THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
WILMA ELLIS,	)	
Employee	)	OEA Matter No. 1601-0160-13
	)	
v.	)	Date of Issuance: May 28, 2015
	)	
OFFICE OF THE STATE	)	
SUPERINTENDENT OF EDUCATION,	)	
Agency	)	Arien P. Cannon, Esq.
	)	Administrative Judge
	)	

Stanley K. Foshee, Esq., Employee Representative
Hillary Hoffman-Peak, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Wilma Ellis ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on September 10, 2013, challenging the Office of the State Superintendent of Education's ("Agency") decision to remove her from her position as a Bus Attendant. Employee's removal was based on a charge of violating Section 1603.3 of the District Personnel Manual ("DPM"): Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations. Agency filed its Answer on October 11, 2013. I was assigned this matter on May 14, 2014.

A Prehearing Conference was held on July 15, 2014, and an Evidentiary Hearing was scheduled for October 15, 2014. After a second Prehearing Conference was held on October 1, 2014, via telephone, the Evidentiary Hearing was rescheduled for November 24, 2014. As such, the Evidentiary Hearing was held on November 24, 2014, where both parties presented testimonial and documentary evidence. Both parties submitted written closing arguments. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action (termination) against Employee.

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

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.[1] "Preponderance of the evidence" shall mean:

> That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.[2]

SUMMARY OF TESTIMONY

The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding.

Agency's Case-in-Chief

Walter Crawford ("Crawford") Tr. 9-38

Crawford is currently employed with the District of Columbia Department of Consumer and Regulatory Affairs. Previously, Crawford worked for Agency as the Director of Human Resources. Crawford is familiar with Employee through his position as the Director of Human Resources at Agency.

Crawford testified regarding the specific incident which led to Employee's termination: Employee came into the office to meet with a Human Resource ("HR") Specialist in order to resume work after being out for a medical issue. While Employee was meeting with the HR Specialist in the lobby, Crawford was coming into the HR suite. Crawford stated that the discussion between Employee and the HR Specialist was "heated."[3] As Crawford was walking

[1] 59 DCR 2129 (March 16, 2012).
[2] OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).
[3] Tr. at 11.

by, he intervened into the conversation and asked what was going on. The HR Specialist stated there were some issues with Employee's paperwork regarding her being returned to duty. After looking at the paperwork, Crawford explained to Employee that because the paperwork had some deficiencies, they could not return her to work. Crawford then allowed Employee to call her doctor's office to see if they could fax or e-mail the appropriate paperwork for Employee to return to work. While Employee was on hold, Crawford went to his office. Crawford then walked down the hallway past Employee, who asked Crawford to "come here" and waved him over. Crawford asked Employee, "what do you need?" Employee again stated, "come here." Crawford testified that Employee got close to him and whispered in his ear, "don't let me pull those pants down." Crawford responded, "excuse me?" Employee then repeated herself, saying, "yeah, I'm going to pull those pants down." Crawford then told Employee that her comment was inappropriate and stepped away from her.

At this point, Eva Laguerre ("Laguerre") was walking down the hallway and Crawford took Laguerre into his office explained to her what just happened. Subsequently, Crawford e-mailed Employee's supervisor, Tatia Hart. Ms. Hart responded and told Crawford that she was available and in the building. Crawford then told Ms. Hart that he needed her upstairs because of what just happened. Crawford explained the situation to Ms. Hart, who then pulled Employee into a conference room and asked her if what Crawford said did in fact happened. Employee confirmed that the exchanged did occur. At this point, they ended the conversation and Ms. Hart advised Employee that she needed union representation. Crawford excused himself from the conversation and walked out. Crawford stated that he was taken aback by Employee's comment given the fact that she knew he was the Director of Human Resources.

Crawford testified that sexual harassment is generally considered an unwanted advancement or approach from someone of a sexual nature, which can be a touch or verbal statement. Crawford perceived Employee's comment as an unwanted sexual advance because she said, "I'll pull your pants down," which he interpreted as sexual in nature. After meeting with Ms. Hart, Crawford turned the matter over to his employee relations team.

On cross-examination, Crawford stated that it was not possible that he could have misunderstood Employee's comment. Crawford also stated that he did not have a conversation with Employee on the day of the incident regarding how he was dressed, nor how other employees were dressed.

Crawford was aware that Employee was a member of a union. However, he was unaware of any activities Employee engaged in as a union member. Crawford stated that Agency did not terminate Employee because of her union activity.

Eva Laguerre ("Laguerre") Tr. 38-48

Laguerre currently serves as the HR Compliance Manager with Agency. In this capacity, Laguerre oversees the drug and alcohol testing program, criminal background checks for employees, volunteers, and child care providers who provide child care out of their homes. Laguerre also oversees the labor and time attendance with Agency. She has been in HR for twelve (12) years. She testified that sexual harassment in the workplace is when someone says

or does something to you in your presence that is in an unwelcomed sexual nature.

Crawford was Laguerre's supervisor for two years while he was with Agency. She described Crawford as a fair and level supervisor. She further described him as a very calm person who never really overreacted to anything. Laguerre is familiar with Employee, who had been in contact with Laguerre's office on occasions in reference to leave or pay. Laguerre recalls an incident where she observed Crawford and Employee interacting with one another. Although she could not remember the exact date of the incident, Laguerre did recall that as she was walking down the hallway towards Crawford and Employee, Crawford was noticeable upset. Laguerre did not hear what was said during their exchange; however, she did observe the end of the exchange where Employee was leaning towards Crawford. She also observed Crawford state, "that is inappropriate." Laguerre described Crawford as being "noticeably shaken."[4]

After the incident, Crawford told Laguerre that Employee said something to him of a sexual nature regarding his pants. Laguerre could not remember the exact words Crawford described to her. This incident stuck in Laguerre's memory because it involved the HR Director. Laguerre further testified that Crawford dressed professionally with his shirt tucked in.

Renee Prather Hairston ("Hairston") Tr. 48-74

Hairston is an Employee Relations Specialist with Agency. In this capacity, Hairston is responsible for administering discipline and dealing with employee complaints. Hairston was assigned to draft Employee's termination letter in the instant matter. Prior to the termination letter, Hairston administered an Advance Written Notice of Proposed Suspension of five (5) days to Employee on August 5, 2013. When Employee was administered this advance written notice of proposed suspension, she thought her suspension began the next day and did not return to work until five days later to get reinstated.

Employee's Case-in-Chief

Wilma Ellis ("Employee") Tr. 75-99

Employee began working with Agency in 1999. On the day of the alleged incident, Employee went to Agency's HR Office to get reinstated after being suspended. When she arrived, Employee was informed that there were some deficiencies with her paperwork that prevented Agency from returning her to duty. While in the office seeking to be returned to work, Employee told Hairston that she was wearing a dingy white shirt and jeans.[5] Employee then stated that if she came in the director's office while in uniform with her shirt untucked and with a dingy shirt and jeans, then she would get written up.[6] Employee then asked Hairston who her manager was, and Hairston referred Employee to Crawford. Crawford then asked Employee to calm down and explained to her that she could not be returned to work because her doctor's note did not provide a date for when she could return to full duty.

[4] Tr. at 43.
[5] Tr. at 80.
[6] Id.

Crawford then escorted Employee down the hallway to a phone where she was permitted to call her doctor in order to receive the necessary paperwork. While Employee was on hold with her doctor's office, she continued to talk to Crawford and stated that Hairston's shirt was dingy. Employee insisted that if she had come into the office resembling the unkempt appearance of Hairston that she would be written up. Employee then proceeded to tell Crawford to "pull [his] pants up" and asked, "do you need me to help you straighten up?"[7] Employee testified that she was talking about Crawford's pants because the cuffs were dragging the floor.[8] Employee maintained that her only purpose regarding the statements she made to Crawford was regarding his appearance and the appearance of Hairston.

Employee further testified regarding her union activity when she addressed the media in 2009 regarding some concerns about Agency getting children to school on time. Employee stated that she is known as a whistleblower.[9] On cross-examination, Employee stated that she never filed a complaint with the EEOC nor the Office of Human Rights regarding her whistleblower claim.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Whether Agency's adverse action was taken for cause

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

Chapter 16, Section 1603.3 of the District Personnel Manual ("DPM") sets forth the definitions of cause for which disciplinary actions may be taken against Career Service employees of the District of Columbia government. Here, Employee was terminated under Section 1603.3(g): Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations. Specifically, Agency avers that on August 9, 2013, Employee made an inappropriate comment to Crawford, then-Director of Human Resources at Agency.

[7] Tr. at 82-83.
[8] Tr. at 84.
[9] Tr. at 89-90.

Any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations.

Employee was charged and terminated pursuant to DPM § 1603.3(f), "any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations." Under the DPM, this charge sets forth nine (9) sub-offenses, which does not include sexual harassment. However, § 1603.4 of the DPM provides that the causes specified in § 1603.3, shall not necessarily be limited to the offenses contained in the Table of Appropriate Penalties (§ 1619 of the DPM). The causes listed in the Table of Appropriate Penalties are identical to the causes listed under § 1603.3 of the DPM.

Agency maintains that Employee's comment to Crawford amounted to an unwanted sexual remark in violation of Mayoral Order 2004-171 (October 20, 2004) on sexual harassment. The Mayor's Order defines sexual harassment as:

> Unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when any one of the following criteria is present:
>
> a. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment;
> b. Submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting the individual; or
> c. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive work environment.

In this case, I find that Employee made an unwelcomed sexual comment to Crawford that created a hostile and offensive work environment. Crawford testified that when he observed Employee and an HR Specialist in a heated discussion, he intervened and sought to ease the tension. Upon learning of the deficiencies with Employee's paperwork regarding her ability to resume working again, Crawford allowed Employee to use a telephone to call her doctor's office. As Employee was on hold, she waved Crawford over and asked him to come over to her. When Crawford approached Employee, she leaned over and whispered in his ear, "don't let me pull those pants down."[10] After Crawford emphatically responded, "excuse me," Employee repeated herself and stated, "yeah, I'm going to pull those pants down."[11] Crawford immediately told Employee that her comment was inappropriate and stepped away from her. Crawford perceived Employee's comment as an unwanted sexual advance and of a sexual nature because she said, "I'll pull your pants down."

[10] Tr. at 13.
[11] Tr. at 13.

I found Crawford's testimony to be very credible. While Crawford was the HR Director for Agency, his interactions with Employee were limited and there was no motive for him to fabricate his story. Immediately after his interaction with Employee, Crawford explained to Laguerre what transpired. Laguerre caught the end of the interaction between Employee and Crawford and testified that Crawford was "noticeably upset."[12] Furthermore, while Laguerre did not hear what was said during the exchange, she did observe Employee leaning towards Crawford, which supports the assertion that Employee whispered something to Crawford.[13] Laguerre also observed Crawford tell Employee that her comment was inappropriate.[14] Laguerre's testimony was very forthright and credible.

Despite Employee's contention that her comment was directed towards the professional appearance of Crawford and others in the office, Crawford adamantly testified that the exchange he had with Employee was not about how he or any other employees were dressed.[15] Additionally, Employee contends that Agency's action of terminating her was retaliatory because of her union activity where she addressed the media concerning Agency getting children to school on time. Crawford testified that he was unaware of this union activity by Employee. Employee's claim that Agency's action was retaliatory is undermined by the fact that she addressed the media in 2009 and was subsequently removed for the instant matter in 2013. Employee further contends that she was labeled a whistleblower; however, she never filed a complaint with the EEOC or the Office of Human Rights regarding her allegations against Agency. Thus, Employee's retaliatory claim does not stand and I find that Agency has satisfied its burden that it had cause to take the instant adverse action against Employee for "any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations."

Appropriateness of penalty

Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the undersigned.[16] This Office may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.[17] When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.[18]

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency. Here, Agency relies on

[12] Tr. at 43.
[13] *See Id.*
[14] Tr. At 43.
[15] Tr. at 31.
[16] *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).
[17] *See Id.*
[18] *See Id.*

Mayoral Order 2004-171 (October 20, 2004), which provides that "the agency shall recommend appropriate disciplinary action, up to and including termination of any employee found to have engaged in sexual harassment…"[19] This order gives Agency broad discretion in administering a penalty when an employee has engaged in sexual harassment. Based on the analysis set forth above, I find that Employee's comment towards Crawford constitutes sexual harassment as defined in Mayoral Order 2004-171 (October 20, 2004) and that Agency properly invoked its managerial discretion in removing Employee from her position. Given the nature of the comment made by Employee to Crawford, who was then-Director of Human Resources for Agency illustrates the seriousness of the offense committed by Employee. Accordingly, I find that the penalty imposed against Employee was appropriate and that Agency did not exceed the limits of reasonableness when invoking its managerial discretion.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's decision to remove Employee from her position is **UPHELD**.

FOR THE OFFICE:

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Arien P. Cannon, Esq.
Administrative Judge

[19] Mayor's Order 2004-171, Section XIV (October 20, 2004).