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

In the Matter of:)	
)	
JAMES WILSON,)	
Employee)	
)	OEA Matter No. 1601-0062-17
v.)	
)	Date of Issuance: September 26, 2018
D.C. DEPARTMENT OF PARKS AND)	
RECREATION,)	
Agency)	Michelle R. Harris, Esq.
)	Administrative Judge
James Wilson, Employee, <i>Pro se</i> ¹)	
Ryan Donaldson, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 22, 2017, James Wilson (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Department of Parks and Recreation’s (“Agency or “DPR”) decision to remove him from service from his position as a Motor Vehicle Operator effective, June 5, 2017. On July 26, 2017, Agency filed its Motion to Dismiss/Motion for Summary Disposition in response to Employee’s Petition for Appeal. On September 29, 2017, Agency filed a Motion to Stay Discovery. On October 5, 2017, Employee filed a Motion for an Extension of time to respond to Agency’s Motion.

Following a failed attempt at mediation, I was assigned this matter on October 3, 2017. On October 10, 2017, I issued an Order Scheduling a Status/Prehearing Conference for December 6, 2017, and denying Agency’s Motion for Summary Disposition. On November 14, 2017, Agency filed its Answer to Employee’s Petition for Appeal. On November 22, 2017, Agency filed a Motion to Continue the Status/Prehearing Conference. I issued an Order on November 28, 2017, granting Agency’s request and rescheduling the Status/Prehearing Conference for December 18, 2017. Both parties were present for the Prehearing Conference on December 18, 2017. During the Prehearing Conference, I determined that an Evidentiary Hearing was warranted, as a result, I issued an Order Convening an Evidentiary Hearing for March 6, 2018.

¹ Employee was previously represented by counsel, but the representatives withdrew their appearance on October 18, 2017.

During the Evidentiary Hearing, both parties presented testimonial and documentary evidence. Following the Evidentiary Hearing, I issued an Order on April 4, 2018, requiring both parties to submit their written closing arguments on or before May 3, 2018. On April 20, 2018, Agency filed a Consent Motion to extend the time to file closing arguments. On April 23, 2018, I issued an Order Granting Agency's Motion and required closing arguments be submitted by May 18, 2018. Both parties submitted their written closing arguments by the prescribed deadline. The record is now closed.

JURISDICTION

The 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 against Employee; and
2. If so, whether termination was the appropriate penalty under the circumstances.
3. Whether Agency, in administering the adverse action utilized the appropriate version of Chapter 16 of the District Personnel Manual ("DPM").

BURDEN OF PROOF

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

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

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

OEA Rule 628.2 *id.* states:

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

SUMMARY OF TESTIMONY

On March 6, 2018, an Evidentiary Hearing was held before this Office. 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. Both Employee and Agency presented testimonial and documentary evidence during the course of this matter to support their positions.

Agency's Case-In-Chief**Steven Anderson ("Anderson") (Tr. Pages 12-51)**

Steven Anderson has worked at Agency for approximately eight (8) years and is a Support Service Manager where he manages transportation services, warehouse operations, and stage craft operations. Anderson testified that at the time of the incident involving Employee, he was out of the building but was informed by telephone that there had been an altercation at the warehouse and returned to the facility. Anderson explained that upon returning to the facility, he had conversations with both parties involved and those who had witnessed what happened. Anderson could not recall whether the police arrived before or after he got there, but that he observed the videotape of the incident with police officers present and Walter Black, another manager in support services. Anderson testified that he contacted the Agency's Human Resources department to notify them about the incident and to determine what the next steps would be. Anderson said that he did not remember the specific person he notified, but that it was likely Kwelli Sneed. Anderson stated that he also spoke with Dominique Odesola.

Anderson testified that he did not receive written statements from the witnesses, but to his knowledge, incident reports submitted by the witnesses were provided to the risk management department and HR. Anderson indicated that he also filled out an incident report describing what he saw in the video tape. Anderson explained that in some of the witnesses' statements it said that the discussion started in another part of the building but that it was not depicted on the video because there are no cameras in the office area where the witnesses stated the discussion began. Anderson testified that the witnesses explained that they were having a discussion that started in the office area. He also explained that the witnesses said that James Wilson ("Employee") moved from the office to the warehouse and Donna Dowery ("Dowery") went to the warehouse as well. Anderson said that the distance from the inside of the office area to the warehouse or loading dock that the video shows is about thirty to forty feet. (*The surveillance videotape of the incident between the witnesses on February 17, 2017 was played.*) Anderson testified that he recognized the people in the video and identified them as Employee and Donna Dowery.

Anderson conferred with Human Resources and Kwelli Sneed when he made the decision for the proposed removal. Anderson testified that fighting is not something he believes is acceptable in the workplace. Anderson said that he agreed that Ms. Dowery was aggressive, but that he made his determination primarily on the fact that there was an altercation. Anderson explained that Employee's explanation did not give him reason to think that anything less than a termination was appropriate because there was action from both parties. Anderson testified that he had no further involvement in the disciplinary process after signing and issuing the advance written notice.

On cross-examination, Anderson testified that he does not know Employee to be a violent person, nor could he recall a time Employee displayed aggressive behavior in the workplace. Anderson also stated that he cannot recall a time that he has had to write- up Employee. Anderson said that he has heard that Dowery has instigated certain instances in the workplace and that she had been put on administrative leave prior to his tenure. Anderson also testified that what was said during the argument or why the argument started is not how he would base his discipline. Anderson further explained that once an argument escalates to a certain point he has no choice with regard to how to manage the situation.

Kwelli Sneed (“Sneed”) (Tr. Pages 60-89)

Kwelli Sneed testified that she has been at Agency for approximately two-and-a-half years and is a deputy director of Administrative Services. Sneed explained that in her position, it is her job to oversee procurement, training, human resources, information, technology, support services and nutrition and wellness. Prior to that position, Sneed explained that she was the chief human resources officer and held that position from August 9, 2015, to October 31, 2016. Sneed expressed that her current role involves the employee disciplinary process.

Sneed testified that she was not familiar with Dowery, but that she was familiar with Employee because she would see him periodically during the course of business. Sneed said that she had not dealt with either of the employees in a disciplinary capacity prior to the incident. Sneed indicated that she first became aware that an incident involving Employee had occurred at the warehouse on February 17, 2017. Sneed explained that Anderson showed her the videotape of the altercation, and inquired about the next steps. Sneed testified that after reviewing the tape, she reviewed the witness statements. Sneed assigned the issue to Dominique Odesla and Human Resource Specialist, Kanasha Anthony, to coordinate a meeting to obtain Employee’s and Dowery’s perspective on what occurred. Sneed explained that she attended the first meeting with Employee, but not the second meeting with Dowery.

After that meeting, Sneed testified that she asked for the statements of the witnesses who observed the altercation. Sneed said that she also notified legal counsel, Amy Caspari, but that she could not recall notifying anyone else. After collecting and reviewing all of the information, Sneed indicated that she then determined what penalty would be appropriate. Sneed explained that she then drafted the proposed action, with the assistance of Steven Anderson and Agency legal counsel, and termination was recommended. Sneed expressed that she agreed with the level of discipline because both employees had no regard to safety for themselves or the safety of others. Sneed said that she considered the *Douglas* Factors and that there was nothing in her analysis that convinced her that a lesser level of discipline was warranted in this circumstance. She also explained that after viewing Employee’s version and explanation of the events, his explanation did not convince her that a lesser penalty was warranted, and she believed that Dowery and Employee were equally aggressive. Sneed explained that the duties and responsibilities of Wilson’s job played a factor in her analysis of what the appropriate level of discipline was because it eroded management’s trust in his ability to do his job. Sneed expressed that it drew into question whether Wilson would be reactionary to different triggers later on.

Sneed indicated that she did not think that Employee’s length of service at Agency and his lack of prior discipline should warrant a lesser level of discipline than termination due to the egregiousness of the altercation. Sneed also testified that she, Amy Caspari, Steven Anderson, and Jason Yuckenberg were all a part of the process when the hearing officer provided the recommendation of a 30-day suspension. Sneed cited that the recommendation was considered, however the Agency final decision was for termination. Sneed said that in her opinion, the video did not demonstrate that Dowery was the initial aggressor, and that it seemed that they were both equally aggressive towards one another. Sneed testified that she believe that Employee’s action was reflexive to the situation but not to a physical contact or touch. Sneed concluded that after some discussion, the department determined that they would move forward with the separation of Employee, and that she believes termination was the appropriate level of discipline.

Jason Yuckenberg (“Yuckenberg”) (Tr. Pages 96-121)

Jason Yuckenberg (“Yuckenberg”) is the chief of staff at Agency. Yuckenberg testified that he has been in this role for three (3) years and that he reports directly to the director of the Agency. Yuckenberg explained that he is also required to oversee Human Resources and is involved in the employee disciplinary process when appropriate. Yuckenberg said that on occasion, he is consulted on serious matters of discipline and he is the deciding official depending on the chain of command.

Yuckenberg testified that he was the deciding official in Employee’s disciplinary matter. Yuckenberg indicated that in this particular matter he reviewed the evidence presented regarding the incident as well as the DPM to make sure that the proposed action was consistent with the DPM. He also explained that he reviewed the Douglas Factors and the response and opinion received from the hearing officer to ultimately make the final decision regarding whether or not to uphold the proposed action or to propose an alternative. Yuckenberg said that he cannot remember the exact date of when he was first brought into the disciplinary process but it was within 24-48 hours after the incident occurred. Yuckenberg testified that given the seriousness of the situation, Agency’s general counsel was consulted along with the Human Resources Director, Kwelli Sneed, who was serving as both the Deputy Director and Human Resources Director simultaneously. Yuckenberg expressed that due to Sneed’s dual role, he was brought in as the deciding official on the matter.

Yuckenberg indicated that prior to the issuance of the written advance notice of proposed removal, he had several conversations with regard to the matter, but became less involved with the investigation once it was determined that he would be the deciding official, in order to remain impartial. Yuckenberg said that he reengaged in the process once the hearing officer’s opinion was completed. Yuckenberg testified that after reviewing the video and all of the written statements from the witnesses, he reached the conclusion to uphold the proposed termination. Yuckenberg expressed that he carefully reviewed the Douglas Factors. Yuckenberg also explained that after reviewing the video, he felt that the decision was appropriate because both individuals were aggressive.

Yuckenberg stated that he also considered the mitigating factors. He expressed that, given the seriousness of the incident and Employee’s position that he could not move forward with a lesser penalty. Yuckenberg testified that after reviewing Employee’s statement, he found both Employee and Dowery to be the aggressors. Yuckenberg explained what he saw on the videotape and concluded that he did not find Employee’s action to be reflexive in nature because Wilson moved forward and pushed Dowery to the ground which he felt showed problems in foresight. Yuckenberg also indicated that after the incident, another employee had to hold the two employees apart to keep the situation from escalating. Yuckenberg expressed that Employee did not remove himself from the situation as he stated in his description of the events. Yuckenberg noted that he agrees that Dowery was the initial aggressor, but that both employees were aggressive. Yuckenberg also expressed that the nature of Employee’s job responsibilities played into his conclusion because Employee job involves dealing with the public. Yuckenberg cited that it is imperative that the staff have the composure and ability to deescalate certain situations no matter how much of an aggressor the other person may be. Yuckenberg concluded that after reviewing the video, Employee did not display that ability and thus eroded their trust.

Yuckenberg testified that prior to the incident he hasn’t known Employee to be an aggressive employee, had not heard of any violence by Employee, nor has he known Employee to have any complaints or write-ups. He later testified that he cannot speak on whether or not Dowery was ever put on administrative leave. On redirect examination, Yuckenberg said that in his review of the

video, he did not find that Wilson was clearing his personal space and protecting his personal safety because he easily could have walked away.

Employee's Case-In-Chief

Ricardo Douglass ("Douglass") (Tr. Pages 123-153)

Douglass testified that he works at Agency and was at the warehouse the day of the incident. Douglass explained that on the day of the incident, he and another employee, Preston Small, were sitting at a table having lunch, when he saw Employee come through the door with Dowery following behind him yelling profanity at him. Douglass explained that he heard Employee repeatedly saying, "Go ahead Donna. I ain't got time for that." Douglas then expressed that Donna Dowery continued to walk behind Employee and called him profanities. He then stated that Employee turned around to look at Dowery and then proceeded to walk away from her. At that point, Douglass indicated that Dowery bumped Wilson from behind; Employee turned around and looked at her when Dowery took her finger and pushed him in his face where you could see his glasses come up. Douglass said that Employee then says "no, get away from me," and pushes Dowery and she fell down. Douglass noted that Dowery got up and took off her coat and approached Employee as if she wanted to fight him. He then said that Employee stood there and looked at her. Douglass testified that they separated them because Dowery proceeded to go after Employee and that the police were called.

Douglass testified that Dowery and Employee came from the area near the offices and the incident started outside of the warehouse. He then noted that there was a door that leads between the outer part of the office and a door that leads into the warehouse. Douglass then explained that they were standing about six (6) feet away from the cargo elevator when the incident happened. He furthered expressed that Employee was standing with his hands in his pocket when Dowery made physical contact (bumping) with him from behind. Douglass said that Dowery called Employee profanities and a derogatory term, and put her finger in Wilson face that caused his glasses to go up and that Employee then pushed her away. Douglass also indicated that he was sitting about a foot away with Preston Small ("Small") until the incident got out of hand, in which he separated them. Douglass testified that there were several seconds in between the times when Dowery bumped Employee and the time she struck him in the eye. Douglass also testified that Dowery and Employee were pretty much standing in the same place both for when she bumped him as well as when she pushed him. (*The surveillance videotape of the incident between the witnesses on February 17, 2017 was played.*)

Douglass noted that the video doesn't show him, but that he was approximately three (3) feet off camera. Douglass further explained that he was not aware of what Employee or Donna was saying in the videotape. Douglass expressed that the statements made by Dowery when she first came through the door are what caught his attention. (*The surveillance videotape of the incident between the witnesses on February 17, 2017 was played at 2:43 seconds.*)

Douglass explained that when Dowery bumped Employee, she bumped him from behind and that that part may have been out of the camera. Douglass indicated that he told Employee to ignore her and that it was not worth it, but that it is not displayed on the video. (*The surveillance videotape of the incident between the witnesses on February 17, 2017 was played at 3:44 seconds.*) Douglass testified that he and Preston Small initially stood up and asked Employee to come over to where they were seated, however, Employee and Dowery were separated by the woman in the video so they sat back down. Douglass explained that there is a blind spot in the video because the camera sits on the

bay door, which is why he and Preston Small are not visible on the videotape. Douglass testified that he does recall Employee raising his voice, but that he was not screaming or yelling. Douglass further explains that Dowery was speaking louder than Employee during the entire incident.

Douglass testified that in the five (5) years of him working at Agency with Employee, he has never known Wilson to be aggressive, hurt anyone, or do anything outside of his job in the workplace. Douglass stated that he has heard that Wilson helped a lot of people get their CDL licensure. Douglass explained that Dowery has been in many situations where she has cursed and become agitated in the workplace. Douglass also expressed that he told the police officers and a few people at DPR, that Dowery had bumped Employee from behind before the incident; however, he does not remember whether or not he included it in his statement.

Preston Small (“Small”) (Tr. Pages 154-163)

Small testified that on February the 17, 2017, he was working at the warehouse. He cited that as he was walking from the warehouse to get water, he heard commotion going on between Employee and Dowery. Small explained that he heard Dowery use profanity and saw her pointing at Employee. Small also indicated that Dowery directed profanity at him as well. Small then explained that Employee came over to him, grabbed him and said that they should change locations due to Dowery’s actions. Small testified that Dowery followed Employee from the office to the warehouse where she kept poking behind his head and continued to use profanity. Small explained that Employee told Dowery to leave him alone, when Dowery then reached up under Wilson’s glasses and poked him in the eye. Small testified that Employee in turn defended himself, pushed her away from him and Dowery fell to the floor.

Small testified that he was on his way to get water from the office but that he never ended up getting water because he heard commotion from Employee and Dowery on the other side of the door where the water dispenser was located. Small expressed that he saw the start of the incident that occurred in the office and that only words had taken place at that point. Small indicated that Employee told him that Dowery had gotten in his face and used profanity. Small explained that at the point when Dowery struck Employee in the eye, that they were on warehouse side of the facility and he was seated in a chair by the gate. Small noted that once Dowery struck Employee in the eye, he got up and walked over to Employee to deescalate the situation. Small explained that he heard Employee tell Dowery to get out of his face, but that he did not raise his voice. Small indicated that he does not recall Employee to be an aggressive person or one to try to cause bodily harm to anyone in the workplace. Small further testified that Wilson is known to always help others in receiving their CDL license.

James Wilson (“Employee”) (Tr. Page 164-200)

Employee testified that on February 17, 2017, he was at the warehouse site and was congratulating two other employees for passing their CDL test. He expressed that Dowery walked into the office upset. Employee explained that Dowery repeatedly made negative comments on his ability in helping other coworkers obtain their CDL. Employee indicated that Dowery then uttered profanities at him. Wilson expressed that DPR is aware that Dowery is a problem employee.

Employee testified that Dowery continued to use profanity toward him and cursed about management. Employee expressed that although he was upset, his judgment does not affect his job

when he works around others. He then indicated that he has never had any complaints or write-ups at work.

Employee indicated that Dowery chest bumped him and repeatedly tapped him on his back but that he did not want any problems with her; because he knew that he would be deemed the aggressor. He explained that they would say that he was the aggressor because Dowery is a woman and because of his size and skin complexion. Employee cited that he knew where the camera was located in the warehouse, and purposely walked over there. Employee indicated that when he and Dowery were in the warehouse, she was making threats toward him and saying that she was going to get her boyfriend to come and kill him. Employee testified that he attempted to get away from the situation but that if he walked completely off site, he would be deemed to have abandoned the job. Employee also cited that his physical contact with Dowery was a “knee-jerk” reaction, and that he was defending himself. Employee expressed that he has a relationship with Yuckenberg, Anderson, and Sneed and that they all know his character and are all aware that he is not aggressive in nature.

Employee testified that after he was struck in the eye by Dowery, he did not immediately walk away, but that when he eventually did, he was told that he should not have walked offsite. Employee indicated that although Dowery was the aggressor, he did not press charges because he initially felt that it was not as serious. Employee explained that Dowery bumped him as he was walking through the warehouse, and that he stood where the camera could see so that everything could be captured on video, because he felt no one would have believed him otherwise. Employee stated that although Dowery raised her voice, he tried to stay calm because he did not want to lose his job. Employee indicated that Dowery repeatedly told him that she would have him killed, and he told her she would not get him killed. Employee indicated that after that, Dowery struck him in the eye and that he responded and pushed her.

Employee noted that it was bad judgment on his part to not include in his written statement that Dowery threatened to have him killed. Employee explained that when Dowery first made physical contact by bumping him, he did not walk away because he felt that he shouldn't have had to since he was not the aggressor. Employee testified that right before Dowery poked him in the eye, she threatened to have him killed and that he leaned in and told her to do it. Employee then stated that Dowery's nails were long and although he was not permanently injured from the physical contact and could have seen a doctor, he chose not to. Employee testified that after he pushed her, he did not walk outside of the warehouse, but did not attack her once she was down. Employee stated that he talked to a police officer, but did not give them any written statement.

Agency's Position

Agency avers that it had cause to terminate Employee from service and administered the adverse action in accordance with all applicable laws, rules and regulations. Agency asserts that on February 17, 2017, Employee and another employee, Donna Dowery, were involved in a physical altercation that was captured on video surveillance. Agency cites that Employee was served an Advanced Written Notice of Proposed Removal on March 29, 2017.² Agency avers that an independent hearing officer found that an assault occurred and that the charge of fighting was found by a preponderance of evidence. Agency asserts that the hearing officer recommended that the penalty be reduced from removal to a penalty of 30-days suspension following the consideration of what she believed to be mitigating circumstances and Employee's length of service and lack of prior

² Agency's Motion to Dismiss (July 26, 2017).

discipline in his record.³ The hearing officer also found that the other employee was the aggressor in the altercation and that Employee's actions were reflexive in nature.⁴

Agency notes that its deciding official disagreed with the hearing officer's recommendation and that on May 31, 2017; it issued a Final Agency decision, finding that Employee "engaged in behavior that aggravated and escalated the level of the dispute" and that his actions "deteriorated management's confidence in Employee to work with other staff members and manage required job responsibilities."⁵ As a result, Employee was terminated from service effective, June 5, 2017. Agency also argues that the issue of self-defense raised during the Evidentiary Hearing in this matter is unsubstantiated by the record, and the notion that Employee's actions were reflexive in nature, were disproven by the video surveillance in this matter.⁶ As a result, Agency avers that it had cause to terminate Employee from service and that it administered the instant adverse action in accordance with all applicable laws, rules and regulations.

Employee's Position

Employee argues that while he was involved in an altercation with a co-worker on February 17, 2017, that he was acting reflexive in manner after she assaulted him. Employee cites that on the date of the incident, his co-worker, Donna Dowery, approached him and began to yell profanities after being frustrated by other employees' recent receipt of their CDL licensure.⁷ Employee explained that Dowery began to harass him and physically follow him as he tried to get away from her. Employee asserts that Dowery continued to yell and scream at him. Employee avers that what is depicted in the video shows that Dowery was pointing and yelling in his face and ultimately "poked him in the eye with her fingernail." Employee cites that he pushed her away as a reflex, because he did not know what else she was going to him. Employee avers that he was not the aggressor in the situation and immediately walked away from the situation to calm down.⁸

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

ANALYSIS

Appropriate Version of DPM

In an Order for Closing Arguments dated April 4, 2018, the undersigned required the parties to address whether Agency, in administering the adverse action against Employee utilized the appropriate version of the District Personnel Manual ("DPM"). Specifically, parties were to address whether the DPM Chapter 16 version effective as of August 2012⁹ or February 2016¹⁰ should be applicable to this action.

Agency asserted that its adverse action was properly guided by and assessed under the 2012 version of the DPM. Agency asserts that Employee was a member of AFGE Local 2741 and that at

³ Agency's Closing Arguments (May 18, 2018).

⁴ *Id.* at Page 3.

⁵ *Id.*

⁶ *Id.* at Page 15.

⁷ Employee's Brief (December 27, 2017).

⁸ *Id.*

⁹ DPM Chapter 16 effective July 13, 2012, as reflected by the August 26, 2012, Transmittal Date.

¹⁰ DPM Chapter 16 effective February 5, 2016, as reflected by the February 26, 2016 Transmittal Date

the time of the February 2017 incident, impact and effects (I&E) bargaining was ongoing between Employee's union and Agency, and were still ongoing at the time of Employee's termination.¹¹ As a result, Agency avers that due to the ongoing nature of negotiations with union, the 2012 DPM version was still in effect and that it appropriately utilized this version when in its administration of the instant adverse action. Employee did not provide any statement with regard to the use of the DPM, however he noted in his Petition for Appeal that he was a member of AFGE Local 2741.¹²

The undersigned finds that given the ongoing "I&E" bargaining and negotiations with Employee's union, Local 2741, and Agency at the time of the incident, that the newer, 2016 version of the DPM was not effective, and that Agency appropriately utilized the 2012 version of the DPM in its administration of this adverse action.

Whether Agency had cause for adverse action

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. *(Emphasis added).*

Additionally, DPM § 1603.2 provides that disciplinary actions may only be taken for cause. Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Employee was terminated from his position as a Motor Vehicle Operator pursuant to: DPM § 1603.3(e) and (g) – **“Any on duty or employment related act or omission that the employee knew or should reasonably have known is a violation of law: fighting; and “any other on-duty or employment-related reason for corrective or adverse action that is arbitrary or capricious: arguing.”**

This Office has held that pursuant to the District Personnel regulations, adverse actions involving fighting under the aforementioned section include an “employee engaging in activities that have criminal penalties or are in violation of federal or District of Columbia laws.”¹³ Further, the “District of Columbia Superior Court has held that OEA must make factual findings relating to whether an employee's conduct meets the factual requirements and legal elements of the crime they are alleged to have committed.”¹⁴ Here, Employee was charged with fighting on duty, and as a result, the undersigned must consider the elements of assault. “The elements of assault are that the employee (1) must have made an attempt with force of violence to injure another; (2) with the

¹¹ Agency's Closing Arguments at Page 11 (May 18, 2018).

¹² See Employee's Petition for Appeal at Page 4 (June 22, 2017).

¹³ *Angelina Chambers v. Office of the State Superintendent of Education*, OEA Matter No. 1601-0066-12 (January 29, 2015).

¹⁴ *Id.*

apparent present ability to effect the injury; and (3) with the intent to do the act constituting the assault.”¹⁵

In the instant matter, on February 17, 2017, Employee was involved in an altercation with a co-worker. Video surveillance captured portions of the altercation, specifically with regard to physical contact between Employee and the co-worker. During the course of the Evidentiary Hearing in this matter, I had the opportunity to consider witness testimony and examine documentary evidence, and view the video surveillance of the incident. It is uncontroverted that Employee and his coworker, Donna Dowery, were involved in an argument that resulted in a physical altercation. Witness testimony during the Evidentiary Hearing noted that Dowery was yelling and cursing at Employee over the course of several minutes which occurred before the incident captured on video. Employee cited that Dowery began to harass him in one part of the warehouse (named as the “office area”), and he walked away from her, toward the part of the warehouse where the video captured the incident. Employee and other witnesses, specifically, Ricardo Douglass, testified that Dowery followed Employee after he attempted to walk away from her and that she “bumped him from behind” and kept yelling and screaming profanity at Employee. This incident was not featured on the video, nor was there any audio available.

Employee also testified that during the exchange, Dowery kept threatening to have him killed. I had the opportunity to observe Employee and the witnesses (who were eyewitnesses to the incident), and found their testimony to be credible. In the review of the video, where the physical contact takes place, I observed Dowery first strike Employee in the eye, to which he immediately responded by pushing her in the face causing her to fall to the ground. Employee noted that his action was reflexive in nature to attempt to remove her from his personal space, as he was not sure what she would do next.¹⁶ Agency cites that Employee was an equal aggressor in the matter and that his physical contact was not reflexive in nature or a measure of self-defense.¹⁷ The undersigned disagrees with Agency’s assertion. The undersigned finds that based on the review of the testimony of Ricardo Douglass and Preston Small, as well as the video evidence, that Employee was not the initial aggressor, and that his strike to Dowery was reflexive, following her striking him first. As a result, the undersigned finds that Employee did make physical contact with his co-worker that would amount to “assault” as previously defined with regard to fighting. However, the undersigned finds that Agency failed to appropriately consider mitigating factors in assessing disciplinary action in this matter.

Specifically, the undersigned finds that Agency failed to appropriately consider self-defense in this matter. D.C. Superior Court held in *Lisa Randolph v. DMV*, that in instance of assault, “self-defense is the use of reasonable force to repel a danger which a person reasonably believes may cause him imminent body harm.”¹⁸ Further, the Court cited that, “to invoke self-defense to assault, an individual must satisfy the following: (1) that there was an actual or apparent threat; (2) the threat was unlawful and immediate (3) the individual honestly and reasonably believed that he was in imminent anger of death or seriously bodily harm; and (4) the response was necessary to save

¹⁵ *Id.* citing *Stroman v. United States*, 878 A.2d 1241 (D.C. 2005).

¹⁶ Employee’s Closing Argument (April 27, 2018).

¹⁷ Agency’s Closing Arguments at Page15 (May 18, 2018).

¹⁸ *Lisa Randolph v. District of Columbia Department of Motor Vehicles*, 2014 CA 006788 P(MPA) (September 3, 2015). In this decision, Superior Court remanded a matter back to the OEA Board. The Court held in this matter that the “agency record does not adequately reflect that officials [DMV] considered the petitioner’s self-defense claim or any mitigating circumstances that may have been applicable to the petitioner’s circumstance.

himself from danger.”¹⁹ Additionally, the Court found that “even if that individual is unable to establish a perfect self-defense claim, an imperfect claim of self-defense may nevertheless lie as mitigation. In making out an imperfect self-defense claim, the onus is on whether that individual has a good faith belief even though the appearance of the circumstances turned out to be false.”²⁰

In the instant matter, Employee was harassed, threatened and physically attacked by his co-worker before the incident that played in the video. Witnesses present at the warehouse at the time, testified that Dowery was yelling profanities at Employee, following behind him and made physical contact (bumping him from behind) as he tried to walk away, threatened to have people kill him and ultimately struck Employee in the face (the eye), after which he pushed her to the ground. Employee cited that he reacted in a manner to get her out of his personal space because he “did not know what else Donna Dowery might try to do to him.”²¹ I found Employee’s testimony and the testimony of witnesses Ricardo Douglass and Preston Small to be credible and consistent with regard to the incident. Agency avers that Employee dismissed the threats made by Dowery and didn’t seek attention to his eye, and that other employees had to separate both parties after the incident.²² As a result, Agency found Employee did not active reflexively or in self-defense. The undersigned disagrees. As previously cited, D.C. Superior Court found that even if someone is not able to make a perfect self-defense claim that “an imperfect claim of self-defense may nevertheless lie as mitigation.” As a result, I find that Agency failed to appropriately consider Employee’s claim that he was trying to remove Dowery out of his personal space to prevent her from doing any other harm to him as a mitigating factor.

The undersigned also finds that Agency failed to appropriately consider the *Douglas* factors, namely the “*mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter* (Emphasis added).”²³ Here, Employee and other witnesses

¹⁹ *Id.* citing *Mack v. United States*, 6 A.3d 1224, 1230-31 (D.C. 2010) (quoting *Brown v. United States*, 619 A.2d 1180, 1182 (D.C. 1993).

²⁰ *Id.* citing *Williams v. United States*, 858 A.2d 984, 994 n.13 (D.C. 2004) (“Imperfect self-defense is a mitigation defense which, unlike perfect self-defense does not result in full exoneration.”)

²¹ Employee’s Closing Argument (April 27, 2018).

²² Agency’s Closing Arguments at Page 15-16 (May 18, 2018).

²³ *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

- 1) the nature and seriousness of the offense, and it’s relation to the employee’s duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- 2) the employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- 3) the employee’s past disciplinary record;
- 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 employee’s ability to perform assigned duties;
- 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- 7) consistency of the penalty with any applicable agency table of penalties;
- 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 were violated in committing the offense, or had been warned about the conduct in question;
- 10) potential for the employee’s rehabilitation;
- 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

testified that Dowery was yelling profanities and harassing Employee for several minutes before the physical contact. Witnesses also testified that Employee tried to walk away from Dowery, but that she continued to follow and harass him. As a result, I find that Agency's contention that Employee did not "try to improve or ignore the situation with the other employee" to be unsubstantiated and unsupported by the evidence in the record. Further, it should be noted that the independent hearing officer who reviewed this matter at the Agency level, found during the course of her review that Employee was not the aggressor in the situation, and cited that considerations for Employee's work history, his record of no prior adverse/disciplinary actions, and the fact that his actions were reflexive in nature to be mitigating factors that warranted a reduction in the penalty from a removal to a suspension of thirty (30) days.²⁴

Agency disagreed with the hearing officer's recommendation and cited that given the circumstances, Employee's actions affected "management's ability to entrust your decision making and conduct while at the warehouse."²⁵ Agency also cites that "there was no sign that you [Employee] were potentially willing to try to improve or ignore the situation with the other employee, instead you engaged in aggravating and escalating the level of discipline."²⁶ The undersigned finds Agency's assessment to be contrary to the evidence presented in the record. The testimonies of Employee, Douglass and Small all consistently exhibit that Employee tried several times to remove himself from the situation and avoid further confrontation with Dowery. Further, the video shows clearly that Dowery struck Wilson first, and even after she fell to the ground, got up and was approaching Employee again before being separated by another employee.

Because I find that Agency failed to appropriately and meaningfully consider self-defense and other mitigating factors regarding this incident, the undersigned finds that Agency has not met its burden to establish cause for adverse action in this matter. As a result, I find that Agency did not have cause to remove Employee from service.

ORDER

Based on the foregoing, it is **ORDERED** that:

1. Agency's action of terminating Employee from service is **REVERSED**.
2. Agency shall reinstate Employee to his position of record and reimburse Employee all back pay and benefits lost as a result of his termination.
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MICHELLE R. HARRIS, Esq.
Administrative Judge

12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

²⁴ Agency's Evidentiary Hearing Exhibit Tab 13 (March 6, 2018).

²⁵ Employee Petition for Appeal at Agency's Final Notice.

²⁶ *Id.*