THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No. 1601-0126-08
JONATHAN OWENS	
Employee	Date of Issuance: February 4, 2010
v.	Sheryl Sears, Esq.
	Administrative Judge
DEPARTMENT OF MOTOR VEHICLES	
Agency	

Jonathan Owens, Employee, *Pro Se*
Charles Tucker, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

Jonathan Owens, ("Employee") was a Hearing Examiner in the Adjudication Section of the Department of Motor Vehicles ("Agency" or "DMV"). The DMV is tasked with licensing and identifying individuals and the registration, titling and inspection of vehicles and the adjudication and processing of tickets. The Hearing Examiner unit addresses customer challenges to tickets, driver's license suspensions and revocations. Employee's job was to conduct hearings and make rulings on these matters.

By letter dated December 3, 2007, Wanda J. Butler, Administrator of Adjudication Services, notified Employee of Agency's proposal to remove him for an alleged altercation with a customer. Agency set forth these details:

> On October 24, 2007, at approximately 4:35 p.m. you were involved in an argument with a female customer [Ms. T.C.] in the hallway outside your hearing room (1145) located at

> 301 C Street, NW which resulted in a physical altercation. (Your tour of duty is from 8:15 am to 4:45 pm). A video version of the incident shows you were in the process of leaving the building when you turned around and confronted the customer. There were witnesses to this event and the Court Smart Recording system detected part of your verbal exchange with the customer. The recording reveals that the customer made some derogatory remarks to you as you exited the hearing room. In response, you used profane language and were heard to say in a challenging manner "so what are you going to do now." It's at this point that physical contact occurred. An audio and video version of the exchange has been made and is part of the official record of the incident.

Agency charged that Employee's actions interfered "with the efficiency and integrity of government operations." District Personnel Manual (DPM) §1603.3 (e) and that Employee "knew or should have known [his behavior was] a violation of the law." DPM §1603.3 (f). Agency further charged that Employee's "conduct affected adversely the confidence in the public in the integrity of government" violating DPM §1803.1(a)(6) and that he "lost independence and impartiality" in contravention of DPM §1803.1(a)(4)."

Emeka Moneme was appointed as the Hearing Officer to conduct an administrative review of the proposal to remove Employee. In a report dated July 8, 2008, Moneme recommended to Lucinda Babers, Agency's Director, that she proceed with the removal. By letter dated July 14, 2008, Babers notified Employee that he would be removed effective on July 15, 2008.

On July 28, 2008, Employee filed an appeal with the Office of Employee Appeals ("OEA" or "the Office"). The parties convened for a pre-hearing conference on January 12, 2009, and presented oral argument on the factual and legal issues. There was a full evidentiary hearing on March 16 and August 5, 2009. This decision is based upon the testimonial and documentary evidence and legal argument adduced during the adjudicatory proceedings before this Office.

JURISDICTION

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

ISSUES

I. Whether Employee committed the acts with which he was charged.

II. If so, whether they constitute legal cause for adverse action.

III. If so, whether Agency abused its discretion in the selection of the penalty.

A. Did Agency act in accordance with the applicable laws, rules, regulations and guidelines in effect at the time in choosing the penalty?

B. Did Agency treat Employee disparately from other similarly situated employees who committed similar acts?

C. Did Agency apply the principle of progressive discipline?

BURDEN OF PROOF

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) provides that "[f]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction." In accordance with OEA Rule 629.1, *id*., the applicable standard of proof is by a "preponderance of the evidence." OEA Rule 629.1 defines a preponderance of the evidence as "[t]hat 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." In accordance with these provisions, Agency has the burden of proving, by a preponderance of the evidence, that Employee committed the acts in question, that they constitute legal cause for adverse action and that the penalty of removal was commensurate with any offense.

EMPLOYEE'S PROCEDURAL CHALLENGES

Employee set forth several procedural challenges to Agency's adverse action in which he addressed the charges, agency's authority to effect a personnel action and his participation in the process. They are enumerated and addressed below.

Agency is not a lawful personnel authority.

Employee contends that Agency is not a "personnel authority within the meaning of D.C. Code Sections 604.06, 604.07 and Personnel Regulations 1699.1." Without proper authority, Employee urges, Agency's administrative hearing and subsequent adverse action were *per se* unlawful. At §16.99.1 of the D.C. Personnel Regulations, an agency is defined as "any unit of the District of Columbia government, excluding the courts, required by law, by the Mayor of the District of Columbia, or by the Council of the District of Columbia to administer any law, rule, or any regulation adopted under authority of law." By this definition, the Department of Motor Vehicles is an agency of the District of Columbia Government and, therefore, a lawful personnel authority with authority to effect an adverse action against an employee found guilty of misconduct.

Agency cited additional specifications in the original notice of proposed removal.

In the original notice of proposed removal, Agency supported the charges against Employee with allegations of a second incident. Agency described "Incident #2" as follows:

> On November 13, 2007 at approximately 3:15 p.m., a customer approached you in the hallway outside room 1010 to ask you a question. You responded to the question. The customer then asked a second question. You then started yelling for security. Officer Kenneth Toyer responded and you kept continually yelling for security. You were advised by Officer Toyer to lower your voice and keep calm. Officers Butler and Wright approached at which time you walked away. You failed to provide an explanation as to why you were yelling for security. At approximately 4:40 p.m., you approached Officer Toyer at the 301 C entrance to the building and told him, "I don't need you to tell me to calm down, don't ever say anything to me about calming down. I will yell [sic] security until I feel safe."

Agency later withdrew all allegations of this second incident and was left with the burden of proving that the alleged altercation of October 24, 2007, justified the removal. Agency was prohibited, throughout these proceedings, from presenting any evidence of the second incident. Employee was not obliged to present evidence or argument in defense thereof.

However, during the adjudicatory proceedings, Employee repeatedly referenced the alleged second incident. During the hearing, Employee posited questions to Agency officials about why the allegations were set forth in the first place. In his final brief, Employee cited the incident in support of his argument for a lesser penalty than removal. Employee stated that, "on November 13, 2007 . . . a customer accosted me in the hallway and, also, I exchanged words with a security officer." Employee argued that, because he called for the assistance of a security officer rather than responding physically to the customer, he was a good candidate for rehabilitation.

Agency dropped the charges of alleged misconduct by Employee on November 13, 2007. The parties were not permitted to present evidence to prove or disprove them. Therefore, it is uncertain whether Employee acted calmly and rationally as he suggests or ranted unreasonably as suggested by Agency's recitation of the event. However, neither party will be allowed to rely upon either version in support of their position.

Agency abandoned one of the charges against him.

Employee contends that Agency abandoned the charge that he committed acts that "affected adversely the confidence in the public in the integrity of government" during proceedings at the agency level. Employee reasons that, because Hearing Officer Moneme did not make a specific finding that Employee's actions amounted to that charge, one can assume the converse- - -that he found that Employee's actions *did not*. This conclusion does not necessarily follow reason. Moreover, Agency's notice of final decision stated that the removal was based, *inter alia*, "on the charge of an on duty act that interferes with the efficiency or *integrity of government* operations." Emphasis added. Thus, it is clear that Agency did not abandon the charge and may, in these proceedings, present evidence and argument to support it.

Agency relied upon supporting documentation that does not exist.

Moneme included the following language in his report: "I have reviewed the supporting documentation, which included a ruling from the Superior Court of the District of Columbia and a report filed with the Metropolitan Police Department (MPD). Both documents corroborate the events presented by the requesting official." During proceedings before the Office, Agency conceded that no report was filed with the MPD and that no ruling relevant to these matters has issued from the D.C. Superior Court. Agency explained that this language was likely included by Moneme, in error, when he used boilerplate language from a previous report.

Employee argues that the Director should not have considered the hearing officer's recommendation at all because of the error. Employee further contends that, because she did, her decision to remove him was fatally flawed. However, including that reference was no more than a clerical error by Moneme that did no harm to Employee. Agency has not sought to rely on the documents and has openly acknowledged that they do not exist.

Agency did not allow Employee to make input when fashioning the proposed adverse action.

Employee challenges Agency's decision to initiate adverse action based on statements by witnesses that did not include his version of the events. Employee complains that "the first [he] ever knew that there was a complaint was when [he] was presented with the advance notice written of proposed removal." He protests that he should have had the opportunity to "respond beforehand" so that he could put forth his theory of self-defense. Employee contends that, if he had been allowed to do so, he would not have been removed.

Employee's theory that Agency would not have initiated action if they had known he was claiming self-defense is conjectural. Agency had the option at any time, including after the administrative review at the agency level or after Employee filed his appeal with this Office, to rescind the removal and reinstate him. But, even with his self-defense

argument on the record, Agency did not do so. Employee received legally sufficient notice of the proposed adverse action and ample opportunity to present his self-defense argument.

None of these challenges cited by Employee amounts to a harmful procedural error that is grounds for relief. This Judge turns, therefore, to a consideration of the viable arguments of the parties.

POSITIONS OF THE PARTIES

It is undisputed that, on October 24, 2007, a customer in whose matter Employee rendered an adverse ruling came back to him several times seeking a different outcome. At the end of the day, when Employee was on his way out of the building, she approached him once more.

Agency alleges that, after a heated verbal exchange with the customer, Employee struck her. Agency relies upon the reports of two Hawk One Special Police Officers along with a digital video recording of the incident in charging that Employee used his hand or hands to strike her about the face. Agency contends that Employee, a high level professional, should have been able to diffuse the situation without physical violence by using active listening, de-escalation techniques and other principles that he learned at a customer service course on June 20, 2007.

Employee denies hitting, slapping or grabbing the customer with his hand but admits striking her with his briefcase. In defense of his behavior, Employee cites the high stress level of the job, the woman's persistence and the management practice of referring customers back to the Hearing Examiner when they are dissatisfied with a ruling. Employee also claims that she was physically aggressive first and he acted in self-defense.

Employee contends that the penalty of removal was too severe because it was his first offense and he had a record of satisfactory job performance. Employee also argues that there was no table of penalties in effect at the time and that Agency did not cite to any guidelines for fashioning the penalty.[1] Employee contends that, in accordance with applicable provisions of a collective bargaining agreement between Agency and the union of which he was a member, Agency should have applied the principle of progressive discipline. Employee claims that he was treated disparately from other employees who were similarly positioned and committed acts like the ones attributed to

[1] At various times during the history of D.C. personnel law, there have been gaps in the publication of guidelines for adverse personnel actions. Agency has not disputed Employee's assertion that there was no Table of Penalties published at the time of his removal. However, that does not render Agency without authority to take action, up to and including removal, against an employee found guilty of misconduct. It was not unlawful for Agency officials to reference a previously issued Table of Penalties as a guideline. Every penalty that is appealed to this Office is subjected to review by several measures to determine its appropriateness. The penalty imposed upon Employee will be examined and discussed in detail below.

him but were not removed. Although Employee cited several employees with whom he sought to compare himself, this Judge found only one to be similarly positioned to him. That Employee was another Hearing Examiner (who shall be referred to as X.Y. for the sake of his privacy). Hearing Examiner X.Y was involved in a verbal altercation with a customer and was not removed.

FINDINGS OF FACT

At the hearing, the following witnesses testified: Kenneth Toyer and Carolyn Hardman, Special Police Officers; Cassandra Claytor, Chief Hearing Examiner and Employee's supervisor; Wanda Butler, Agency Administrator and Employee's second line supervisor; Lucinda Babers, Agency Director and Employee. The witnesses included Employee's supervisors. Their line of supervisory authority was as follows:

Lucinda Babers, Agency Director
/
Wanda J. Butler, Administrator of Adjudication Services
Employee's Second Line Supervisor
/
Cassandra Claytor, Supervisory Hearing Examiner
Employee's Immediate Supervisor
/
Jonathan Owens, Hearing Examiner

Summary of Testimonial Evidence

Officer Kenneth Toyer, Special Police Officer

On October 24, 2007, Officer Toyer, a twenty (20) year veteran Special Police Officer, was working for the Metropolitan Police Department at the John Daly Building in Washington, D.C. He was stationed at an x-ray machine near the Adjudication Division of the Department of Motor Vehicles with his partner, Officer Carolyn Hardman. Toyer knew Employee from seeing him come and go. He sometimes spoke to Employee in greeting at their workplace but Employee did not respond.

Toyer said, "When I looked down the hall, I saw Mr. Owens aggressively tussling with a young lady. As I can remember, his hands was [sic] above her shoulder's [sic] line." (*Transcript 1, Page 23, Lines 18 – 21*). The woman was "[u]p against the wall." (*Transcript 1, Page 24, Line 1*). Toyer went to separate them. He observed Employee to be the more aggressive of the two. He said that the customer was trying to push Employee off of her and she seemed to be bruised in the area of her face. Toyer described the customer as an African-American with a dark complexion.

Toyer talked to Employee for a few minutes to try and settle things down and then escorted them both to the security office. Members of the Protective Services Division of the Metropolitan Police Department came in to question them. Toyer was in and out of

the security office for about a half hour after that but he did not hear all of the questions posed to Employee and the customer by the Protective Services officers. Toyer prepared a brief written statement for the agency recounting some of his observations.

In his written statement prepared on the date of the event, Toyer stated that he saw that "the male person was pushing the female to the wall." He and Officer Hardman ran down the hall to stop them.

Officer Carolyn Hardman, Special Police

At the time of the hearing, Hardman had been a Special Police Officer with Hawk One for four (4) years. She was working with Officer Toyer when she "heard some fussing going on." (*Transcript 2, Page 317, Line 7- 8*). Although Toyer told her to stay at her post while he ran down the hall, she followed. She said that she went because it upset her to see a man hitting a woman.

Hardman saw Employee push the customer against the wall. She did not see Employee attempt a retreat. "[A]fter he pushed her, she pushed him back, and then that's when he hit her." (*Transcript 2, Page 318, Lines 2-4*). "I saw him when his hand went up to strike her. I saw it." (*Transcript 2, Page 342, Lines 7-8*). She heard the customer say repeatedly, "I just can't believe he slapped me. He slapped me. And her face was red." (*Transcript 2, Page 323, Lines 2-4*). Toyer pulled Employee away while she pulled the customer.

Hardman also wrote a report after the event noting that she saw Employee "push [the customer] against the wall." After she and Officer Toyer broke them up, "she kept stating that he had slapped her." "Where she said that he slapped her was very noticeably red."

Cassandra Claytor, **Supervisory Hearing Examiner**

Cassandra Claytor, Employee's immediate supervisor, has direct oversight of the operations of the Hearing Examiner unit. Customers come in to "have a hearing on the ticket, make a payment plan, pay tickets, just have general questions about tickets issued to their vehicle or their driver's license." (*Transcript 1, Page 56, Lines 4-7*). As supervisor of the unit, Claytor was responsible for "[s]cheduling the examiner's daily assignments, planning for completion of all our various tasks that we have to do in terms of mail, hearings." (*Transcript 1, Page 54, Lines 15 – 18*).

On the date of the altercation, Claytor advised the customer about her right to appeal the adverse decision from Employee. Then, at about 4:30 p.m., one of the security guards reported an incident involving Employee and the customer to Claytor. Claytor went to the Hawk One security office along with Wanda Butler, her supervisor, where she heard the customer saying, "He hit me, he hit me." (*Transcript 1, Page 59, Lines 17-18*).

Claytor wrote an incident report in which she recounted the following:

> [The customer] stated that she did return to Mr. Owens' hearing room several times in regard to tickets to 'beg him up'. Her goal was to have him reduce the tickets. According to her when he left the hearing room to go home wearing his hat and jacket, she spoke to him again and he slapped her on the side of her face. A Hawk One security officer came to break them up. (*Transcript 1, Page 62, Lines 10 – 17*).

Claytor also recalled that Ms. L., another customer, told her and Butler that she saw Employee push the customer who then pushed back. Then, Ms. L. saw Employee slap her. Claytor also reviewed the video.

Claytor said that Employee's work was satisfactory. However, some of his colleagues complained that he did not carry his share of the workload. On at least one occasion, she saw Employee leaving work early and emailed him about it. Claytor recounted that there have been multiple customer complaints about Employee and his rude and patronizing manner of speaking. She said, "He's never been, I would say a violent person, he's (*sic)* just has a way of saying things to people that really anger[s] them." (*Transcript 1, Page 134, Lines 3-5*). According to Claytor, complaints about the decisions of the Hearing Examiners are common but concerns about their manner are not.

Claytor acknowledged Employee's contributions including his work on the "Fish Committee." The name comes from "the Peak Fish market in Seattle, Washington where the Fishmongers would try to have fun at a job that they didn't necessarily find all that exciting to increase the morale and engage their customers." (*Transcript 1, Page 68, Lines 19 – 22 and Page 69, Line 1*). Employee also worked to help start a law library and was a union appointed safety officer. "He was a floor warden, actually. When there was a fire drill or an alarm, then the floor wardens had to make sure that the people in their particular area of the building were aware and left the building and went to the spot where we were supposed to meet." (*Transcript 1, Page 73, Lines 8 – 13*).

Claytor described the workload of the hearing examiners as including hearings on about twenty-five (25) matters daily and up to one-hundred and twenty-five (125) a week. This adds up to five hundred (500) in each month and five-thousand (5000) over the course of ten (10) months. Claytor confirmed that many customers are dissatisfied to the point that they must be escorted from the building. Panic buttons have been installed "on the hearing examiner's desk that if they feel that the customer is a little bit unruly or out of hand, they're concerned for their safety, they pull the button and security will come to see if there's a problem and ask the person to leave, if necessary." (*Transcript 1, Page 77, Lines 8 – 13*). Security guards make routine patrols of the building including the hearing rooms.

Claytor conferred with David Glasser, the General Counsel, Odessa Nance, the Human Resources Specialist and Wanda Butler, the Agency Administrator in deciding to remove Employee. Claytor concluded that removal was appropriate because Employee had the opportunity to disengage from the encounter with the customer by continuing on his course to leave the building but did not. Instead, he came back "to confront her." (*Transcript 1, Page 133, Line 8*). Claytor said that, based on his professional stature and experience, Employee should have been able to avoid the physical confrontation.

Employee questioned Claytor about incident involving Hearing Examiner X.Y. Claytor said that Wanda Butler was on duty but she was on leave the day that it happened. Claytor heard that the Hearing Examiner was involved in a loud argument in which profane language was used.

Wanda Butler, **Administrator of Adjudication Services**

At the time of the hearing, Wanda Butler had been the Administrator of Adjudication Services for six (6) years. She has ultimate oversight for the operations of the Hearing Examiner unit. She was Cassandra Claytor's immediate supervisor and Employee's second-line supervisor. When Claytor came to report the incident, she and Butler went together to the security office.

Butler talked with Employee and the customer. The customer said that, after she got unfavorable decisions on her tickets, she came back to Employee to "beg him up" (*Transcript 1, Page 167, Lines 4-5*) and ask him to reduce some of the penalties on the fines. Employee described the customer as "harassing him all day." (*Transcript 1, Page 167, Line 17*). Employee said that the customer struck first. The customer said that Employee did.

Butler also talked with the two security officers and another customer who was in line to pay a ticket, Ms. L. Ms. L. said that "the male pushed the female and female pushed the male and the man slapped the woman and . . . all the woman's belongings fell onto the floor, her purse and papers." (*Transcript 1, Page 171, Lines 3-6*).

Butler said that Employee was a "very competent hearing examiner," (*Transcript 1, Page 168, Lines 9-10*). However, there were complaints from customers about his "condescending tone." (*Transcript 1, Page 168, Line 14*). Butler explained that, when reviewing a customer complaint, she tries to distinguish between their dissatisfaction with the outcome and valid complaints about the Hearing Examiner's behavior. She has received other complaints from customers who felt that Employee was "harsh" in the way that he spoke. (*Transcript 1, Page 198, Line 17*). For that reason, she was "not surprised when this happened." (*Transcript 1, Page 168, Lines 16- 17*).

Butler described the customer service mandate of the department. It requires that all staff provide their services to the public in a professional and respectful manner. When necessary, the agency investigates written or oral customer complaints. Any employee who acts inconsistently with the customer service policies is brought in for

counseling. This can result in a reprimand. In fashioning the penalty of removal, Butler considered the prominence of Employee's position and his obligation to provide courteous and professional services to the customers. She felt that Employee's behavior detracted from that mission and could potentially impact public confidence in the agency. She considered that the "lady was sort of hounding him" (*Transcript 1, Page 236, Line 22*) but felt that Employee "had options of getting out of that scenario without getting into a physical altercation with her." (*Transcript 1, Page 237, Lines 1-3*).

Butler said that she referred to a table of penalties that allowed for removal for fighting. She also consulted with Mr. Glasser and Ms. Claytor who agreed that removal was appropriate. She reviewed all of the *Douglas* factors but considered numbers one, two and eight most strongly. Butler said that, in the matter of Hearing Examiner X.Y., a customer complained that he had cursed at him. The Hearing Examiner told the he would "kick his ass." (*Transcript 1, Page 222, Line 12*). He received a written admonishment. Butler did not recall any previous incident of a physical altercation between a Hearing Examiner and a customer. Butler believed that the penalty was appropriate because Employee hit a customer and was not acting in self-defense.

Lucinda Babers, Director, Department of Motor Vehicles

Babers is the top level leader of the agency. In an effort to execute its customer based mission, in 2003, they began the Fish philosophy initiative to "focus on customer service in addition to increasing employee morale." (*Transcript 1, Page 243, Lines 10 – 11*). She did not recall Employee's participation on the committee. Agency also offered training including de-escalation techniques in 2007 due to the tension in the matters before them.

Babers was informed about the incident of October 24, 2007, by Wanda Butler. Babers viewed the video and noted that there was a time when Employee and the customer were physically apart from one another. They approached one another. She also saw Employee put his hands on the customer rather than reverse. She did not see anything that would have prevented Employee from removing himself from the situation.

Babers said, ". . . all of the examiners of course are aware that the customers they're going to get upset, they're going to take it personal which is why they have the higher ground. . ." (*Transcript 1, Page 254, Lines 15 – 17*). If a "situation reaches a physical nature, then it is expected for the hearing examiner to get a supervisor, get a guard, walk away, run away, whatever they have to do to avoid any type of confrontation." (*Transcript 1, Page 255, Lines 3 – 7*). Babers acknowledged that Employee remained in active duty October 24, 2007, the date of the incident, until July 15, 2008, the effective date of his removal. Even though Agency's confidence in him was not eroded to the point that he was summarily removed, she considered the matter a serious one.

When asked how she factored in Employee's tenure at the agency, Butler said, "unfortunately due to the seriousness of the nature and the fact . . .it was the customer, I

couldn't put that much weight on the length of time." She felt that Employee's potential for rehabilitation was limited because he did not utilize the techniques he had been taught when the situation most required it. She did not use progressive discipline because of the seriousness of the matter. After reviewing the table of penalties and consulting with Glasser and Nance, she decided on removal based "on the seriousness of the incident, his position and the fact that it was a physical altercation with a customer that could have been avoided." (*Transcript 1, Page 269, Lines 1 – 4*).

Babers conceded that she did not consider the general stress of the job when making her decision. She said, "I don't think I specifically took that into consideration, the stress that you and the rest of our coworkers have to deal with on a daily basis. No, I can't say I did." *(Transcript 1, Page 292, Lines 10 – 13*). Babers acknowledged that the customer came back to Employee at least three (3) times after he made a ruling in her case. She said that, although there are upset customers at Agency every day, "a physical altercation with a customer is simply unheard of." (*Transcript 1, Page 305, Lines 10 – 11*). She felt that not taking action would be seen as condoning Employee's behavior.

Jonathan Owens, Employee

At the time of the events that gave rise to this appeal, Employee had worked as a Hearing Examiner for Agency for ten (10) years. He was responsible for making decisions on tickets ranging from about $50.00 to $100.00. The costs can go up into the thousands of dollars if penalties and fees add up or if the vehicle has been booted and immobilized. Before a customer can retrieve a vehicle, all the fees must be paid. For that reason, they become very upset when they receive an adverse decision. It is almost an everyday occurrence for customers to get upset and many become unruly. Employee has handled over 50, 000 customers and, every six (6) or seven (7) months, encountered one who became as unruly as the one on the date of the incident. He "effectively defused a situation in all other matters." *(Transcript 2, Page 372, Line 17).*

Employee recounted his positive contributions to the agency which included spearheading the start of a law library. He developed a guide for police officers on the parameters of their testimony. His work was so successful that the officers at the Anacostia Naval Base invited him to do a seminar for them. He also worked as union representative and on the safety committee. He volunteered as the floor warden for fire drills. Along with the union and his supervisors, Ms. Butler and Ms. Claytor, he helped to alleviate an asbestos situation at the agency.

Employee ruled that the customer owed $300.00 for tickets. She stayed in his hearing room for eight (8) to ten (10) minutes trying to get him to change his mind. She wanted him to excuse her from responsibility for all of the tickets. Between 12:00 p.m. and 4:30, she came to his room three (3) times. At about 4:30, she appeared a fourth time. He asked her not to enter and warned that he would call security.

Employee then prepared to go home. Picking up his briefcase, he headed toward the stairway. Employee "heard [the customer] call out to me, calling me profane names. I

looked down the hallway and [she] was standing in the middle of the hallway calling me profane names." (*Transcript 2, Page 377, Lines 4-7*) She "called [him] a bitch" and said that "she should slap the shit out of [him]." (*Transcript 2, Page 377, Lines 11)* He replied with "something like 'silly ass whore.'" *(Transcript 2, Page 377, Line 20)*. He walked back down the hall toward her as she walked toward him. Employee said they did not touch. She continued to call him names but he stopped.

Employee recalled:

> [The customer] moved with her body into me, not with her hands. She moved her front part of her body, her stomach, her chest area, into me bumping me. At that point I think I realized that this should not be going on. I think I came to my senses, and then I tried to move away from [her]. [She] continued to move into me and bump me as I backed up down the hallway. At some point, at one point I believe that I saw [the customer] about to raise her hand. At that point I then placed my right hand over [her] hands. (*Transcript 2, Page 378, Lines 9 – 20*)

He said, "At one point when she was about to come into me again, I took my backpack and swung it and hit Ms. C. a glancing blow on her shoulder." (*Transcript 2, Page 381, Lines 9- 11*). When he swung his bag, all of the contents fell out. The customer put her paperwork on the floor and headed toward him again. They were then nose to nose and separated by the security guards. "At no time did I slap [the customer]. At no time did I hit [her] in her face with either my bag or my hand." (*Transcript 2, Page 382, Lines 4 – 6*).

Employee offered testimony about the incident involving Hearing Examiner X.Y., gathered from his discussion with one Mr. Collins, a union representative involved in the matter. However the hearsay evidence he sought to present was too far from Employee's direct knowledge to be reliable.

Employee acknowledged that he is a member of the D.C. bar and is familiar with the rules of professional conduct. However, he characterized his behavior as "instantaneous human reaction." (*Transcript 2, Page 419, Lines 14 – 15*). He said, "I've had customers threaten to ask me to step outside. I've had customers tell me they better not see me on the street. I've had customers offer to fight me in the hearing room. And I have to walk past them in order to get to security." (*Transcript 2, Page 424, Lines 11 – 15*) For some reason, for whatever reason, I lost my composure with [this customer]." "She harassed me all day, is the only thing I can think of that would compel me to take such an action against [her]."

Employee, however, placed the ultimately responsibility for his actions on the agency which "never taught [him] how to deal with unruly customers." (*Transcript 2, Page 426, Lines 2 – 6*). "So therefore, the agency, in my opinion, cannot hold me liable

for actual knowledge of how to de-escalate an unruly customer." (*Transcript 2, Page 426, Lines 8 – 10*). Employee acknowledged that he took a class that taught de-escalation techniques for a situation in which a customer was agitated but not for "a customer that was in your space and in your face." (*Transcript 2, Page 398, Line 1*).

Compact Disk of the Audio Recording

An audio recording of an exchange between Employee and the customer when they were in his hearing room is a part of the record. In the recording, a door can be heard to open. The customer began to speak inaudibly. Employee asked her not to enter and told her, "I'm going to have the guard remove you." She continued to talk as he said, " I don't have anything else for you."

Digital Video Disk (DVD) of the Court Smart Video Recording

The video produced by the Court Smart system was transferred to a DVD and made a part of the record before this Office. It documents the encounter between Employee and the customer in the hallway at the end of the date. This Judge reviewed the recording several times. The recording shows a hallway cordoned off with a "velvet rope" where customers can form a line. According to the testimony of witnesses, this was the office where customers went to pay tickets. Several persons went into the doorway and came out while others, presumably other customers and agency employees, walked back and forth on the other side of the hall.

The customer in question, Ms. T.C., entered the payment office. As she exited, into the hallway, Employee was walking ahead with his back toward her. They were headed in the same direction. According to his testimony, he was about to leave work. He is wearing a jacket and carrying a bag. It is reasonable to presume that the customer said something to him because Employee turned completely around and they began to walk toward one another. When they came together, they stood briefly during which there was a verbal exchange.

Employee then raised his right hand and appeared to strike Ms. C. on the left side of her face. Although the recording is not detailed enough to see him make contact, his movement is very clear. Employee then backed away as the customer moved aggressively toward him. She proceeded forward as he backed down the hall. Employee then swung his briefcase at her. At that point they reached a wall. The customer first backed up to the wall and then stepped up chest to chest with Employee. By then, the guards are on their way down the hall. They came and disengaged the pair.

Findings

Whether Employee committed the acts with which he was charged.

Employee was courteous and professional with the customer in the hearing room as documented by the audio recording. However, Agency charged Employee with striking her later. Employee admits that he hit the customer with his briefcase but denies slapping her.

Both security guards, who were first on the scene, reported that the customer exclaimed that Employee slapped her as they were disengaging them. Employee maintains that Toyer could not have seen a mark on the woman's face because, if she was of a dark complexion, a "reddish" mark would not be visible on her face. Further, Toyer did not include that in his written report, and not all of the other witnesses mentioned it. Toyer explained that he saw the bruise after one of the Protective Services officers pointed it out to him. Employee also argued that Toyer's testimony should be discredited because he mentioned that Employee would never speak to him when they encountered one another at work. Toyer's testimony was consistent that of his supervisors that Employee was reported, by customers, to be somewhat arrogant. That Toyer took notice of that does not render his testimony any less credible. Toyer's testimony was professional and concise. He responded with clear recollection where he could and acknowledged when he was unsure of any answer. Toyer's presented credible testimony.

Employee sought to identify discrepancies between Toyer's testimony and the videotaped version of the events. Although Toyer testified that Employee had his hands above his shoulders, that video does not show that. The exception is that the video does show Employee raising his hand to the customer. Employee also maintains the video tape does not show that he had the customer against the wall. Although the video does not show his hands on her at that point, it does show that she is backed up against the wall with Employee in her face.

Hardman said that she saw him do it. Employee urges that this Judge should find that "Officer Hardman's testimony is inherently a fabrication." Employee notes that Hardman said that he and the customer were standing in line at the treasurer's office but, according to the video, there was never a line. It is true that, at the time the customer entered the payment office, there was no line. This minor discrepancy does not, however, impact the credibility of the rest of Hardman's testimony.

Officer John J. Barbusin prepared a Protective Services Division/Police Incident Report. He quoted Ms. T.C. as reporting that when she confronted Employee about his adverse decision, he called her a "bitch" in response to which she asked "[W]ho do you think you are talking to." They started arguing and Employee "hit and shoved" her. Claytor testified that when she went to the security office with Butler, she heard the customer saying, "He hit me, he hit me." Claytor recalled that Ms. L., another customer, told her that she saw Employee slap the customer. Claytor's responses were thorough

and informed and delivered in a credible manner. Butler, who also delivered testimony in an open and direct manner, said that she heard Ms. L. say that she saw Employee and the customer push one another and that Employee slapped the customer. Butler testified that she heard the customer say, alternately, that Employee slapped/hit her. Butler also noted that the other security guard, Officer Hardman, reported to her that the customer said repeatedly that Employee hit her. In her written report of October 24, 2007, Hardman used the word "slapped."

The persons who observed and/or took reports about the incident, vary in their recollections of whether the customer said that she was hit or slapped but most recalled either seeing Employee strike the customer or hearing her say that he did. Whether characterized as "hitting" or "slapping," in the view of this Judge, the references are the same. The witnesses are speaking of Employee using his hand to strike a blow upon the customer. Employee acknowledges putting his arm up to ward her off as she was advancing toward him. And he testified with conviction that he did not hit her. But the cumulative evidence proves otherwise. Whether Employee does not recall making contact or is misrepresenting what happened is uncertain. But, it is clear, from the video, that he did hit her in the face. And although Employee maintains that no one could have seen a mark on her face due to her complexion, they did.

Employee maintains that he acted in self defense. Employee cites *Tate v. D.C. Department of Parks and Recreation*, OEA Matter No. 1601-0117-07 (March 12, 2008) as stating the following:

> The District of Columbia Court of Appeals has defined 'self defense' as 'the use of reasonable force to repel a danger which a person reasonably believes may cause him imminent bodily harm.' . . . In the District of Columbia, the right of self-defense is not conditioned upon a duty by the individual to retreat or otherwise avoid the confrontation. However, an individual's failure to avoid the confrontation can be considered, along with all other circumstances, in determining whether the case is truly one of self-defense.

Employee contends that he was defending himself from the threat of an assault by the customer who said to him, "I should slap the shit out of you," after which she proceeded down the hall toward him. However, the video shows that Employee proceeded toward her as well. And observers said that Employee pushed the customer first. Employee counters that she made the first physical contact. According to the videotape, it was Employee who did. Employee's argument of self-defense is refuted by the fact that, before there was any physical contact between them, he moved as aggressively toward her as she did toward him and when the situation escalated into a heated verbal exchange, Employee struck first.

ANALYSIS AND CONCLUSIONS

Whether Employee committed acts constituting cause.

Employee, by his own admission and as documented in the video, struck the customer with his briefcase. He denied hitting her with his hand but the evidence supports the finding that he did. Employee maintains that hitting the customer with his briefcase is a less serious matter than striking her directly with his hand. It isn't. Even if this Judge had found that Employee "only" hit her with his briefcase, the conclusion would have been the same: Employee committed acts constituting cause.

There is no doubt that it interferes with the efficiency and integrity of the agency's customer service mission for a high level official such as Employee, a Hearing Examiner, to engage in a profane verbal altercation with a customer and then strike her. Employee, an attorney, had every reason to know that his actions could have constituted a violation of the law. Employee and the customer both declined to press criminal charges. Had either of them done so, both would have been arrested. There is no dispute that Employee acted professionally and courteously toward Ms. T.C. during the adjudicatory process and her many efforts to influence him to change his ruling. However, he did finally lose his independence and impartiality. Such behavior by a government official with a strong public presence could have a strong adverse affect on the confidence of the public in the integrity of this agency.

Whether Agency abused its discretion in the selection of the penalty.

The role of this Office, when reviewing the penalty imposed by an agency is to ensure that "managerial authority has been legitimately invoked and properly exercised." *See Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (DC 1985), and *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915 (1985). Only in the case of an abuse of that discretion would modification or reversal of an agency imposed penalty be warranted. The penalty must be based upon a consideration of relevant factors. *See Employee v. Agency*, OEA Matter No. 1601-0012-82, 30 D.C. Reg. 352 (1983). This Office will leave an 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. 2915, 2916 (1985).

The legal standard for the appropriateness of a penalty was established by the Merit Systems Protection Board in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981). In *Douglas* the MSPB set forth a list of factors to be considered when assessing the appropriateness of a penalty. *Douglas*, at 331-332. Every factor is relevant to every matter. And, the weight accorded to the factors varies according to the circumstances. They are as follows:

(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 the 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.

The reasoning and factors established in *Douglas* have been adopted by the District of Columbia Court of Appeals in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). The Court in *Stokes* stated:

> Review of an Agency imposed penalty is to assure that the Agency has considered the relevant factors and has acted reasonably. Only if the Agency failed to weigh the relevant factors or the Agency's judgment clearly exceeded the limits of reasonableness, is it appropriate . . . to specify how the Agency's penalty should be amended. *Stokes*, at 1010.

Employee maintains that the penalty was too severe in view of his longevity with the agency, the provocation by the customer, the general stress of the job and the lack of training by agency in handle such a situation. Agency does not dispute that Employee worked for ten (10) years with only one (1) noted complaint. And his job does present constant stress from angry, agitated customers from whom there is a threat of bodily harm. Employee has at least a satisfactory rating every year without any late arrivals or unexcused absences and has made several contributions outside of his specific job duties to enhance the efforts of his Agency.

It is understandable that a customer as persistent as this one was would frustrate and even anger the professional committed to the highest level of customer service. And there is no doubt this customer did everything except initiate physical contact to provoke him by continuously coming to his hearing room after he rendered his decision. But it is greatly significant that the customer did not put her hands on him. It seems that Employee unleashed an anger that he did not control. According to credible testimony (and the video tape), Employee made the first physical contact. Employee presents a different version which has the customer "bumping" him first and appearing as if she were about to raise her hand. There is no evidence that she did so. But if Employee walked away from the customer instead of toward her, he would not have been close enough for her to bump into him or threaten him with striking. Moreover, the threat of striking someone is not the same as doing so.

Striking a customer is a serious matter, especially in Employee's prominent and public position. Employee clearly lost his temper. As such, it is arguable that he did not intentionally hit Ms. T.C. but acted out of uncontrollable anger. This, however, increases rather than diminishes the likelihood that it could happen again. If Employee cannot control his response to such provocation, it may be that, after so many years of high level stress, he is no longer be capable of doing so.

Employee's previous record is laudable. Unfortunately, his gross misconduct on this one occasion is serious enough to reasonably impact his supervisors' confidence in his ability to perform properly in the future. The limited potential for the employee's rehabilitation from this event is evidenced in large part by his view of it. Employee characterizes his actions as self-defense without taking full responsibility for walking into

the situation. This self-serving response to the situation is telling. If Employee does not recognize his responsibility for de-escalating this event before it became a physical altercation, it is uncertain that he would do so in the future. The principle of progressive discipline, by which Agency could have imposed a lesser penalty this time and a greater one if the event were repeated, allows for great risk to another customer and the reputation of the agency.

Clearly, there were job tensions unique to Employee's position. However, they were routine and it was expected that Employee would be able to handle them. Even in the face of provocation by the customer, Employee's best choice would have been one that required not training but common sense- - -walking away. Security assistance was readily available to him as evidenced by their appearance when the incident occurred. Someone in the position of Hearing Examiner must have, as part of his cache of tools for effectively doing his or her work, the ability to resolve or disengage from confrontations with customers.

Employee sought to compare himself to Hearing Examiner X.Y. who was also involved in an altercation with a customer but was not removed. However, that Hearing Examiner made verbal remarks that were inappropriate and did not become physically engaged. Employee urges that their behavior was the same because, by the definition set forth in Black's Law Dictionary, they each committed an "assault." According to the Eighth Edition of Black's, an assault is "the threat *or* use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact." Emphasis added.

Employee notes that the current publication of the "Table of Appropriate Penalties: General Discipline" of the District Personnel Manual recommends removal for a first offense of "assault or fighting on duty." By this reference, Employee suggests that, if one Hearing Examiner was not removed for assault, neither should the other be. However, Agency officials reasonably distinguished between X.Y.'s verbal remarks and Employee's physical violence. Employee and Hearing Examiner X.Y. were not similarly situated. Agency did not, therefore, treat them disparately in the selection of their penalties.

Agency officials certainly had the discretion of choosing a lesser penalty than removal for this employee. But the standard for this Judge's review is not whether that is the penalty she would have chosen but whether Agency officials abused their discretion in its selection. Based on a consideration of the relevant and lawful factors, it is the conclusion of this Judge that Agency did not abuse its discretion in selecting removal as the penalty.

ORDER

It is hereby ORDERED that Employee's removal is UPHELD.

FOR THE OFFICE: _____

SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE