THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CECIL BYRD,	)	
Employee	)	
	)	OEA Matter No.: 1601-0040-15
v.	)	
	)	
	)	Date of Issuance: December 19, 2017
UNIVERSITY OF THE	)	
DISTRICT OF COLUMBIA,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Cecil Byrd ("Employee") worked as the Director of the Office of Veterans Affairs at the University of the District of Columbia ("Agency"). On January 20, 2015, Agency notified Employee that he was being terminated from his position. According to Agency, the termination action was based on Employee's ongoing, poor performance. In addition, Agency alleged that Employee placed the University at risk of losing its ability to obtain funding from the U.S. Department of Veterans Affairs ("VA") to educate and serve students who are Veterans. The effective date of Employee's termination was January 31, 2015.

On February 2, 2015, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). In his appeal, Employee argued that Agency failed to follow the proper

procedures and that he was not evaluated prior to being terminated. As a result, he requested that OEA reinstate him and that he be permitted to file for damages.[1]

Agency filed its response on April 7, 2015. It contended that Employee was provided with ample notice of his ongoing performance deficiencies and was afforded the opportunity to improve upon his performance. Also, Agency stated that Employee submitted inaccurate and untimely certifications of Veterans' documents to the VA; failed to follow instructions from the VA; and altered documents submitted to the VA. Agency further alleged that there was a conflict of interest with respect to Employee's purchase of school supplies for a Veteran student and because Employee performed work as an Executive Director for a non-profit organization during work hours. Therefore, Agency requested that OEA deny Employee's Petition for Appeal.[2]

An OEA Administrative Judge ("AJ") was assigned to this matter in May of 2015. The AJ held a Status Conference on August 13, 2015, during which he determined that an evidentiary hearing was warranted.[3] Hearings were subsequently held on March 29, 2015 and April 18, 2016, wherein both parties presented testimonial and documentary evidence in support of their positions.

An Initial Decision was issued on February 14, 2017. The AJ first highlighted Title 8, Sections 1506.1 and 1506.2 of the D.C. Municipal Regulations ("DCMR"), which provide that when a personnel authority issues a notice of adverse action it must: provide and serve the notice to the affected employee in writing; state the specific reasons for which the adverse action is being proposed; provide the proposed penalty in the notice; and include a description of the alleged acts and conduct which is sufficient to enable the employee to respond. Next, the AJ stated that Agency notified Employee about his "lackluster on-the-job performance" on more

[1] *Petition for Appeal* (February 2, 2015).
[2] *Agency Answer to Petition for Appeal* (April 7, 2015).
[3] *Order Rescheduling a Prehearing Conference* (July 16, 2015).

than one occasion, and he was counseled several times about what was expected of the position. He further noted that Employee was provided with numerous opportunities to improve upon his job skills but did not. In addition, the AJ opined that Employee's skill deficiencies were detrimental to the Veteran students at Agency because they relied on the proper and timely submission of VA documents in order to obtain the benefits that they were rightfully entitled to. As a result, the AJ held that Agency met its burden of proof in this matter. He further concluded that termination was appropriate under the circumstances. Consequently, Employee's termination was upheld.[4]

Employee disagreed with the Initial Decision and filed a Petition for Review on March 16, 2017. He argues that the AJ's findings were not based on substantial evidence because Agency's adverse action was not taken for cause. Employee reiterates his positon that Agency never formally notified him of his performance deficiencies and that he was not allowed to address any allegations of poor performance prior to being terminated. He also states that Agency failed to provide him with a formal evaluation process. Moreover, Employee posits that several of Agency's witnesses provided false and/or misleading testimony during the hearings.

With respect to his duties as the Director of the Office of Veterans Affairs, Employee maintains that Agency was not familiar with the roles and responsibilities of his position as required by federal regulation. He also reasons that many of the issues Agency raised could have been rectified if Agency had a proper mechanism in place for tracking the information related to Veteran students as required by his job. According to Employee, the AJ also erred by rejecting ninety-five percent of the witnesses that he wanted to testify. Moreover, Employee states that the lack of staff and support personnel contributed to his inability to complete certain tasks. Lastly,

[4] *Initial Decision* (February 14, 2017).

he disagrees with many of the AJ's findings of fact and conclusions of law. Therefore, Employee asks that the Board grant his Petition for Review.[5]

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:
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> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
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> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
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> (c) The findings of the Administrative Judge are not based on substantial evidence; or
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> (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Substantial Evidence

On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[6]

Poor Work Performance

In this case, the Board finds that the AJ's conclusions are based on substantial evidence. Agency's Notice of Proposed Separation stated that its termination action was predicated on

[5] *Petition for Review* (March 16, 2017).
[6] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

Chapter 8B, § 1506 of the DCMR. This regulation provides the following in pertinent part with respect to non-faculty members of UDC:

> 1506.1 When the personnel authority issues a notice of adverse action, the notice shall be in writing and served upon the employee. Specific reasons for which adverse action is being proposed and the penalty proposed shall be specified in the notice.
>
> 1506.2 The notice shall contain a description of the alleged acts and conduct which is sufficient to enable the employee to respond.

Specifically, Agency stated that the termination action was based on Employee's ongoing, poor work performance. In support thereof, the notice enumerated several examples of Employee's unsatisfactory conduct, including, but not limited to:

1. Not certifying Veterans in a timely manner at the beginning of the semester;
2. Not notifying VRC[7] of add/drops and not updating the VA Once system in a timely manner;
3. Discrepancies and errors in credits certified by the Certifying Official;
4. Not providing requested information on Veterans (schedule, credits, last date of enrollment, etc);
5. Altering official VA documents (specifically Form 1905);
6. Purchasing books for a Veteran, which the VA cites as a "clear conflict of interest"

At the time Employee was terminated, there were approximately 220 Veteran students enrolled at Agency. According to the Job Classification Description provided by Agency, the Director of Veterans Affairs was generally responsible for "having knowledge of all military Veterans and their families receiving full education benefits from the VA to enhance their

[7] Veterans Resource Center.

satisfaction and retention with [UDC]."[8] As a practical matter, Employee's primary duty as the certifying official was to certify the Veteran students with the VA in order to facilitate payment for tuition, books, and housing.

However, during the evidentiary hearings, several Agency witnesses testified that Employee refused to learn and implement the processes and procedures for efficiently assisting the Veteran students. Agency's witnesses also provided testimony to support a finding that Employee failed to certify Veterans in a timely manner; failed to attend staff meetings approximately seventy-percent of the time; failed to be available during posted office hours; failed to learn the BANNER system[9]; and submitted inaccurate 28-1905 forms on behalf of Veteran students.[10] Employee's inability to satisfactorily perform the functions of his job resulted in complaints from VA representatives concerning the improper and inaccurate completion of forms that were submitted to VA. Thus, students were placed in jeopardy of being unable to receive their VA benefits. Employee's poor work performance also placed Agency at risk of losing their VA funding.[11]

This Board agrees with the AJ's assessment that Employee exhibited an ongoing pattern of lackluster on-the-job work performance. Employee was notified of his deficiencies by Agency management in his chain of command and was given the opportunity to improve.[12] Instead of improving his skills, Employee shirked his duties by devoting a large amount of his on-duty hours to a personal, non-profit organization, the National Association of Concerned Veterans.

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[8] *Evidentiary Hearing Transcript*, Agency Exhibit 1.
[9] The BANNER system is Agency's comprehensive computer information system.
[10] A Form 28-1905 is an authorization document for services used by the VA. The form states what services the VA will provide to the student, the student's degree program, length of services, and any additional services being requested. The certifying official is required to process the Veteran's enrollment information. *Evidentiary Hearing Transcript*, Volume 1, pgs. 109-110.
[11] *Evidentiary Hearing Transcript*, Volume I, p. 59.
[12] *Id*. at Agency Exhibit 3.

This was a clear conflict of interest with what was required of his position as the Director of Veterans Affairs.

Further, we find that Agency complied with DCMR §§ 1506.1 and 1506.2 by providing Employee with written notice of its proposed termination action. The notice stated the specific reasons for the removal and including a description of the alleged acts and conduct, as required. Employee was also afforded an opportunity to respond to the proposed termination action in writing.[13] Based on the foregoing, we conclude that the AJ's findings are based on substantial evidence.

Performance Evaluation

Next, Employee contends that he was never formally evaluated prior to being terminated by Agency. Therefore, he opines that Agency was in clear violation of procedure. According to the University of the District of Columbia's Performance Appraisal System for Non-Faculty Employees, at the start of each performance cycle, critical element performance goals are established by supervisors for their respective non-faculty employees. The goals are documented on a form called the Performance Management Record ("PMR"). The PMR is used to provide feedback and tracks employee performance during the year.[14]

For the 2013-2014 school year, Employee received an overall performance rating of "Below Expectations." While he did not recall ever being evaluated, UDC's Associate Vice President of Student Development and Success, Dr. Sislena Ledbetter, testified that she completed Employee's PMR and shared it with him after the assessment. The document also reflects that Employee provided written feedback to Dr. Ledbetter under the "First Year Self

[13] *Petition for Appeal*, Attachment 1.
[14] Evidentiary Hearing Transcript, Volume I, Agency Exhibit 13.

Evaluation" section on the PMR regarding his performance.[15] Therefore, Agency provided Employee with a formal evaluation of his work performance prior to the effective date of termination.[16]

Appropriateness of Penalty

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 holding in *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties. The Court in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised."[17] Thus, OEA has consistently held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[18]

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[15] *Id*. at Agency Exhibit 13.
[16] Employee was employed by Agency for approximately fifteen months.
[17] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). Additionally, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that although selection of a penalty is a management prerogative, the penalty cannot exceed the parameters of reasonableness. Moreover, the Merit Systems Protection Board ("MSPB") in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981), provided the following:

> [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.

[18] *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, Opinion and Order on Petition for Review (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

In this case, Employee was placed on notice that his performance was unsatisfactory. Employee continued to exhibited poor work performance for a year prior to his termination, despite being given the opportunity to improve upon his skills. As a result, this Board finds that Agency acted reasonably and did not abuse its discretion in selecting the penalty of termination. Therefore, we will not disturb the AJ's finding.

Witness Testimony

Employee argues that Agency's witnesses provided testimony during the evidentiary hearing that constituted false accusations and hearsay. Employee also believes that the AJ erred by rejecting ninety-five of the witnesses that he wanted to testify. The D.C. Court of Appeals in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. In *Hutchinson v. D.C. Office of Employee Appeals*, 710 A.2d 227 (D.C. 1998), the Court of Appeals provided that "[i]t is settled that hearsay evidence may be admitted in administrative hearings. Administrative tribunals are not required to disregard evidence merely because it is hearsay. In fact, hearsay evidence can serve under some circumstances as 'substantial evidence' on which to base a finding of fact."

Here, the AJ found Agency's witnesses to be both credible and persuasive. Conversely, the AJ found Employee's testimony to be self-serving. The OEA Administrative Judge was the fact finder in this matter. Thus, as this Board has consistently ruled, we will not second guess the AJ's credibility determinations.[19] Moreover, the AJ was allowed to consider hearsay evidence in

[19] *Ernest H. Taylor v D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Derrick Jones v. Department of Transportation*, OEA Matter No. 1601-0192-09, *Opinion and Order on Petition for Review* (March 5, 2012); *C. Dion Henderson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0050-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Ronald Wilkins*

reaching his findings of fact and had the discretion to make rulings on the admission of evidence, including disallowing certain witnesses to testify.[20] Consequently, Employee's arguments are without merit.

Conclusion

Based on the foregoing, Agency's termination action was based on substantial evidence. Employee was warned of his performance deficiencies as the Director of Veterans Affairs, but failed to improve upon his skills prior to being terminated. Thus, this Board finds that Agency proved, by a preponderance of the evidence, that Employee was terminated for cause.[21] Further, Agency complied with § 1506 of the DCMR when it issued its Notice of Proposed Separation. Lastly, the penalty of termination was reasonable under the circumstances. Consequently, Employee's Petition for Review must be denied.[22]

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v. Metropolitan Police Department, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); and *Theodore Powell v. D.C. Public Schools*, OEA Matter Nos. 1601-0281-10 and 1601-0029-11, *Opinion and Order on Petition for Review* (June 9, 2015).

[20] *See Generally* OEA Rule 627.

[21] *See* D.C. Official Code §1-616.51(2001). Under OEA Rule 628.1, 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.

[22] We further note that many of Employee's arguments regarding the Initial Decision are merely disagreements with the AJ's findings of fact and conclusions of law. These disagreements are not a valid basis for appeal *See Michael Dunn v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0047-10, *Opinion and Order on Petition for Review* (April 15, 2014); *Gwendolyn Gilmore v. District of Columbia. Public Schools*, OEA Matter No. 1601- 0377-10, *Opinion and Order on Petition for Review* (September 16, 2014); and *Garnetta Hunt v. Department of Corrections*, OEA Matter No. 1601-0053-11, *Opinion and Order on Petition for Review* (July 21, 2015).

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is **DENIED**.

FOR THE BOARD**:**

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Sheree L. Price, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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P. Victoria Williams

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Jelani Freeman

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.