

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

| | | |
|------------------------------|---|-------------------------------|
| In the Matter of: |) | |
| |) | |
| ARMELL GAINES |) | |
| Employee |) | |
| |) | OEA Matter No.: 1601-0138-06 |
| v. |) | |
| |) | Date of Issuance: May 6, 2009 |
| DEPARTMENT OF TRANSPORTATION |) | |
| Agency |) | |

OPINION AND ORDER

ON

PETITION FOR REVIEW

Armell Gaines (“Employee”) was an Asphalt Worker assigned to the Street and Bridge Maintenance Division of the Department of Transportation (“Agency”). Agency removed Employee from his position based on a charge of Drunkenness on Duty. Employee’s termination was effective August 14, 2006.

The event from which the charges stemmed occurred on May 13, 2006 when Employee was on official duty. Robert Morris, Asphalt Worker Foreman, was

Employee's supervisor that day.¹ The other members of Morris' crew were Michael Jackson, Antoinette Burno, and Douglas Young. The workers were instructed to meet Mr. Morris at Georgia Avenue for breakfast prior to traveling to their worksite. At approximately 9:45 a.m., the workers got into a truck after obtaining carryout food. Mr. Morris reported that he observed Employee sitting in the government vehicle with a green bottle that appeared to be beer and asked Employee to exit the truck. Employee poured the bottle of liquid on the ground immediately after exiting the truck. Mr. Morris reported that Employee had a strong odor of alcohol on his breath and suspected that he was under the influence of alcohol. Employee began arguing with Mr. Morris and was ordered to go home. When he left the worksite, Employee went to meet with Assistant Street Supervisor Nathaniel Jones. Employee, however, denied drinking or holding a beer bottle while on duty that day. The other workers in the truck corroborated Employee's story; however, one worker admitted that Employee's breath "stunk" that day.²

Mr. Morris subsequently filled out a Reasonable Suspicion Checklist and a separate handwritten report. The handwritten report made no mention of any physical sign of Employee's drunkenness other than the presence of a beer bottle in Employee's hand. Mr. Jones testified that employee came to him on May 13, 2006 complaining about being removed from the site. Jones testified that he did not believe Employee was fit to work that day, but stated that he would have personally allowed Employee to work.³ Mr. Jones also stated that Employee's speech was faster than usual.

¹ See *Initial Decision*, pg. 2-Employee's testimony.

² T. pp. 105-119.

³ T. pp. 138-169.

On May 26, 2006, Agency issued Employee a fifteen (15) day advance notice proposing to remove him from his position an Asphalt Worker based on his behavior on the morning of May 13, 2006.⁴ Specifically, the notice stated that Employee was being cited for "drunkenness on duty—being under the influence of alcohol while on official duty, including reporting for duty under the influence of alcohol, to a degree which would interfere with proper performance of your duties, or which would be a menace to safety or prejudicial maintenance of discipline."⁵

Agency conducted an administrative review August 4, 2006. Agency concluded that Foreman Morris had the best training and objectivity to observe Employee's behavior and to make a determination that he was under the influence of alcohol while on official duty.⁶ On August 14, 2006, Agency issued its final notice to terminate Employee.

On August 16, 2006, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). In an Initial Decision issued March 12, 2007, the AJ reversed Agency's decision to terminate Employee.⁷ After weighing the testimony of each witness, the AJ held that Agency did not meet its burden of proof by establishing that its actions were supported by a preponderance of the evidence. The AJ stated that Agency's charges rested primarily on the testimony of Mr. Morris and that Agency's other witness, Mr. Jones wasn't positive that Employee was intoxicated. He also stated that Mr. Morris failed to verify Employee's alleged intoxication with another supervisor as required by Agency regulations. The AJ further held that Mr. Morris never questioned

⁴ *Agency Answer to Employee's Petition for Appeal*, Exhibit 10 (September 28, 2006).

⁵ *Id.*

⁶ *Id.*, Exhibit 11.

⁷ *Initial Decision*, p. 4 (March 12, 2007).

Employee as to whether he was actually drunk and that he failed to fully document Employee's observed behavior except for a handwritten statement.

Agency then filed a Petition for Review on April 17, 2007. Agency asserts that the findings of the Administrative Judge are not based on substantial evidence.⁸ Agency also contends that because there was a conflict in the testimony between Employee and Mr. Morris, the AJ was required to make credibility findings and failed to do so. Agency draws our attention to *Hillen v. Department of the Army*, 35 M.S.R.P 453 (1987). In *Hillen*, the Administrative Judge listed several factors to consider when making a credibility determination, including (1) the witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor.⁹

It is within the province of the Administrative Judge to assess the credibility of witnesses.¹⁰ Credibility was at issue in this case. However, an administrative factfinder need not give any reason at all for his or her credibility determination.¹¹ In resolving issues of credibility, the AJ may rely on the *Hillen* factors. These "first-hand" observations are critical in cases where removal is at issue.¹²

Here, the conflicting evidence is between Employee's testimony and Mr. Morris' testimony as to whether Employee was intoxicated while on duty. There is also

⁸ *Petition for Review*, p. 1(April 17, 2007).

⁹ *Hillen v. Department of the Army*, 35 M.S.R.P 453 (1987)

¹⁰ *Dell v. Dept. of Empl. Servs.*, 499 A.2d (D.C. 1985).

¹¹ *Hutchinson v. District of Columbia*, 710 A.2d 227, 232 (D.C. 1998).

¹² *Bedney v. Department of Public Works*, OEA Matter No: 1601-0053-07 (August 20, 2008).

conflicting evidence between Employee's three fellow workers and Mr. Morris. The Initial Decision stated that "[a]rrayed against the weak evidence of the Agency are the three fellow workers of Employee who all testified credibly that Employee was not drunk or acting suspiciously."¹³ The AJ in this case has many years of experience observing and assessing witnesses and that expertise was utilized in this case. Moreover, the AJ provided several reasons for concluding that Mr. Morris' testimony was insufficient to meet Agency's burden of proof. For example, the AJ held that Mr. Morris failed to verify with Mr. Jones regarding the condition of an employee suspected to have been drinking. It was also determined that Mr. Morris failed to determine whether his suspicions regarding Employee's suspected intoxication were in fact correct.

OEA Rule 629.1 requires that the burden be met by a "preponderance of the evidence," which is defined as "[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue."¹⁴ Moreover, substantial evidence is "relevant evidence such as a reasonable mind might accept as adequate to support a conclusion."¹⁵ Evidence is substantial if it is "more than a mere scintilla."¹⁶ This Board will uphold an Administrative Judge's decision so long as it is supported by substantial evidence in the record notwithstanding that there may be contrary evidence in the record.¹⁷ After careful consideration of all the evidence, including the testimony of each witness and the written arguments, this Board finds that the Initial Decision was based on substantial evidence

¹³ *Initial Decision*. at 4.

¹⁴ *Id.*

¹⁵ *Mills v. D.C. Dep't of Employment Servs.*, 838 A.2d 325, 328 (D.C. 2003) (quoting *Black v. D.C. Dep't of Employment Servs.*, 801 A.2d 983, 985 (D.C. 2002)).

¹⁶ *Vogel v. D.C. Office of Planning*, 944 A.2d 456, 463 (D.C. 2008).


¹⁷ *Ferreira v. District of Columbia Dep't of Empl. Servs.*, 667 A.2d 310, 312 (D.C. 1995).

and Agency failed to meet its burden of proof by a preponderance of the evidence that removal should be sustained. For the reasons stated above, we are compelled to deny Agency's Petition for Review and uphold the Initial Decision.

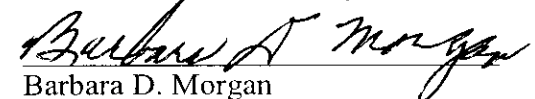
ORDER

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

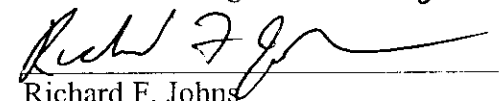
FOR THE BOARD:



Sherri Beatty-Arthur, Chair



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 the formal notice of the decision or order sought to be reviewed.