett responded, "well break my f-ing jaw." Employee said he told Lovett that he was trying to make him lose his job and he didn't have time for that. He asked Lovett to back up and Lovett poked him in the chest and said "whoa whoa you want to break my children." Employee explained that Lovett assaulted him several times and that it's been a cover up that no one talked about. Employee said he walked away and told Gail Heath the same thing. Employee walked by the alley and said let's find more bulk items and he heard somebody say, "watch this." He said Lovett came from behind, swung and punched him in the nose. Employee said he told Heath about this, but she didn't want him to send any of that information. Employee said he fought back, but did not swing or lay a punch, but wrestled him. He said Lovett was growling like something was wrong with him. Employee felt that he had to fight for his safety and feared for his life because Lovett punched him and kicked him in the groin.

Employee said there were no other people in the alley besides him and Lovett. He stated that he was not completely in the alley and believed that Bateman came in the alley later and then Mr. White while they were wrestling. Employee says Bateman grabbed him by the arm, but as he was doing so, Lovett kept trying to punch him, so he put his arm back down Lovett. Mr. White said to let him up and as he lets go, Lovett was still holding his shirt and trying to punch him. Employee told White that he wasn't going to swing on him, but to grab him because every time he tried to let go, Lovett was trying to punch him. Employee testified that his shirt was torn, he was bleeding from his nose and shoulder and injured his back and knee. Employee maintains that he provided all this information to Heath and even the shirt.

Employee said that he should have called the police and expressed that to White. White said that he should have called the police but that he didn't want to get them in trouble. Employee asserted that he called the supervisor before the fight started. He said that he would not have started a fight knowing he had called the supervisor. Employee testified that it would not have made sense because he had just been promoted to a Grade 9 position and that White was the only person who knew he had been promoted.

Employee testified that Lovett was not telling the truth when he said others came into the alley. Employee maintains that only White and Bateman came into the alley. Employee also asserted that he was not fighting, but wrestling and that he did not throw one blow because he did not want to lose his job. Employee also testified that he was interviewed by Gail Heath on maybe August 19 or August 20th following the incident. He gave her a copy of his incident report. Employee iterated that he told her that Lovett was in the street turning over cans and that he called out to him to say they were going too far and that they were not supposed to do that. Employee said that Mackell and Hooks came back, but Lovett ran up to him and got in his face. He told Heath that Lovett was spitting in his face and that he asked him to back up. He also said that Lovett punched him in the face and kicked him in the groin and that's when they started wrestling.

Employee disagreed with several statements contained in the investigative report completed by Gail Heath. Employee said that he did not tell Heath about taking a step back and then being kicked in the groin. He also asserted that he never said Lovett said he had knocked him out, but said Lovett told him to break my f-ing jaw. Employee also disagreed that Lovett said, "you want some more." Employee said that Lovett kept telling him that he was going to die that day. Employee testified that Lovett told him "I'm going to kill you MF&A" and that he said it in front of everyone. Employee said White was there, and that he said to White "do you hear this Roy, you hear him threatening me?" Employee maintains that White said, yeah and that he told "Black to drive off." Employee also explained that he told Heath that it was not until Lovett punched and kicked him that he grabbed him, and they began tussling on the ground. Employee said that he feared for his safety and he did wrestle with Lovett. Employee also said that he never told Heath that he didn't want to get out of the truck, but that it was his job to keep the vehicle (packer) moving. Employee said he is responsible for being in the truck and it's the other workers who are response for being outside and picking up the trash.

Employee also stated that it was untrue that he called anyone "bitch mother fuckers," and that he never used that language and that he also did not say "niggers" or use that language. Employee said that Heath did not ask him but told him that he had called people "mother fuckers," and demanded if he had said these things. He testified that he asked her where she was getting all of this from and that it was totally not true, so he laughed. Employee said Heath got mad with him because he had laughed.

On cross examination, Employee testified that he and Sanders were the first to arrive to the service area on Fairlawn Avenue and that they waited for the other crew to arrive approximately 30 minutes later. He said he was not happy when the other coworkers did not get out of the van. Employee said he asked them politely to get out of the van and give them a hand. Employee testified that he said the word "ass" in response to that situation. Employee maintained that he called his supervisor when the others were not working. Employee said that he did not say to anyone specifically, but just said "this was some lazy shit." Employee said that some people were around him when it was said. Employee did not have a relationship with Bateman or Lovett. He indicated that there were previous meetings with the supervisor because those two were the rowdiest ones, never listened, never paid attention or never wanted to follow instructions.

Employee asserted that he and Mr. Sanders worked well together and were friends at work, but not that he was his friend outside of work. He did not spend time with Mackell outside of work. Employee indicated that it was not fair to say that he was angry at Lovett for turning over cans in the street. He said he is not angry but did not like what they were doing, and it was not "work ethical and they

did not provide what they should have.” He said they were not doing what they were supposed to do and were causing chaos by turning cans over and that cars behind were blowing their horns etc. Employee said he was frustrated. Employee said he went and talked to Lovett about the cans and that he cursed at him. He said he told Heath that Lovett came running back to the vehicle and aggressively got in his face and was spitting in his face. Employee said that Lovett was initially dumping cans and when confronted about them, Lovett waved him off with his hand. Employee maintained that Lovett did not “spit at him” but was up in his face spitting. Employee said he and Lovett were nose to nose and he never said whether the spitting was intentional or unintentional. Employee said he didn’t say this because he didn’t know what Lovett’s motives were and that he asked him to get out of his face and that’s when Lovett poked him in the chest. Employee said he talked to White about the incident while they were on the yard. Upon review of White’s statement, Employee said that he did not tell White whether the spitting was intentional or unintentional. He said he told White that Lovett was in his face yelling and insubordinate.

Employee said that when Lovett was yelling at him to break his jaw, that he told him “look man go ahead, you’re trying to get me to lose my job” and that he turned and walked away. He also said that when he walked away from Lovett, that he came up behind him running and yelling “watch this” and that Lovett punched him in the face, and hit his nose causing his nose to bleed. Employee said that later, Bateman was grabbing his arm and that he told him to let his arm go. Employee did not know what Bateman’s intentions were at the time he first grabbed his arm and each time he did, he told him to let go of his arm. Employee said he told Bateman not to grab his arm, because every time he did, Lovett would try to swing at him. Employee said that he now believes that Bateman was trying to stop the wrestling, and so was his supervisor, Leroy White. Employee said that Bateman was the only one who pulled, and that White asked him to let Lovett go and when he did, Lovett was grabbing his shirt and Bateman pulled his arm again, to which he replied, “y’all grab him, I’m not going to swing.” Employee said that he acted in self-defense and “felt for his life, [his] safety after being kicked in the groin.” Employee agreed that he was involved in a physical altercation. Employee said that he provided a typed statement where he said that he was kicked in the groin. Employee maintained that Heath took pictures of the injuries, what she wanted to take, but that his shirt showed the blood from his nose. Employee said he pointed out his injuries. Employee did not point out his nose at the time, citing that it had been approximately five days to a week or longer and his nose was no longer bleeding. Employee provided forms from Kaiser Permanente and stated that he received medical treatment. Employee noted that he tried to give Heath additional medical documentation about the diagnosis and that he also saw an orthopedist as well, but that Heath said no. Employee testified that he felt her refusal to take the documents was her being biased and that she provided no reason to not accept them, but just said “no I don’t need it.”

Employee said that he never told Heath that he and Mackell got out of the truck and started dumping cans as she indicated in her investigative report. Employee said that he had a previous encounter with Ms. Heath in 2017-2018 when he wrote up one of the crew members he was supervising at the time. He wrote that crew member up for acting in a threatening manner and refusal to follow a direct order. Employee explained that Heath handled the matter for Tony Duckett. Employee cited that he told Heath that Duckett did not like him and that she did not investigate the write up he did. Since then, Employee said he has been a target and contends that Heath’s investigation into this current incident is biased against him. Employee had never been involved in any physical altercation with Lovett. He had been in a verbal argument when he refused to follow directions and that it happened frequently with him and Bateman. Employee testified that he did not harbor ill feelings toward Lovett or Bateman, but that they did not like him. He doesn’t have anything against them, but he believes in getting work done, and they don’t. On redirect, Employee noted that he and the sweeper driver got there first at the same time and that included three people, Bynum, Sanders and himself. Bynum was in the packer with Employee. When they got there they were cleaning up, doing what they could/light work until others arrived.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAWANALYSIS*I. Agency's Motion to Strike Employee's Closing Argument*

As was noted in the procedural history, on May 17, 2021, Agency filed a Motion to Strike portions of Employee's closing arguments citing that evidence not entered into the record had been improperly included with those arguments. Specifically, Agency asserts that Employee's Attachments 5-9 be stricken from the record and not considered as it was not entered into evidence at the evidentiary hearing. Agency avers that OEA Rule 626 governs the presentation of evidence and witnesses and that §626.2 denotes that the record is closed at the conclusion of the evidentiary hearing. Agency asserts that closing arguments do not permit a party to include documentation that was not entered into evidence at the hearing.² Agency argues that Employee filed Attachments 5-9 and then inappropriately relied on those documents to support factual findings in the closing argument. Further, Agency asserts that these documents were not submitted as proposed exhibits prior to the evidentiary hearing and were not admitted during the hearing.³

Employee, by and through his representative, responded on May 27, 2021, and asserted that the documents⁴ should not be stricken from the record. Employee asserts it submitted a list of exhibits pursuant to the October 28, 2020 Order and that these documents were included. Further, Employee argues that the exhibit list included Attachments 5-9. Regarding Attachment 5, Employee asserts that for the closing argument that "...the only information required from the Advanced Written Notice of Proposed Removal was portions of the HR Report that contained witness interviews as well as the "Findings and Recommendations." Further, Employee avers that Attachments 6 and 7 are quotes from witnesses and "rather than literally including these quotes in the body, they were made part of the record by creating attachments." Employee asserts that both Attachments 8 and 9 referenced the DPM language found in §§1607.2(a)(15), (a)(16) and (j)(3). Employee argues that "the applicable language was copied and labeled as Attachment 9. Further Employee avers that it is "disingenuous for Agency's representative to seek to strike the inclusion of DPM language simply because it is presented in the form of an attachment. Employee also notes the same is true for Attachment 8 in that it references DPM and CBA language, and rather than include all eight pages in closing argument, it was presented as Attachment 8."⁵

OEA Rule 626 governs the presentation of evidence and witnesses. Upon review of the evidentiary hearing transcript and the record pertaining to this matter, the undersigned finds that Employee erroneously included Attachments 5-9 in the closing arguments. However, the undersigned would note that the portions of Attachments, 5, 8, and 9 were already in the record by and through Employee's Petition for Appeal previously submitted in this matter. That said, the undersigned has also noted that the submissions included with the closing argument had been modified from the previously

² Agency's Motion to Strike (May 17, 2021).

³ *Id.* at Page 2.

⁴ Employee's Response to Agency's Motion to Strike (May 27, 2021). Employee asserts the following as representative of the exhibits:

Attachment 5: HR Report (excerpts) by Gail Heath with witness statements

Attachment 6: Statement from witness, Donald Mackell, disputing the accuracy of statements attributed to him by the HR Rep

Attachment 7: Statement from witness, Christopher Bynum, noting that Employee is a hard worker

Attachment 8: DPM Factors not considered and CBA language violated.

Attachment 9: DPM regulations that do not "provide for removal for a first offense" regarding unacceptable language or Discriminatory Practices.

⁵ *Id.*

submitted documents in the record.⁶ Further, the undersigned finds that both statements found in Attachments 6 and 7 from Donald Mackell and Christopher Bynum were not entered into evidence during the hearing and were inappropriately included with the closing argument.

Consequently, the undersigned finds that Attachments 5 through 9 in Employee's closing argument are hereby stricken from the record and will not be considered by the undersigned. Accordingly, Agency's Motion to Strike Attachments 5-9 of Employee's Closing Argument is hereby **GRANTED**.

The undersigned does make clear that documents submitted with Employee's Petition for Appeal, Agency's Answer as well as any other briefs submitted as required by this matter, along with the transcript from evidentiary hearing/witness testimony were all considered in making a determination in this matter, with the appropriate weight and probative value measured and determined accordingly. The OEA Board has ruled that while OEA is guided by the Federal Rules of Evidence (FRE), it is not bound by them. The OEA Board has held that under Rule 402 of the FRE that all relevant evidence is generally admissible. An AJ is permitted to rely upon each document that is submitted through the course of an appeal and consider its probative value before rendering a decision.⁷ Wherefore, the undersigned notes that aforementioned submissions in this matter, including the Petition for Appeal and its attachments, Agency Answer and the like, were utilized and considered in rendering the instant decision.

Brief Summary of Agency's Position

Agency asserts that it had cause to terminate Employee from service and that it followed all appropriate laws, rules and regulations in administering the disciplinary action against Employee. Following an incident on August 15, 2019, Employee was charged with conduct prejudicial to District Government and discriminatory practices.⁸ Agency asserts that the record reflects and Employee does not dispute, that he was involved in a physical altercation with another employee while on duty on August 15, 2019.⁹ Agency avers that Employee assaulted Mr. Stewart Lovett and attempted to and actually inflicted bodily harm to him. Agency's position is that "Employee instigated the physical altercation, as Mr. Bateman and Mr. Lovett both testified that Employee was the one who asked Lovett to go into the alley."¹⁰ Agency avers that Employee's account of the incident differs from its findings in its internal investigation completed by Gail Heath, and is in contradiction to the testimony from Lovett and Bateman. That said, Agency argues that a physical altercation occurred, and that Employee does not dispute that. Agency notes that "Employee asserted that it was in self-defense, stating "I felt for my life, my safety after being kicked in the groin." However, Agency argues that there is no evidence to support Employee's assertion and there are no witnesses who can verify that they saw Lovett kick Employee or that Lovett assaulted Employee first. As a result, Agency avers that "it cannot be found that Employee acted in self-defense because there is no evidence in the first instance that Mr. Lovett began the altercation, and that any action by Mr. Lovett was so extreme to the point where Employee allegedly feared for his life."¹¹

⁶ The documents submitted with the closing argument included highlights of certain portions and written discussion of some of the materials presented.

⁷ Rachel George v OAG Opinion and Order on Review (July 16, 2019).

⁸ Employee was charged with violation of : (1) DPM § 1607.2(a) (15) – "Conduct prejudicial to the District Government: Assault, fighting, attempting to inflict or inflicting bodily harm while on District property or while on duty [see also DPW Employee Conduct Policy, Section VI(A)(1), Prohibited Conduct: Fighting, threatening, or inflicting bodily harm on another in the job (workplace violence); (2) DPM § 1607.2(a)(16) – "Conduct prejudicial to the District Government: Use of abusive, offensive, unprofessional, distracting or otherwise unacceptable language, gestures or other conduct; quarreling; creating a disturbance or disruption; or inappropriate horseplay; (3) DPM § 1607.2 (j)(3) Discriminatory Practices: Use of remarks or gestures that relate to and insult or denigrate an individual based on any actual or perceived trait or classification protected under the D.C. Human Rights Act or the Civil Rights Act of 1964.

⁹ Agency's Closing Argument at Page 7 (May 7, 2021).

¹⁰ *Id* at Page 8.

¹¹ *Id*.

That noted, Agency asserts that there is preponderance of evidence that both were involved in a physical altercation and fighting and that the conduct was prejudicial to the District Government.

Agency also argues that there is preponderance of evidence that Employee used abusive and offensive language and that he was involved in a quarrel. Agency asserts that Lovett and Bateman both testified that Employee used words such as “bitch ass niggas and motherfuckers.” While Agency notes that Employee disputes that he said those words¹², it argues that it is still undisputable that Employee was involved in a quarrel with Lovett. Additionally, because Agency found that Employee used the term “nigger or nigga”, it held that its charge against Employee for discriminatory practices was warranted and that there was a preponderance of evidence that Employee engaged in this behavior. Consequently, Agency asserts that the penalty of removal was appropriate under the circumstances. Agency asserts that it balanced the totality of the circumstances and provided a thorough analysis of the *Douglas* factors in this case. Agency also asserts that it has a zero-tolerance policy for workplace violence. Accordingly, Agency asserts that its termination of Employee should be upheld.

Summary of Employee’s Position

Employee asserts that while he was involved in an altercation with another employee on August 15, 2019, he acted in self-defense. Further, Employee maintains that he did not use the language for which he was charged. Employee avers that he became frustrated with his coworker Lovett for turning over a foul-smelling trash can. He also notes that he was frustrated with other coworkers for not working on the site and that led him to call his supervisor, Leroy White to come to the scene. Employee maintains that he said “lazy shit” or “ass” on the day of the incident but did not direct that to any coworker. Employee also avers that Lovett kicked him in the groin and punched him first. Employee maintains that he told the investigator Gail Heath what happened and disagrees with her assessment that his statements during the investigation were inconsistent. Accordingly, Employee avers that Agency has presented insufficient proof to meet its burden and did not have cause to remove him from service.¹³ Employee also asserts that Agency failed to utilize progressive discipline in this matter.

Whether Agency had cause for Adverse Action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

(a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or *suspension for 10 days or more* (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. (*Emphasis added*).

Additionally, DPM § 1601.7 provides that “[e]ach agency head and personnel authority has the obligation to and shall ensure that corrective and adverse actions are only taken when an employee does not meet or violates established performance or conduct standards, consistent with this chapter.” Pursuant

¹² Agency avers that Employee admitted saying “ass” and “lazy shit”, but that it was not directed to any colleagues.

¹³ Employee’s Closing Argument (May 7, 2021).

to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Employee was terminated from service pursuant to three (3) charges: **(1) DPM § 1607.2(a) (15) – “Conduct prejudicial to the District Government: Assault, fighting, attempting to inflict or inflicting bodily harm while on District property or while on duty** [see also DPW Employee Conduct Policy, Section VI(A)(1), Prohibited Conduct: Fighting, threatening, or inflicting bodily harm on another in the job (workplace violence); **(2) DPM § 1607.2(a)(16) – “Conduct prejudicial to the District Government: Use of abusive, offensive, unprofessional, distracting or otherwise unacceptable language, gestures or other conduct; quarreling; creating a disturbance or disruption; or inappropriate horseplay;** **(3) DPM § 1607.2 (j)(3) Discriminatory Practices: Use of remarks or gestures that relate to and insult or denigrate an individual based on any actual or perceived trait or classification protected under the D.C. Human Rights Act or the Civil Rights Act of 1964.**

DPM § 1607.2(a)(15) – “Conduct prejudicial to the District Government: Assault, fighting, attempting to inflict or inflicting bodily harm while on District property or while on duty.

In the instant matter, Employee was charged pursuant to 1607.2(a)(15) for his involvement in a physical altercation with another employee. OEA has typically considered matters involving fighting as charged under DPM §1607.2 (a)(4). Within those considerations, this Office has held that adverse actions involving fighting under the aforementioned section include an “employee engaging in activities that have criminal penalties or are in violation of federal or District of Columbia laws.”¹⁴ When a charge is levied under that section for fighting, the “District of Columbia Superior Court has held that OEA must make factual findings relating to whether an employee’s conduct meets the factual requirements and legal elements of the crime they are alleged to have committed.”¹⁵ This would mean that if an employee was charged with fighting on duty under that provision, the undersigned would also have to consider the elements of assault. The elements of assault are that the employee: “(1) must have made an attempt with force of violence to injure another; (2) with the apparent present ability to effect the injury; and (3) with the intent to do the act constituting the assault.”¹⁶ However, Agency’s charges in this matter are applied under a different DPM provision. Wherefore, the undersigned will not provide an analysis of the elements of assault in the instant matter.

It is uncontroverted that on August 15, 2019, Employee was involved in a verbal and physical altercation with a co-worker. Witnesses were comprised of other members of the crew that were on duty during the time the incident took place. It is also undisputed that the altercation involved Employee and his coworker, Stewart Lovett. Further, the altercation was largely noted as a verbal argument that ultimately resulted in Employee and Lovett “wrestling or tussling” as noted by the witnesses in this matter, to include both Employee and Lovett. Agency avers that based upon the testimonies and statements provided by Lovett and Bateman, along with the investigative report, that it had cause to discipline Employee. Agency also argues that Employee’s claim of self-defense as it relates to the physical altercation is unfounded based upon the evidence in the record. Employee maintains that he did not start the altercation but acted in self-defense following the actions of his coworker, Stewart Lovett.

In this matter, I find that making credibility determinations to be seminal in assessing and evaluating the charges against Employee in this matter. During the Evidentiary Hearing, I had the opportunity to consider witness testimony and examine documentary evidence regarding the incident. Here, Employee testified on his own behalf that on the day of the event, they were assigned to work in the area of Fairlawn SE DC. He explained that other coworkers were not working and that led him to call his

¹⁴ *Angelina Chambers v. Office of the State Superintendent of Education*, OEA Matter No. 1601-0066-12 (January 29, 2015).

¹⁵ *Id.*

¹⁶ *Id.* citing *Stroman v. United States*, 878 A.2d 1241 (D.C. 2005).

supervisor, Leroy White, to come to the scene. During the time of the assigned duty, a verbal argument ensued following Lovett's dumping of a foul-smelling trash can. Employee testified that he was frustrated by Lovett's actions regarding the dumping of the trash can but did not react as was described by Lovett.

Employee maintained that when he talked to Lovett about the trash cans, that Lovett became angry, got in his face and was spitting (or that spit was coming out of his mouth) and also poked him in the chest, while also yelling and cursing at him. Lovett testified that it was Employee who had kicked over a trash can and spilled the contents all over another coworker, Donald Mackell. Following the dumping of the cans, Employee indicated that he went to an alley to collect more bulk trash, when he heard someone say, "watch this", and that Lovett came behind him and punched and kicked him. Lovett testified that Employee told him "let's go in the alley" and that he told Employee "this is not for us." Employee maintained that Lovett swung on him first and that he would not have otherwise reacted, except that he feared for his safety. Both Employee and Lovett testified that White and Bateman were in the alley and broke up them up.

Other witnesses to the incident also testified as to what they observed during the day of the incident. Leroy White, the supervisor, testified that Employee and Lovett were tussling/wrestling in the alley and that he and Bateman broke them up. White also testified that he saw Lovett jogging back toward the packer (the truck Employee drove) and shortly thereafter an argument ensued. White also maintained that he did not hear any profanity from Employee during this incident. Bateman testified that he was in the alley to assist to break up the fight, and that Employee cursed at him, and said something to the effect of "don't grab me motherfucker." Additionally, Eddie Sanders testified that he saw Lovett run back toward the packer (that Employee drove) and get into Employee's face following the dumping of the trash cans. Sanders testified that while he heard arguing that he did not hear any profanity from Employee that day. Sanders did not witness the physical altercation between Employee and Lovett. Donald Mackell testified that he did not hear any profanity from Employee that day. He also did not witness any physical altercation between Employee and Lovett that day. Mackell also testified during the Evidentiary Hearing that he never told the investigator, Gail Heath, that someone told him that Employee had called the crew "bitch motherfuckers." Mackell reiterated this position on cross-examination. It is also of note to the undersigned, that Mackell never indicated that any contents of a trash can had been spilled on him by Employee. Mackell testified that the job was messy that day and for all intents and purposes, he wasn't paying attention to Employee and Lovett as he was focused on avoiding becoming messy from the work.

Regarding the incident itself, the undersigned found the testimonies of White, Sanders, Bateman and Mackell to be credible, straightforward and consistent with the record. Alternatively, the account provided by Lovett regarding the incident was not consistent and leads the undersigned to question the credibility of his testimony. First, Lovett is the only person who indicated that Employee had kicked over a trash can. Additionally, it is noted that during direct questioning, Lovett noted that he doesn't use profanity or offensive language, but later referred to Employee as a "nigga" and "little fucker" during his testimony on cross examination.¹⁷ Additionally, Lovett's account regarding Employee approaching and yelling at him does not align with other witnesses testimony. Lovett indicated that Employee had yelled and cursed and called the whole crew "bitch ass niggas/bitch motherfuckers." However, all the other witnesses aside from Bateman testified that they did not hear Employee use profanity or say those words on this day. Bateman testified that he heard Employee say "lazy motherfuckers" while workers were in the van and said that Employee said "motherfucker" when he and White were trying to break up the physical altercation. Bateman made no attestations with regarding to the use of the words "bitch" or "nigger" by Employee. Wherefore, the undersigned finds that Lovett's testimony is not credible regarding the incident that took place on August 15, 2019. Further, Lovett noted that it was Employee who approached him, but the testimonies of White, Sanders and Employee all cite that Lovett ran/jogged back

¹⁷ See. Evidentiary Hearing Transcript Vol 2 Page 56-57 (February 10, 2021).

toward Employee and that shortly after an argument ensued. Following the incident, an investigation was conducted by Gail Heath on behalf of the Agency. Based on the information ascertained from the witnesses to the incident, as well as interviews done with Employee and Lovett, Agency found that Employee was the aggressor in the matter and ultimately did not find Employee's claim of self-defense to be supported. Further, Agency further found that several of Employee's statements provided during the investigation were inconsistent and led them to doubt the credibility of those statements.

The undersigned disagrees with Agency's conclusion in this matter and finds that other mitigating factors were not meaningfully considered. The undersigned finds that Agency's reliance on the testimony and statements of Lovett and Bateman, fall short of the consideration of the other witness testimony that was provided. Specifically, the undersigned finds that based on the review of the testimonies of Employee, Eddie Sanders and Leroy White, that Employee was not the initial aggressor. As previously noted, Sanders testified that he saw Lovett run back toward Employee and get in his face, and that following that he saw an argument, but did not hear what was said. Leroy White also testified that he saw Lovett jogging back toward the packer (truck that Employee drove) and that shortly after, Lovett and Employee were arguing. The testimony from White and Sanders corroborate and are consistent with Employee's testimony that Lovett had gotten in his face, poked him in the chest and that spit was coming out of his mouth. While the undersigned found Gail Heath's testimony during the Evidentiary Hearing to be credible, she was not present at the scene of the incident that the investigative report was based on. Agency relied upon those statements provided by witnesses as presented during its investigation, however, based upon the testimony provided by the witnesses and observed by the undersigned during the Evidentiary Hearing in this matter, I find that Agency failed to appropriately consider Employee's self-defense claim and other mitigating factors regarding the physical altercation between Employee and Lovett.

Specifically, the undersigned finds that Agency failed to appropriately consider self-defense in this matter and failed to consider certain *Douglas* factors related to that claim. D.C. Superior Court held in *Lisa Randolph v. DMV*, that in instances of assault, "self-defense is the use of reasonable force to repel a danger which a person reasonably believes may cause him imminent body harm."¹⁸ Further, the Court cited that, "to invoke self-defense to assault, an individual must satisfy the following: (1) that there was an actual or apparent threat; (2) the threat was unlawful and immediate (3) the individual honestly and reasonably believed that he was in imminent danger of death or seriously bodily harm; and (4) the response was necessary to save himself from danger."¹⁹ Additionally, the Court found that "*even if that individual is unable to establish a perfect self-defense claim, an imperfect claim of self-defense may nevertheless lie as mitigation. In making out an imperfect self-defense claim, the onus is on whether that individual has a good faith belief even though the appearance of the circumstances turned out to be false.*"²⁰ (*Emphasis added.*)

In the instant matter, Employee provided a statement during the investigation that he feared for his safety. Those statements were made and were included in the investigative report and align with the testimony provided during the evidentiary hearing. Even if the Agency disagreed with Employee's statement, I find that it failed to give due and meaningful consideration to those claims and instead relied

¹⁸ *Lisa Randolph v. District of Columbia Department of Motor Vehicles*, 2014 CA 006788 P(MPA) (September 3, 2015). In this decision, Superior Court remanded a matter back to the OEA Board. The Court held in this matter that the "agency record does not adequately reflect that officials [DMV] considered the petitioner's self-defense claim or any mitigating circumstances that may have been applicable to the petitioner's circumstance. See also. *James Wilson v District of Columbia Department of Parks and Recreation*, Opinion and Order on Petition for Review, OEA Matter No. 1601-0062-17, Pages 6-10 (May 28, 2019).

¹⁹ *Id.* citing *Mack v. United States*, 6 A.3d 1224, 1230-31 (D.C. 2010) (quoting *Brown v. United States*, 619 A.2d 1180, 1182 (D.C. 1993).

²⁰ *Id.* citing *Williams v. United States*, 858 A.2d 984, 994 n.13 (D.C. 2004) ("Imperfect self-defense is a mitigation defense which, unlike perfect self -defense does not result in full exoneration.")

upon the statements of the other employee involved, Lovett. As previously cited, D.C. Superior Court found that *even if* someone is not able to make a perfect self-defense claim that “*an imperfect claim of self-defense may nevertheless lie as mitigation.*” (*Emphasis added.*) Accordingly, I find that Agency failed to appropriately consider Employee’s claim that he was trying to defend himself as a mitigating factor. The undersigned also finds that Agency failed to appropriately consider the *Douglas* factor related to this issue, namely the “*mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter*” (*Emphasis added.*)”²¹ Here, Employee and other witnesses testified that Lovett ran back toward Employee and got in his face. As previously noted, Eddie Sanders testified that he saw Lovett get in Employee’s face first and on cross examination reiterated that he saw Lovett go back to the packer and get in Employee’s face. Leroy White also testified to seeing Lovett jog back toward Employee and that shortly thereafter the argument started.

As previously explained, the undersigned finds Stewart Lovett’s testimony to be lacking in credibility and veracity regarding the events of that day. Lovett testified that it was Employee who kicked over a trash can. No other witness indicated that Employee had turned or kicked over a trash can, rather all testimony noted that it was Lovett that was turning over trash cans. Additionally, it was cited in the Final Agency notice that Lovett “had dumped an overfull trash can over and turned the can upside down afterward.”²² Further, Lovett indicated during direct examination that he does not curse or use offensive language. However, during his cross examination, Lovett referred to Employee as a “nigga” [see Tr. Vol 2 Page 56 Line 7] and a “little fucker” [See Tr. Vol 2 Page 57 Line 2], all of which contradicts his previous testimony regarding his own use of language and also lends itself to question the credibility of his statements. Lovett’s testimony contradicted and was strikingly different from the testimony of other witnesses to the incident.

Alternatively, I found Employee’s testimony to be forthcoming and consistent with what was introduced in the record. Employee did not deny engaging in a physical altercation, but claimed it was self-defense, following being punched and kicked in the groin by Lovett. Employee also maintained that Lovett had gotten in his face and was spitting (intentional or unintentional was not determined), of which was found in the investigative report, although the investigator, Ms. Heath found Employee’s statements

²¹*Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

- 1) the nature and seriousness of the offense, and its relation to the employee’s duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- 2) the employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- 3) the employee’s past disciplinary record;
- 4) the employee’s past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- 5) the effect of the offense upon the employee’s ability to perform at a satisfactory level and its effect upon supervisors’ confidence in employee’s ability to perform assigned duties;
- 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- 7) consistency of the penalty with any applicable agency table of penalties;
- 8) the notoriety of the offense or its impact upon the reputation of the agency;
- 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- 10) potential for the employee’s rehabilitation;
- 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

²² Agency Answer at Tab 7 Notice of Final Decision (May 1, 2020).

to be inconsistent. While Gail Heath's testimony during the evidentiary hearing was credible regarding her investigation into the matter, the undersigned again notes the investigative report was based on statements ascertained from those present at the time of the incident and that Heath was not present. Further, the testimonies of the witnesses during the Evidentiary Hearing also cite to the inconsistencies of Lovett's version of the events of that day. As a result, I find Agency's contention that Employee was the aggressor/instigator to be unsupported by the evidence in the record. Further, I find that Agency failed to appropriately give due consideration to the mitigating factors regarding the incident, specifically with regard to Employee's claim of self-defense (even if imperfect), as well as the *Douglas* factors related to the consideration of mitigating factors, namely those of malice or provocation on the part of another party.

Agency argues that the record shows that there was quarreling and that "even if it is found that Employee did not instigate the verbal and physical altercation with Lovett, it cannot be disputed that he was, very least mutually involved in the verbal and physical altercation with Mr. Lovett."²³ Further, Agency asserts that the "DPR does not require that Employee start the fight with another employee in order to be guilty of misconduct; the offense only requires that he was indeed engaged in an assault and fight with another employee, and that he was attempting to or actually inflicted bodily harm on another employee."²⁴ This argument would be sufficient if Agency had thoroughly and appropriately considered the mitigating factors in this matter, but it did not. Rather, Agency dismissed Employee's claims and only relied upon the testimony and statements of Lovett, the other employee involved in the altercation and Mr. Bateman. The undersigned would also note that the Hearing Officer's Final Report cited that at the time of their consideration of the matter, that Lovett that was pending disciplinary action for a suitability charge.²⁵ There is no record of Lovett being terminated for his involvement in this altercation. Thus, Agency's position regarding the mutuality of the involvement in the altercation as a reason to sustain the charges and for termination of Employee; but having not applied the same to the other party involved, Lovett, does not align with its argument regarding its zero-tolerance policy and the provisions of the DPM set forth in its closing arguments. The undersigned finds that this exhibits Agency's failure to appropriately consider Employee's self-defense claims and other mitigating factors as required. Because I find the Agency failed to make meaningful and appropriate considerations of self-defense and the *Douglas* factor related to mitigation, I find that Agency failed to follow all appropriate laws, rules and regulations in this administration of the instant disciplinary action and that this charge cannot be sustained.

DPM § 1607.2 (j)(3) Discriminatory Practices: Use of remarks or gestures that relate to and insult or denigrate an individual based on any actual or perceived trait or classification protected under the D.C. Human Rights Act or the Civil Rights Act of 1964.

In this matter, Employee was also charged under the aforementioned DPM section for language allegedly used on August 15, 2019. Specifically, after its investigation, Agency found that Employee had called other coworkers "bitch nigga/ bitch motherfuckers" and "lazy/bitch ass niggas."²⁶ Employee testified that he did not call anyone a "bitch, nigger/nigga or mother fucker." Employee conceded that he said that was some "lazy shit" when his coworkers did not proceed to work when they reached the site that day and that he called his supervisor. Agency relied upon the statements of Lovett and Bateman in its assessment of this charge against Employee. As previously noted, the undersigned did not find Lovett's testimony to be credible regarding this matter. There were inconsistencies in his testimony and no other

²³ Agency's Closing Argument at Page 12. (May 7, 2021).

²⁴ *Id.*

²⁵ Agency Answer at Tab 6 - Hearing Officer's Report Page 8 (footnote) (May 1, 2020).

²⁶ Agency Answer at Tab 7- Final Notice (May 1, 2020).

witnesses, outside of Bateman, who heard Employee use the profanity alleged by Lovett that day. This is of note given that Lovett testified that Employee had cursed and said these words to the entire crew.

Again, the undersigned noted that no other witness testified to hearing any of the language for which Employee was charged. Further, Donald Mackell strongly iterated during his testimony that he never told Ms. Gail Heath that he had been told that Employee had said “bitch motherfucker” and also noted that the first time he heard that language was during his conversation with Ms. Heath. The undersigned also makes note that Bateman did not testify during the evidentiary hearing that he heard Employee say the words “nigger/niggas”; rather Bateman’s testimony during the evidentiary hearing was that he heard Employee say “lazy motherfucker/motherfucking” and also that Employee said “don’t grab me when I’m fighting, I’ll kick your ass.”²⁷ The statement written for Bateman by Gail Heath cited that Bateman said Employee said “bitch motherfuckers.” As previously noted, Employee testified that he said, “lazy shit” and “ass” but maintained that he did not say the other phrases for which he was accused. No other witness outside of Lovett testified during the evidentiary hearing to hearing “bitch” or “nigger/nigga” uttered by Employee. Rather, most witnesses testified that they did not hear any profanity from Employee on the day of the incident. The undersigned found Employee’s testimony regarding this issue to be forthcoming and consistent with the record. Based upon my review of the witness testimony and my aforementioned credibility findings, I find that Agency has not met its burden to show that Employee used the words “nigger/nigga” or “bitch” as it relates to the charge of Discriminatory Practices under DPM § 1607.2 (j)(3). As a result, I find that this charge cannot be sustained.

DPM § 1607.2(a)(16) – “Conduct prejudicial to the District Government: Use of abusive, offensive, unprofessional, distracting or otherwise unacceptable language, gestures or other conduct; quarreling; creating a disturbance or disruption; or inappropriate horseplay;

Under this charge, Agency asserts under this charge that “quarreling or creating a disturbance” could be considered as grounds under this section for its action against Employee. Further, Employee testified that he said, “lazy shit” and/or “ass” on the day of the incident. Accordingly, the undersigned finds Agency has shown cause for action for this charge. As such, Agency can use this charge to discipline Employee.

Whether the Penalty was Appropriate

Because I find that Agency failed to appropriately and meaningfully consider self-defense and other mitigating factors regarding this incident, the undersigned finds that Agency has not met its burden to establish cause for adverse action in this matter under DPM §1607.2 (a)(15). Further, I find that Agency did not meet its burden of proof as it related to the charge under DPM §1607.2(j)(3) Discriminatory Practices. Accordingly, the undersigned finds that Agency’s penalty of termination for these charges is inappropriate. Lastly, while I find that Agency had cause to discipline Employee under DPM §1607.2(a)(16), that its chosen penalty of removal is not appropriate under the totality of the circumstances and also does not align with the guidance found in the Table of Illustrative Actions. The penalty range for a first offense of a charge under DPM §1607.2(a)(16) ranges from counseling to a 15-day suspension. Based upon the evidence in the record and Employee’s own admissions regarding certain conduct related to this charge, the undersigned finds that a reasonable penalty for this charge would be a 15-day suspension.

²⁷ Bateman noted that this was during the time in which he and White were breaking up the physical altercation between Employee and Lovett.

ORDER

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

1. Agency's action of terminating Employee from service is **REVERSED**.
2. Employee is **suspended for fifteen (15) days for the charge under DPM § 1607.2 (a)(16)**;
3. Agency shall reinstate Employee and reimburse Employee all back pay and benefits lost as a result of his termination.
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MICHELLE R. HARRIS, Esq.
Administrative Judge