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

_____	)	
In the Matter of:	)	
	)	
ROBERT HARGROVE	)	OEA Matter No. 1601-0067-17
Employee	)	
	)	Date of Issuance: June 25, 2018
v.	)	
	)	Lois Hochhauser, Esq.
D.C. DEPARTMENT OF TRANSPORTATION	)	Administrative Judge
	)	
Agency	)	
_____	)	
Gina Walton, Employee Representative	)	
Michael O'Connell, Esq., Agency Representative	)	

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

Robert Hargrove, Employee, filed a petition with the Office of Employee Appeals (OEA) on July 7, 2017, appealing the final decision of the D.C. Department of Transportation, Agency, to remove him from his position as Traffic Control Officer, effective June 9, 2017. The matter was assigned to this Administrative Judge (AJ) on September 14, 2017.

The prehearing conference (PHC) was held on October 30, 2017, and was attended by Employee; Gina Walton, Employee representative; and Michael O'Connell, Agency representative. At the PHC, Agency again declined to engage in mediation. The parties summarized their positions, and an evidentiary hearing was scheduled.

At the January 24, 2018 evidentiary hearing, the parties were given full opportunity to, and did in fact, present testimonial and documentary evidence as well as argument in support of their positions.<sup>1</sup> Following the submission of written closing arguments, the record closed on April 9, 2018.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

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<sup>1</sup> Witnesses testified under oath and the hearing was transcribed. The transcript is cited as "Tr" followed by the page number. Documents entered into evidence are cited as "J" for "joint" followed by the document number

## ISSUES

Did Agency meet its burden of proof in this matter? If so, is there any basis to disturb the penalty?

### FINDINGS OF UNDISPUTED FACTS, POSITIONS OF THE PARTIES AND SUMMARY OF EVIDENCE

#### Findings of Undisputed Facts (FUF):

1. Employee held a permanent appointment in the career service, and had been a Traffic Control Officer (TCO) for about three years, at the time he was removed.
2. The duties of the TCO include directing traffic, writing citations, responding to questions from citizens, and working at special events, primarily in downtown areas. The position can be stressful because the TCO must interact with the public, including individuals who are displeased, impatient or even angry at actions taken by the TCO. (Tr, 16, 47-48).
3. Nettina Wren Perkins<sup>2</sup> had been Employee's supervisor (STCO) for several years at the time he was removed. She has worked at Agency for six years, first as a TCO and then a Lead TCO before assuming her current position. (Tr, 17).
4. On December 22, 2016, at about 11:50 a.m., Employee was proceeding down the hall on the second floor of the Reeves Building when he encountered STCO Perkins and STCO Jason Godfrey. As a result of the encounter, the specifics of which are in dispute, and are discussed below in considerable detail, Employee was directed to leave the building. He was placed on administrative leave with pay and then terminated. (Ex J-1).
5. Mr. Godfrey provided the following written statement on December 22, 2016, which he signed on January 3, 2017:

Approximately 11:49 a.m. this morning, Nettina and I were walking out of the supervisor office heading towards the bank. Once we came out of the office Mr. Hargrove was walking towards us. Mr. Hargrove stated "y'all f..... with my money." Then he turned around and shove[d] his right shoulder into the door with anger Nettina and I looked at one another and said what's going on. As we continue walking down the hall towards the Credit Union, Mr. Hargrove stated "y'all are going to stop playing with me. DDOT ain't going to be able to save y'all. I will come back up here and do something to you. These supervisors going to stop playing with me" As he continued walking down the hall mumbling, I asked Nettina what is going on? She stated "I don't know. But I know what I'm about to do." Nettina started to call someone when Mr. Hargrove turned around and got into her face with his hands balled up in a fist and kept saying to her, "say one more word." I then proceeded to get in front of him and told him to calm

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<sup>2</sup> This witness is identified as "Ms. Perkins" throughout this *Initial Decision* (ID), but is also referred to as Nettina, Tina and Ms. Wren in documents and testimony, some of which are quoted in this ID.

down and walk away. He continued to threaten Nettina to say one word. He then proceeded to turn around and walk down the hallway. (Ex J-8).

6. Ms. Perkins submitted the following written statement on December 22, 2016:

On December 22, 2016 approx. 11:50 AM myself and Mr. Godfrey was heading out of the office to the credit union as we were approaching the glass door I notice[d] [Employee] coming toward the glass doors and as I proceeded to open the door Mr. Hargrove seem[ed] very upset/angry he started mumbling words looking at me then he turned around and hit the gray door out of anger with his shoulder still mumbling words. Then as we proceeded to walk by the elevator Mr. Hargrove turned around and said “DDOT is not going to save you all I will come up here and do something to you all, you all supervisors going to stop playing with me and my money.”

As we started walking down the hallway Jason & I were behind Mr. Hargrove he started saying fuck DDOT they going to stop playing with his [livelihood] and we don't know who he is and somebody is going to get hurt. Go ahead and write me up, started cursing. Jason & I asked Mr. Hargrove what's wrong are you ok he continued to say don't play with me! Jason & I approached the middle of the hallway by the credit union. I was speaking to Jason I said I know what I am about to do. Mr. Hargrove turned around got in my face very angry and hostile and with his fist balled up and arm pulled back and a stance like he was about to attack me. And continue to threaten me by telling me to say something! Jason stepped in with his child and asks Mr. Hargrove to step back out of my face and to keep walking he still stood there just looking at me still with his fist balled up and in a stance like he was going to hit me. Then he looked at Mr. Godfrey and walked to the roll call room as we was walking he stated [his] check was short.

I feel threaten[ed] and [unsafe] at this point with this employee I was not aware of any issues regarding his check until that moment. (Ex J-9).

7. Ms. Perkins informed her supervisor of the incident and who told her to order Employee to leave the building. She said that she was too frightened to speak with Employee, so Mr. Godfrey told Employee to leave, which Employee did without incident. Employee was not asked to submit a written statement about the incident before he left. He was placed on paid administrative leave, and did not return to work.
8. Neither Ms. Perkins nor Mr. Godfrey contacted Agency security during or after the incident. The D.C. Metropolitan Police Department, contacted by Ms. Perkins that day, did not arrest Employee. Ms. Perkins sought a restraining order, and Employee agreed to the imposition of a Temporary Restraining Order until the February 2018 hearing.<sup>3</sup>

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<sup>3</sup> In its written closing argument, Agency attached a copy of an Order Entering Permanent Injunction issued by D.C. Superior Court Associate Judge Neal Kravitz on February 20, 2018. Agency did not request that the record be reopened to enter this document, which post-dated the evidentiary hearing by almost a month. The document was not entered into evidence and neither it, nor any arguments made by Agency about the Order were considered by the AJ in reaching this decision.

9. Agency Departmental Order No. 05-2010, issued on July 29, 2010, addresses workplace violence. It provides procedures for managers to take in the event of a potentially dangerous situation. The Order states that Agency has a Zero Tolerance Policy” regarding workplace violence. (Ex J-12). It notes that its “Zero Tolerance Policy” includes the following:

**Section 1:** Any intentional act of intimidation, threat of violence, or act of violence committed against any person or to the property of another while on the job and/or on property owned by or leased to [Agency] is prohibited.

**Act(s) of intimidation: (Implied threat):** Any willful act/behavior directed toward another person, the result of which causes the other person to reasonably fear for his/her safety or the safety of others.

**Threat(s) of violence: (Actual threat):** Any willful act/behavior directed toward another person which threatens the other person, or which threatens damage to the property of another, under such circumstances that would cause the other person to reasonably fear for his/her safety, the safety of others or damage to said property.

**Act(s) of violence:** Any willful act/behavior committed against another person or the property of another, the result of which causes bodily injury, however slight, to the other person or damage to the property of another.

10. Charnita Walker, Agency Program Analyst, was appointed by Agency to investigate the incident. In her January 24, 2017 Final Report, she stated that as part of her investigation, she reviewed the written statements of STCOs Perkins and Godfrey and interviewed them on January 3, 2017; and that she interviewed Employee, who was accompanied by Merika Tapp, Shop Steward, on January 5, 2017. Based on her investigation, Ms. Walker made findings, including the following:

- As Mr. Godfrey and Ms. Wren continued to walk, Mr. Hargrove stated: “DDOT is not going to save you all; I will come up here and do something to you all. You supervisors are going to stop playing with my money.”
- At that point, Mr. Godfrey and Ms. Wren began asking Mr. Hargrove what was wrong with him and was he okay. Mr. Hargrove replied, “Fuck DDOT,” and that they were going to stop playing with his livelihood and they don’t know who he is, and that someone was going to get hurt. He also told Ms. Wren to go ahead and write him up.
- Ms. Wren picked up her phone and said, “I know what I am about to do.” Before she could dial, Mr. Hargrove got very close to her with his fists balled up and threatened her to ”Say one more thing, say one more thing.”
- Ms. Wren stated that Mr. Hargrove was very angry, and hostile, and with his fist balled up and arm pulled back in a stance as if he were going to hit her.
- Jason Godfrey stepped in and asked Mr. Hargrove to please just walk away.

- In the interview with Mr. Godfrey, he expressed that the look of rage in Mr. Hargrove's eyes was so intense, that he was afraid that Mr. Hargrove was going to attack Ms. Wren at any moment.
  - Mr. Hargrove continued to threaten Ms. Wren to say one more word, and eventually turned around to walk towards the roll call room. It was then, that he finally stated that he was very angry because his check was short.
  - Ms. Wren stated that she was scared because Employee's behavior was totally different than usual. When Mr. Hargrove usually has a problem, he talks to her about it. After this behavior, she does not know how she will be able to communicate with him moving forward. She still [is] very afraid and shaken at the thought of him.
  - According to Mr. Hargrove, he was upset because there was a discrepancy with his pay. He stated that he deals with the care of his dying parents and is under pressure daily. The payroll issue further frustrated him.
  - Mr. Hargrove stated that as Ms. Wren and Mr. Godfrey walked behind him asking what was wrong with him, he eventually turned around and was very close to Ms. Wren. He agreed that his stance was very tense, but denies threatening her.
11. On February 27, 2017, Agency issued its Advance Written Notice of Proposed Removal, informing Employee that it intended to terminate his employment. (Ex J-2). In the Advance Written Notice, Agency stated its decision was based on the following violations and findings:
1. **Any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law, pursuant to DPM §§ 1603.3 ( e) and 1619.1(5); and**
  2. **Any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious, pursuant to DPM § 1603.3(g).**

Agency alleged the following in support of its decision:

**Cause 1: Threats to do bodily harm, pursuant to D.C. Official Code § 22-407 in violation of 1603.3(e) and 1619.1(5).**

Specification 1: Supervisory Traffic Control Officer (STCO) Jason Godfrey provided a detailed signed statement of an incident which occurred at approximately 11:49 AM on the morning of Thursday, December 22, 2016, at the DDOT facility located on the 2nd Floor of the Frank D. Reeves Municipal Center. [Ex.A.01]

STCO Godfrey was exiting the Supervisors' Office on the second floor of the building accompanied by Supervisory Traffic Control Officer Nettina Wren. As you were walking toward them you stated: "Y'all fucking with my

money,” turned, and shoved your shoulder into a door in a physical expression of your anger.

STCO Godfrey described that he and STCO Wren stopped and looked at each other wondering what was going on. STCO Godfrey recounts that you stated: “Y’all are going to stop playing with me. DDOT ain’t going to be able to save you. I will come back up here and do something to you. These supervisors going to stop playing with me.”

STCO Godfrey said that he asked STCO Wren what was going on, and that she responded: “I don’t know. But I know what I’m about to do.” As STCO Wren started to use her telephone, you turned around and escalated your verbal threats to an immediately actionable physical threat. You placed yourself immediately in front of STCO Wren in a menacing manner. STCO Godfrey stated that you got into STCO Wren’s face with your hands balled up into a fist and kept repeatedly saying to her “Say one more word.” Your physical disposition, coupled with your choice of words, indicate that you physically and verbally threatened STCO Wren to instill a fear of immediate actual assault.

STCO Godfrey was compelled to protect STCO Wren from an assault by stepping in between you and STCO Wren, thereby assuming the risk of assault himself. STCO Godfrey then instructed you to calm down while you kept daring STCO Wren to “Say one more word,” before you turned and walked away.

STCO Wren’s statement of the incident, dated December 22, 2016, is consistent with STCO Godfrey’s. [Ex.A.02]. STCO Wren’s statement includes details which affirm that you deliberately and without provocation put yourself in immediate proximity to her, with your fist balled up and your arm raised, as if you were going to hit her, while you dared her to speak. STCO Wren has described that you became very angry and hostile, and that she feels threatened and unsafe because of your behavior.

Shortly after the incident, on the same day December 22, 2016, STCO Wren informed me of the incident in accordance with the DDOT Workplace Violence Prevention and Response Policy (WVP). [Ex.A.05]. When I advised STCO Wren to relieve you of duty status and send you home, she expressed that she was so threatened and overcome by fear she could not muster the courage to have any additional contact with you. Consequently, I instructed STCO Godfrey to relieve you of duty status, and you were sent home on December 22, 2016.

On the afternoon of December 22, 2016, STCO Wren contacted the DC Metropolitan Police Department (MPD) to report the incident: MPD Office Robert Owen [Badge 3931] came to the DDOT facility and recorded the incident details on Public Incident Report CCN # 16215767, which indicates an open case status for a complaint of “Threats to do bodily harm, which is a criminal misdemeanor pursuant to Official Code §22-404. [Ex.A.03].

The next day, at approximately 12:30 PM on December 23, 2016, you were placed on Administrative Leave pending an investigation of the workplace violence incident. [Ex.A.06].

On December 23, 2016, STCO Wren filed a motion for a Temporary Restraining Order and Motion for Preliminary Injunction in the District of Columbia Superior Court...Although the Temporary Restraining Order was denied on January 13, 2017, an order granting the Motion for a Preliminary Injunction was granted on January 27, 2017. [Ex.A.08].

During the WVP interview conducted with you in the presence of AFGE Local 297 Chief Shop Steward Merika Tapp, you acknowledged that your behavior was very tense but you denied having threatened STCO Wren. You stated that you were upset because there was a discrepancy in your check. [Ex.A.04].

However, it is clear from the statements of victim STCO Wren and eye-witness STCO Godfrey that your actions were deliberate, aggressive and intimidating, and that you posed a credible and immediate risk of actual assault on STCO Wren. In the MPD Police Report, your behavior was recorded as a misdemeanor offense of “Threats to do bodily harm” pursuant to D.C. Official Code §22-407. [Ex.A.03]. Your behavior constitutes a real threat and assault on a DDOT employee while on duty, which is cause for disciplinary action in accordance with DPM § 1603.3 (e). For this misconduct, the agency’s Table of Appropriate Penalties DPM §1619.1(5) recommends a penalty of Removal in the first instance.

I have considered STCO Wren’s reactions to your statement, which indicate that your language and behavior imposed sudden and real fear of personal injury to her. I have considered that STCO Wren acted immediately after the event to avoid any further contact with you. STCO Godfrey’s reaction to your behavior was to physically intervene, because the look of rage in your eyes was so intense he believed you were going to attack STCO Wren at any moment. STCO Godfrey’s reaction underscores the immediacy of the threat you posed.

STCO Wren’s apprehension of harm was real and is supported by her actions immediately following the incident, including filing a police report of the incident, notifying her supervisor and being candid that she was so afraid of you that she could not have further contact with you. STCO Wren also followed the matter up with efforts to have you legally restricted from interpersonal engagement with her. STCO Wren’s continuing apprehension of harm from you was recorded in the WVP report, which records that on December 24, 2016 – two days after the incident – STCO Wren was still very afraid and shaken at the thought of you. [Ex.A.04].

Your intent to make a threat is clear from your escalation from disdainful remarks “Fuck DDOT” and the aggressive physical conduct of shoving your body in anger against a door, to threatening remarks that “DDOT would not be able to save y”all” meaning Supervisors Godfrey and Wren, to your

deliberate action to turning around and imposing your menacing posture in close physical proximity to STCO Wren's face, ready to strike her with your fist while repeating "Say one more word." You maintained this deliberate, unprovoked, and intense behavior through several reiterations of the threat. As a District of Columbia employee, your violent, threatening, and wholly unprofessional misconduct is unacceptable and will not be condoned.

In considering the attendant circumstances, STCO Wren recognized that you appeared to have an issue, so she enquired in an effort to discern the circumstances. STCO Wren was trying to be of assistance in asking if you were OK. Her efforts met with your aggressive and threatening physical response which indicates that you are predisposed to resort to a violent response.

Your threat to STCO Wren was deliberate and avoidable and exposed a callous and unacceptable disregard for the well-being of a DDOT employee. Your actions were taken without regard to DC law which prohibits such misconduct. Your actions were taken in disregard of DDOT Workplace Violence Prevention policy, which was implemented to raise awareness or interpersonal conduct standards and consequences of violation in effect at DDOT since 2010.

Your misconduct warrants Removal in the first instance for Cause 1: Threats to do bodily harm, pursuant to D.C. Official Code §22-407. In violation of DPM §§ 1602.2(e) and 1619.1(5).

**Cause 2: Use of abusive or offensive language to cause fear of harm, pursuant to DPM §§1603.3(g) and 1619.1(7)**

Specification 2: On December 22, 2016, you encountered STCO Wren in the DDOT facility at 200 14<sup>th</sup> St. NW, as described above, and as described by witness STCO Godfrey. Your inappropriate and aggressive language and violent disposition when communicating with SCTO Wren was such that you violated reasonable standards of interpersonal professional conduct with another employee while at the workplace. Your abusive and offensive language was aggressive, intimidating and was imposed by you on STCO Wren without provocation. Your abusive and offensive language in concert with your violent posture, was intended to emphasize the immediate possibility of physical violence against STCO Wren.

DDOT Workplace Violence Prevention policy provides that such behavior is an actual threat of violence in accordance with WVP II §1, which is cause for disciplinary action in accordance with WVP II §5. Your abusive and offensive language is an aggravating factor which reinforced your physical threat. Under these circumstances, your abusive and offensive language is cause for the disciplinary action of Removal. Your abusive and offensive language was so hostile and impactful that it instilled fear of harm in STCO Wren.

Your threats seriously interfere with the integrity of the DDOT Traffic Control program supervisory hierarchy because your threats have caused



STCO Wren a fear of interpersonal engagement with you. STCO Wren and other supervisors should be able to interact with you without being subject to assault, threats, intimidation or fear of harm. Your threats are contrary to reasonable requirements for workplace conduct as a District of Columbia employee. I find that under the circumstances, your use of abusive and offensive language was misconduct which warrants removal, to ensure that this behavior does not recur and to ensure that STCP Wren can carry on her supervisory duties in the Traffic Control Officer program without apprehension of further abuse or fear of threat from you.

12. The matter was referred to Hearing Officer (HO) Karen Calmeise on March 8, 2017. Employee, through his representative, submitted a written statement to the HO on March 24, 2017. In it, he maintained that he did not threaten or engage in threatening actions, but rather was frustrated because of continued payroll errors, and the refusal of Mr. Godfrey and Ms. Perkins to leave him alone after he told them that he was fine and did not want to continue the conversation. (Exs. J-4).
13. In her May 5, 2017 Hearing Officer's Report/Decision, HO Calmeise reviewed the conflicting versions presented by Agency witnesses and Employee, stating she gave "greater weight to the statements" made by Mr. Godfrey and Ms. Perkins since they were made contemporaneously. (Tr, J-5). She acknowledged Employee's frustration with continuing payroll difficulties. She concluded that Agency met its burden of proof on the first charge, *i.e.*, threat to do bodily harm and the second charge, *i.e.*, the use of abusive or offensive language that caused fear of harm, noting:

These actions tipped the scale from venting frustration to threatening physical injury or harm. The supervisor's role and work relationship is altered by his actions and presents a concern that such an incident could be repeated. Furthermore, Hargrove did not present regret for the outburst and in essence blamed DDOT training and Office Wren for his actions. (Ex J-5)

14. Agency's Notice of Final Decision for Proposed Removal was issued on June 6, 2017. (Ex J-6). Suzette Robinson, Agency Chief Operations Officer (COO), the Deciding Official, reviewed the charges, the positions of the parties, the applicable provisions, and concluded that there was sufficient evidence presented regarding both charges, and that termination was appropriate. She then considered the *Douglas Factors*<sup>4</sup>:

Aggravating: *The nature and seriousness of the offense in relation to your duties.* Your position involves engaging with the public. Your threatening and intimidating behavior to DDOT indicates that you cannot be relied on to carry out Traffic Control Operator duties in a calm and controlled manner. In addition, your offense was intentional or not inadvertent. You maintained and repeated your threat while in proximity to STCO Wren. DDOT cannot accept the risk that you pose to the agency as a public-facing DC Government employee because of your readiness and willingness to threaten and antagonize another person.

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<sup>4</sup>*Douglas v. Veterans Administration, 5 M.S.P.R. 280 (1981).*

Neutral: *Your job level and type of employment* is not a significant mitigating factor for this nature of offense, in which single instance warrants removal.

Neutral: *You have no past disciplinary record;* however, that is not a significant mitigating factor in this matter.

Neutral: *Your work record, including length of service, quality of performance, and dependability* is not a significant mitigating factor in this matter. Satisfactory performance does not mitigate your serious misconduct violation, and satisfactory performance does not indicate or assure that you can be relied on to conduct yourself at all times in the manner required of DDOT employees who serve citizens and visitors to the District of Columbia.

Aggravating: *The effect of the offense upon your ability to continuing performing at a satisfactory level, and the effect on management's confidence in you after the misconduct.* Your threats to STCO Wren have irrevocably undermined management confidence that you can control yourself under the stressful environment of traffic control operations and even in the course of resolving perceived administrative issues regarding pay. Furthermore, you have denied making a threat to STCO Wren in spite of your admitted very tense, close stance to her. You have made no indication of remorse, regret or acknowledgement of your actions against STCO Wren. Supervisors Godfrey and Wren are reasonable and respected government employees who cannot be placed in a predicament where a direct report can disparage DDOT, make threatening remarks and escalate behavior to the point of physical attack. DDOT management will not tolerate this form of abuse among its employees. It is deleterious to morale and seriously undermines authority in the workplace.

Aggravating: *The consistency of the penalty with those imposed upon other employees for the same and similar offenses.* DDOT consistently proposes the penalty of Removal for employees who assault or threaten others in an on-duty or employment-related context.

Aggravating: *Consistency with the penalty with the Agency's Table of Penalties.* The penalty of Removal is consistent with the Table of Penalties DPM §1619.1(5).

Neutral: *The notoriety of the offense and the impact on DDOT reputation* is not a significant aggravating or mitigating factor in this matter, because it was contained in-house.

Aggravating: *The clarity with which the employee was [notified] of the rules violated in committing the offense, including warnings about the conduct.* Your misconduct was a serious violation of acceptable social conduct, and showed egregious disregard for professional comportment. Your misconduct was a contravention of established DDOT Workplace Violence Prevention Policy, which has been published on DDOT Intranet since 2010. Whether you were trained or had intimate knowledge of the details of the policy which

would not prevented you from threatening supervisors Wren and Godfrey, and of disparaging DDOT. You knew or reasonably should have known that such behavior, which is unacceptable in an employment context, is wholly unacceptable and would have serious consequences including Removal from your position. Your behavior is deleterious to productivity and workplace morale.

Neutral: *The potential for the employee's rehabilitation* is not a significant aggravating or mitigating factor in this matter. Your misconduct was excessive and indicates potential for repetition which could lead to an on-duty employment-related physical injury of a DDOT employee or member of the public. DDOT cannot control how you react to pressure and the stresses of life and cannot be assured of your rehabilitation. Your lack of acknowledgement of the actuality of your misconduct is concerning and indicates that you do not see your behavior as transgressive. This indicates that you are likely to repeat the behavior.

Mitigating: *The circumstances surrounding the commission of the offense (unusual job tensions, personality conflicts, bad faith issues, mental impairment, harassment, etc.)* While I sympathize with the stress that caring for family creates, and I recognize the frustration of an apparent discrepancy in a paycheck, your threats were grossly out of proportion and misdirected. Neither STCO Wren nor any other DDOT employee or member of the public should be subject to assault, threat to do bodily harm, or intimidation as a result of your personal circumstances. The mitigation from extenuating factors is not sufficient to reduce the proposed penalty of Removal.

Aggravating: *The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by you or others.* Removal is the only effective means to maintain a workforce free of employees who engage in on-duty or employment-related assault or threats. To protect its employees and the integrity of operations DDOT requires employees to behave with reasonable standards of interpersonal conduct, to maintain harmonious interactions among all levels of employees. Your behavior to STCO Wren was so unreasonable that Removal is warranted for your violation of law and your violation of professional and decent workplace conduct standards. All employees must be free to carry out their function for DDOT without fear of threat or attack by other employees.

#### Positions of the Parties and Summary of Evidence

Agency's position is that Employee used threatening and abusive language and engaged in threatening conduct, which caused Ms. Perkins and Mr. Godfrey to fear that Employee would carry out his threat against Ms. Perkins if immediate action was not taken. Agency contends that Employee's conduct violated both Agency policy and District of Columbia law, and that the penalty of removal was appropriate

Ms. Perkins testified that as she was walking to the credit union in the Reeves Building at about 11:00 a.m. on December 22, 2016, with STCO Godfrey carrying his infant daughter in a car

seat, they approached Employee who was walking toward them. She said that he looked upset, and as she opened the glass door, she heard him mumbling, but did not hear what he said. She testified that “[he] looked at me and I looked at him and he said something, and with that he slammed his right shoulder up against the grey door going out” and kept walking (Tr, 34). She said that he then “turned around and he [said something like]:

DDOT is not going to save you. I’m going to come up here and do something to you all. Or else they can keep paying me my money.” (Tr, 20).

Ms. Perkins stated that she heard Employee say, “fuck that, y’all going to stop playing with my livelihood.” She said she asked him if he was okay, and he responded, “don’t play with me.” She said that she did not say anything to Employee after that, but he continued to talk “the whole time.” The witness said that she told Mr. Godfrey “I know what I’m about to do,” when:

[Employee]...turned around, slammed my face, in my personal space, and he swiped right here and said what did you say? Say it again, say it again. ...And I’m looking at him like he probably hit me, so I’m standing, looking at him, any other time I would say something but he had so much anger in his face and I’m looking at him and I’m not saying anything.” (Tr, 21).

The witness testified that Employee was in her “personal space,” saying that he was close enough so she could touch him. She said that he made a fist with his right hand but did not raise his arms. (Tr, 22). She stated that she was “scared” and “confused” and trying to figure out how she could “get out of [the] situation. (Tr, 23). When asked if she felt fearful, she responded that she “felt past fear” and was concerned that Employee was going to strike her. (*Id*).

Ms. Perkins testified that even if Employee had payroll problems, his conduct was not justified. (Tr, 26). She contended that if he could not control himself with a co-worker, she was concerned with how he could carry out his TCO duties, which require interaction with the public. (Tr, 27). She noted that she had worked with Employee in the past to resolve payroll discrepancies. (Tr, 28). She said that the incident caused her to become anxious. (Tr, 31).

Jason Godfrey stated that he has worked at Agency for seven years, first as a TCO, then a Lead TCO, then an acting branch chief, and now was a STCO. He said that at about 11:49 a.m. on December 22, his day off, he was at the Reeves Building with his infant daughter, and was walking with Ms. Perkins to the credit union, when they saw Employee coming through the double doors. The witness said:

[Employee] mumbled, ‘they fucking with my money’...shoved himself into the door and walked out. (Tr, 51).

The witness said that he asked Employee if he was okay, and that Employee continued walking down the hallway. Mr. Godfrey said that when they reached the elevators, Employee, who was still walking, said:

[Y'all] are going to stop playing with me, DDOT can't save y'all, and those type of words. Once we started to look at him, [Employee], everything okay? He turned around and kept on walking. (*Id*).

Mr. Godfrey said that he and Ms. Perkins continued walking, when Employee turned around, "walked up to [Ms. Perkins] and said, "say one more word." (Tr, 52). He described what happened next:

Once he got in her face with his hands balled, foot cocked like he was about to swing one at her, I... put my daughter behind me [and] stepped in between ...them. I was like, Mr. Hargrove, walk away. Mr. Hargrove, walk away. He kept on saying, "say one more word, say one more word." Tina, knowing Tina, her reaction, usually she would have said something but she was frozen.

I seen the glint in [Employee's] eyes that, he ain't playing I'm like, walk away, Mr. Hargrove, walk away. So then he proceeded to walk away. (*Id*).

The witness said that Employee was interacting with Ms. Perkins and he was "close enough to kiss her." He said that he felt the need to step between them because of Employee's reaction:

He balled his fist up, cocked it back like he was going to hit her and told her to say one more word like he was going through with it." (Tr, 53).

Mr. Godfrey said that he was not worried that Employee was going to hit him, but thought Employee would hit Ms. Perkins, since his anger was directed at her. (Tr, 54). Mr. Godfrey testified that Employee could not continue with his duties because "the same thing might have happened in the field with a citizen." (Tr, 55).

Karen Calmeise, Agency Employment Officer, served as the Hearing Officer (HO) in this matter. She testified that based on her review of the documents submitted by the parties, she concluded that Employee had engaged in the charged conduct, noting:

Aside from [Employee's] explanation, [his conduct] rose to the level of a violation of the DPM, that there was threatening, hostile behavior and it was not justified under the circumstances. (Tr, 72).

The witness stated that Employee had expressed that he had payroll problems since September, and that Ms. Perkins had "denied his payroll amount." She thought that Employee directed his anger at Ms. Perkins because she was his supervisor. (Tr, 74, 80). She testified that Employee's actions would not have been acceptable even if Ms. Perkins had acted improperly regarding his payroll problems and even if he was not familiar with Agency Workplace Violence Policy. She characterized his conduct as "threatening." (Tr, 82). She explained that after reviewing the written statements, she determined that the statements from Ms. Perkins and Mr. Godfrey were more credible than Employee's because they "were generated contemporaneously to the incident." She also noted that they were consistent. (Tr, 71). HO Calmeise testified that she concluded there was sufficient evidence to support Agency's decision to terminate Employee. (Tr, 76).

Employee's position is that he did not engage in the charged conduct. He denied threatening anyone, using derogatory language, cursing, or "[compromising] the integrity of [his] uniform" as a D.C. government employee. He maintained that even though he was "sort of desperate," he "always remain[ed] professional" when working. (Tr, 94). He said that he was never referred to an employee assistance program (EAP) and never received workplace violence training. (Tr, 95-96). He explained that he was under a great deal of stress at the time, because both of his parents had cancer, and that he and his wife were providing his parents with financial support, which placed an additional burden on him, and that the payroll problems increased his stress level. (Ex, J-14). He stated that when he told Ms. Perkins about these problems in the past, either he or she would call Ms. Pettus, and the "hours would get straight." (Tr, 94-95). He also stated that he had asked Ms. Perkins about applying for FMLA<sup>5</sup> leave so that he could spend more time with his parents, and although she told him that she would look into it, he never heard back from her and had pursued the matter with the Union. He said that as a "last resort" he asked Ms. Perkins for a shift change so he could have weekends off to see his parents, but she denied his request.

Employee testified said that on December 22, 2016, at about 11:47 a.m., he found "a discrepancy" in his time about the hours he had worked. (Tr, 86). He said that he went to alert his supervisor or someone who could help before he submitted the time. He said that he saw Ms. Perkins and Mr. Godfrey coming through the glass doors about 15 feet away from him, and told them that his time was "messed up." He said that they advised him to contact Ms. Angela Pettus. He said that he responded "okay, fine," and then turned and walked away. He denied shoving or hitting anyone. (Tr, 87-88).

Employee stated that as he continued walking, he heard Mr. Godfrey and Ms. Perkins calling out to him, continuing to ask him what was wrong. He said that although he responded that he did not want to talk and that he was "good," the two "persistently [and] consistently" kept asking him what was wrong. He said that he continued to respond that he was ok, and that they had already told him to pursue the matter with Ms. Pettus. (Tr., 88-89). He stated that when he was about ten feet from them, he told them:

[W]hen we don't do our job as TCOs, they're quick to terminate us...but where do we go when you guys don't do your job? (Tr, 89).

Employee stated that the two individuals stayed behind him, continuing to call out to him; and that he kept "letting them know that [he was] good;" that he was going to roll call and that he did not want to talk. (Tr, 89-90). He testified that he "finally" turned around, explaining to them that he was "frustrated" because for the past few months, his pay checks had not reflected all of the hours he had worked. Employee denied ever being in "anyone's personal space," and said that Mr. Godfrey never moved in front of him. (Tr, 90-91). He stated that his hands remained at his side, and he just repeated that he did not want to talk. He said he then went to the roll call room.

Employee stated that Mr. Godfrey approached him and told him that he understood that he was "distracted" because his "mind [was] on [his] father and ...mother" and that he should "take the day off" and "go home." (Tr, 91-92). Employee said that he got his things and left, and it

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<sup>5</sup> Family Medical Leave Act

wasn't until he reported to work the following day that he was told that he had been placed on administrative leave and could not return to work. (Tr, 92).

In response to the AJ's question as to why Mr. Godfrey and Ms. Perkins thought he was upset, Employee first said that he was "distraught," but then revised his answer, stating that he "wasn't upset at all." (Tr, 100). He explained that the change in his response was because although he was distraught due to the pressures of taking care of two households, and had been crying and his eyes were watering; he was not upset with Ms. Perkins or Mr. Godfrey, about the pay errors or about Ms. Perkins's refusal to allow him to change shifts. (Tr, 102, 104). He said that how he looked may have given Ms. Perkins and Mr. Godfrey the impression that he was "distraught," but once they told him to see Ms. Pettus, he walked away to go to roll call. (*Id.*).

Employee denied that he ever entered Ms. Perkins's "personal space," stating that he was more than an arm's length away from her, and was too far to touch her. (Tr, 105). He denied speaking in a loud voice, noting that there were three security officers one level below them, who could have intervened if he was loud. (Tr, 107-109). Employee stated that neither Mr. Godfrey nor Ms. Perkins contacted the security officers and that no incident report was taken. He said that MPD did not arrest him, and that he was not ordered to stay away from Ms. Perkins by the Court, but rather volunteered to do. (Tr, 113, 118).<sup>1</sup>

### FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Pursuant to OEA Rule 628.2, Agency has the burden of proof in adverse action appeals. Agency must meet its burden, according to OEA Rule 628.1 by "a preponderance of the evidence," which is defined as "the 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."

Three individuals were present during the incident that resulted in Employee's removal. Ms. Perkins and Mr. Godfrey offered written and oral evidence that was essentially consistent on the relevant factors. Employee, the third participant, offered written and oral evidence that contradicted the evidence of the other two witnesses on almost all the facts relevant to this matter. Therefore, credibility was at issue. Credibility determinations were critical since the two versions of the events could not be reconciled. This AJ has more than 25 experience making credibility assessments, and utilized her experience and expertise in this matter.

The District of Columbia Court of Appeals has emphasized the importance of credibility evaluations by the factfinder, who observes the witness "first hand." *Stevens Chevrolet Inc. v. Commission on Human Rights*, 498 A.2d at 440-450 (D.C. 1985). The factfinder has the "benefit of observing the witnesses while they testify," and can observe demeanor, tone and other factors that cannot be discerned from a transcript. *Haebe v. Department of Justice*, 288 F2d 188 (Fed Cir. 2002). *See also, Hillen v. Department of Army*, 35 MSPR 452 (1987). In order to make credibility determinations, the factfinder must consider a wide range of factors including the witness's opportunity and capacity to observe the act; the witness's character as it relates to honesty; any prior inconsistent statements made by the witness; the witness's bias or lack of bias; conflict between the witness's version and other evidence; the inherent improbability of the witness's version; and the witness's demeanor. *Universal Camera Corp. v. National Labor*

*Relations Board*, 340 U.S. 474, 496 (1951). The factfinder can determine that parts of a witness's testimony is true, but reject other parts as untrue. *DeSarno, et al., v. Department of Commerce*, 761 F.2d 657, 661 (Fed. Cir.1985).

Both Mr. Godfrey and Ms. Perkins maintained that Employee was both verbally abusive and physically confrontational; that he entered Ms. Perkins's "personal space," and directed verbal threats at her. Employee denied each of these allegations, asserting that despite his frustration and stress, he did not engage in the charged conduct. He said that Mr. Godfrey and Ms. Perkins continued to ask him what was wrong despite his responses that he was "okay," thereby increasing his frustration. HO Calmeise stated that she based her conclusion that Ms. Perkins and Mr. Godfrey were more credible than Employee in large part because they provided their written statements contemporaneously with the event while Employee's statement was made at a later time. (Tr, 71). The AJ did not consider this factor in reaching her decision since Employee was ordered to leave the premises immediately, and did not have the opportunity to offer a contemporaneous statement.

The AJ carefully observed the three eyewitnesses during their testimony. She found that each had the opportunity and capacity to observe the event at issue, and that none appeared to be deceitful. She had some credibility problems with both Employee and Ms. Perkins, because despite their statements that there was no ill will between them, the AJ noted some *animus* toward the other from their words and demeanor. Although Employee stated that Ms. Perkins helped him with payroll problems in the past, he testified that she refused his request to change his tour-of-duty so he could spend time with his parents, and that she failed to help him with his efforts to get FMLA leave. Employee was emotional during his testimony when discussing the failing health of his parents, the strain he was under because he was helping his parents financially, his frustration with continuing payroll problems which added to the financial strain, and the rejection of his request to change his work schedule to allow him to spend more time with his parents. Ms. Perkins answered questions curtly and appeared angry at Employee and/or having to testify. She stated that she knew Employee was under considerable stress due to the failing health of his parents and financial burdens, but she did not appear at all sympathetic to his situation. She stated that she and Employee had worked well, but did not explain why she became and has remained, so fearful of him that she is pursuing a permanent injunction.

Mr. Godfrey did not exhibit any *animus* toward Employee. He did not appear to exaggerate or over-react when describing events, but testified calmly and factually. For these reasons, the AJ determined that he was the most credible eyewitness and accepted his version of the events. She therefore finds that Employee used abusive and threatening language, that he was in close proximity to Ms. Perkins, and that Employee's language and physical proximity reasonably led Mr. Godfrey and Ms. Perkins to believe that Ms. Perkins was in danger of being harmed. In addition to testifying about Employee's words and actions, Mr. Godfrey described Employee's demeanor, *i.e.*, the "glint" he saw in Employee's eyes, and Employee's stance which contributed to his conclusion that Employee could harm Ms. Perkins unless Mr. Godfrey intervened. Mr. Godfrey did not fear that he would be harmed because the threats were directed at Ms. Perkins. In addition, Mr. Godfrey's testimony that normally he would have expected Ms. Perkins to react, but that she appeared "frozen" and unable to respond, supports Ms. Perkins's testimony regarding her fear and anxiety, and supports Agency's position.



Based on a review of the record, the AJ believes that initially Employee's anger and inappropriate language were directed at Agency, resulting from the stress and strain he was experiencing. The AJ credit Employee's testimony that he initially tried to avoid talking with Ms. Perkins and Mr. Godfrey, telling them everything was "okay," but they continued asking him what was wrong, which increased his frustration. The AJ believes that the situation changed because Employee heard Ms. Perkins say that she knew what she was going to do, and saw her get out her cell phone. Although there was little if any testimony at the hearing about Ms. Perkins's comment or her intention to use her cell phone to call management at the hearing, the record contains findings that this took place. (*See Findings of Undisputed Facts*, #10). Given the proximity of the three, the AJ believes the evidence supports the conclusion that when Employee heard the comment and saw her start to use the cell phone, he realized that she was going to report him and that he could get in trouble. It was then that Employee's level of stress and anxiety increased to a point that he lost his self-control, and focusing his frustration and anger on Ms. Perkins, he entered her "personal space," and taunted her to "say one more thing." His words, actions and demeanor caused Mr. Godfrey and Ms. Perkins to fear that Ms. Perkins was in danger of being harmed by Employee.

Although the AJ concludes that Employee engaged in the charged misconduct, she does not believe that Employee deliberately lied at the hearing. Rather, she thinks that Employee did not realize that he had lost control and did not appreciate the impact of his words, demeanor and actions. The record supports the conclusion that Employee did not have a problem controlling his temper and had not engaged in this type of conduct before. The record also supports the conclusion that Employee and Ms. Perkins had a good working relationship until December 22. The AJ attributes inaccurate and false testimony to the "*Rashomon* effect"<sup>6</sup> where eyewitnesses to the same event describe it in different and contradictory versions because recollection is subjective, based on the individual's emotions and experiences. In this instance, Employee was stressed and distraught about family and financial issues. He thought that he was keeping his emotions under control, but Agency presented sufficient evidence that Employee was unable to do so. The AJ believes that Employee heard Ms. Perkins say that she knew what she was going to do and realized that she was about to report him to management which could get him in trouble. This caused Employee to lose his remaining control, and direct his anger and frustration on Ms. Perkins. Employee's words and actions caused Mr. Godfrey to take immediate action because he feared for Ms. Perkins's safety. It caused Ms. Perkins to be fearful and anxious. Employee had not engaged in this type of conduct before, and might have gotten control of himself and not followed through on his threats, but these suppositions do not detract from the finding that he engaged in the charged misconduct.

The AJ concludes that Agency met its burden of proving that Employee used abusive and derogatory language in stating that Agency was "fucking" with his money when talking with Ms. Perkins and Mr. Godfrey. However, the use of that word did not cause Agency to terminate Employee. Rather, its decision was based on its conclusion that Employee's words, demeanor and actions constituted a threat to do bodily harm.

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<sup>6</sup> The "*Rashomon* effect" is named for the 1950 Akira Kurosawa movie, *Rashomon*, in which the eyewitnesses to the same event presented conflicting and contradictory descriptions of the event.

There was no crime at common law associated with threatening bodily harm. It was not until 1970 that the District of Columbia enacted legislation criminalizing the threat to do bodily harm, both as a misdemeanor and a felony. *See*, District of Columbia Official Code §22-407.<sup>7</sup> Although the legislation does not define the term or offer criteria to use to decide if a threat was made, the District of Columbia Court of Appeals has provided ample guidance. In *Postell v. United States*, 282 A.2d 551, 553 (D.C. 1971), the Court defined “threat” as “words...of such a nature as to convey a menace or fear of bodily harm to the ordinary hearer.” In *Campbell v. United States*, 450 A.2d 428, 431 (D.C. 1972), the Court identified the elements needed to establish a *prima facie* case of the offense:

The essential elements of the offense of threats to do bodily harm are: that the defendant uttered words to another person; that the words were of such a nature as to convey fear of serious bodily harm or injury to the ordinary hearer; that the defendant intended to utter the words which constituted the threat.

In *Clark v. United States*, 755 A2d 1026, 1031 (D.C. 2000), the Court added the importance of the context in which the words were said in determining if a threat to do bodily harm was made:

Words cannot always be read in the abstract and often acquire significant meaning from context, facial expression, tone, stress, posture, inflection, and like manifestations or the speaker and the factual circumstances of their delivery.

In the employment context, the Court, in *Metz v. Department of Treasury*, 780 F.2d 1001 (Fed. Cir. 1986), noted the importance of the reaction of the employer and co-workers to the words used, applying the “reasonable person” standard, stating that the Court would consider:

what reasonable persons who heard the statements actually did. For instance, a listener who reacted by calling police after hearing a statement is more likely to have heard a threat than a listener who did nothing.

In this matter, based on the standards provided by the Court of Appeals in the decisions above, the AJ concludes that Agency met its burden of establishing that Employee’s words and actions would cause a reasonable person to believe that he or she was in danger of physical harm. The words “say one more thing” that Employee reiterated, are not threatening words standing alone, but in the context of Employee’s demeanor and his invasion of Ms. Perkins’s personal space, the words and conduct became threatening. Mr. Godfrey, who the AJ considers a reasonable person believed that based on his words, actions and demeanor, Employee would attack Ms. Perkins unless he intervened, and that Ms. Perkins was “frozen” in fear. Although Agency security was not called, Mr. Godfrey immediately intervened and was able to diffuse the situation. Ms. Perkins then called management, and Employee was directed to leave the premises and was not allowed to return. Ms. Perkins contacted the police and then sought a temporary restraining order and permanent injunction. These facts support the findings that Agency took the matter seriously and took immediate action. It also supports the finding that Mr. Godfrey and Ms. Perkins had reason to believe that Employee was threatening Ms. Perkins with physical harm and could carry out this

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<sup>7</sup> The Court of Appeals has interpreted the elements of the misdemeanor statute to be the same as those in the felony counterpart. *See, e.g., United States v. Young*, 376 A2d 809 (D.C. 1977).

threat. Based on the analysis of the evidence presented, the Administrative Judge concludes that Agency met its burden of proof by a “preponderance of evidence” that Employee engaged in the charged misconduct.

The remaining issue is whether there is any basis for the AJ to change the penalty. Agency has the primary responsibility for managing its employees, which includes imposing discipline. *See, e.g., Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994). This Office cannot substitute its judgment if Agency’s decision comes “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 (1985). This Office’s review of the imposed penalty is limited to determining if Agency’s decision is based on relevant factors; is not a clear error in judgment and is not arbitrary. *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). *See also, e.g., Anthony Payne. v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008) and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011). In this matter, the fact that this AJ may have imposed a lesser penalty and may have weighed the *Douglas Factors* differently is irrelevant. Agency met its burden of establishing that its decision was not arbitrary, based on erroneous judgment or capricious. It further established that its use of the *Douglas Factors* was not unfair or unreasonable. Agency acknowledged that Employee had not had similar problems in the past and that he under a lot of stress. However, its determination that Employee’s “intimidating and threatening conduct” had undermined Agency’s confidence that [he could] control [himself] under the stressful environment of traffic control” was certainly not unreasonable. (FUF 14, *infra*).

In sum, based on the evidence and arguments offered by the parties, the applicable law and supporting precedent, and the findings of facts and conclusions of law, concludes that Agency met its burden of proof in this matter regarding the adverse action and the penalty.

### ORDER

It is hereby:

ORDERED: The petition for appeal is dismissed.

FOR THE OFFICE:

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Lois Hochhauser, Esq.  
Administrative Judge