**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| Mark Powell | ) | OEA Matter No. 1601-0027-11 |
| Employee | ) | |
| | ) | Date of Issuance: February 12, 2014 |
| v. | ) | |
| | ) | Joseph E. Lim, Esq. |
| District of Columbia Department of Public Works | ) | Senior Administrative Judge |
| Agency | ) | |
| | ) | |

Eric Huang, Esq., Agency Representative
Heather G. White, Esq., Employee Representative

**INITIAL DECISION**

INTRODUCTION

On November 26, 2010, Mr. Powell ("Employee"), a Transfer Operations Foreman, Grade 10, Step 5, in the Career Service, filed a petition for appeal from Agency's final decision to suspend him for 30 days from his position for "on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law: engaging in activities that have criminal penalties -threatening physical violence."

This matter was assigned to me on July 26, 2012. After a postponement requested by the parties, I held a prehearing conference on October 24, 2012. At the parties' request, a mediation conference was held on December 3, 2012, but it was unsuccessful. I held a hearing on January 11 and 31, 2013. The record was closed at the end of the hearing.

JURISDICTION

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

ISSUES

1) Whether Employee's actions constituted cause for adverse action; and

2) If so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

Position of the Parties

By notice dated October 29, 2010, Agency charged Employee with the cause of an "on-

duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law: engaging in activities that have criminal penalties -threatening physical violence." The notice informed Employee that he would serve a 30-day suspension effective November 22, 2010, and listed the Douglas factors[1] considered by management in arriving at the penalty. It stated that the action was taken in accordance with the provisions of Chapter 16 §1614 of the District Personnel Manual (DPM).

Specifically, Agency charged that on July 1, 2010, Employee threatened Transfer

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1 In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth "a number of factors that are relevant for consideration in determining the appropriateness of a penalty." Although not an exhaustive list, the factors are as follows:

> 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
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> 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
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> 3) the employee's past disciplinary record;
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> 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;
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> 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
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> 7) consistency of the penalty with any applicable agency table of penalties;
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> 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 where violated in committing the offense, or had been warned about the conduct in question;
>
> 10) potential for the employee's rehabilitation;

Operations Foreman John Carter with physical violence. The Advance Written Notice of Proposed Suspension of 10 Days or More indicated that, "Mr. Carter reported that on the morning of June 30, 2010, at approximately 6 a.m., you approached him and asked him to step outside and walk up the street so that you could speak with him in private. While speaking with Mr. Carter you accused him of vandalizing your car. Mr. Carter denied doing damage to your car resulting in you becoming upset and stating, "Mother fucker I don't like you. I can't stand you. Keep fucking with my car and I'm going to fuck you up. I'm a man and I'm telling you like a man. I told my brothers and I have there people in my crew that will shoot you. Touch my car again and I'll fuck you up." Mr. Carter responded to your threats by calling the Metropolitan Police Department and notifying Mr. Peter Mitchell, Chief, Solid Waste Disposal Division (SWDD)."

Employee denies ever threatening to do bodily harm to Mr. Carter or to have someone else shoot him. Employee asserts that Carter has a track record of disturbing and erratic behavior and speech at work. Secondly, Employee denounces Agency's selective enforcement of rules of conduct and states that his penalty was motivated by reprisal by another employee, Mr. Marshall, who made false statements to the investigator. Lastly, Employee contends that the agency failed to properly consider the Douglas factors in selecting a penalty.

The parties stipulate that Mr. Carter had no record of discipline in his personnel folder with regards to violence, threats of violence, or abusive, offensive or threatening language.

## EVIDENCE

1. John Carter (1/11/13 transcript, pages 18 – 81; 1/31/13 transcript, pgs. 411-446)

Mr. Carter, a transfer station operations supervisor working at Agency's Fort Totten Transfer Station, testified that on July 1, 2010, when everyone other than himself and Employee had left the supervisor's office, Employee started ranting about how he could not stand him and accusing him of messing up his Lexus car and threatening to get men with guns to "take care of you."[2] Carter then stood up and left for the parking lot after warning Employee not to put his hands on him. Employee followed Carter and accused him again of messing up his car and of recording their conversation. Carter denied the charges and told Employee he was crazy. Employee threatened to bring armed men against him again before going back to the building. At this point, Carter called Safety Officer Daniel Harrison and informed him about the incident. Carter then called the police and waited at the parking lot.

Employee drove up in his truck and informed Carter that he could no longer work with him and that he will be asking for a transfer. The police arrived, and after questioning both of them, determined that they will not be filing a police report and left them a warning that the next time they had to come again, one of them will be in handcuffs. Later, Carter was finally able to call his supervisor, Mr. Mitchell, and report the incident. Mitchell asked him if Carter had forgotten to take his medication. Carter denied taking any medication.

2 Page 25 of transcript.

About two months prior to July 2010, Employee had already threatened and accused Carter of damaging his car. On cross-examination, Carter revealed that in a prior argument with Employee regarding Employee's vehicle, their Supervisor Mitchell stated that his problem with Employee should have been handled internally. Mitchell then reassigned Carter out of Fort Totten.

Carter denied shoving Supervisor Jose Sarravia or threatening Employee or blocking Employee's vehicle or damaging it. He said Employee did not offer to show him the damage to his car and that he never saw any damage to Employee's car. Carter said he had no reason to vandalize Employee's car and indeed still has no idea what Employee's car looks like. Carter testified that Employee was paranoid about his car and often suspected people of messing with it, even the car repair shop that he patronized. He told Employee to call the police if he had any proof that he damaged his car. Carter also revealed that he was the one who initially trained Employee on the job.

Sometime in 2010, Carter admitted that he inadvertently sent a text to Ms. Mease which got him sent to the Director's Office and then admitted to the Psychiatric Institute of Washington for 3 days for erratic behavior. Carter admitted that he had bipolar disorder since at least 2006 and that he went to therapy for five years and took medication before he stopped the medication when the psychiatrist agreed with him that it wasn't working.

2. Daniel Harrison (1/11/13 transcript, pages 81-133)

Safety Officer Harrison confirmed that it was Carter who first brought the dispute to his attention. His subsequent investigative report was based on his conversations with the two antagonists and their fellow workers. (Agency Exhibit 1). Three fellow employees, Winston Dyer, Robert Bell, and Jude Harris, indicated that they, too, had confrontations with an unprofessional and aggressive Employee. They did not have similar experiences with Carter. Neither Employee nor Carter informed him of the details of their disagreement. Mr. Marshall, a prior supervisor of Employee, reported that Employee was a hot-headed and abusive person. Harrison stated that Mr. Mitchell was terminated by Agency in connection with a fire incident.

During his investigation, Employee stated to him that he suspects Carter of causing damage to his car roof and side of the car, and removing screws on his mud flaps. Employee also stated that Carter was jealous of his good relations with their supervisor, Mr. Mitchell. Employee also told him that Carter acts erratic when he fails to take his medication.

An upset Carter, on the other hand, told him that he felt threatened by Employee's remarks about having someone shoot him. Carter stated that this was the most volatile of the arguments he had with Employee. He was told that a Dennis Bolden could corroborate John Carter's version of events prior to the July 1, 2012 incident. However, he never interviewed Bolden as he felt prior events were irrelevant. On cross-examination, Harrison admitted that he

did not do follow-up interviews with his witnesses to see if their versions corroborate or contradict the others. He submitted his findings in his investigative report. (Agency Exhibit 1.)

3. Sybil Hammond (1/11/13 transcript, pages 135-209)

Solid Waste Management Administrator Hammond was the deciding official who signed the final notice of adverse action suspending Employee for thirty days. The notice enumerated the Douglas factors[3] that went into deciding the penalty. She indicated that the chosen penalty was in line with the District's Table of Penalties (Agency Exhibit 6) and that they did not penalize Employee for any other possible incident.

Hammond stated that every employee received a memo from Director Howland warning against inappropriate employee conduct on the job (Agency Exhibit 2) and that Employee signed a receipt for it. (Agency Exhibit 3) She considered the investigative report, remarks from Employee's supervisor, co-workers and citizen complaints with Employee's temper. Hammond also considered her own experiences in speaking to Employee about his temper and approach to dealing with people in coming up with the decision to sustain the penalty.

Hammond stated that the men in Employee's workgroup had little arguments among themselves. She recalled a report about a Mr. Marshall hitting Mr. Leak, a worker, on the head with a stapler.

4. Employee (1/11/13 transcript, pages 211 – 327; 1/31/13 transcript, pages 446-477)

Employee testified that he and Carter both report to Mr. Marshall as transfer operations supervisors for Agency's Fort Totten transfer station or city dump. Employee suspected Mr. Carter of damaging his car because Mr. Carter appeared to know about his having his car repaired without Employee telling him. He described the damage as a dent on the roof and the side, and missing mud flap screws. Around four a.m., Employee then asked Mr. Carter to go outside to see his silver Lexus car and warned him to refrain from further damaging his car. Employee claimed that Carter offered to have Employee hit his own car to get even but he declined the offer. The next day, July 1, Carter called the police and reported that Employee had threatened bodily harm to him. The police arrived at nine a.m. but declined to make a police report and warned them that if he had to come back, he would lock both of them up.

Employee denied being paranoid about his cars but admitted that he complained about car damage two or three times to his supervisor Mr. Mitchell. In one instance, he described the damage as someone bashing the roof of his car. Another time, his mud flaps were dangling because his flap screws were gone. Another instance the bottom of his car was pushed in.

Employee denied being hot-tempered or ever threatening to shoot Carter or have family

3 For a discussion of the Douglas factors, see *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981),

members inflict harm on Carter. He clarified that he has seven brothers whose ages range from 50 to 60. With regards the people, such as Mr. Marshall, Mr. Dyer, Mr. Kelly, and Mr. Harris, who had reported that he had a hot temper, Employee explained them by enumerating instances where they would have a motive for those lies.

Employee testified that a Mr. Kelly had reported him for Employee's refusing to allow him to illegally dump trash at the Fort Totten station. With regards to his former supervisor Mr. Marshall's reporting him for his hot temper, Employee talked about the incident where he reported Mr. Marshall's allowing a Mr. Kelly to dump trash. Another incident was when Mr. Marshall struck Mr. Leak with a stapler. He also talked about another incident when Mr. Marshall had an altercation with Ms. Mease and another when Mr. Marshall threatened to kill Mr. Mitchell. He stated that his subordinates Mr. Dyer and Mr. Harris were upset with him for writing them up for infractions. Employee talked about a drycleaner incident where he accidentally broke a window but had since paid for the damage but that Mr. Marshall claimed was another instance of violent behavior on his part. Employee described Mr. Marshall as a violent guy.

Employee opined that Carter is knowledgeable about his job but very aggressive with a tendency for wild mood swings. He testified of instances when Carter exhibited violent or aggressive actions against fellow workers such as Mr. Saravia and Ms. Mease. He also mentioned that Carter took a Ms. Morgan to the ladies room. Employee described Mr. Carter and Mr. Marshall's relationship as very hostile. He mentioned that management had Mr. Carter admitted for psychological evaluation. Employee emphasized that apart from the car issue and minor work irritants due to the differences they approached their jobs, he had no problem with Carter.

Employee denied retaliating against those employees by reducing their overtime. Employee admitted that he had no direct proof that Carter had damaged his car, that all he had were suspicions. When asked for a motive, Employee speculated that Carter felt neglected by Mr. Mitchell and that he was supposed to be Mr. Mitchell's favorite. Ms. Mease reported to him that she too had car damage.

Employee denied being hot-tempered and described himself as mainly calm and cool although Mr. Marshall suggested through Mr. Mitchell that Employee go to COPE.[4]

5. Clifford Dozier (1/31/13 transcript, pages 349-379)

Mr. Dozier, currently a manager of labor relations at D.C. Water, used to work as the employee and labor relations advisor at Agency from November 2008 to May 2011. He testified that he co-investigated the July 1, 2010, incident together with Mr. Harrison. Based on their interviews with co-workers, they found that Employee had a reputation for an explosive temper. He admitted that they did not interview Mr. Mitchell, Employee's current supervisor. He recalls Mr. Carter being admitted for psychiatric evaluation for a threatening text message to Ms.

4 COPE is a District program designed to assist employees coping with personal problems.

Mease. Dozier was not aware of any rationale for Agency to retaliate against Employee.

6. Lynois Mease (1/31/13 transcript, pages 379-396)

Ms. Mease, a weighing machine operator, testified that she was not a witness to the altercation between Mr. Carter and Employee. She was not aware of any violent action from Employee but she did received a disturbing text message from Mr. Carter which suggested that they run away together or Carter will kill himself. Mease reported it to Facility Manager Mr. Marshall. She recalled that Mr. Marshall once stormed in and yelled at her for changing his payroll time under instructions from Mr. Mitchell. Mr. Mitchell wanted the time change made because Mr. Marshall was frequently away from work at the Fort Totten Transfer Station.

Apart from that, Mease never had any problem or social interaction with Mr. Carter or Employee outside of work. She never experienced any hotheadness from either of the two men.

7. Jose Saravia (1/31/13 transcript, pages 397-409)

Mr. Saravia, a transfer operations supervisors for Agency's Fort Totten transfer station, testified that he did not witness the altercation between Mr. Carter and Employee. Apart from the one instance when Mr. Carter falsely accused him of driving the loader on the scale and threatened to write him up. This intense confrontation caused Saravia to cry. Afterwards, Mr. Carter apologized to him and everything was fine. Although Saravia reported the incident to Employee, he did not pursue it further.

Saravia indicated that it was customary for them to turn away non-District residents from dumping their trash at the Fort Totten Transfer Station. He also testified that he never had any problem with Employee.

## FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

**Whether Agency's action was taken for cause.**

Agency is required to prove its case by a preponderance of evidence. "Preponderance" is defined as "that degree of relevant evidence which the reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue". OEA Rule 628.1, 59 D.C. Reg. 2129 (2012).

Employee's argument that Mr. Marshall and Mr. Dozier are not credible for having opined that he had a hot temper is not relevant to this matter. Agency never charged Employee for being hot-tempered. Rather, Agency charged Employee for making a criminal threat to physically harm his fellow employee, Mr. Carter.

Thus, the ultimate determinant of whether Agency's charge against Employee should be upheld hinges on the credibility of the only two witnesses to the July 1, 2010, incident, namely, Employee and Mr. Carter.

Based on their demeanor at the witness stand, the consistency of their statements, the forthrightness of their testimony, I find that all Agency's witnesses to be more credible than Employee.

I find Mr. Carter to be highly credible. He was forthright about his manic-depressive condition as well as his unfortunate episode with Ms. Meese, which he stated had led to his being confined for three days of psychiatric evaluation. Carter's account of that episode was corroborated by Ms. Meese. His account of his unfortunate episode with another fellow employee, Mr. Saravia, was corroborated by Mr. Saravia himself.

As for the crucial July 1, 2010, incident, I again find Mr. Carter to be much more credible than Employee. Mr. Carter's account at the witness stand was consistent with the account that he rendered to Investigator Harrison and the police. The fact that he immediately called his supervisor and then the police to report Employee's threats lend more credibility to his account of Employee's threats.

In contrast, Employee's version is much less credible. By his own account, his suspicion that Mr. Carter was responsible for his car damage hinges solely on a single remark that Mr. Carter allegedly made. This suspicion, unsupported by any other proof, led him to confront Mr. Carter and threaten him. Employee gave no credible motive as to why Mr. Carter would want to harm his vehicle on several occasions or why Mr. Carter would lay down in the snow just to remove screws from Employee's mud flaps. At the witness stand, Employee also displayed his pride at the two luxury cars that he owned at the time and how he quickly notices any cosmetic defects or damage to this car. I find that Employee became suspicious that other people were responsible for the damage to his vehicle and that ultimately his suspicion centered on Mr. Carter.

During their investigation into this incident, both Mr. Harrison and Mr. Dozier had credibly testified that Employee had a reputation among his fellow workers for being hot tempered. These facts, coupled with Employee's courtroom demeanor, lends credence to the charge that he had angrily issued physical threats against Mr. Carter. I therefore find the Employee did in fact threaten to physically harm Mr. Carter. I also find Carter's version that Employee simply threatened him more credible than Employee's version which claims that his threat, if indeed one was made, was conditional on any further damage to his car.

Next, Employee argues that even if Carter's allegation was found to be true, his alleged threat fails to meet the legal standard for a genuine threat of violence. The leading federal case involving threatening behavior by an employee is *Metz v. Department of the Treasury*, 780 F.2d 1001 (Fed. Cir.1986). In *Metz*, the U.S. Court of Appeals for the Federal Circuit discussed the legal standard which must be applied by an agency when determining whether or not a threat has been made. First, the court explained that the agency must use a "reasonable person standard" to determine whether or not a threat has been made. *Id*. at 1002. This standard required the agency to use 'the connotation which a reasonable person would give to the words' in order to determine

if the words constituted a threat." *Id*.

The court continued that in order to apply the reasonable person standard, the agency must consider five evidentiary factors in order to determine whether or not a threat has been made. Metz, supra, at 1002. These include:

1. The listener's reaction
2. The listener's apprehension of harm
3. The speaker's intent
4. Any conditional nature of the statements; and
5. The attendant circumstances.

The court concluded: "We do not instruct the board to rely on objective evidence alone . . [but] we do direct the board to give objective evidence heavy weight." *Id.* at 1003.

In *Carson v. Veterans Administration*, 33 MSPR 666, 669 (1987), the Merit Systems Protection Board (Board) stated that apprehension of harm is only one factor to consider in determining whether conduct constitutes a threat. The Board must also consider [the threatened employee's] reactions, the appellant's intent, any conditional nature of the statements, and the attendant circumstances, and, in doing so, accord heavy weight to the objective evidence. Courts tend to look for some sign that an employee who has been threatened by another employee truly believes the threat.

Here, Mr. Carter credibly testified that he felt threatened enough to call the police to demand that they take some action. As I have found, the threat was not conditional and the threat of being confronted by men with guns would be frightening based on a reasonable man's standard. Based on the evidence presented, I do not find Employee's contention that Mr. Carter had no genuine fear or concern since he continued to work alongside Employee after the July 1,2010 incident to be persuasive. Instead, I find that Carson's concerns were somewhat alleviated once the police and his superiors were notified and when Agency took action. In conclusion, I find that Agency had cause to discipline Employee.

I also find that Employee presented no credible evidence to support his claim that he was a victim of retaliation or that he was subjected to disparate treatment by management. Employee also presented no credible evidence that he was a whistleblower or that he was retaliated against for supposedly being a whistleblower.

**If so, whether the penalty chosen is within the range allowed by law, rules, or regulations.**

Employee argues that Agency did not properly consider the Douglas Factors in selecting the appropriate penalty to be imposed in a disciplinary action. He argues that not enough consideration was given to any mitigating or aggravating circumstances that have been determined to exist.

I have reviewed Agency's Notice of Final Decision-Suspension of More than 10 Days (Agency Exhibit 5), and have found that Agency carefully and meticulously laid out their consideration of the Douglas factors one by one. That Agency may not have weighed these factors in the exact same manner as Employee would have preferred is not a ground for overruling Agency's determination.

Agencies have the primary responsibility for managing their employees. *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 Board has long recognized that the appropriateness of a penalty "involves not only an ascertainment of factual circumstances surrounding the violation but also the application of administrative judgment and discernment". *Beall Construction Company v. OSHRC*, 507 F.2d 1041 (8th Cir. 1974). This Office will not substitute its judgment when determining if a penalty should be sustained, but rather will limit its review to determining that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985). A penalty will not be disturbed if it 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).

Based on the Table of Penalties (Agency Exhibit 6), the penalty for a first offense for "any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law" includes suspensions up to removal. That Agency chose a thirty-day suspension indicates a consideration of mitigating factors.

For the reasons stated above, the Administrative Judge concludes that Agency did not abuse its discretion in its decision, and further concludes that the penalty was within the permitted range and was not a clear error of judgment.

## ORDER

Based on the foregoing, it is hereby ORDERED that Agency's action of suspending Employee from service for thirty days is UPHELD.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge