THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0008-11
LISA RANDOLPH,	
Employee	
	Date of Issuance: July 29, 2013
v.	
DISTRICT OF COLUMBIA DEPARTMENT OF MOTOR VEHICLES,	
Agency	Sommer J. Murphy, Esq.
	Administrative Judge

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On October 12, 2010, Lisa Randolph ("Employee"), filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the D.C. Department of Motor Vehicle's ("Agency") action of terminating her employment. Employee was charged with "any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of the law" and "any other on-duty or employment-related reason for corrective action or adverse action that is not arbitrary or capricious." Specifically, Employee was charged with fighting while on duty during an April 22, 2006 altercation. Employee was working as a Motor Vehicle Inspector at the time she was terminated. The effective date of her termination was September 30, 2010.

I was assigned this matter in July of 2012. On November 19, 2012, a Status Conference ("SC") was held for the purpose of assessing the parties' arguments. During the SC, it was determined that there were no material facts in dispute that would otherwise warrant an evidentiary hearing. I subsequently ordered the parties to submit written briefs addressing the issues discussed *infra*. Both parties responded to the order.[1] The record is now closed.

[1] On February 25, 2013, Agency filed a Motion to Dismiss Employee's appeal for lack of jurisdiction. As discussed below, OEA has jurisdiction over adverse actions taken for cause by an agency. Accordingly, Agency's motion is denied.

JURISDICTION

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

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.

ISSUES

1. Whether Agency's action was taken for cause
2. Whether the penalty imposed was appropriate under the circumstances.

Agency's Position

Agency contends that Employee's arguments, as stated in her Petition for Appeal and subsequent brief to this Office, fail to substantiate a claim of a hostile work environment or discrimination. According to Agency, Employee's claims fall outside the jurisdiction of OEA, thus this Office is unable to consider the merits of her appeal.

Employee's Position

Employee argues that Agency's action of terminating her employment was discriminatory in nature. In her Petition for Appeal, Employee contends that she was working in a hostile work environment, and that Agency failed to protect her safety in spite them being made aware of her previous problems with N.S. In her written submission to this Office, Employee states the following:

> "My concern is we both went to court and I won the case in self-defense. My concern is [N.S.] went back to work and got promoted [and] I was sent home on leave with pay. No one from the Union

> or Government call[ed] or recommended me to return to work. My question is why. I feel like the Government didn't do right by me, myself and [N.S.] both should have been terminated…."[2]

Uncontested Facts

1. Employee's position of record at the time she was terminated as a Motor Vehicle Inspector, DS-1802-08.

2. On April 22, 2006, Employee was involved in a physical altercation with another employee ("N.S.") at approximately 1:20 p.m., while working at an Inspection Station. During the altercation, Employee assaulted N.S. with a pen, causing a laceration on the left side of his face.[3]

3. A Workplace Violence Report of Investigation was drafted following the altercation between Employee and N.S. The purpose of the report was to gather information from witnesses, and documents pertaining to the April 22, 2006 incident.[4]

4. On September 13, 2010, Agency issued an Advance Written Notice of Proposed Removal, charging Employee with the following: "any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of the law"; "any other on-duty or employment-related reason for corrective action or adverse action that is not arbitrary or capricious."

5. Employee was given the opportunity to respond, in writing, to the Advance Written Notice of Proposed Removal within six (6) days. Employee did not submit a response.

6. On September 24, 2010, a Hearing Officer issued a Report and Recommendation on Employee's proposed removal. The Hearing Officer recommended that Employee be terminated based on the documentation provided to her.

7. On September 28, 2010, Agency issued Employee a Notice of Final Decision on Proposed Removal. The effective date of Employee's termination was September 20, 2010.

8. Employee subsequently filed a Petition for Appeal with this Office on October 12, 2010.

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[2] Employee Brief (January 11, 2013).
[3] Agency Answer, Tab 6 (November 15, 2010). On February 28, 2007, Employee was found not-guilty on a criminal charge of assault in the D.C. Superior Court. The Court held that the Government failed to prove, beyond a reasonable double, that Employee did not act in self-defense based on the testimony presented at trial. *See* CA No. 2006-CF2-698.
[4] *Id*. at Tab 10.

ANALYSIS, AND CONCLUSIONS OF LAW

With respect to Employee's claims of discrimination, D.C. Code § 2-1411.02 specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Complaints classified as unlawful discrimination are described in the District of Columbia Human Right Act.[5] Additionally, District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. However, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works*[6] held that OEA may have jurisdiction over an unlawful discrimination complaint if the employee is "contending that he was targeted for whistle blowing activities outside the scope of the equal opportunity laws, or that his complaint of a retaliatory RIF is different for jurisdictional purposes from an independent complaint of unlawful discrimination or retaliation.…"[7]

Here, Employee's claims as described in her submissions to this Office do not allege any whistle-blowing activities as defined under the Whistleblower Protection Act. There is also no evidence in the record to support a finding that Employee's termination was retaliatory in nature. Accordingly, I find that Employee's claims of discrimination fall outside the scope of OEA's jurisdiction. I further find that this Office lacks jurisdiction over Employee's claims of a hostile work environment. This is not to say that Employee may not aggrieve any allegations of discrimination or a hostile work environment in another venue; however, I am unable to address the merits, if any, of such allegations.

Whether Agency's adverse action was taken for cause.

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.

In this case, Employee does not contest that she was involved in a fight with another co-worker during her tour of duty. Moreover, both parties concede that there are no material issues of fact to be decided that would require an evidentiary hearing. Therefore, the only remaining issues to be decided in this matter are whether Agency's action was taken for cause and whether the penalty imposed was appropriate under the circumstances. It should be noted that

[5] D.C. Code §§ 1-2501 *et seq.*
[6] 730 A.2d 164 (May 27, 1999).
[7] *El-Amin*; *citing Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 666 (D.C. 1994).

Employee's submission to this Office in response to the Undersigned's November 29, 2012 order does not contest or address either of the aforementioned issues. As such, the following analysis will be based on the documents submitted throughout the course of Employee's appeal.

In accordance with Section 1651 (1) of the CMPA (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. Section 1603.3 of the District Personnel Manual ("DPM") defines cause to include "[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations (fighting on duty), and "any other on-duty or employment-related reason for corrective action or adverse action that is not arbitrary or capricious."

Based on a review of the record, I find that Agency has met its burden of proof to establish that Employee was involved in a physical altercation with N.S. on April 22, 2006. As previously stated, Employee does not contest that she was involved in a fight while on duty. Employee's sole defense is that she was placed in a hostile work environment by management, and acted in self-defense when confronted by N.S. While this assertion may be true, this Office's jurisdiction is limited by statute, and OEA does not have authority to adjudicate Employee's claims of a hostile work environment. Fighting while on duty violates section 1603.3 of the DPM, and I find that Agency's decision to terminate Employee was done so with cause, and was not arbitrary or capricious.

Whether the penalty was appropriate under the circumstances.

With respect to Agency's decision to terminate Employee, any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[8] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised.[9] When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[10]

Agency has the discretion to impose a penalty, which cannot be reversed unless "OEA finds that the agency failed to weigh relevant factors or that the agency's judgment clearly exceed the limits of reasonableness."[11] The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for a first offense for fighting on duty is removal.

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[8] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, Opinion and Order on Petition for Review (July 2, 1994).
[9] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).1601-0417-10
[10] *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).
[11] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985).

I find that Agency acted reasonably and well within the parameters established in the Table of Penalties. Based on the foregoing, I conclude that Agency's decision to select removal as the appropriate penalty for Employee's actions was not an abuse of discretion and should be upheld.

Based on the foregoing, I find that Agency has met its burden of proof by establishing that Employee's conduct constituted: 1) an on-duty or employment-related act that Employee knew or should reasonably have known is a violation of the law; and 2) any other on-duty or employment-related reason for corrective action or adverse action that was not arbitrary or capricious." Accordingly, removal was reasonable in light of the seriousness of the offense, and its relation to Employee's duties, position and responsibilities as a Motor Vehicle Inspector.

ORDER

It is hereby **ORDERED** that Agency's action removing Employee is **UPHELD**.

FOR THE OFFICE:

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SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE