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

_____	)
In the Matter of:	)
	) OEA Matter No. 1601-0033-09
PERCELLIA MONTGOMERY	)
Employee	) Date of Issuance: March 18, 2010
	)
v.	) Sheryl Sears, Esq.
	) Administrative Judge
D.C. DEPARTMENT OF	)
TRANSPORTATION	)
Agency	)
_____	)

Percellia Montgomery, Employee, Pro Se  
Melissa D. Williams, Esq., Agency Representative

**INITIAL DECISION**

**INTRODUCTION**

Percellia Montgomery (“Employee”) was an Asphalt Worker for the D.C. Department of Transportation (“Agency or “DDOT”). By letter dated August 22, 2008, Frank Pacifico, Traffic Systems Maintenance Manager, notified Employee of a proposal to remove her for allegedly fighting at work. Employee was charged with the following acts:

On April 18, 2008, at approximately 8:00 a.m., you participated in a physical altercation with your coworker Ms. Stephanie Conyers. This altercation involved threats, abusive language, and harmful contact with Ms. Conyers. This physical altercation was witnessed by several of your coworkers. Prior to the physical altercation, you were heard making inappropriate comments about Ms. Conyers. Ms. Conyers responded by directing inappropriate comments towards you. A witness to the incident stated

that you escalated the matter to a physical altercation by initiating physical contact with Ms. Conyers. You knew, or should have known, that fighting on duty is a violation of the law.

Agency cited these provisions of the District Personnel Manual (DPM) as legal cause for the proposed action:

1603.2 In accordance with section 1651 (1) of the CMPA [Comprehensive Merit Personnel Act] (DC Official Code section 1-616.51 (1) (2006 Repl.)), disciplinary actions may only be taken for cause.

1603.3 For the purposes of this chapter, except as provided in section 1603.5 of this section, cause for disciplinary action for all employees covered under this chapter is defined as follows . . .

(e) Any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law.

Matthew J. Marcou was appointed as the Hearing Officer. Employee presented a response to the proposal through the American Federation of Government Employees (AFGE), Local 1975. Marcou also considered the advance notice along with written statements from Johnnie Treadwell, Tritt Ross, Brenda Bailey, Donald A. Ferrell and James Hall. He Marcou stated his findings in a report issued on September 22, 2008. He concluded that, at about 7:30 a.m. on the date in question, Employee and her co worker, Conyers, were in the women's changing room talking. "At some point the conversation turned into an altercation, which escalated to a physical confrontation and ultimately a fight." The "fight was witnessed by several people and attempts were made to break them apart." Marcou "found sufficient evidence in the record to support DDOT's proposal to remove Ms. Montgomery from the position of Asphalt Worker."

By letter issued on October 6, 2008, Terry Bellamy, Associate Director, notified Employee that she would be removed effective on October 10, 2008. Employee filed an appeal of the removal with the Office of Employee Appeals ("the Office") on November 4, 2008. This Judge convened a pre-hearing conference on June 17, 2009, and a full evidentiary hearing on November 18, 2009.

## **JURISDICTION**

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

## ISSUES

- 1) Whether Employee was fighting on the job on April 18, 2008.
- 2) If so, whether her behavior was on-duty or employment-related act or commission that an employee knew or should reasonably have known is a violation of law.
- 3) If so, whether removal was an appropriate penalty.

## POSITIONS OF THE PARTIES

Agency alleges that Employee started a fight with Ms. Conyers causing a noisy, dangerous workplace disturbance observed by other employees. Employee denies fighting with Ms. Conyers. According to her, they were just bantering about a party they'd been to the night before.

## BURDEN OF PROOF

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) provides that “[f]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction.” Accordingly, the agency has the burden of proof in this matter. Pursuant to OEA Rule 629.1, *id.*, the applicable standard of proof is a “preponderance of the evidence.” OEA Rule 629.1 defines a preponderance of the evidence as “[t]hat 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.” Accordingly, Agency must prove, by a preponderance of the evidence, that Employee committed acts that constitute cause for adverse action and that removal was a reasonable penalty.

## FINDINGS OF FACT

### Summary of Testimony by Agency’s Witnesses

#### **Tritty Ross, Roadway Maintenance Supervisor**

Tritty Ross, testified that, on April 18, 2008, she was working as a Motor Vehicle Operator transporting materials to different job locations. She and Employee did not work on the same crew but saw one another and spoke in greeting at the W Street work site. Ross described the compound where they worked as a yard with six (6) or seven (7) trailers including one for security at the entrance, a main trailer and a ladies’ locker room trailer.

Ross was in the back area of the ladies’ locker room when she heard loud voices that she recognized as Employee and Ms. Conyers. At first, they were joking about going out and partying. Later, “it got ugly.” (*Transcript, Page 24, Line 21*). Ross heard Montgomery accusing Conyers of doing “oral favors for people for money.” (*Transcript,*

*Page 25, Lines 19-20*). They were going back and forth “saying . . . negative things about each other.” (*Transcript, Page 25, Lines 9 - 10*). Conyers was defending herself and “they were both cussing at each other.” (*Transcript, Page 27, Lines 9 - 10*). Ross acknowledged that employees curse at the worksite but she described this exchange as particularly vulgar and personal. Ross was hesitant, when testifying, to repeat the language she heard. However, in her written statement recounting the events, she was stated that she heard Employee say that Conyers “suck dick for money to pay her bills” to which Conyers responded by “calling Ms. Montgomery dirty, stinking and looking like she’s about to die.”

Ross went to the area where she saw them fighting among the tables, chairs and a television. She identified Employee as the aggressor in both the verbal and physical altercations. “Yeah, she hit her, she hit her. Ms. Montgomery hit Ms. Conyers.” (*Transcript, Page 37, Line 22 and Page 38, Line 1*). They both ended up on the floor. Ross went to Mr. Pacifico’s office to get help. However, she chose not to tell him about the fight because there were several people in his office. When she returned, Ross saw Conyers leaving with Donald Ferrell and concluded that it was over. Later, when she and Conyers talked about it, Conyers asked Ross not to write a statement. Ross told her that she would be fine if she explained that she was defending herself and, as noted above, wrote her statement anyway. Other than her hesitation to repeat curse words in a formal setting, Ross was straightforward in presenting her testimony.

### **Brenda Bailey, Asphalt Worker Leader**

Brenda Bailey was an Asphalt Worker Leader at the W street facility. Her job was to “carry out the instructions and . . . get the crews ready to do the job assignment, make sure that they have the tools and equipment for the project and make sure that the area is set up safe for everyone and help the workers with their job.” (*Transcript, Page 48, Lines 3 - 7*). She also heard loud voices in the locker room but could not understand what they were saying. When she opened the door, she saw them fist fighting:

I had to like get in the middle and try to break them up, because they were like knocking over chairs and pushing against the table and the television almost fell on them, so I had to run over there to catch the television so it wouldn't fall on their head. (*Transcript, Page 51, Lines 2 - 7*).

Bailey tried to break them apart but fell to the floor. Paulette Tenner and Antoinette Bruno, after trying more than once, were able to break them apart. Johnnie Mae Treadwell was at the door but did not help. Bailey also identified Employee as the aggressor and said that Montgomery was pulling Conyers’ hair. Bailey did not observe any animosity between the two after the event. Bailey said that Byrd later asked her for a statement. Bailey was clear in her recollection. She would not answer questions about anything that she did not remember.

### **Johnnie Mae Treadwell, Commercial Driver's License Operator**

Johnnie Mae Treadwell, a Commercial Driver's License Operator (a driver of large vehicles) said that she heard the two employees talking while she was getting ready for work. The conversation escalated to include profanity. She does hear some employees at her workplace using profanity but not in this kind of exchange. She heard them getting "louder and louder." (*Transcript, Page 72, Line 7*). "They were calling each other bitches, whores and cursing." (*Transcript, Page 72, Lines 16 - 17*). Bailey went into the room. She came back and told Treadwell that they were fighting.

Treadwell then followed Bailey into the room where she saw Montgomery holding Conyers in a headlock with her hand tangled in her hair. Both were throwing punches at one another. Two other employees, Ms. Paulette Tenner and Antoinette Bruno, along with Bailey, were trying to break them up. Dana Murphy was also in the room. They were the only ones left after others cleared out of the room. Treadwell said, "they were wild, all over the place, and they were knocking over chairs and tables." (*Transcript, Page 88, Lines 13 - 14*). She saw them almost knock over a television. Bailey was thrown to the floor. Treadwell said that she did not intervene because she did not want to get hurt. She recalled it lasting for about fifteen (15) minutes. They did not look like they were joking around. Treadwell's written statement matched her verbal recitation of the events.

Treadwell remembered that Wander Knight, the security guard, and employee Dana Murphy were standing in the doorway when Murphy begged Knight to intervene. "She did absolutely nothing and she stood there like though she was in shock." (*Transcript, Page 99, Lines 17 - 18*). Every now and then, she would just say, "Y'all stop that," "Y'all stop that," but that was it. (*Transcript, Page 99, Line 22 and Page 100, Line 1*). Knight left. When she returned and asked if everything was okay, Treadwell heard Conyers say of Montgomery, "It ain't over. I'm going to kill that bitch." (*Transcript, Page 100, Lines 10 - 11*). Afterward, Conyers had a "busted lip." (*Transcript, Page 76, Line 10*). Murphy went to get Mr. Morris, a supervisor, from a deck outside. Murphy notified another supervisor, Robert Green, who came to help. Donald Ferrell, Conyers' supervisor, escorted her out.

Treadwell later overheard Stephanie, Ms. Conyers, and Ms. Bruno talking about getting Montgomery to agree with their report that they were not fighting but no one asked her to change her statement. In that statement, she reported the "fist fight" and the efforts of employees to "break up said fight."

### **Donald A. Ferrell, Sr., Asphalt Foreman**

Donald Ferrell, Conyer's supervisor, did not see the fight. However, he was looking for Conyers on the day of the incident because they were scheduled to meet about her evaluation. When he found her, he noticed that her lip was swollen and had blood on it. Robert Morris, an Asphalt Foreman, told Ferrell that Employee and Conyers had been fighting. When Ferrell and Conyers got to the trailer where their meeting was to

take place, he asked her and she denied it. Later, as they were riding together to a job site, told him that she'd been playing. He "told her they were playing a little rough if it drew blood." (*Transcript, Page 117, Lines 9 – 10*). In his written statement, Ferrell noted that he expressly asked Conyers if she was telling the truth when she said that she had not been fighting and she said "Yes." He did not investigate the incident further. Conyers later told Ferrell that Montgomery said something that led to the incident even though she still maintained that it was playful. He knew Montgomery and Conyers to be "buddies, pals." (*Transcript, Page 126, Line 22* ).

### **Francesco Pacifico, Chief of the Street and Bridge Maintenance Division**

Francesco Pacifico testified that there were two or three layers of management between him and Employee. He found out about the fight when one of the male security guards came to get him. He excused himself from a meeting and went toward the ladies' locker room. Pacifico saw the two security guards outside. He also saw Mr. Ferrell, who said he'd also heard there was a fight. Pacifico determined that it was over.

Pacifico asked Ferrell if anyone was hurt. Ferrell told him that Conyers had a bloody lip. He conveyed her explanation that she and Montgomery were only playing. . He allowed the employees to continue working together that day. Pacifico assigned his Deputy, Clarissa Byrd, to investigate further. She reported to him over a period of a few weeks as she interviewed Employee, Conyers and other witnesses. He found out, through Byrd, that the female security officer who was present did not try to break up the fight. Pacifico acknowledged that neither Employee nor Conyers presented written statements before Agency issued the notices of proposed removal to both employees. "When reading the statements, I felt that the fight was egregious enough that it did warrant removal." (*Transcript, Page 174, Lines 20 - 21*). He felt that was a reasonable penalty based on the guidelines in the District Personnel Manual and because fighting on the job "breeds hostility [and] low morale." (*Transcript, Page 152, Line 14* ).

Johnnie Treadwell reported to him that she was being harassed to change her statement. So he contacted the Office of Integrity and Compliance. However, no charges were fashioned upon the claim of harassment.

### **Summary of Testimony by Employee's Witnesses**

#### **Wander Knight, Special Police Officer**

On the day of the event, Knight was working "at the trailer and outside, you know, checking everybody's ID cards when they come in the gate, and making rounds." She went to the ladies' locker room trailer to get some ice but no one told her while she was there or when she was in her trailer that there was a fight. If she had been informed, she would have followed protocol and called her security service and the police. She saw Conyers and Montgomery later "on the grounds where "they were getting ready to get in their trucks so they could leave out the yard and start work."

Knight testified that Byrd questioned her that day. “And she told me, ‘If you don't state the names and tell me who was fighting, I'm going to get you removed from your post.’ ” Knight said that she, along with other employees of her security company, were removed as part of a lay off. Knight’s testimony was concise and direct. She maintained a neutral demeanor as she spoke.

### **Percellia Montgomery, Employee, Asphalt Worker**

Employee testified that, as an Asphalt Worker, her jobs were to “run the jackhammer, break up a sidewalk, put it back together, use the asphalt cleaner truck, get the tools.” She said that her conversation with Conyers was about a party. “I got all excited because we have the women’s, ladies’ night out, and we have strippers at our party. So that’s what it was about, it was about the strippers that we have at our party. Women’s night out, we had a party.” (*Transcript, Page 194, Lines 9 – 13*). I said, “Stephanie, did you see the man thing? Is it big? You know, is it small or big? What you thought about it?” (*Transcript, Page 194, Lines 20-22*). Montgomery admitted that she got loud during the conversation but denied that it was in anger. “I think I got real loud because I was all excited. I have never seen nothing like that and it really did something to me, it turned me on, it did something to me and I was excited and I was just talking to her about it.” (*Transcript, Page 195, Lines 7 – 11*).

Montgomery offered more details about her friendship and the exchange with Conyers:

Me and Stephanie, we play with each other. Stephanie’s my best friend, that's my dawg. I'm not – that’s my dawg. She calls me, I call her. She needs food, I give her food. I give her gas money. I ride home with her every day. That's my dawg. We didn't have no fight, we wasn't fighting, we were just playing. Maybe I got a little rough because I was excited about the man thing. (*Transcript, Page 195, Lines 15 – 22*).

According to Montgomery, when they made contact, they were hugging. “I was hugging her, embracing her, holding her, hugging her and stuff, and it probably got out of hand because I was like, ‘Did you see . . .,’ you know, like that.” (*Transcript, Page 196, Lines 9-12*). Montgomery denied that Bailey had to separate them.

Employee recalled that Paulette Tenner, Antoinette Bruno, Donna McCrae, and Brenda Bailey were present. “Tritty Ross was not there, she was not there at all. She was not there at all, she wasn’t nowhere on the site, nowhere, and she says she was there and she wasn’t.” (*Transcript, Page 197, Lines 3 - 5*).

When asked if it was common for employees at her workplace to use profanity or joke boisterously with one another, Employee said, “They yell terrible, yes, it is, they yell terrible. All that stuff goes on there, it’s terrible.” She even expressed the belief that she

was fired so that she would not report them. “That's why they want me to lose my job, that I won't tell [Mayor] Fenty. I said, ‘I'm going to tell Fenty.’ ‘If I get fired, everybody's getting fired. I'm going to tell the Mayor.’ I meant that. That's why they got rid of me, that's why Frank [Pacifico] got rid of me.”

Employee was asked to specify what profanity is used at her workplace. She responded:

The men pull their things out, they sell drugs, they push you, they disrespect you. They sell asphalt. They do sidewalks at 20,000 off a side job. It's a terrible thing. They bring everybody down there in the yard when they get in trouble. That's supposed to be the bad yard, yes. Yes, it's terrible, yes, it is. Ain't nothing good about that yard.  
*(Transcript, Page 210, Lines 13 – 20).*

Employee presented a notarized written statement to Agency dated August 26, 2008, in which she stated the following:

On April 18, 2008, I didn't in no way have an altercation with my co-worker Stephanie Conyers. We didn't participate in a physical or verbal fight. On the day in question, we were talking about a party we (Stephanie and I) went to, however, at no time did we become serious. We never had to be separated by anyone including Ms. Brenda Bailey.

An Asphalt Worker named James Hall wrote a statement in which he said that he did not see a fight. He also stated that, when talking with him, Employee denied having been involved in one. Hall did not testify at the hearing.

### **Findings**

The weight of the evidence supports a finding that Percellia Montgomery and Stephanie Conyers were engaged in a physical altercation. Other employees heard their conversation escalate from friendly to loud and profane. Tritty Ross, Brenda Bailey and Johnnie Mae Treadwell all testified, with clear recollections, that they saw them fighting.

Employee sought to convince this Judge that what others heard was merely “party talk.” If she and Conyers were talking loudly enough about men's private parts in obscene terms that everyone heard them, that was inappropriate in any work place. As a witness before this tribunal, Employee was jumpy and easily incited, by any question, into lengthy commentary on the behavior of others at the agency. It is not hard to believe that she was provoked into fighting by what witnesses heard Conyers saying about her appearance and alleged personal activities. And her effort to use her testimony to deflect



attention from her behavior was not successful. This Judge is convinced that there was much more than talking going on.

The security guard, Wander Knight, testified that there was no fight. However, others saw her standing by while it happened. She had reason to deny seeing the fight. If she admitted to having seen it, her failure to act would have been deemed unprofessional. James Hall, a co-worker of Employee's presented a written statement but it contained no personal recollection because he did not see anything. He only repeated Employee's statements of denial to him. That carries little weight in the face of eye witness testimony that there was a fight.

Employee and her colleague brought their personal business to work. There, it erupted into an ugly verbal altercation and then became a physical fight. Agency has proven, by a preponderance of the evidence, that Employee was fighting at work.

### **ANALYSIS AND CONCLUSIONS**

Agency charged Employee with violating the District Personnel Manual (DPM) § 1603.3 which proscribes "(e) any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law." Various definitions of the offense are offered by the Table of Penalties 1619.1 including "Engaging in activities that have criminal penalties or are in violation of federal or District of Columbia laws and statutes, such as . . . *Assault or fighting on duty* . . ." (Emphasis added.) Employee did commit acts constituting this charge.

Agency notes that Section 1619.1c of the DPM sets forth removal as the suggested penalty for a first offense of assault or fighting on duty. Progressive discipline is not indicated. The only remaining question is whether the penalty of removal was appropriate for the offense. The legal standard for the appropriateness of a penalty was established by the *Merit Systems Protection Board in Douglas v. Veterans Administration*, 5 MSPB 313 (1981). In *Douglas*, the MSPB set forth a list of factors to be considered when assessing the appropriateness of a penalty. *Douglas*, at 331-332. The reasoning and factors established in *Douglas* have been adopted by the District of Columbia Court of Appeals in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). The Court in *Stokes* stated:

Review of an Agency imposed penalty is to assure that the agency has considered the relevant factors and has acted reasonably. Only if the Agency failed to weigh the relevant factors or the Agency's judgment clearly exceeded the limits of reasonableness, is it appropriate . . . to specify how the Agency's penalty should be amended. *Stokes*, at 1010.

This Office will leave an agency's penalty "undisturbed" when "the penalty is 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, 2916 (1985).

The penalty of removal reflects a fair and reasonable consideration of the circumstances. Employee engaged in behavior that was unprofessional, inappropriate and dangerous. The incident interrupted other workers and engaged them to either watch or try to stop it. That Employee denied the event altogether indicates no meaningful possibility of rehabilitation. If she fails to acknowledge what happened or believes that it was appropriate, it is highly possible that she would, without remorse, do it again. There is no reason for the Department of Transportation to tolerate that behavior from any employee and every reason not to.

**ORDER**

It is hereby ORDERED that Employee's removal is UPHOLD.

FOR THE OFFICE:

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SHERYL SEARS, ESQ.  
ADMINISTRATIVE JUDGE