THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Robert Tate	)	OEA Matter No. 1601-0117-07
Employee	)	
	)	Date of Issuance: March 12, 2008
v.	)	
	)	Joseph E. Lim, Esq.
District of Columbia Department of	)	Senior Administrative Judge
Parks and Recreation	)	
Agency	)	
	)	

Gail Elkins, Esq., Agency representative
Frederick Schwartz, Jr., Esq., Employee representative

INITIAL DECISION

INTRODUCTION

On September 10, 2007, Employee, an Information Technology Specialist in the Career Service, filed a petition for appeal from Agency's final decision summarily removing him from his position for "on-duty act and conduct which constitutes an immediate hazard to the Department of Parks and Recreation (DPR) and other District Government employees," and "on-duty act and conduct that interferes with the efficiency or integrity of government operations."

This matter was assigned to me on November 19, 2007. After a postponement requested by the parties, I held a prehearing conference on December 14, 2007, and a hearing on February 11, 2008. 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).

ISSUE

Whether Agency's action was taken for cause.

Position of the Parties

By notice dated July 12, 2007, Agency charged Employee with the cause of an "on-duty act

and conduct which constitutes an immediate hazard to the Department of Parks and Recreation and other District Government employees," and "on-duty act and conduct that interferes with the efficiency or integrity of government operations." The notice of summary removal stated that the action was taken in accordance with the provisions of §1617 of the District Personnel Manual (DPM). Specifically, Agency charged that on July 11, 2007, Employee was involved in a physical altercation with another DPR employee that resulted in destruction of government property and bodily injury.

Employee asserts that his actions were entirely in self-defense and that he was merely trying to protect government property, that the agency failed to consider the prior disciplinary records of the employees involved, and that the penalty was too harsh.

EVIDENCE

1. Employee (transcript, pages 9 – 71, 121 - 134)

As an Information Technology Specialist, Employee's job duty was to go to D.C. government sites as ordered by his superiors and fix computers. In 2007, he shared an office and a large desk with Latasha Washington at the 1325 S Street, N.W., Washington, D.C. address. Employee testified that, except for a few arguments when Ms. Washington did not want to share office space, they got along well enough.

On July 11, 2007, Employee carried a computer with a malfunctioning power supply towards his office. Ms. Washington was standing by the door talking to a guy named "Big Will." After a short conversation with Will, Employee proceeded towards his office and placed the computer on his side of the desk. Ms. Washington asked him what he was doing in the office and told him to get out. Employee replied that he was assigned to work there. Ms. Washington then picked up the computer and put it outside the office. Employee took the computer and returned it to his desk. Again, Latasha Washington placed the computer outside. Employee grabbed the computer and the two of them began a tug of war as Washington attempted to push Employee out the door while Employee stood his ground.

Washington pushed the computer and it crashed to the ground and shattered. Employee yelled, "What the hell are you doing, what's going on?" Things quickly escalated as Ms. Washington jabbed her finger at his face and then began swinging her fists and trying to knee his groin. Employee would learn later that Ms. Washington used to be a boxer training for the Olympics. Except for a blow to his jaw, Employee successfully blocked the physical blows. Washington grabbed his hair and pulled him all the way back into the office. To break loose, Employee grabbed Ms. Washington's wrists. Washington then bit Employee's chest. (Agency Exhibit #5 showed photos of Employee's bruised bite wound.) Employee quickly backed away and got out the office after Washington loosened her hold on his hair. Washington slammed the door in his face.

Employee testified that he reported the incident to his supervisor and his superiors. A

Metropolitan policeman, Officer Derrick Ferguson, arrived to make a report. (See Agency Exhibit #4). Employee denied ever putting Ms. Washington in a headlock, asserting that Washington made that part up. Employee also said that when he notified Officer Ferguson of the error, Ferguson indicated that he could not change his report without being reprimanded for sloppy reporting. Employee subsequently went to see a doctor and got tetanus shots and antibiotics.

When asked why Employee did not simply walk away when Washington placed his computer outside the door, Employee replied that his duty was to protect the computer, finish his job, and that he had no idea that Washington was going to act so violently. Employee denied making any sexual remarks about Ms. Washington, putting her in a headlock, or initiating the fight.

2. Nathaniel Jenkins (transcript, pages 72 – 81)

Nathaniel Jenkins was the agency's chief technology officer during the relevant time period. As such, he was the supervisor to both Employee and Ms. Washington. He described Employee as reliable while Ms. Washington was frequently tardy and falsified time cards. Jenkins also stated that only Employee, and not Ms. Washington, was supposed to be working at the headquarters building.

3. Officer Derrick Ferguson (transcript, pages 83 – 96)

Officer Derrick Ferguson testified that he did take down a police report regarding the altercation between Employee and Ms. Washington. He recalls that Employee disputed his report of his putting Ms. Washington in a headlock and admitted that during his questioning, he had to leave for a police run. He stood by his report but admitted that his report was very basic and had few details and that he did not take down any notes during his questioning.

4. Russell Cramer (transcript, pages 97 – 120)

Russell Cramer, Agency's risk manager, testified that he investigated the July 11, 2007, incident between Employee and Ms. Washington. Ms. Washington had told him that Employee had put her in a headlock and that she had reported to Mr. Greene that Employee had also sexually harassed her before. He saw Employee's bite wound and caught Ms. Washington in a lie regarding the bite and the sexual harassment accusations.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Whether Agency's action was taken for cause.

Here, Agency charged Employee with: "on-duty act and conduct which constitutes an immediate hazard to the Department of Parks and Recreation and other District Government employees," and "on-duty act and conduct that interferes with the efficiency or integrity of government operations." This is a catch-all phrase that Agency uses to denote employee conduct that is unprofessional and disruptive of efficient government operations. Employee claims that his

actions were entirely in self-defense.

Self-defense

The courts recognize the right of self-defense. However, the amount of force that can be used depends upon many factors, such as, the nature of the assault, conduct of the assailant, whether the slayer provoked or continued the difficulty, and the reasonableness of retreat. This latter element is summarized in *Laney v. U.S.*, 294 F. 412 (D.C. Cir., 1923); "It is a well-settled rule that, before a person can avail himself of the plea of self-defense against the charge of homicide he must do everything in his power, consistent with his safety, to avoid the danger and avoid the necessity of taking life. If one has reason to believe that he will be attacked, in a manner which threatens him with bodily injury, he must avoid the attack if it is possible to do so, and the right of self-defense does not arise until he has done everything in his power to prevent its necessity. In other words, no necessity for killing an assailant can exist, so long as there is a safe way open to escape the conflict…"

The substance of a claim of self-defense is the same in both criminal and civil litigation; only the burden of proof differs.[1] The District of Columbia Court of Appeals has defined "self-defense" as "the use of reasonable force to repel a danger which a person reasonably believes may cause him imminent bodily harm."[2] In the District of Columbia, the right of self-defense is not conditioned upon a duty by the individual to retreat or otherwise avoid the confrontation.[3] However, an individual's failure to avoid the confrontation can be considered, along with all the other circumstances, in determining whether the case is truly one of self-defense.[4] Moreover, the right of self-defense arises only when the necessity begins and equally ends with the necessity.[5]

Agency's charges hinge on its allegation that Employee initiated the physical altercation with Ms. Washington, failed to walk away from an explosive situation, and destroyed a government computer when it crashed to the floor during the fight. However, Agency's allegations are grounded upon Ms. Washington's hearsay[6] assertion that she was the victim, not the aggressor. In addition, all

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1 *Moor v. Licciardello*, 463 A.2d 268, 272 (Del. 1983).

2 *Gezmu v. United States*, 375 A.2d 520, 523 (D.C. 1977), *Josey v. United States*, 135 F.2d 809, 810, 77 U.S. App. D.C. 321 (1943).

3 *Gillis v. United States*, 400 A.2d 311, 312 (D.C. 1979).

4 *Gillis, id, 313; Cooper v. United States*, 512 A.2d 1002 (D.C. 1986).

5 *United States v. Peterson*, 483 F.2d 1222 (D.C. Cir. 1973), *cert. den.* 414 U.S. 1007 (1973).

6 The Federal Rules of Evidence provide a general definition of hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Subject to two classes of "exemptions," this definition classifies a statement as hearsay if the statement meets two requirements: (1) the statement must be extra-judicial (i.e. not made by this witness in

the evidence of Agency arrayed against Employee is nothing but hearsay. Indeed, the only testifying eyewitness to the incident is Employee. Employee's antagonist, Ms. Washington, did not testify. Thus, determining who was the aggressor in this conflict necessarily involves the weighing of live testimony against hearsay evidence.

"It is settled that hearsay evidence may be admitted in administrative hearings. Administrative tribunals are not required to disregard evidence merely because it is hearsay. In fact, hearsay evidence can serve under some circumstances as 'substantial evidence' on which to base a finding of fact." *Hutchinson v. D.C. Office of Employee Appeals*, 710 A.2d 227, 232-233 (D.C. 1998). (citations omitted). "The decision to permit administrative agencies to admit hearsay evidence reflects a recognition that the reliability and probative value of evidence does not always turn simply on whether or not it falls within the legal definition of hearsay evidence, and that, unlike juries, '[Administrative Judges] are . . . capable of properly assessing the reliability and weight of evidence' that is hearsay in nature." *Jadallah v. D.C. Department of Employment Services*, 476 A.2d 671, 676 (D.C. 1984), citing *Kopff v. D.C. Alcoholic Beverage Control Board*, 381 A.2d 1372, 1385 (D.C. 1977). "The weight to be accorded hearsay evidence is determined by the item's 'truthfulness, reasonability, and credibility.'" *Wisconsin Avenue Nursing Home v. D.C. Commission on Human Rights*, 527 A.2d 282, 288 (D.C. 1987), citing *Johnson v. United States*, 628 F.2d 187, 190-191 (D.C. Cir. 1980). Further:

> [T]he central point [is] that the evaluation of hearsay . . . cannot be accomplished in the abstract; the evidence must be examined in the light of the particular record. This includes . . . an examination of the quality and quantity of the evidence on each side, as well as the circumstantial setting of the case.

McCormick on Evidence, § 351(d), p. 846 (2nd ed. 1972). (footnote omitted).

Hence, the probative value of Washington's hearsay statement rests upon Washington's truthfulness, reasonability, and credibility. Yet Agency's own witness, Russell Cramer, found that Washington lied in key aspects of her version of how the fight started. Washington lied about lodging sexual harassment charges against Employee and lied about biting Employee. In short, Agency's own witness impeached the credibility of Washington.

In addition, here we have Washington's unsworn statement. Unsworn statements are admissible. However, where witnesses are unavailable for cross-examination, unsworn statements are generally not reliable enough to constitute substantial evidence. *See Dietrich v. District of Columbia Bd. of Zoning Adjustment*, 293 A.2d 470 (D.C. 1972); *Selk v. District of Columbia Dep't of Employment Services*, 497 A.2d 1056 (D.C. 1985); *Hall v. General Services Admin.*, 21 M.S.P.R. 200 (1984); *Mahnken v. United States Postal Serv.*, 34 M.S.P.R. 1 (1987); *Hinton v. Department of Corrections*, OEA Matter No. 1601-0136-92, *Opinion and Order on Petition for Review* (July 10,

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this proceeding). (2) The statement must be offered to prove the truth of what the statement asserts if anything. Fed. R. Evid. 801(c).

1995), __ D.C. Reg. __ ( ) at 5. Thus, unsworn statements such as that of Washington's generally do not constitute substantial evidence. So here we have a situation where I find Washington's statement to be simply unsworn, incredible hearsay.

In contrast, I find that Employee testified credibly in a clear, forthright manner. Even under intense cross-examination, Employee did not make excuses for his actions nor did he waver in his consistent testimony. Employee's testimony and the documentary evidence show that it was Ms. Washington who was the aggressor, and that Employee was caught totally unprepared for his co-worker's attack. I find that his subsequent reactions of trying to secure the computer he was working on, refusing to be pushed out of his office, warding off blows and holding his attacker's hands to prevent injury to himself, were all in legitimate self-defense.

Based upon the above evidence, I find that Agency failed to meet its burden of proving its charges against Employee. Accordingly, I conclude that the Agency has not met its burden of establishing cause for taking adverse action.

ORDER

It is hereby ORDERED:

1. Agency's decision is to remove Employee from his position is reversed.

2. Agency is directed to reinstate Employee, issue him the back pay to which he is entitled and restore any benefits he lost as a result of the removal, no later than 30 calendar days from the date of issuance of this Decision.

3. Agency is directed to document its compliance no later than 45 calendar days from the date of issuance of this Decision.

FOR THE OFFICE:

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JOSEPH E. LIM, Esq.
Senior Administrative Judge