THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
VALERIE SANDERS,	)	
Employee	)	OEA Matter No. 1601-0226-12
	)	
v.	)	
	)	Date of Issuance: June 21, 2016
DEPARTMENT OF TRANSPORTATION,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Valerie Sanders ("Employee") worked as a Traffic Control Officer with the Department of Transportation ("Agency"). Agency removed her for "any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law: assault, battery, or fighting on duty, pursuant to DPM § 1603.3(e) and § 1619.1(5)(c)" and "any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious: use of abusive or offensive language, pursuant to DPM § 1603.3(g) and § 1619.1(7)." Specifically, Employee was charged with physically pushing a citizen who questioned why she was issuing a parking ticket to him; using profanity and raising her middle finger to a school bus driver; and using profanity with her supervisor when presented with the

notice placing her on administrative leave.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on August 29, 2012. She denied committing the alleged infractions. As a result, she requested that she be reinstated to her position.[2]

On October 5, 2012, Agency filed its Answer to Employee's Petition for Appeal. It explained that it had cause to remove Employee from her position. Agency contended that Employee admitted to her supervisor that she assaulted or threatened another person in a menacing manner, which is a criminal offense in the District of Columbia. Agency claimed that the facts supported that Employee was the aggressor; however, even if she was not, it is undisputed that she used profanity and pushed the citizen, Mr. Aberra. Additionally, Agency stated that Employee voiced obscenities and made obscene gestures to a school bus driver, Ms. Meade. She also cursed at her supervisor during a meeting. Agency further asserted that it considered all of the relevant *Douglas* factors[3] and the range of penalties related to Employee's

[1] *Petition for Appeal*, p. 5-8 (August 29, 2012).
[2] *Id.* at 4.
[3] The *Douglas* factors are provided in the matter *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The court held 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

conducted. Therefore, it requested that Employee's removal be sustained.[4]

The OEA Administrative Judge ("AJ") conducted an evidentiary hearing before issuing her Initial Decision on January 30, 2015. After reviewing the documents submitted by both parties and the testimonies provided, the AJ held that there was evidence to sustain the charge of "any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law: assault, battery, or fighting on duty." The AJ found that Employee's testimony conflicted with the affidavit statements of the other witnesses. Accordingly, she held that Employee initiated the physical altercation with Mr. Aberra. Because pushing Mr. Aberra caused offensive bodily contact, she ruled that there was cause for the charge.[5]

The AJ also found that Employee used offensive language toward her supervisor. As a result, the AJ ruled that Agency also had cause for "any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious: use of abusive or offensive language." However, there was not enough evidence to support Agency's determination that Employee used profanity and raised her middle finger toward Ms. Meade. [6]

As it relates to the *Douglas* factors and range of penalties, the AJ concluded that relevant factors were considered by the Agency. She also opined that Agency acted reasonably when determining the penalty for Employee's actions. Therefore, she upheld its termination action against Employee.[7]

Employee filed a Petition for Review with the OEA Board on March 9, 2015. She

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

[4] *Agency's Answer to Employee's Petition for Appeal,* p. 5-7 (October 5, 2012).
[5] *Initial Decision,* p. 11-12 (January 30, 2015).
[6] *Id.*, 12-13.
[7] *Id.*, 14-15.

contends that the Initial Decision was not based on substantial evidence. She argues that the AJ relied on hearsay that was unreliable and faulted her for offering a more detailed account of the incident during the evidentiary hearing. Employee explains that there were no contradictions between her written response and her testimony. She further posits that because Mr. Aberra and Renee Snowden did not testify, it was hearsay to allow the testimony of others who were not present during both incidents.[8]

Furthermore, Employee alleges that the AJ ignored evidence that the proposed removal was not issued by an authorized official, as required by the DPM. She also claims that the AJ failed to consider that Agency did not prove that relevant *Douglas* factors were considered. Thus, Employee requests that she be reinstated to her position with back pay and benefits.[9]

On April 13, 2015, Agency filed a response to Employee's Petition for Review. It contends that Employee offered no support for her argument regarding the proposed removal being decided by an authorized official. It went on to highlight all the references it made in the record to its consideration of the *Douglas* factors.[10]

As for Employee's argument regarding hearsay, Agency provides that in accordance with OEA Rule 626.1, the AJ could rely on all material and relevant evidence or testimony in an evidentiary hearing. It noted that OEA Rule 626.2 provides that an agency is entitled to present its case by oral or documentary evidence. Thus, it is Agency's position that it had cause to remove Employee given the testimony and documents submitted. As a result, it requests that Employee's removal be sustained.[11]

Employee made several arguments on Petition for Review that were not raised before the

[8] *Employee's Petition for Review,* p. 3-12 (March 9, 2015).
[9] *Id.,* 13-17.
[10] *Agency's Answer to Employee's Petition for Review,* p. 4-5 (April 13, 2015).
[11] *Id.,* 6-9.

Administrative Judge, although she had several opportunities to do so. On July 21, 2014, the AJ ordered both parties to submit their closing arguments on this matter by August 29, 2014. Employee elected not to file a closing brief. She, instead, waited until the Initial Decision was issued to raise arguments regarding hearsay testimony; Agency's proposed removal notice; and Agency's lack of consideration of the *Douglas* factors.

In accordance with OEA Rule 633.4, "any . . . legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." The D.C. Court of Appeals held in *District of Columbia Metropolitan Police Department v. Stanley,* 942 A.2d 1172 (D.C. 2008) that "it is a well-established principle of appellate review that arguments not made at trial may not be raised for the first time on appeal." Additionally, the Courts ruled in *Brown v. Watts,* 993 A.2d 529 (D.C. 2010) and *Davidson v. D.C. Office of Employee Appeals,* 886 A.2d 70 (D.C. 2005) that any arguments are waived where a party never attempted to reopen the record to introduce any evidence supporting their argument before the issuance of an OEA Initial Decision. As previously stated, Employee had numerous opportunities to present these arguments to the AJ, but she chose not to. This Board has consistently held that an argument is waived if it was not raised on appeal before the AJ.[12] Thus,

[12] *Sharon Jeffries v. D.C. Retirement Board,* OEA Matter No. 2401-0073-11, *Opinion and Order on Petition for Review* (July 24, 2014); *Latonya Lewis v. D.C. Public Schools,* OEA Matter No. 1601- 0046-08, *Opinion and Order on Petition for Review* (April 15, 2014); *Markia Jackson v. D.C. Public Schools,* OEA Matter No. 2401-0138-10, *Opinion and Order on Petition for Review* (August 2, 2013); *Darlene Redding v. Department of Public Works,* OEA Matter No. 1601-0112-08R11, *Opinion and Order on Petition for Review* (April 30, 2013); *Dominick Stewart v. D.C. Public Schools*, OEA Matter No. 2401-0214-09, *Opinion and Order on Petition for Review* (June 4, 2012); *Calvin Braithwaite v. D.C. Public Schools*, OEA Matter No. 2401-0159-04, *Opinion and Order on Petition for Review* (September 3, 2008); *Collins Thompson v. D.C. Fire and EMS*, OEA Matter No. 1601-0219-04, *Opinion and Order on Petition for Review* (November 13, 2008); *Beverly Gurara v. Department of Transportation*, OEA Matter No. 1601-0080-09, *Opinion and Order on Petition for Review* (December 12, 2011); *Ilbay Ozbay v. Department of Transportation,* OEA Matter No. 1601-0073-09R11, *Opinion and Order on Petition for Review* (October 28, 2014); and *Yordanos Sium v. Office of State Superintendent of Education,* OEA Matter No. 1601-0135-13, *Opinion and Order on Petition for Review* (May 10, 2016).

because these arguments were just raised on Petition for Review, we cannot consider them on their merits. Accordingly, Employee's Petition for Review is denied.[13]

[13] *Assuming arguendo* that we could consider the merits of this case, we believe that there is substantial evidence to uphold the Initial Decision and Agency's removal action. Nothing in the record establishes that the AJ's reliance on affidavit evidence was improper. As Agency provided, it could have relied on material evidence or testimony presented through documentary evidence or orally. Moreover, in accordance with OEA Rule 626.3, Employee could have objected to the admission of any evidence during the evidentiary hearing or by a written motion. However, she chose not to object to the alleged hearsay testimony, proposed removal notice, or *Douglas* factors until after the issuance of the Initial Decision.

Additionally, Employee raises several witness credibility arguments. This Board has consistently held that it will not question an AJ's credibility determinations. In accordance with *Raphael v. Okyiri*, 740 A.2d 935, 945 (D.C. 1999) (quoting *Kennedy v. District of Columbia*, 654 A.2d 847, 854 (D.C.1994); *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services*, 683 A.2d 470, 477 (D.C.1996); *Kennedy*, supra, 654 A.2d at 856; and *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C.1989)), due deference must be accorded to the Administrative Judge's credibility determinations, both by the OEA, and by a reviewing court. The Court in *Raphael* held that the Administrative Judge's findings of fact are binding at all subsequent levels of review unless they are unsupported by substantial evidence. This is true even if the record also contains substantial evidence to the contrary. Thus, this Board cannot second guess the AJ's credibility determinations against the affidavit statements provided.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DISMISSED**.

FOR THE BOARD:

_____
Sheree L. Price, Interim Chair

_____
Vera M. Abbott

_____
A. Gilbert Douglass

_____
Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.