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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
RONNELL DENNIS,)	
Employee)	OEA Matter No. 1601-0404-10
)	
v.)	Date of Issuance: October 31, 2013
)	
OFFICE OF THE CHIEF MEDICAL)	
EXAMINER,)	
Agency)	Eric T. Robinson, Esq.
)	Senior Administrative Judge
_____)	
Ronnell Dennis, Employee <i>Pro-Se</i>)	
Eric Huang, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Ronnell Dennis (“Employee” or “Dennis”) filed a petition for appeal with the Office of Employee Appeals (“OEA”) contesting the Office of the Chief Medical Examiner’s (“OCME” or “Agency”) action to remove him from his position. Employee’s last position of record was an Autopsy Assistant, CS-601-07. The effective date of removal was September 17, 2010. Agency contends that there was cause for removal and that the penalty was appropriate. Employee disagrees and has alleged that there was no cause for his removal, and that the penalty, in turn, was inappropriate.

An evidentiary hearing was held in this matter on Tuesday, December 4, 2012. Afterwards, the parties were required to submit written closing arguments in support of their positions. Both parties complied with this order by submitting their closing arguments on or around March 18, 2013. The record is now closed.

JURISDICTION

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

ISSUE

Whether the Agency's action of removing the Employee from his position was supported by cause and whether the penalty was appropriate.

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.”

STATEMENT OF THE CASE

By letter dated August 12, 2010, Agency issued to Employee an Advanced Written Notice of Proposed Removal from his position of Autopsy Assistant, CS-601-07. The action was based upon the following cause: any on-duty or employment-related act or omission that the Employee knew or should reasonably have known is a violation of law; specifically:

“1. On June 24, 2010 you sexually harassed and assaulted Latoya Jamison by using sexually degrading language to describe her body. You called her a loser; too fat and that you would need a couple shots of alcohol to ‘fuck’ with her; told her that no man wants a full-figured woman; and you poked her in the stomach and hit her on the hip.”

“2. When the Security Guard intervened, you told her that she looked like your dog.”

Employee was advised of his rights to review material upon which the proposed action was based, to respond in writing within six (6) days of receipt of the Notice, and to an administrative review by a hearing officer. A decision was rendered with no response from Employee.

The hearing officer's written decision was issued on August 24, 2010, finding that Agency had established that it had cause to remove the Employee and recommended termination.

On September 8, 2010, Agency's Chief Medical Examiner issued the final decision sustaining the removal.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Summary of the Testimony

1. Latoya Jamison Transcript (hereinafter "Tr.") pgs. 23-52.

Agency Witness Latoya Jamison (hereinafter "Jamison") testified in relevant part that: she has been employed by the OCME as a Forensic Investigator since December 2009. She held this position on the incident date in question, June 24, 2010. She related that Employee's position at the time was a Mortuary Technician. Because she and the Employee held different positions, Jamison had access to certain areas of the office that Employee did not, including her own office. On June 24, 2010, Employee knocked on her office door, and she let Employee into her office. A verbal exchange occurred where Employee, uncharacteristically, began questioning Jamison about her personal relationships. Employee then began referring to Jamison's physical appearance, specifically that Jamison's "gut had gotten too big or [Jamison] gained a few pounds and that he needed a few shots of Patron to actually be interested in someone such as myself." Jamison testified that it was that last comment that stood out, and that these comments made her feel uncomfortable. She related that Employee then got on the computer and showed her pictures of women he would be interested in on Facebook that differed from herself. She further related that the security guard came into the office and tried to de-escalate the situation, but that the guard was unsuccessful in her attempts. Jamison remembered hearing Employee stating that the security guard looked like a dog. Jamison testified that Employee poked at her stomach, remarking "Look at that gut, it's getting big," and that interaction was very unusual. As a result of this physical interaction, Jamison backed up, startled, and told Employee not to put his hands on her again. She testified that she did not give Employee permission to touch her stomach, and that she had never given permission for similar touching. Jamison testified that she wrote an email to request that she and Employee no longer work on the same shift.

Jamison identified an affidavit that she had written on July 9, 2010, soon after the date of the incident. The affidavit, identified and admitted as Agency's Exhibit 1, reiterated much of Jamison's testimony. Additionally, it included several specific comments that Jamison indicated that Employee made to her:

"you are a loser,"

"your stomach is disgusting and a turn off; proceeded to poke me in the stomach."

"if you lost that stomach, you would be a really nice looking person,"

"no man wants a full-figured woman,"

"I would need a couple of shots of alcohol to be involved [sexually] with you,"

"your stomach resembles [']Precious,['] [from the movie]," etc.

The affidavit also related that during this interaction, Jamison repeatedly told Employee to stop, and that Employee did not heed these requests. The affidavit related that Employee called the security guard fat, unattractive, and that she looked like his dog. The affidavit

indicated that Employee attempted to play the whole incident off as a joke, and that he proceeded to hit Jamison on the hip, to which Jamison responded by pushing his hands off herself and admonishing him. The affidavit also noted that because Employee would not leave her office, Jamison left the office to “get away from him.”

On cross examination, Jamison testified that both before and after the June 24, 2010 incident, there were no incidents of sexual harassment. She further related that her affidavit did not mention that she had been sexually harassed or sexually assaulted. She identified the email she previously testified about, and it was admitted as Employee’s Exhibit 1. She testified that she would not characterize the incident as sexual assault. In response to a question as to whether she had been sexually harassed, Jamison testified that she felt uncomfortable with the circumstances.

On redirect examination, Jamison testified that she no longer felt comfortable about responding to crime scenes with Employee. She further related that she would not change the content of the affidavit she wrote.

On re-cross examination, Jamison identified Facebook messages that were exchanged between herself and Employee, introduced into evidence as Employee’s Exhibit 2. She also testified she did not make the original complaint regarding sexual harassment.

On re-redirect, Jamison testified she felt very uncomfortable about having to appear in court, talk about the uncomfortable event, and make contact with Employee. She reiterated that nothing in her affidavit was fabricated.

2. Patricia Lewis Tr. pgs. 62-72.

Employee Witness Patricia Lewis (hereinafter “Lewis”) testified in relevant part that: she, as an HR advisor for OCME, recognized Employee’s Exhibit 3, as an email written by Employee to her regarding Employee’s request to obtain the supporting documentation that Agency used to sustain the 15-day notice of proposed removal. Employee’s Exhibit 3 was admitted into evidence. She related that she responded to the request by stating via email that Agency would give Employee access to the documents he was requesting. She further testified that she met with Employee in person and gave him the opportunity to review two witness statements. She further testified that the documents were subsequently emailed to the Employee, although she was unable to recall the date the documents were sent.

On cross examination, Lewis testified that the Agency did not act in any way to retaliate against the Employee for any reason. She further testified that Agency never acted to inhibit Employee’s ability to present the facts of his case.

3. Sharlene Williams Tr. pgs. 73-128.

Agency Witness Sharlene Williams (hereinafter “Williams”) testified in relevant part that: she is Agency’s General Counsel. She has held the position since 2004, and held that position on the date of the incident. She testified that Ms. Peggy Fogg (“Fogg”), a supervisor in the Facilities Management Department of OCME, contacted her in reference to Jamison’s

reporting of the June 24, 2010 incident. Because Williams was also the Equal Employment Officer (“EEO”), she informed Jamison that she needed to report the incident to her, not just to Fogg.

Williams testified that she interviewed Jamison, and related Jamison’s story: that another employee, Dennis Bell, and Employee had approached Jamison’s office and asked to be let in. Jamison complied, and Employee began making comments to her about her shape, weight, and other vulgar statements. Jamison indicated to Williams during her interview the following:

She said that he told her that in order to “F” with her, he would have to have a shot of whiskey. And he had poked her, his finger, in her stomach area and then slapped her on her behind.

And she also stated that he had gone into her computer – her computer was on because she had been working in there. He went into her computer and pulled up some pictures of women and started talking about who looked good and she didn’t look good and she didn’t look like “this” and making comments about her, further comments about her body.

Williams further testified that she asked Jamison if there were any other witnesses, and that Jamison indicated that Leigh Fields, another medical investigator, had been in and out of the room, as well as the security guard. Williams identified Agency’s Exhibit 1 as the affidavit she asked Jamison to write recapping the incident.

Williams testified that she talked to the security guard, Jimmetta Brown (“Brown”), about the incident. Williams explained that Brown was upset about the situation; that “Mr. Dennis had said some degrading things to Ms. Jamison and that it was degrading to women, in general.” Williams further indicated that Brown said that while trying to intervene, “Mr. Dennis turned on her and told her that she looked like his f-ing dog...”

Williams testified that she asked Brown to do an incident report, and that a few days later, Brown refused to give her a copy of the incident report. Williams then retrieved the report from Brown’s supervisor. Williams identified Agency’s Exhibit 2 as that report, and it was admitted into evidence. Williams indicated that Jamison’s affidavit and Brown’s report described similar facts.

Williams then testified that she attempted to interview other potential witnesses. Williams indicated that Ms. Leigh Fields was not present during the incident. Williams indicated that Mr. Dennis Bell agreed with the facts as presented, but characterized the incident as a joke.

Williams testified that she received an email from Jamison stating that Jamison was uncomfortable working the same shift as Employee. Williams made arrangements to separate the two individuals’ work schedules. Williams identified Agency’s Exhibit 3 as the advanced written notice of proposed removal for Employee, and that it was sent in accordance with Agency guidelines. Williams testified that after a hearing officer reviewed the materials involved in the matter, a final decision was sent to Employee. The final decision letter was

admitted as Agency's Exhibit 4, and contained Employee's signed receipt of the document. Both Agency's Exhibits 3 and 4 were admitted into evidence.

Williams testified that the process by which Employee was removed was in accordance with District Personnel Manual ("DPM") guidelines. She continued that at the time when Employee was charged, there was a zero tolerance policy for sexual harassment regarding unwanted touching. Thus, pursuant to the DPM's Table of Penalties and a Mayor's Order regarding sexual harassment that discussed a zero tolerance policy, she proposed Employee's removal. She testified that the removal was within the penalty allowed for Employee's conduct.

On cross examination, Williams testified that she herself did not witness Employee sexually harass or sexually assault Jamison. She identified what was later admitted as Employee's Exhibit 4 as a copy of Chapter 16 of the DPM. She also identified what was later admitted as Employee's Exhibit 5 as a copy of Mayor's Order 2004-171 regarding sexual harassment. Williams testified that the Mayor's Order did not negate the DPM, and that the proper procedures under the DPM were followed. The Employee was given initial advance written notice, final notice, and provided the investigation by the hearing officer. The Employee was given an opportunity to provide a response to the charges, but he did not.

Williams testified that she was aware of Employee coming to the OCME and asking for copies of the materials that supported his termination, and was aware that copies were not provided at that time. Williams explained that she did not immediately provide copies since the requested documents were confidential and she was concerned about making them public. She allowed Employee to come review the documents and invited him to write out a response at that time, which Employee refused. Later, Williams emailed the documents to Employee.

Williams testified that she was unaware how the complaint by Jamison originated. She further testified that during her investigation, she did not interview anyone who was not present at the time of the incident. Williams denied attempting to coerce Brown into writing "an incident report to your liking...."

On redirect examination, Williams testified that none of the actions were taken in retaliation of anything EEO related to Employee.

On re-cross examination, Williams denied asking Brown to write a report to certain specifications because "I want [Employee] out of here."

4. Dr. Marie-Lydie Pierre-Louis Tr. pgs. 130-153.

Agency Witness Dr. Marie-Lydie Pierre-Louis (hereinafter "Pierre-Louis") testified in relevant part that: she is the Chief Medical Examiner for the District of Columbia, and the Director of the Agency. She has held the position since 2003, and held that position on the incident date. She testified that she approved the removal of Employee. She felt that removal was appropriate for a number of reasons. First, she indicated that the DPM allowed for removal in cases of touching another employee or sexual harassment. Second, she indicated Employee's conduct was compounded because he was in an unauthorized area. Third, she indicated that

Employee was aware of the zero tolerance policy. Fourth, she indicated that she was concerned, as a result of this incident, with Employee's ability to do his job. She explained that responding to crime scenes is very stressful, and often took place in hostile environments, and that the investigators on the scene need to be free of worries concerning inter-employee relations.

Pierre-Louis further explained that the fact that Jamison asked to not work with Employee anymore impacted the Agency's ability to do its job efficiently, due to its limited number of employees.

On cross examination, Pierre-Louis identified Employee's Exhibit 6, a copy of hearing officer Scott Larson's report. She acknowledged that she gave the report and the evidence consideration when making her decision. She acknowledged that she did not personally witness Employee sexually harass or assault Jamison. Pierre-Louis further testified that she did not send Employee to sexual harassment training as a result of this incident because she had the option of removal. She indicated that she did not receive a written investigative report from Williams.

On redirect examination, Pierre-Louis indicated that none of the actions taken by Agency were done in retaliation against the Employee for other matters.

5. *Jimmetta Brown Tr. pgs. 160-185.*

Employee Witness Jimmetta Brown (hereinafter "Brown") testified in relevant part that: she was present with a group of employees at Agency's office on the day in question. She named Dennis Bell, Jamison, and Azalie Jewell as other people present. She testified that she was working on the incident date, and heard Jamison and Employee "loud talking" in the investigating room. She went over to the office to investigate, and left when Jamison left the room to "go out front." Brown followed Jamison to "make sure she was okay." Brown indicated that other employees followed them outside, and "there was all of us just standing out there and we was just joking and joning and it was fun to me." It was during this interaction, Brown testified, that Employee indicated that Brown looked like his dog. Brown did not take offense.

Brown testified that Williams wanted her to articulate that Employee had sexually assaulted Jamison, and Brown refused to lie. Brown testified that she was called into a meeting with her commander, and that Williams had called in alleging that Brown had "jumped in her face." Brown denied doing so. As a result of these accusations, Brown indicated that she refused to return to work. Brown indicated she was very upset that Williams would make such an accusation and press her to fabricate an incident report.

When shown Agency's Exhibit 2, the Incident Report, Brown testified that she had ample time to write the report. Brown indicated that she felt pressured by her interaction with Williams. Brown testified that she would not consider Employee's comments to Jamison as sexual harassment, and also did not witness Employee sexually assault Jamison.

On cross examination, Brown acknowledged that everything in her report was accurate. She agreed that Employee's comments were degrading towards women. She agreed that regardless of Williams' request, it was her obligation to write an incident report. She agreed that

she had enough time to write the report. Moreover, Brown indicated that the problems with Williams occurred after the incident report had been submitted.

Brown testified that Jamison stormed out of the office, and she followed to see if Jamison was fine. Brown indicated that she did not put in her report that Jamison was upset because Jamison had indicated to her that she was fine.

On redirect examination, Brown reiterated that she would have written the incident report without prompting by Ms. Williams. Brown testified that during the incident, she did not feel Jamison's safety was at issue, did not attempt to stifle the verbal confrontation she witnessed between Jamison and Employee, and did not feel that Jamison was threatened by Employee outside of the office.

6. Dennis Bell Tr. pgs. 186-190.

Employee Witness Dennis Bell (hereinafter "Bell") testified in relevant part that: on June 24, 2010, he did not witness Employee sexually assault or sexually harass Jamison or Brown. Bell identified the employees present that evening as himself, Employee, Brown and Jamison. Bell testified that during the time when he was in the presence of this group, he did not witness Employee sexually assault or harass Jamison, and did not witness Employee sexually harass Brown.

On cross examination, Bell acknowledged that he was only amongst this group of people when the group was outside of the office, and that he never saw any physical touching between Employee and Jamison.

7. Azalie Jewell Tr. pgs. 191-193.

Employee Witness Azalie Jewell (hereinafter "Jewell") testified in relevant part that: on June 24, 2010, she was amongst a group of people that included herself, Employee, Bell, Jamison and Brown. Whilst amongst this group, she did not witness Employee sexually assault or sexually harass Jamison or Brown. She testified that everyone was "laughing and joking."

On cross examination, Jewell acknowledged that she was never inside Jamison's office, nor did she witness any physical touching between Jamison and Employee.

8. Scott Larson Tr. pgs. 195-205.

Employee Witness Scott Larson (hereinafter "Larson") testified in relevant part that: this was his first time serving as a hearing officer. On June 24, 2010, he was a grade level DS-13.

On cross examination, Larson testified that nothing he wrote or did was done with intent to retaliate against the Employee.

On redirect examination, Larson testified that he did not personally witness any events surrounding the charge.

9. Ronnell Dennis Tr. pgs. 219-253

Employee Ronnell Dennis (“Employee”) testified in relevant part that: on June 24, 2010, he reported to Agency for his tour of duty. He stopped at a vending truck, and the man who ran the truck inquired about a girl, later identified as Jamison, who worked with Employee. The food truck man related a story from another employee named Mike regarding relations between Mike and Jamison. Employee continued to work, and hours later, broke for lunch with Bell.

As he returned to the Agency, he engaged in a conversation with Jamison, and went into her office to eat lunch. He testified that their conversation surrounded them exercising together, namely, that “whatever weight you lose, I want to gain, I want you to pass it on to me.” He testified that another investigator present, Ms. Leigh Fields, thought the comment was offensive, and he responded that Jamison did not appear to take offense to it. Employee also commented that Jamison looked like she had “her glow back.” When Jamison asked for clarification, Employee dismissed the comment, finished eating, and walked outside. Once outside, Employee testified that he, Jamison, Bell, Jewell, and Brown discussed the type of members of the opposite sex they found attractive. An anonymous lady walked by, and Brown inquired whether Employee enjoyed her appearance. Employee indicated that he did not, because she was too big. When asked to clarify, Employee cited examples of women he felt were too big.

Employee testified that Jamison then inquired if she offered herself to him, would he find her sexually desirable? Employee testified that “If I were sober, no, I wouldn’t... Maybe if I had a couple shots of Patron, I probably would.” He testified that Jamison was offended, and Employee attempted to placate her by indicating that he thought she was attractive.

Employee testified that Brown indicated that she did not like skinny men, and then questioned why Employee was attracted to one of the mother’s of his children. He testified that Jamison asked what she looked like, and Employee and Jamison went back into the office to look at pictures of the two mothers of his children on Facebook. Afterwards, they proceeded outside.

At this time, Employee testified that Jamison began asking what his previous comment about her “glow” meant. Employee indicated that he told her about his prior conversation with the food truck man, and how Employee was told about Mike’s relations with Jamison. Employee testified that if he knew, who knew how many others in the Agency knew, and indicated to her that she should be careful. He indicated that Jamison was shocked, but appreciated his information. Employee noted that Jamison walked away upset and despite his attempts to talk to her, she told him she was fine. The crowd disbursed, and nothing else occurred that evening.

Employee testified that a couple of weeks later, he was warned by a fellow employee that the previously-mentioned Mike, a manager, had been talking about him, and later Brown informed him that Agency was “trying to get [Employee] fired.” Later, Employee spoke to Brown where she related to him her tense interaction with Williams. Employee testified that he

spoke to Williams, and offered a written statement, but was rejected. Employee indicated that Agency had attempted to suspend him previously.

Employee testified that despite his offering of a statement, Williams insisted that one was not needed. Employee later received his 15-day advance written proposal, and he was shocked to learn it alleged sexual harassment. Employee alleged that this action taken by the Agency was based on retaliation for his filing an Equal Employment Opportunity Commission (“EEOC”) complaint in 2009. Employee testified, over objection, to previous interactions with Agency surrounding this EEOC complaint, and discussed further allegations of retaliation. Employee reiterated that it was because of the circumstances surrounding this prior EEOC filing that led to this allegation of sexual harassment and sexual assault.

On cross examination, Employee agreed that Agency’s Exhibit 1, Jamison’s affidavit, and Agency’s Exhibit 2, Brown’s incident report, were both written closer to the time of the incident than the testimony given at the hearing.

On redirect examination, Employee admitted that the affidavit and incident report conflicted with his version of events. However, Employee alleged that the documents themselves conflicted with each other. Employee noted that Jamison did not characterize his behavior as sexually assaulting or sexually harassing, and that Jamison’s affidavit did not either. Employee also noted that Brown did not characterize his behavior as sexually assaulting or sexually harassing either.

On re-cross examination, Employee again reiterated that his version of events conflicted with the affidavit and incident report. Employee reiterated that Brown did not feel Employee threatened Jamison in any manner, characterizing the interactions as joking. Employee reiterated that his version of events conflicted with the affidavit and incident report. Employee testified that he felt like the victim in this instance, not Jamison or Brown.

On further re-cross examination, Employee indicated that he was familiar with sexual crimes, indicating a personal family experience with rape and murder. Employee argued that the reason Jamison was uncomfortable during her testimony was because she was fabricating her story.

Employee admitted that his comments made to Jamison and Brown were “off-handed” and “teasing” but stopped well short of sexual harassment and sexual assault. Employee testified that Brown did not intervene because there did not exist a situation in which to intervene. Moreover, Employee argued that if Jamison was overly sensitive, she was entitled to that, but his actions did not constitute sexual harassment.

10. Sharlene Williams Tr. pgs. 254-259.

Agency Witness Williams (hereinafter “Williams”) testified, in rebuttal, in relevant part that: she never called Brown’s place of employment alleging that she jumped at her face. Williams testified that she retrieved the incident report from Brown’s supervisor, Fogg.

Williams testified that neither Bell nor Jewell ever gave her an eyewitness account of the incident.

On cross examination, Williams testified that during her investigation, she did not directly question Bell, but did interview Employee. Williams testified that it was normal practice to interview someone about an incident and not ask for a written statement to be provided. Williams testified that during her conversation with Employee, he indicated that, "Yes, I did all of it, but it was a joke..." When asked by Employee why she did not feel the need to have the admission in writing, Williams expressed that she doubted that Employee would have put it in writing.

Analysis and Findings of Fact

Employee was removed from his position based upon his behavior towards Ms. Jamison and Ms. Brown. Agency has shown by a preponderance of the evidence that Employee's removal was for cause and that it was the appropriate penalty under the circumstances.

1. Employee was removed for cause

Mayor's Order 2004-171, dated October 20, 2004, titled, "Sexual Harassment," establishes that the District of Columbia Government has "a zero tolerance for sexual harassment in the workplace." *Employee's Exhibit 5* at 1. This Order applies to all D.C. employees, the Mayor and his/her employees, and any third parties that D.C. has business relations with. *Employee's Exhibit 5* at 1. The protection of the Order extends to "employees, contractors, interns and other persons engaged by the District of Columbia to provide permanent or temporary employment services at District of Columbia worksites inside and outside District of Columbia agencies." *Id.*

The Order defines Sexual Harassment, as follows:

III. Definition of Sexual Harassment

Sexual harassment is defined as *unwelcome sexual advances*, requests for sexual favors, and *other verbal or physical conduct of a sexual nature* when any one of the following criteria is present:

...

- c. such conduct has the purpose or *effect of unreasonably interfering with an individual's work performance* or creating an intimidating, hostile or offensive work environment.

Id. at 2 (emphasis added).

The Order also defines the type of behavior that may create an intimidating, hostile or offensive work environment, as relevant:

a. sexually oriented or *sexually degrading language describing an individual or his/her body*, clothing, hair, accessories or sexual experiences;

b. *sexually offensive comments or off-color language, jokes*, or innuendo that a reasonable person would consider to be of a sexual nature, or *belittling or demeaning to an individual* or a group's sexuality or gender.

...

d. *unnecessary and inappropriate touching or physical contact*, i.e. brushing against a colleague's body, touching or brushing a colleague's hair or clothing, massages, groping, patting, pinching, and hugging, that a reasonable person would consider to be of a sexual nature;

Id. at 2 (emphasis added).

Additionally, the Order further defines sexual assault and its consequence, in pertinent part as follows:

IX. Allegations of Sexual Assault

Where there is an allegation of sexual assault (*that is, a knowing, intentional, non-consensual touching of a sexual nature*), the agency may place the victim and/or the alleged harasser on administrative leave with pay pending final administrative resolution of the complaint. Where either the agency or an appropriate law enforcement [body] determines that a sexual assault occurred, the agency shall recommend discipline of the alleged perpetrator up to, and including, termination.

Employee's Exhibit 5 at 4 (emphasis added).

I find that on June 24, 2010, Employee made unwanted comments about Jamison's body, making specific comments about her stomach; that he would need alcohol in order to be sexually attracted to Ms. Jamison; and, Employee proceeded to touch Jamison's stomach without her consent and in the context of describing her body in terms of personal physical attraction. This type of touching had never been previously authorized. Jamison told Employee to cease his behavior, but he continued. When he persisted, Jamison was forced to leave her office to distance herself from Employee. Employee also described Brown as fat, unattractive, and stated that she looked like his dog. Employee also used Jamison's computer to show her pictures of women that he found attractive, a situation that made her uncomfortable. This tribunal has no reason to doubt Jamison's credibility. Her version of events was reinforced by Williams, who related that Jamison described similar facts in her initial interview.

While Jamison was unwilling to define what happened as sexual assault or sexual harassment, I find that pursuant to the Mayor's Order, that what occurred was indeed sexual assault and sexual harassment. Employee's actions were unwelcomed, and involved physical contact in the context of describing sexual attractiveness. Employee used sexually degrading

language to describe Jamison's body, and belittled and demeaned Brown by comparing her to a dog. Employee's contact with Jamison was inappropriate and unnecessary, and was knowing, intentional, and non-consensual. Under all definitions, Employee's conduct can be considered sexual harassment and sexual assault. Because the Mayor's Order articulates with specificity the spectrum of conduct which may be disciplined, this tribunal is not bound by what a layperson understands sexual harassment or sexual assault to be.

Employee attempts to defend his actions as mere joking; however, pursuant to the Mayor's Order, it is reasonable to conclude that these remarks, even viewing them in the light most favorable to the Employee, would be considered sexual in nature and demeaning to an individual. Jamison testified that even as Employee attempted to play the entire incident off as a joke, he continued to try to touch her, which prompted her to push his hands off of her. Brown's incident report, one of Employee's witnesses, reinforces this fact, describing Employee's comments and actions to be "degrading as a woman." *Agency's Exhibit 2*. Moreover, in a conversation with Williams, Brown indicated that Employee had said degrading things to Ms. Jamison and women in general.

Employee admitted that both Jamison's affidavit and Brown's incident report were written closer in time to the incident, and that both conflicted with his version of events. It is worth noting, moreover, that in the end, Employee did not dispute Jamison's version of events, instead asserting that his comments made to Jamison and Brown may have been off-handed and teasing and suggesting that Jamison may have been overly sensitive. Employee, during his interview with Williams, admitted that the events occurred but insisted the entire incident was a joke. The testimony of Jewell and Bell has little impact on this tribunal, as neither was inside the office when the incident occurred between Employee and Jamison.

In weighing the credibility of the Employee against Jamison's, the testimony and documentary evidence clearly suggest that Jamison's version of the events is the most accurate one. Accordingly, Employee's actions were inappropriate and violated the aforementioned Mayor's Order, justifying cause for actions taken by the Agency.

Employee's Exhibit 7, a policy Notice issued by the EEOC, while educational, is not persuasive in the instant matter. The Notice establishes and defines sexual harassment for purposes of determining whether employer conduct violates § 703 (a) (1) of Title VII, 42 U.S.C. § 2000e-2(a), otherwise known as Title VII of the Civil Rights Act of 1964 ("Title VII"). The instant matter, however, does not prompt an inquiry into whether actions taken by the Agency, a government entity, violated Title VII. The analysis undertaken today involves one employee's actions towards another, and questions whether those actions were cause for removal, and whether removal was appropriate. As such, Employee's Exhibit 7 has little to no persuasive impact in the case at bar.

Finally, this tribunal notes that while there was extensive testimony regarding the procedure that was followed in investigating the incident and instituting a penalty in this matter, this matter was held *de novo*. Accordingly, this tribunal's primary concern, in reviewing the facts *de novo*, is whether there was cause for removal, and whether removal was appropriate.

Reviewing the testimony and exhibits in totality, this tribunal finds that Agency had cause to remove the Employee.

2. Removal was the appropriate penalty

In assessing the appropriateness of the penalty, the Office of Employee Appeals is limited to ensuring that “managerial discretion has been legitimately invoked and properly exercised.” *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). When an Agency’s charge is upheld, the Office of Employee Appeals 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.” *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).

Chapter 16 of the District Personnel Manual establishes a Table of Appropriate Penalties by which Agencies are instructed as to the level of punishment permissible for a specific cause. It reads, as relevant:

CAUSES SPECIFICATIONS/GENERAL CONSIDERATIONS	FIRST OFFENSE	SECOND OFFENSE	THIRD OFFENSE
5. Any On Duty or Employment-Related Act or Omission that the Employee Knew or Should Reasonably Have Known is a Violation of Law:			
Engaging in activities that have criminal penalties or are in violation of federal or District of Columbia laws and statutes, such as:			
(a) Unauthorized smoking in the workplace; incidents of a sexual or ethnic nature involving unwelcome remarks, joking, offensive comments or slurs; and acts of insubordination that are verbally abusive.	Suspension for 5-15 days	Suspension for 10-30 days	Removal
(b) Misuse of resources; unwanted sexual advances or propositions, etc.	Suspension of 30 days up to Removal	Removal	N/A
(c) Assault or fighting on duty; battery; violation of EEO laws; such as incidents of sexual harassment involving physical or financial threats; touching (Class Four Felony or stalking); other violation of EEO laws that result in the loss of employment; misuse of funds; resources or property;	Removal	N/A	N/A

unfair labor practices or illegal work stoppage; use or distribution of controlled substances; etc.			
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Employee's Exhibit 4.

This section of the DPM's Table of Penalties clearly covers in section (b) both unwanted sexual advances or propositions and in section (c) assault, battery, violations of EEO laws, to include sexual harassment or unwanted touching. In both sections, removal is within the allowable penalty; in the case of sexual harassment and unwanted touching, removal is the only penalty. Additionally, Mayor's Order 2004-171 also articulates that the appropriate disciplinary action for sexual harassment shall be "up to and including termination..." *Employee's Exhibit 5* at 6. These penalties are applicable in the instant matter; indeed, it is the Employee himself who introduced these disciplinary guidelines into evidence.

Moreover, while the evidence and testimony establishes that there were no prior or subsequent instances of sexual harassment, it is clear from the Mayor's Order that the lack of history does not preclude discipline. Indeed, the nature of a zero tolerance policy necessarily means that a systemic violation of the Mayor's Order is unnecessary before discipline is assigned; one violation may be enough to prompt an agency to institute disciplinary measures.

The record in this matter clearly establishes that Employee's removal was the appropriate penalty under the circumstances. Employee engaged in an unwanted touching of a sexual nature, while using sexually degrading language towards Jamison in the instant matter. Employee also belittled and demeaned Brown in calling her a dog. The sustained charges are based on these actions. Jamison testified that the incident made her so uncomfortable, that she not only provided a detailed affidavit for investigation, but she also requested to not be placed on the same shift as Employee. Pierre-Louis testified extensively that such a breakdown in trust between colleagues has a significant impact on OCME's ability to do its job. It is reasonable to conclude, therefore, that Employee's conduct had the "effect of unreasonably interfering with an individual's work performance..." *Employee's Exhibit 5* at 2. In light of the Mayor's Order articulating a zero tolerance policy against sexual advances of this nature, this tribunal concludes that removal was an appropriate penalty.

3. Agency did not retaliate against Employee

I find that there is no creditable evidence that the removal was a retaliation based on Employee's filing of an EEOC complaint in 2009. There was no witness testimony that any Agency action was done with retaliation, and no documentary evidence offered by Employee to prove retaliation. The only testimony that supported the notion that this action was taken in retaliation came from Employee himself, and is, without proof, mere conjecture.

Conclusion

Agency has proven that it did have cause to remove the employee and that the penalty of removal was proper and in accordance with DPM guidelines and Mayor's Order 2004-171. Therefore, the removal is upheld.

ORDER

Based on the foregoing, it is hereby ORDERED that Agency's action of removing the Employee from service is UPHeld.

FOR THE OFFICE:

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE