THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0033-17
YEETA WARD, Employee	
	Date of Issuance: March 2, 2018
v.	
	Arien P. Cannon, Esq.
D.C. DEPARTMENT OF FOR-HIRE VEHICLES, Agency	Administrative Judge

Jasmine V. Johnson, Esq., Employee Representative
Matthew D. Watts, Esq., Employee Representative
Janea Hawkins, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 24, 2017, Yeeta Ward ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") challenging the decision of the Department of For-Hire Vehicles[1] to remove her from her position as a Public Vehicle Inspection Officer. Agency filed its Answer on March 29, 2017. A Prehearing Conference was initially scheduled for August 24, 2017. Agency filed a Consent Request for Continuance on August 8, 2017. The Prehearing Conference was subsequently convened on August 31, 2017. A Post Prehearing Conference Order was issued on the same date which scheduled this matter for an Evidentiary Hearing. The parties were also ordered to address, via legal briefs, which version of Chapter 16 of the District Personnel Manual[2] should apply in this matter.[3] Both parties submitted their briefs accordingly.

An Evidentiary Hearing was convened on October 27, 2017. Upon receipt of the transcript, an order was issued on November 20, 2017, for the parties to submit their written

[1] Formerly known as the D.C. Taxicab Commission.
[2] Also referred to as the District Personnel Regulations.
[3] The parties were ordered to brief whether Chapter 16 effective, August 27, 2012 (older), or Chapter 16 effective February 26, 2017 (newer) should apply in this matter.

closing arguments. Both parties have submitted their written closing arguments accordingly. 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. Which version of Chapter 16 of the District Personnel Manual is applicable to the instant case, the older or the newer version.[4]

2. Whether Agency had cause to take adverse action against Employee for: Any on-duty or employment-related act or omission that Employee knew or should reasonably have known is a violation of the law, specifically: assault or fighting on duty; and

3. If so, whether the Agency's decision to remove Employee from her position was the appropriate penalty under the circumstances.

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.

CHARGES AND SPECIFICATIONS

Employee was removed for "Any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of the law, specifically: assault or fighting on duty." Agency asserts that on November 17, 2016, Employee bumped Vehicle Inspection Officers (VIO) RonTreece Gibson-Colbert and William Morgan. The Metropolitan

[4] The "older" version of Chapter 16 of the DPM went into effect on August 2017, 2012; whereas the "newer" version of Chapter 16 of the DPM went into effect on February 26, 2016.

Police Department was summoned and two officers responded to the scene, which resulted in VIO Gibson-Colbert filing a report for simple assault.

SUMMARY OF TESTIMONY

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

Agency's Case-in-Chief

Sanya Cade ("Cade") Tr. 16-45

Cade was hired by Agency in 2015 as a Chief Administrative Officer where she served in this role for two years. Cade currently serves as the Deputy CFO for the U.S. House of Representatives. While serving as Chief Administrative Officer with Agency, Cade oversaw Human Resources, Finance, Logistics and General Administration. Cade did not personally know Employee, but was aware that Employee worked under Chief Starks.

Cade was the Deciding Official in the instant case. In making a final decision, Cade sought the counsel of DCHR and considered the evidence presented to her. Cade testified that she was not bound by the Proposing Official, but certainly considered the Proposing Official's recommendation.

On the day of the incident, an officer spoke with Cade to let her know that the police were called and looking into an alleged assault. No further details were provided to Cade at this time. Cade also alerted Agency's Director that something transpired and the police were called. Outside of these dealings, Cade did not have much to do with the case until she was assigned as the Deciding Official.

In making her final decision, Cade reviewed a report by Monique Bocock, Agency's General Counsel, along with the Proposing Official's (Dennis Stark) investigation and recommendation. It was Cade's understanding that the Proposed Adverse Action Notice took into account what Mr. Starks believed was the correct version of Chapter 16 of the District Personnel Regulations (DPR/DPM).

Cade stated that she had a long and lengthy discussion with DCHR about what was the proper version of Chapter 16 of the DPM to apply in this case. Cade had a concern because Mr. Starks proposed a suspension and the suspension was based on the incorrect version of Chapter 16. The version of Chapter 16 that Mr. Starks relied upon was not the correct version because it had not been ratified or adopted by the union.

Cade confirmed with DCHR and was instructed to use the older version of Chapter 16 of the DPR. Cade was advised that some agencies who had reached an agreement with the collective bargaining unit were using the newer version of Chapter 16. However, the collective

bargaining unit that was a part of Agency had not reached an agreement in regards to Chapter 16. Thus, Cade relied upon the older version of Chapter 16 of the DPM which provided that an assault should result in an immediate dismissal, despite the proposing official recommending a suspension.

After review of Ms. Bocock's report, Mr. Starks' report (proposing official), and the hearing officer's report, Cade concluded that an assault by Employee occurred and that Employee should be dismissed based on the older version of Chapter 16 of the DPM.

On cross-examination, Cade testified that she did not heighten the proposed suspension to a termination, but that she used a different version of the DPM that was used by the proposing official. From Cade's understanding, the older version of the DPM's Table of Appropriate Penalties only provided for termination, and not a suspension. Cade further testified that even if the newer version of the DPM was applied here, she still would have opted to terminate Employee given the egregious nature of the offense. Cade also felt that Agency had an obligation to protect Ms. Gibson-Colbert from a hostile work environment.

Dean Aqui ("Aqui") Tr. 46-61

Aqui is a Supervisory Attorney Advisor for Negotiations in the Office of Labor Relations and Collective Bargaining for the District Government ("OLRCB"). Once union contracts expire and they are renewable either by management or the union, this activity falls under Aqui's purview. Aqui also supervises impacts and effects ("I & E") bargaining. Aqui explained that impacts and effects bargaining is when an issue comes up prior to the expiration of the bargaining agreement and management decides to exercises one of its statutory prerogatives then that particular issue is subject to impact and effects bargaining. Aqui gave the following example: if management wanted to set the tour of duty for its employees midway through the bargaining agreement, then it would notify the union through OLRCB that it intends to take this step. If the union makes a timely demand to negotiate the impact and effect of this change, then management would be required to engage in the negotiation exercise. The union could request that the implementation of such a change is delayed to allow employees to find daycare that meets the newly proposed tour of duty hours.

Aqui further explained that he would typically send out an email notice to the unions that management is seeking to make a change. Management typically provides 30 days' notice of the intended implementation and will ask the union to respond by a certain date of their intention on engaging in the I & E process.

There is currently an ongoing I & E bargaining regarding Chapter 16 of the DPM, which began in November 2015. Employee's union, AFGE Local 1975, was one of the unions to request I & E bargaining regarding Chapter 16. Agency's Exhibit 1 addresses correspondence between management and the unions regarding revisions to Chapter 16. AFGE Local 1975's then-president, Cliff Lowery, responded to an email from Mr. Aqui and indicated that the union would like to engage in the I & E process. The email correspondence also states that an email notice of the union's desire to engage in I & E is sufficient. As of the date of the evidentiary

hearing, the I & E process has not been finalized between management and the AFGE and its locals.

Aqui testified that he has been with D.C. government for a number of years and has worked with Mr. Lowery on numerous occasions regarding bargaining. Mr. Lowery has requested bargaining verbally, by formal letter, and also via email exchange. Aqui stated that the method by which the union request to engage in I & E does not matter.

Mr. Brown, one of Aqui's direct reports, handles the I & E bargaining for AFGE.

Herman Brown ("Brown") p. 62-73

Brown is currently an attorney advisor with OLRCB. In this capacity, Brown handles negotiations, arbitrations, grievances, trainings and typically serves at the chief negotiator on a lot of contracts regarding unions with the District Government. Brown testified that AFGE Local 1975 has been currently engaged in I & E bargaining regarding Chapter 16 (discipline) of the DPM for a little over a year. The I & E bargaining process came about when DCHR promulgated new rules under Chapter 16. The process began around January 2016, however, a Memorandum of Understanding (MOU) has not been signed; thus the process has not been completed for Local 1975.

Brown explained that if a particular local is still undergoing the I & E process regarding an issue, in this case, Chapter 16 of the DPM, then the older version of a particular section of the DPM would be applicable until an MOU is signed adopting the updated version. Brown further explained that if a local was still undergoing the I & E bargaining, and an agency implemented discipline under the newly promulgated section then that would be inappropriate. Brown stated that OLRCB has been engaged in group I & E with several locals from AFGE. He further stated that Gina Walton, Local 1975's current president, has been engaged in the I & E process with respect to the newly promulgated Chapter 16 of the DPM.

Brown testified that most of the time, a request to engage in I & E comes through Mr. Aqui. Brown further stated that there is no formal way to request an I & E bargaining. Sometimes the requests are through phone calls to Mr. Aqui, through emails, or letters. Because Chapter 16 deals with discipline of union members, I & E over this chapter is usually more involved than most I & E bargaining.

Kevin Stokes ("Stokes") p. 74-96

Stokes is currently employed by OLRCB as the Chief of Staff. In this capacity he performs litigation work, negotiates collective bargaining agreements for District agencies. Stokes also serves in many administrative capacities overseeing administrative staff, serves as the office's risk manager, and serves as the office's Freedom of Information Act ("FOIA") Officer, as well as oversees human resources, including ADA and FMLA Coordinator for OLRCB.

Because OLRCB is part of the Office of City Administrator ("OCA") they have two different FOIA officers. Stokes is responsible for requests specific to OLRCB as the sub-agency of the Office of City Administrator. Stokes testified that sometimes FOIA requests come directly to him, or sometimes they were sent to OCA and then forwarded to him. Once Stokes receives a FOIA request, he reviews it and if he does not know where to find the answer he will ask a colleague for assistance in addressing FOIA requests.

Stokes testified specifically about receiving a FOIA request from Employee in this case. Stokes testified regarding Agency's Exhibit 4, which is an amended response issued to Employee's FOIA request. The FOIA request response was amended because it was brought to Stokes' attention that he erroneously omitted AFGE 1975 from the list of unions which were engaged in the I & E process. The amended response was issued October 16, 2017.

Stokes first received Employee's FOIA request in February 2017.[5] In preparation for responding to this FOIA request, Stokes spoke with Dean Aqui, the negotiations supervisor, and Repunzell Bullock, who sometimes keeps a log of certain I & E bargaining. He gathered information from these individuals to respond to the FOIA request. At the time of his initial response, Stokes was not aware of the email exchange between Aqui and Cliff Lowery, then-president of AFGE 1975. Based on this email correspondence, Stokes needed to amend his initial response to Employee's FOIA request.

On Cross-examination Stokes testified about his initial response on February 24, 2017, to Employee's FOIA request. AFGE 1975 was not included in Stokes' response to question 1 in Employee's FOIA request. Specifically, the FOIA request sought "A list of names and dates of union, locals and collective bargaining units that went into impact and effect on the new chapter 16 corrective and adverse; enforced leave; and grievances." Stokes explained that their office is not centralized when it comes to requests to engage in I & E bargaining. He further explained that there is not a standard form that unions submit when they request to engage in I & E bargaining. Stokes took ownership of erroneously omitting AFGE 1975 in his initial response to Employee's FOIA request, and explained the oversight. He further explained that this FOIA request was different from a traditional FOIA request in the sense that people usually seek documents and/or records in Agency's possession. In this instance, however, Employee's FOIA request called for OLRCB to create a document setting forth the unions and locals that were engaged in the I & E bargaining.

RonTreece Gibson-Colbert ("Gibson-Colbert") Tr. 98-127

Gibson-Colbert is currently employed with Agency as a Vehicle Enforcement Officer ("VIO"). She has held this position for two years. Gibson-Colbert and Employee both worked the same shift for a period of time as vehicle enforcement officers. When Gibson-Colbert first began with Agency, she and Employee had a cordial relationship. Around October 2015, their relationship changed when an incident arose between the two of them on the 3:30 to midnight shift. Specifically, there was a stop with Officer Ward (Employee) and Mr. Diggs, another vehicle enforcement officer, where Gibson-Colbert and Officer Morgan went to provide back up.

[5] See Employee Exhibit 1.

Employee explained to Gibson-Colbert about a ticket that she wrote to a limousine driver. Because Gibson-Colbert did not fully understand the ticket, she asked Employee for further explanation, which Employee provided. Subsequently, Gibson-Colbert went to seek further clarification and explanation from the chief about the ticket Employee wrote to the limousine driver. After this incident, Gibson-Colbert stated that Employee stopped speaking with her.

Gibson-Colbert also described an incident that took place in November of 2015 when she was entering a room when Employee was attempting to get out of the room. When the two of them passed each other, Employee pushed Gibson-Colbert and she fell back into Officer Morgan. Gibson-Colbert was puzzled by the incident. After this, the two stopped speaking to each other in passing.

Another incident was described which occurred in 2016, where Gibson-Colbert was going into the locker room and Employee was coming out of the locker room and bumped Gibson-Colbert's shoulder and stated, "and what," which Gibson-Colbert interpreted to mean "and what are you going to do?" Gibson-Colbert responded by laughing off the matter and proceeded in the locker room. Gibson-Colbert testified that there was also enough room for Employee to avoid bumping her.

Employee sent an email on October 10, 2016, to Agency's Chief Enforcement Officer, Dennis Starks, which described an incident that occurred on October 6, 2016, and her overall discomfort in working with Employee.[6]

Agency's Exhibit 6 provides photos of Agency's workspace layout, which includes the general area of the locker room, the roll call room, and the supervisors' section.

On the date given rise to the events surrounding the instant case, on November 17, 2016, Gibson-Colbert was working the 8:00 a.m. to 3:30 p.m. shift. Gibson-Colbert was standing with her arm resting on the cubicle, behind the pillar as seen in Agency Exhibit 6.[7] She was speaking with two other VIOs, Officer Morgan and Officer Earle. Employee then walked towards the back of the hallway in the direction of a supervisor's desk. The officers standing by the cubicle then noticed Employee walking towards them when Employee bumped Officer Morgan, whose back was turned towards Employee. After bumping Officer Morgan, Employee then bumped Gibson-Colbert, despite there being plenty of space on the opposite side for Employee to walk past. Employee bumped Officer Morgan, a male officer, enough to move him. After bumping Officer Morgan, Gibson-Colbert was also bumped with enough force which caused her to take a step back. Officer Morgan then attempted to calm Gibson-Colbert's frustration. Gibson-Colbert then went to the roll call room to tell Assistant Chief Bowden what just occurred. She was then instructed to put the incident in writing.

Gibson-Colbert testified that she was upset, mad, and irritated after being bumped by Employee. She also feared for her safety.

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[6] See Agency Exhibit 5.
[7] Agency Exhibit 6, Bate Stamp 16.

Employee was then asked by Assistant Chief Bowden to leave for the day, at which point, Employee and Assistant Chief Bowden got into a debate. Employee did not immediately leave, but rather sat on a file cabinet talking on the phone. Gibson-Colbert informed Assistnat Chief Bowden that she was going to call the police because nothing was being done about the hostile working relationship between Employee and Gibson-Colbert. At some time between Gibson-Colbert calling the police and them arriving, Employee left. The police took a report and provided Gibson-Colbert a case number for assault. The next day, Gibson-Colbert reported to work and then went to the police precinct. The police report was admitted as Agency's Exhibit 8. Gibson-Colbert also submitted an incident report to Agency, which was admitted as Agency's Exhibit 7.

William Morgan ("Morgan") Tr. 129-143

Morgan is currently a VIO with Agency. In this capacity, he is charged with policing and regulating taxicabs, as well as Uber and limousines throughout the city. Morgan and Employee went to training together and worked alongside each other nearly every day. He described his working relationship with Employee as "pretty good" and he did not see anything wrong with it.

Morgan described the incident that occurred on November 17, 2016: He was standing in the front of the office by the cubicle talking to Officer Gibson-Colbert and Officer Earle. While standing there he felt a bump on his left side and saw it was Employee. He also observed Employee bump Officer Gibson-Colbert on her right shoulder as she was walking by to drop papers off at Assistant Chief Bowden's desk. As Employee was coming back, Morgan observed Employee give Gibson-Colbert a "nasty look." Morgan could tell that Gibson-Colbert was mad so he grabbed her to calm her down, then Gibson-Colbert went and told Bowden what had occurred.

Morgan stated that Employee bumped him forceful enough to move his whole upper body and said that it was not a "brush past." No words were exchanged between Morgan and Employee during this encounter. Morgan observed Employee bump Gibson-Colbert with enough force to push her right shoulder back. He also saw that Gibson-Colbert had a look of anger in her face. While calming Gibson-Colbert down, Morgan advised her that she should go report the incident to Bowden.

When Bowden confronted Employee about the incident with Gibson-Colbert, she raised her voice at which point another co-worker told Employee to relax and realize that she is talking to a supervisor. Employee also told Bowden that she should not be questioning her in front of her peers. Bowden then told Employee to leave for the day.

Morgan was present when the police arrived and he declined to file any charges against Employee. Morgan provided a written report of the incident to Agency which was submitted as Agency's Exhibit 9.

Morgan testified that he witnessed at least one other incident where Employee bumped Gibson-Colbert and did not say excuse me.

Dennis Starks ("Starks") Tr. 144-165

Starks has held the position of Agency's Senior Compliance Policy Advisor since July 2017. Prior to that, beginning in December of 2013, he was Agency's Chief Enforcement Officer. In this capacity, Starks supervised Employee. Starks also served as the Proposing Official in this matter.

Starks testified regarding an email sent to him by VIO Gibson-Colbert reporting an October 6, 2016 incident, involving Employee, Gibson-Colbert, and other Officers. As a result of the reported incident, Starks stated that the Agency engaged in a group counseling session.

On the date given rise to the instant action, Mr. Starks was away from the office for most of the day. Upon his return to the office, he received a report of the incident and was informed that there was an allegation of assault. Mr. Starks testified to the contents of the administrative investigation report, prepared by Ms. Bocock and submitted to him for review on or about December 1, 2016. This report was admitted as Agency's Exhibit 10. Upon review, he learned that an assault had taken place against VIO Gibson-Colbert and VIO Morgan based on the incident report, the police report, and the investigating official's conclusions.

Although Ms. Bocock's recommendation for penalty was a suspension, Starks reached his own recommendation after he reviewed the investigative report as well as Chapter 16 of the DPM and the *Douglas* factors. Based on this review, he proposed that a suspension, utilizing the revised version of Chapter 16, was an appropriate penalty.[8] It was not until after he made that recommendation that he was informed that Employee's union was still operating under the previous version of Chapter 16, which required dismissal for the first offense of assault.[9] Mr. Starks also stated that the Deciding Official in disciplinary matters was not bound by his recommendation for discipline.

Employee's Case-in-Chief

Yeetta Ward "("Employee") Tr. 166-202

Employee is currently employed by Prince George's County Government Revenue Authority and Burlington Coat Factory. Employee previously worked for Agency from April 2005 until her removal as a VIO February 1, 2017. Employee was a member of AFGE Local 1975 throughout her tenure with the agency.

On November 17, 2016, Employee returned to the office around 3:30 p.m. after patrolling vehicles. Employee had paperwork that she needed to turn in and inquired with a colleague to determine which supervisor to turn it into. Employee was advised that she was to turn the paperwork into Ms. Bowden by placing it on her desk.

[8] See Appellant's Motion to Supplement the Record, Exhibit 4 (September 29, 2017).
[9] *See* Id, Exhibit 5.

As Employee headed towards Bowden' desk, VIOs Earle, Gibson-Colbert, and Morgan were standing in front of the cubicle and Employee "hurried through them." Employee also stated that as she was walking towards them, they began walking towards her. Employee described walking through the individuals standing by the cubicle as working through a crowded metro train or bus. Employee does not recall coming into contact with VIO Gibson-Colbert or Morgan other than similar contact one would have walking through a crowded metro train.[10] Employee also testified that there were no words exchanged between her and VIO Gibson-Colbert or Morgan. Further, Employee testified that she removed her headphones from her ears when she heard her name called by Ms. Bowden.[11] Employee testified that Ms. Bowden asked her if she bumped VIO Gibson-Colbert and she responded by telling Ms. Bowden not to question her in front of her coworkers. After a verbal exchange with Ms. Bowden, she was dismissed for the day. Employee testified that she left the Roll Call room but sat outside of the room because she had to wait for her sister to come and pick her up from work.[12] Shortly after she departed the premises, Employee drafted a memorandum detailing her perspective regarding the November 17, 2016 incident and her complaints of retaliation and preferential treatment within the workplace.[13]

Employee later learned from a coworker that the police had been called which prompted her to call the Seventh District police station who informed her that someone filed a complaint against her.[14] The following morning, Employee contacted Mr. Starks to inquire whether she should report to work that day and he advised her to report to work, but go directly to the Roll Call room and wait for her union representative. When the union representatives arrived, the union representative, Employee, and Mr. Starks had a meeting in which Employee was advised that she was being placed on administrative leave pending investigation.

Following the meeting, Employee reported to the Seventh District Police Station to provide the assigned detective, Detective Hall, with a copy of the report she had given to Mr. Starks and her contact information. Employee was not arrested, nor formally charged with assault. At the conclusion of the administrative investigation into the matter, Employee received a letter notifying her that she was terminated effective February 1, 2017.

On cross examination, when Employee was asked about her previous reports against VIO Gibson-Colbert and Morgan, she clarified that she made a verbal complaint with Agency's Human Resources department on October 19, 2016, nearly one month prior to the incident.[15] Employee acknowledged the eyewitness accounts of VIOs Gibson-Colbert and Morgan stating that they were standing still when Employee approached them on the date of the incident, yet contended that they, along with VIO Earle, were walking towards her.[16] Employee also testified

[10] Tr. 175.
[11] Tr. 176-77
[12] Tr. 178.
[13] Tr. 181-82; *See* Employee's Exhibit 3.
[14] Tr. 179.
[15] Tr. 193-94.
[16] Tr. 197.

that she was aware that VIO Gibson-Colbert filed a police complaint alleging assault against her.[17]

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.

The undersigned was able to examine both the testimonial and documentary evidence presented by the parties throughout the evidentiary hearing and the documents of record. Employee was removed from her position based on an alleged assault committed against VIO Gibson-Colbert and Morgan on November 17, 2016. Agency has shown by preponderance of the evidence that Employee's removal was for cause and that removal was appropriate under the circumstances. Furthermore, Agency has shown that Employee was subject to the older version of the District Personnel Manual (August 27, 2012) as a member of AFGE Local 1975 when the instant disciplinary action was taken.

Applicable version of Chapter 16 of the DPM

The collective bargaining agreement (CBA) between Agency and AFGE Local 1975, the union in which Employee belonged, provides in relevant part:

> If the Employer desires to institute a major change that has a significant impact upon the term(s) or condition(s) of employment of the entire bargaining unit or any group of bargaining unit employee, the Employer shall provide the union with advance notice and upon written request of the Union the parties shall promptly negotiate the impact of such change.[18]

[17] Tr. 198.
[18] Appellant's Motion to Supplement the Record, Exhibit 1at 60.

This provision is referred to as impacts & effects (I & E) bargaining. This is the provision in which the parties base their arguments on whether the older Chapter 16 of the DPM or newer Chapter 16 of the DPM applies in this case. Agency maintains that the older version of Chapter 16 of the DPM, effective August 27, 2012, applies in the instant case. Employee argues that the newer Chapter 16 of the DPM, effective February 26, 2016, applies here. The difference in the two versions of Chapter 16 speaks to the appropriateness of the penalty. The Table of Penalties in the older version of Chapter 16 provides that the appropriate penalty for a first time offense of assault or fighting on duty calls for removal.[19] The Table of Illustrative in the newer version of Chapter 16 of the DPM provides that the range of penalty for a first time occurrence of assault ranges from a fourteen (14) day suspension to removal.[20]

The testimonial and documentary evidence demonstrate that in November 2015, AFGE Local 1975's then-president, Clifford Lowery, requested to engage in I & E bargaining when the new version of Chapter 16 was proposed. In a November 12, 2015 email to Aqui, Mr. Lowery stated, "[o]f course I want to engage in I & E." Mr. Lowery's email was in response to an email sent by Aqui on the same day, to union colleagues asking them to indicate whether they wished to engage in I & E bargaining regarding the revised version of Chapter 16 of the DPM.[21] As testified by Brown and Aqui, there is no formal process that union representatives must follow when submitting a request to engage in I & E bargaining, and that an email response was sufficient.[22]

Here, as Brown testified, because Local 1975 is still undergoing I & E bargaining regarding Chapter 16 of the DPM, the older version of Chapter 16 is applicable until an MOU is signed and the newer version is adopted. Brown further explained that if a local was still undergoing the I & E bargaining, and an agency implemented discipline under the newly promulgated section, that would be inappropriate. The evidence of record confirms that Agency and Employee's union, AFGE 1975, remain engaged in the I & E process.[23]

Because the parties had not yet agreed to the implementation/applicability of the newer version of Chapter 16 to members of Employee's union, I find that Agency was justified in invoking provisions under the old version of Chapter 16 as its basis for cause justifying Employee's removal.

Employee attempts to rely on Mr. Stokes' initial FOIA response indicating that AFGE Local 1975 was not a union that was currently engaged in I & E bargaining.[24] However, Mr. Stokes testified that his initial FOIA response in February 2017, which omitted Local 1975 as one of the bargaining units who were engaged in I & E bargaining, was his own administrative error.[25] Stokes addressed his discovery of this error with an amended FOIA response, issued in October 2017, which indicated that AFGE Local 1975 was indeed a union that was currently

[19] *See* DPM § 1619.5(c) (August 27, 2012).
[20] *See* DPM § 1607(a)15 (February 26, 2016).
[21] Agency's Exhibit 1, p. 2-3.
[22] Tr. 54-55, 72.
[23] See Agency's Exhibit 10, p. 34
[24] See Employee Exhibit 1 and 2.
[25] Tr. 89.

engaged in I & E bargaining.[26] I find Strokes' explanation of his administrative error credible. Thus, I find that Employee was subject to the old version of Chapter 16 since her union, AFGE Local 1975, was engaged in I & E bargaining at the time of the imposed discipline.

Whether Agency had cause to take adverse action against Employee for: Any on-duty or employment-related act or omission that Employee knew or should reasonably have known is a violation of the law, specifically: assault or fighting on duty.

Agency is required to prove the facts with respect to each of the alleged acts of misconduct by a preponderance of the evidence.[27] Pursuant to OEA Rule 628.1, "preponderance of the evidence" is defined as "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 District of Columbia Superior Court has held that the OEA should 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 violated.[28] In Agency's written closing arguments, it provides a generic definition of assault as set forth in Black's Law Dictionary that it relied upon: Assault is generally defined as the threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact, or the act of putting another in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery.[29] In line with this general definition, Agency also cites to the D.C. Criminal Code which defines the simplest form of assault as nothing more than threatening another in a menacing manner.[30]

In Employee's written closing arguments she highlights that the District of Columbia's assault statute does not enumerate elements of the offenses. She further points to *Alfaro v. United States*[31] which held that, in the absence of a statutory definition, the District of Columbia Superior Court has applied the common law definition of assault.

Recently, the District of Columbia Superior Court addressed employee discipline based on misconduct of assault in *Day v. District of Columbia Public Works*.[32] In *Day*, the Court addresses the various means by which the crime of assault may be proven.[33] Specifically, the Court addresses "different species of simple assault," including the "intent to frighten assault" and "attempted-battery assault." In recognizing the various forms of assault, District of Columbia courts discuss the difference in the required showings of intent. "Attempted-battery assault" requires an intent to use actual violence against the victim, whereas "intent-to-frighten"

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[26] Agency's Exhibit 4.
[27] OEA Rule 628.1, 59 DCR 2129 (March 16, 2012)
[28] *See D.C. DOT v. D.C. OEA*, 2012 CA 002979 P (MPA) (2014).
[29] Black's Law Dictionary, 109 (7th ed. 1999).
[30] *See* D.C. Code § 22-404 (2001).
[31] 859 A.2d 149 (D.C. 2004)
[32] Case No. 2016 CA 5498 P(MPA) (2018).
[33] *Id*.

assault requires proof that Employee intended to cause injury or to *create apprehension* in the victim.[34]

Based on the testimonial and documentary evidence, and applying any of the definitions of assault discussed above—"threatening in a menacing manner" (D.C. Code § 22-404), the definition as set forth in Black's Law Dictionary, "intent to frighten assault," "attempted-battery assault" or the common law definition of assault— I find that Employee committed an assault by using force that caused VIO Gibson-Colbert to have a reasonable apprehension of an offensive contact. VIOs Gibson-Colbert and Morgan both testified that on November 17, 2016, they were "bumped" by Employee with such a force as to cause them to lose their balance.[35] Both witnesses credibly testified that they were standing at a cubicle with enough room for someone to get around them if needed. After making contact, Employee did not say "excuse me" or "sorry" but instead gave a "smirk" to VIO Gibson-Colbert.[36] Morgan also testified that when Employee was walking back towards the individuals standing by the cubicle, Employee gave Gibson-Colbert a "nasty look."

To bolster the claim that Employee's contact with VIO Gibson-Colbert was intentional, further context was provided regarding the history of similar incidents between Employee and Gibson-Colbert. In October 2015, VIO Gibson-Colbert questioned a ticket that Employee issued, which led Gibson-Colbert to seek further clarification from Employee. Subsequently, Gibson-Colbert also went to seek additional clarification and explanation from her superior about the ticket Employee issued. After this incident, Gibson-Colbert stated that Employee stopped speaking with her and created a strain on their relationship.

Gibson-Colbert also described an incident that took place in November of 2015 when she was entering a room while Employee was attempting to get out of the room. When the two of them passed each other, Employee pushed Gibson-Colbert and she fell back into Officer Morgan. Gibson-Colbert was puzzled by the incident.

Another incident was described which occurred in 2016, where Gibson-Colbert was going into the locker room and Employee was coming out of the locker room and bumped Gibson-Colbert's shoulder and stated, "and what," which Gibson-Colbert interpreted to mean "and what are you going to do?" Gibson-Colbert responded by laughing off the matter and proceeded into the locker room. Gibson-Colbert credibly testified that there was enough room for Employee to avoid bumping into her.[37] Given the reported history of similar incidents, I find that VIO Gibson-Colbert reasonably believed that Employee's actions on November 17, 2016 were intentional. Employee's previous instances of bumping VIO Gibson-Colbert, led Gibson-Colbert to file a complaint with the police. VIO Gibson-Colbert testified that out of fear for her safety and fear that such conduct would continue, she relied on the police to handle the situation further because nothing was being done by Agency.[38] I found Gibson-Colbert's testimony to very credible and forthright and provided specific details of her run-ins with Employee.

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[34] *See Buchanon v. United States*, 32 A.3d 990, 998 (D.C. 2011).
[35] *See* Tr. 114, 132.
[36] Tr. 116.
[37] Tr. 103-104
[38] Tr. 117; *See also* Agency's Exhibit 8.

In contrast, I do not find Employee's version of the incident credible. Namely, Employee's rendition that VIOs Earle, Gibson-Colbert, and Morgan began walking towards her as she was walking towards them lacked credibility. All documentary and testimonial evidence, other than Employee's testimony, provides that the other employees were simply standing by a cubicle. By Employee's own account, she "hurried through them" and no words were exchanged between her and Gibson-Colbert or Morgan. As Gibson-Colbert testified, there was plenty of space on the opposite side of the group for Employee to pass them without having to walk through the group. VIO Morgan, who was also an eyewitness to the November 2016 incident, provided very credible testimony and spoke forthright about the interactions he has observed between Employee and Gibson-Colbert. Given the documented background and context of Employee and Gibson-Colbert's working relationship, I find that Employee committed an assault against Gibson-Colbert and Morgan; thus, giving Agency cause to take adverse action against Employee.

Appropriateness of the Penalty

Employee contends that irrespective of whether the older or newer version of Chapter 16 of the DPM applies, the Deciding Official's decision to heighten the penalty proposed by the proposing official was inappropriate. Employee cites to Section 1623.2(b) of the new Chapter 16 of the DPM and Section 1613.2 of the Old Chapter 16 of the DPM to support her argument.[39] While Employee's argument that a Deciding Official is not permitted to increase a Proposing Official's proposed penalty holds true, we must delve into what constituted Agency's proposed penalty from the Proposing Official, Mr. Starks.

Here, during the internal investigation by Agency, the Proposing Official, Mr. Starks, issued a memorandum, dated December 5, 2016, to the Deciding Official, Sanya Cade, and recommended a penalty of "no less than 30 days."[40] Approximately one month later, Mr. Starks issued a letter "Re: Advance Written Notice of Proposed Removal," to Employee on January 6, 2017, proposing to remove Employee from her position.[41] Mr. Starks' decision to increase his original recommendation from a suspension of "no less than 30 days" to a recommendation of removal was after he was informed that Employee's union was still operating under the older version of Chapter 16 of the DPM, which required dismissal for the first offense of an assault.[42]

Although Starks issued a memorandum to the Deciding Official recommending a suspension of no less than 30 days, this memorandum does not appear to be the "Advance Written Notice" contemplated by Chapter 16 of the DPM (neither the older nor newer version). The memorandum dated December 5, 2016, was not addressed to Employee informing her of

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[39] Section 1623.2(b) of the new Chapter 16 of the DPM provides that the deciding official shall "either sustain or reduce the proposed or summary action, remand the action to the proposing official with instructions for further consideration, or dismiss the action."
Section 1613.2 of the older Chapter 16 of the DPM provides that the deciding official "shall either sustain the penalty proposed, reduce it, remand the action with instruction for further consideration, or dismiss the action with or without prejudice, by in no event shall he or she increase the penalty.

[40] *See* Appellants Motion to Supplement the Record, Exhibit 4 (September 29, 2017)

[41] *Id.*, Exhibit 5. This document is actually dated January 6, *2016*; however, it is apparent that the 2016 date is in error and should read *2017*.

[42] *See* Tr. 156-160; See also DPM § 1619.6(c).

Agency's proposed penalty. Rather, it appears to be an internal memorandum during the course of Agency's investigation of the allegations against Employee. The Advance Written Notice issued on January 6, 2017[43] was addressed to Employee and informed her of the Agency's proposal to removal her from her position. Thus, I find that the Advance Written Notice was issued to Employee on January 6, 2017, informing Employee of Agency's proposal to remove her from her position. Because the Advance Written Notice, issued January 6, 2017, provided a proposed penalty of removal, and not a suspension of "no less than 30 days," I do not find that Agency violated Section 1613.2 of the older DPM.[44]

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, as discussed above, I find that Agency satisfied its burden of proof regarding the "any on-duty or employment-related act or omission that Employee knew or should reasonably have known is a violation of the law, specifically: assault or fighting on duty" charge.

As previously discussed, the applicable version of Chapter 16 of the DPM in the instant matter went into effect on August 27, 2012. The Table of Penalties under the older version of the DPM provides, in pertinent part:

CAUSES SPECIFICATIONS/GENERAL CONSIDERATIONS	**FIRST OFFENSE**	**SECOND OFFENSE**	**THIRD OFFENSE**
6. Any On-Duty or Employment-Related Act or Omission that an Employee Knew or Should Reasonably Have Known is a Violation of Law:			
(c) Assault or fighting on duty; battery; violation of EEO laws; such as incidents of sexual harassment involving physical or financial threats; touching (Class Four felony or stalking); or other violation of EEO law that result in the loss of employment; misuse of funds; resources or property; unfair labor practices or illegal work stoppage; use or distribution of controlled substances; etc.	Removal	N/A	N/A

[43] The 2016 date listed on this document is an apparent error and should be dated for 2017.
[44]For argument sake, I also find that Agency did not violate Section 1623.2(b) of the new version of the Chapter 16 of the DPM.

The penalty for a first time offense of assault is removal.[45] The Agency's decision to terminate Employee from her position was within the acceptable range of discipline under the Table of Appropriate Penalties. Additionally, I find that Agency considered relevant *Douglas* factors in its decision to remove Employee.[46] 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 removal of Employee from her position as a Public Vehicle Inspection Officer is **UPHELD**.

FOR THE OFFICE:

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Arien P. Cannon, Esq.
Administrative Judge

[45] D.C. Mun. Regs. Tit.6-B, § 1619.1(5)(c).

[46] *See* Agency Exhibit 11. *See also Douglas v. Veteran Administration*, 5 M.S.P.B. 313 (1981); The *Douglas* factors are:
(1) The nature and seriousness of the offense, and its 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 the 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 where 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
(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.