THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
RALPH WARE	)	
Employee	)	
	)	OEA Matter No.: 1601-0104-09
	)	
v.	)	
	)	Date of Issuance: December 12, 2011
D.C. PUBLIC SCHOOLS	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Ralph Ware ("Employee") was a Bus Attendant with the D.C. Public Schools ("Agency"). As a Bus Attendant, Employee was responsible for escorting the children onto, and off of, the bus and for ensuring their safe arrival into the school building. His duties as a Bus Attendant ceased once Employee was certain that a child had safely reached his or her destination whether it was the school building or the child's home.

On February 26, 2009 Employee was working on a school bus bound for Malcolm X Elementary School. When the bus arrived at the school, Employee made sure that all of the

children had safely entered the school. Employee then went into the building and, upon entering, he noticed that one of the children from his bus was running in the hallway to the cafeteria. When Employee saw this, he entered the cafeteria and approached the child, who was mentally handicapped. Employee then proceeded to walk the child out of the cafeteria and back into the school's hallway. At this point, Employee had the child to reenter the cafeteria, this time walking. Later on that day the child spoke to his mother and told her that Employee had stepped on his feet and choked him. The child's mother then called Agency's Senior Investigator and asked him to investigate the child's claims.

As part of the investigation, the Investigator interviewed the child, two other students, a teacher who witnessed a portion of the incident, and Employee and also viewed a videotape of that portion of the incident that occurred in the cafeteria. Based on his investigation, the investigator determined that when Employee approached the child in the cafeteria, Employee "put his hand on the back of [the child's] neck, kind of in a grabbing motion, [and]. . .walk[ed] [the child] towards the opposite side of the cafeteria."[1] Further, according to the Investigator, the child "was struggling to get away from [Employee.]"[2]

As a result of this incident, Agency charged Employee with committing an act of corporal punishment. On March 10, 2009, Agency notified Employee of its intention to remove him. On March 26, 2009, the removal took effect. Thereafter, Employee timely filed a Petition for Appeal with the Office of Employee Appeals.

The Administrative Judge held an evidentiary hearing in this appeal on March 5, 2010. The Senior Investigator testified on behalf of Agency. According to him, the videotape, coupled with the account of the child and the teacher who observed a portion of

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[1] *Transcript* at page 20.
[2] *Id*.

the incident, indicated that Employee's actions amounted to corporal punishment within the meaning of the regulation.

Employee testified on his own behalf. According to Employee, he entered the school building to use the bathroom which is next to the cafeteria. When Employee saw the child running, he then went into the cafeteria, found the child, and told the child that he was going to have him leave the cafeteria and walk back into the cafeteria as he should have done initially. Employee said that he did this for the safety of the child. Employee also stated that he escorted the child out of the cafeteria, that he was not aggressive with the child, and that he did not hit or grab the child. According to Employee, the only reason he made the child reenter the cafeteria by walking was because he has "seen kids get hurt in the hallways . . . [and he] just wanted [the child] to be safe. . ."[3]

The Administrative Judge began her analysis of this appeal by determining whether Employee's actions amounted to corporal punishment as that phrase is defined in the regulations. According to the regulations, corporal punishment is defined as "the use, or attempted use, of physical force upon, or against, a student, either intentionally or with reckless disregard for the student's safety, as a punishment, or discipline." The regulations go on to provide the following:

> 2403.2 The use of corporal punishment in any form is strictly prohibited in and during all aspects of the public school environment or school activities. No student shall be subject to the infliction of corporal punishment by any teacher, other student administrator, or other school personnel.
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> . . .
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> 2403.5 Conduct prohibited by this section include actual or attempted use of physical force against a student . . .provided that the conduct is not prompted by reasonable efforts at self-defense or the defense of others; is necessary to maintain

[3] *Id.* at page 73.

> or regain order; or is necessary for the safety of the educational environment. . . .
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> 2403.6 The nature and the amount of physical contact reasonably necessary for self-defense, defense of others, protection of the educational environment, or to regain or maintain order shall be dependent upon the factual circumstances of each case. When reviewing those circumstances, the following shall be considered:
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> . . .
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> (b) If the action was taken against a student for the protection of the educational environment or to regain or to maintain order, whether the action taken against the student was (1) taken as a last resort after all other reasonable means had been exhausted, and (2) the least intrusive means of controlling the situation.

Based on the foregoing regulations and the evidence in the record, the Administrative Judge found that Employee did not commit an act of corporal punishment on February 26, 2009. Even though the investigator "testified with clear recollection," the Administrative Judge held that "[t]he strongest evidence, and therefore, the evidence that will be accorded the most weight is Employee's credible testimony that he was not aggressive or violent with the student." The Administrative Judge recognized that Employee was the only eyewitness of the entire incident who was also present at the evidentiary hearing to testify. Furthermore, according to the Administrative Judge, "although [Employee] may have overstepped the bounds of his professional duties by attempting to correct the behavior of the student, he did not inflict the kind of harm that is comprehended by the [regulations]. In fact, …it seems that Employee's action 'was taken against a student for the protection of the educational environment or to regain or to maintain order' and was 'the least intrusive means of controlling the situation.'" Therefore, in an Initial Decision issued March 30, 2010, the Administrative Judge overturned Agency's action and ordered Agency to reinstate Employee with back pay and benefits.

Subsequently, Agency filed a Petition for Review. In the Petition for Review Agency argues that the Initial Decision is not based upon substantial evidence and that it is based upon an erroneous interpretation of the applicable regulations. For these reasons, Agency asks that we grant its petition and reverse the Initial Decision.

Substantial evidence is defined as any "'relevant evidence such as a reasonable mind might accept as adequate to support a conclusion.'" *Mills v. District of Columbia Dep't of Employment Servs.,* 801 A.2d 325, 328 (D.C. 2003 (quoting *Black v. District of Columbia Dep't of Employment Servs.,* 801 A.2d 983 (D.C. 2002)). As long as there is substantial evidence in the record to support the decision, the decision must be affirmed "notwithstanding that there may be contrary evidence in the record (as there usually is)." *Ferreira v. District of Columbia Dep't of Employment Servs.,* 667 A.2d 310, 312 (D.C. 1995). Evidence is substantial if it is "more than a mere scintilla." *Vogel v. D.C. Office of Planning*, 944 A.2d 456, 463 (D.C. 2008) (quoting *Office of People's Counsel v. Pub. Serv. Comm'n*, 797 A.2d 719, 725-26 (D.C. 2002)).

Essentially what Agency is arguing in its Petition for Review is that there is *competing evidence* that would have supported a finding in its favor. For example, Agency believes the Administrative Judge would have found in its favor had she given more weight to the testimony of Agency's witness who had viewed the videotape of the incident and also spoken with the teacher who had seen a portion of the incident. Not only is this speculation, but it ignores the fact that Agency did not produce the videotape nor did it call the teacher to testify on its behalf. As was noted earlier, the only eyewitness to the entire incident was Employee. The Administrative Judge found that Employee's testimony was credible.

It is not necessary that we reexamine every point which Agency believes to be decisive to the outcome of this case. The issue is not whether there is *competing evidence* that

would have supported a finding favorable to Agency. Rather, the issue is whether there is substantial evidence in the record to support the Administrative Judge's finding. We find that there is substantial evidence in the record to uphold the Initial Decision and that it did address all of the issues of law and fact properly raised in the appeal.

Agency's second argument, that the Initial Decision is based upon an erroneous interpretation of the regulations, is without merit as well. Contrary to what Agency states, the Administrative Judge did in fact find that "it seem[ed] that Employee's action 'was taken against a student for the protection of the educational environment or to regain or to maintain order' and was 'the least intrusive means of controlling the situation.'" Employee credibly testified that he "didn't want [the child] to hurt himself," that he "just wanted [the child] to be safe," and that he had "seen kids get hurt in the hallways from not doing what people [had told] them to do." It seems to us that because the child's safety and the safety of the educational environment were paramount to Employee, he took the necessary steps to protect not only the child but the educational environment as well. The Initial Decision is not based on an erroneous interpretation of the regulations. For these reasons we are compelled to deny Agency's Petition for Review and therefore, must uphold the Initial Decision.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED**.

FOR THE BOARD:

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Clarence Labor, Jr., Chair

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Barbara D. Morgan

_____
Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.