THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
TANYA BLUE,	)	
Employee	)	OEA Matter No. 1601-0092-15
	)	
v.	)	Date of Issuance: April 21, 2017
	)	
D.C. DEPARTMENT OF HUMAN SERVICES,	)	
Agency	)	Eric T. Robinson, Esq.
	)	Senior Administrative Judge
	)	

Tanya Blue, Employee *Pro-Se*
Nada Paisant, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

By letter dated February 27, 2015, the District of Columbia Department of Human Services ("DHS" or "the Agency") issued to Tanya Blue ("Employee") a thirty (30) day Advanced Notice of proposed removal from her position as a Social Services Assistant with the Agency. The action was based upon the following causes (1) any on-duty or employment-related act or omission that an employee knew or should have reasonably known is a violation of law; (2) any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations; and (3) any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary and capricious. *See* Agency Exhibit 1. The charges were based upon an incident that occurred on January 9, 2015, while Employee was on duty, whereby Employee was allegedly observed assaulting her colleague Ms. Carmelita Johnson. By letter dated June 22, 2015, Agency issued to Employee a Notice of Final Decision on Proposed Removal. *See* Agency Exhibit No. 8. Through this notice, DHS finalized Employee's removal from service with an effective date of June 26, 2015.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") on June 26, 2015. This matter was assigned to the Undersigned on November 4, 2015. By Order dated November 30, 2015, a Prehearing Conference ("PHC") was scheduled for

January 14, 2016. The parties were present for the PHC and during it; the Undersigned determined that an Evidentiary Hearing was warranted. Initially, the Evidentiary Hearing was scheduled for May 12, 2016. However, the parties wanted to conduct discovery including procuring body camera footage from the Metropolitan Police Department ("MPD") officers that responded to the call for assistance on January 9, 2015. Of note, the request for a subpoena in order to procure the body camera footage was approved by the Undersigned. However, a representative from the MPD informed the Undersigned (and the parties) that the footage in question had not been saved. Due to the delays with respect to the parties readying their respective cases for trial and the processes for attempting to procure a copy of the body camera footage, the evidentiary hearing was ultimately held on October 27, 2016. Afterwards, the parties were given an opportunity to submit written closing arguments which have been received by the Undersigned. After reviewing, the record, the Undersigned has determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

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

ISSUES

The Issues to be addressed in this matter are as follows:

1. Whether the Agency's adverse action was taken for cause.

2. If so, whether the penalty was appropriate under the circumstances.

SUMMARY OF RELEVANT TESTIMONY

Agency's Case in Chief

Carmelita Johnson ("Johnson") Transcript 18 – 50

Johnson testified in relevant part that she currently works for the District of Columbia Department of Human Services – Economic Security Administration as a Section Chief. She has held this position for approximately two years. Prior to her current stint with the Agency she was Employee's Supervisor. At the time of the incident in question, she was not Employee's direct supervisor. Johnson recalled an incident involving Employee on January 9, 2015. She explained the incident as follows:

> Q: What happened with Ms. Blue on that day?
>
> A: On that day, I was walking on the side – which is through room 201, on the other side of the building – when I was trying to exit that side. And Ms. Blue walked up behind me very fast, brushed up against my body to block me from going through the door.
>
> Q: And what else did she do?
>
> A: She pointed in my face and told me "you hit my son in the face, you hit my son." And at that point, I told her "I don't know your son."
>
> Q: And as she was pointing in your face, did she exhibit any other aggressive mannerisms?
>
> A: Yes. After that, she balled up her fists as if she was going to hit me. But that's when one of my co-workers jumped in between us.[1]

Johnson was perplexed by Employee's accusation. To her knowledge, Employee's son was not present at the time of the incident. Johnson testified that during this encounter she felt intimidated and feared for her life. Johnson reported this encounter to David Gatling, DHS Section Chief; she also called 911 to report this encounter to the authorities. Johnson told the police what occurred but opted not to file charges against Employee. She continues to be in fear of Employee and related that if she is brought back onboard at DHS that a similar incident may happen in the future. During Cross examination, Johnson did not veer from her version of events. During Redirect examination, Johnson revealed that she had heard of other incidents involving Employee allegedly harassing her colleagues. However, during Recross examination, Johnson admitted that she was not personally involved in any of these other incidents and that she did not know if they were true or not.

[1] Transcript at 20 -21.

Sheila Burt ("Burt") Transcript 50 – 66

Burt testified in relevant part that she currently works for the District of Columbia Department of Human Services – Economic Security Administration as a Supervisor. She has been in this position since March 2015. During the incident in question she worked for DHS as a Social Worker. At the time, Johnson was her Supervisor. She was present for the altercation between Employee and Johnson. Burt's version of events is almost identical to Johnson's: Employee confronted Johnson and accused her of hitting her son. Employee then balls up her fists and then Burt steps between them to break up the altercation. Burt testified that Employee's son was not present although she does not know him. Afterwards, the police were called in but she did not give them a statement. Her written statement of the events in question was introduced into the record as Agency's Exhibit No. 4. The facts and circumstances in this exhibit do not meaningfully differ from her testimony.

Anita Waller ("Waller") Transcript 66 – 85

Waller testified in relevant part that she currently works for the District of Columbia Department of Human Services – Work Opportunity Family Resource Center as a Vocational Development Specialist. She witnessed the incident in question. She saw Employee approach Johnson and tell her "you hit my son."[2] She also observed Employee's fists balled up during this confrontation and she saw Employee shove Johnson with her shoulder. Like everyone else, Waller did not see Employee's son and does not know him either. She authored an incident report which was introduced as Agency's Exhibit No. 6. The facts and circumstances in this exhibit do not meaningfully differ from her testimony. During Cross examination, she was adamant that her testimony was truthful.

Ricky Wilson ("Wilson") Transcript 84 – 96

Wilson testified in relevant part that he works for the Department of Human Services – Office of Work Opportunity. He has worked for the Agency for nine years. He had not met Employee prior to the incident in question. However, he had a prior working relationship with Johnson. He remembers Employee aggressively confronting Johnson and accusing Johnson of doing something to her son. Wilson created Agency's Exhibit No. 5, which is an incident report that he created right after the incident. During Cross examination Wilson explained in greater detail that he was present for the entire event. Wilson was adamant that his testimony was truthful.

David Gatling ("Gatling") Transcript 96 – 126

Gatling testified in relevant part that he currently works for the District of Columbia Department of Human Services – Economic Security Administration as a Section Chief. Employee was a former subordinate. Their relationship was purely professional. Employee was under his direct supervision at the time of the incident. Gatling did not witness the altercation between Employee and Johnson. According to Gatling, Johnson told him how Employee blocked

[2] Transcript at 70.

her egress and clenched her fists and accused her "of want[ing] to fight [her] son."[3] Gatling was tasked with investigating this incident on behalf of DHS. Gatling gathered unusual incident reports from all of the participants and witnesses to the incident. Gatling then forwarded that information to his superiors – Kevin Hill and Lynda Mosley. Gatling drafted the Advance Written Notice of Proposed Removal. It was edited before it was executed by Kevin Hill and presented to Employee. Gatling recalled prior incidents involving Employee that colored the drafting process and ultimately the penalty that was proposed and meted out in this matter. During Cross examination, like the other witnesses, Gatling reiterated that his testimony was truthful. He also confirmed that Employee was generally a good employee even though she had a few instances where she was given corrective actions (e.g. letter of counseling).

Jaki Buckley ("Buckley") Transcript 125 – 146

Buckley testified in relevant part that he is currently employed by the Department of Human Services as a Supervisory Labor Relations Coordinator. She has worked for the Agency since March 2006. Her duties include acting as a representative for the Agency during Union negotiations; she provides advice regarding Union contracts; and she provides advice to managers and supervisors regarding employee disciplinary matters. Buckley was made aware of the incident in question through a query from Gatling. Buckley helped create the Advance Written Notice of Proposed Removal. Buckley noted that Employee opted to have the matter reviewed by a Hearing Officer as part of her attempt to have the removal rescinded. After the Hearing Officer finished her review, Employee's removal was ultimately approved. Afterwards, a final written notice of removal was ultimately issued which finalized Employee's removal.

Employee's Case in Chief

Donald Schramm ("Officer Schramm") Transcript 145 – 153

Officer Schramm testified in relevant part that he is currently stationed in the Metropolitan Police Department's ("MPD") Seventh District. His tenure with MPD spans 14.5 years. Regarding the incident in question, he does not recall filing a police report. He vaguely recalls responding to DHS but could not recall the details of his encounter. He explained that generally a police report would not be generated if the alleged victim refuses to press charges in the matter.

Michael Moshier ("Officer Moshier") Transcript 153 – 159

Officer Moshier is a Field Police Officer with the MPD. While he recalled reporting to DHS as part of the incident in question, he did not recall the specifics of his visit.

[3] Transcript at 100.

Tanya Blue ("Employee") Transcript 158 - 176

Employee testified in relevant part that on January 9, 2015, she approached Johnson and asked her "what did you say you did to my son?"[4] Johnson immediately responded by calling for security. Employee went back to her cubicle and after being confronted a colleague decided to call the MPD. She recalls that when the MPD Officers Schramm and Moshier responded, they questioned Johnson and Gatling and finally her. Employee noted that the Officers revealed that according to their questioning of Johnson, no assault occurred. She then asked to be put "on leave" for the remainder of the day and she amicably left DHS with the Officers Schramm and Moshier.[5] A week later, Employee requested to be put on Administrative leave due to her allegedly being harassed and feelings of emotional distress. Thereafter, she was informed, via letter, that she was being removed from service. She asserted that she was "innocent" of the charges levied against her.[6] She denies blocking Johnson egress and she denied balling her fists. She asserts that she was the victim of ongoing harassment in the workplace and that her entreaties for assistance or investigation into her allegations were ignored. Employee further asserts that the entire roster of Agency's witnesses testimony in this matter were untruthful.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's appeal process with this Office. As was noted above, Employee was cited for the following causes: (1) any on-duty or employment-related act or omission that an employee knew or should have reasonably known is a violation of law; (2) any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations; and (3) any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary and capricious.

In its Closing Argument, Agency provides the following description for "assault" as that term is used in District of Columbia Criminal matters:

> … the District of Columbia Court of Appeals has traditionally defined assault as consisting of the following three elements:
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> 1. That the defendant made an attempt or effort, with force or violence, to do injury to the person of another;
> 2. That at the time he made such an attempt or effort, he had the apparent present ability to effect such an injury; and
> 3. That, at the time of the commission of the assault, he intended to do the acts which constituted the assault.
>
> *See Robinson v. United States*, 506 A.2d 572, 573–74 (D.C. 1986) *relying on* Criminal Jury Instructions for the District of Columbia, No. 4.11 (3d ed. 1978)

[4] Transcript at 159.
[5] Transcript at 159 – 160.
[6] Transcript at 160 -161.

> The Court in *McGee v. United States,* 533 A.2d 1268, 1269–70 (D.C. 1987) found further that: there are two distinct kinds of criminal assault recognized in the District of Columbia. The more common is the "attempted-battery" type described in *Sousa v. United States,* 400 A.2d 1036, 1044 (D.C.), *cert. denied,* 444 U.S. 981, 100 S.Ct. 484, 62 L.Ed.2d 408 (1979). The other is the "intent-to-frighten" type, "which consists of some threatening conduct intended either to injure or to frighten the victim." *Robinson v. United States,* 506 A.2d 572, 574 (D.C.1986); *see Williamson v. United States,* 445 A.2d 975, 978 (D.C.1982); *Anthony v. United States,* 361 A.2d 202, 204–205 (D.C.1976); 2 W. LaFave & A. Scott, Substantive Criminal Law § 7.16, at 312–317 (1986). The major difference between the two is in the nature of the intent that must be proven. As this court said in *Robinson, supra:*
>
> Attempted-battery assault requires proof of an attempt to cause a physical injury, which "may consist of any act tending to such corporal injury, accompanied with such circumstances as denote at the time an intention, coupled with the present ability, of using actual violence against the person." ... Intent-to-frighten assault, on the other hand, requires proof that the defendant intended either to cause injury or to create an apprehension in the victim by engaging in some threatening conduct; an actual battery need not be attempted.
>
> 506 A.2d at 574 (citations omitted). *McGee,* 533 A.2d at 1269–70. [7]

Agency's witness's testimony is almost unanimous in establishing that on January 9, 2015, Employee confronted Johnson blocked her egress and demanded that Johnson explain what she said (or did) to Employee's son. Employee then balled up her fists in an aggressive posture ready to engage in fisticuffs. Employee tacitly admitted confronting Johnson in an effort to glean information regarding alleged commentary about or contact with her son. However she attempts to downplay the severity of her actions.[8] During the evidentiary hearing I had the opportunity to observe the demeanor, poise, and credibility of Johnson, Burt Waller, Wilson Gatling and Buckley. I find their collective testimony relative to this matter to be both credible and persuasive. I also had the opportunity to observe the demeanor, poise, and credibility of Employee. I find that her testimony relative to this matter to be self-serving. I note that an administrative judge must find facts and in that capacity must assess the credibility of witnesses. *Dell v. Department of Employment Services,* 499 A.2d 102 (D.C. 1985). To assess the credibility of witnesses, the Administrative judge can consider the demeanor and character of the witness, the inherent impossibility of the witness's version, the witness's bias or lack of bias, inconsistent statements of the witness and the witness's opportunity and capacity to observe the event or act at issue. *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 7-8 (1987). I find that Employee engaged in inappropriate conduct with Johnson and what transpired was tantamount to assault.

[7] Agency's Proposed Initial Decision at 23 -24 (February 2, 2017).
[8] As part of her prosecution of this matter, Employee attempted to cite to "Title VII of the Civil Rights Act of 1964." I find that Employee's arguments in this regard were without merit and lacked any connection to the matter at hand. Considering as much, I find that it is not worthy of any further discussion.

The workplace should be a safe environment where DHS employees and its visitors can collaboratively perform the duties that are required to fulfill DHS' mission. I find that Employee's conduct is detrimental to providing a safe working environment. I further find that Agency has overwhelmingly met its burden of proof with respect to both charges levied against Employee.

Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the undersigned.[9] This Office may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.[10] When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.[11] Here, it has already been established that Employee created an improper (possibly dangerous) work environment for her colleagues. For this, I see no plausible reason to disturb DHS' selection of penalty in this matter. Therefore, I find that Agency's decision to remove Employee from her position was appropriate based upon the circumstances. [12] I further find that Employee's other ancillary arguments are best characterized as a grievances and outside of the OEA's jurisdiction to adjudicate.[13]

ORDER

It is hereby ORDERED that Agency's action of removing Employee from service is UPHELD.

FOR THE OFFICE:

_____
ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

[9] *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).
[10] *See Id.*
[11] *See Id.*
[12] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

[13] Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.