THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	OEA Matter No. 1601-0057-20
	)	
v.	)	
	)	Date of Issuance: June 30, 2022
	)	
DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS, Agency	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Heavy Mobile Equipment Mechanic Supervisor at the Department of Public Works ("Agency"). On August 5, 2020, he received a Notice of Final Decision which provided that Agency imposed a thirty-day suspension in accordance with D.C. Municipal Regulations ("DCMR") §§ 1607 and 1618. According to Agency, Employee was charged with "Conduct Prejudicial to the District Government: off-duty conduct that adversely affects the employee's job performance or trustworthiness, or adversely affects his or her agency's mission or has an otherwise identifiable nexus to the employee's position" and "Conduct Prejudicial to the District Government: use of (or authorizing the use of) District owned or leased property, services

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.

or funds for inappropriate or non-official purposes."[2] Ultimately, Agency reduced the suspension from thirty to fifteen days; the effective date of Employee's fifteen-day suspension was August 7, 2020.[3]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on September 3, 2020. He argued that the suspension was without merit and unwarranted. Employee explained that he removed his floor mats and lifted the vacuum hose, when he was approached by Mr. Harrison who stated that "this is not a government vehicle." Employee argued that he immediately rehung the hose and left the location. It is Employee's position that he never turned on the vacuum. Therefore, he requested that the suspension be rescinded.[4]

On November 24, 2020, Agency filed its Answer to Employee's Petition for Appeal. It asserted that its final decision should not be rescinded because Employee engaged in documented conduct that was prejudicial to the government. According to Agency, Employee was caught in the act of using a government-owned vacuum by Mr. Harrison. It claimed that Mr. Harrison observed Employee vacuuming his personal vehicle for several minutes before approaching him and that when he was approached, Employee stopped vacuuming his vehicle and left the property. Moreover, Agency provided that it considered the District Personnel Manual ("DPM") Table of Illustrative Actions before suspending Employee and that the fifteen-day suspension was an appropriate penalty. Additionally, Agency contended that it considered the *Douglas*[5] factors prior

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[2] In Agency's Proposed Notice of Suspension, it provided that Employee's supervisor, Daniel Harrison, observed Employee "vacuuming out [his] personal vehicle using the D.C. Government owned and maintained vacuums. . . ." *Petition for Appeal*, p. 6-13 (September 3, 2020).
[3] *Id.*, 18-23.
[4] *Id*., 2-5.
[5] The standard for assessing the appropriateness of a penalty was established by the Merit Systems Protection Board ("MSPB") in *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

> 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;

to imposing its penalty. As a result, it requested that its penalty be upheld or that an evidentiary hearing be held.[6]

The OEA Administrative Judge ("AJ") held an Evidentiary Hearing on December 14, 2021, and requested that the parties submit written closing briefs.[7] After the hearing, the AJ issued an Initial Decision on March 22, 2022. She determined that Agency did not have cause for the action taken against Employee. The AJ explained that Employee was charged pursuant to DCMR §§ 1607.2(a)(5) and (a)(12) for allegedly using a car vacuum cleaner for his personal vehicle that was only to be used for government vehicles. The AJ provided that Employee was accused of this action by his supervisor, Mr. Harrison, who unfortunately passed away in January of 2021.[8] Alternatively, Employee contended that he never actually used the vacuum and left after his

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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
12) the adequacy and effectiveness of alternative sanctions to deter such conduct.

[6] *Agency Answer to Employee's Petition for Appeal*, p. 1-10 (November 24, 2020).

[7] In Agency's closing brief, it argued 6B DCMR § 1607.2(a)(12) provides for use or authorizing the use of government property for non-official purposes. It contended that Employee authorized himself to use the District-owned vacuum for non-official purposes by going to the vacuum area for the sole intent of its use. *Agency's Closing Argument*, p. 10-11 (February 15, 2022). In his closing brief, Employee argued that Agency offered no witnesses who testified to his use of the vacuum. He also asserted that Agency's witnesses testified that Agency did not have a written policy prohibiting use of the vacuum cleaner, and there were no posted signs near the vacuums. *Employee's Closing Argument* (February 15, 2022).

[8] The AJ provided that Agency filed an unnotarized affidavit of Mr. Harrison because its on-site notaries were unable to renew their commissions due to the Covid-19 health emergency. Agency did not have the affidavit notarized before Mr. Harrison's death. Therefore, the AJ noted that the statements made in the affidavit were not made under oath and that the witness was unavailable to be cross examined regarding his statements. *Initial Decision,* p. 10-12 (March 22, 2022).

encounter with Mr. Harrison. The AJ opined that none of Agency's witnesses testified that they witnessed Employee's alleged use of the vacuum. Moreover, she found that the pictures submitted by Agency did not show Employee using the vacuum. Accordingly, she found that Agency did not prove that Employee used the vacuum, as it alleged. As for Agency's argument regarding Employee's self-authorization to use the vacuum by engaging in preparatory acts, the AJ found that its argument sought the Office to examine Employee's intent regarding misconduct. She held that the regulation did not address intent and that Agency's interpretation of the regulation would lead to a slippery slope that could misalign the provisions of the regulation. Additionally, the AJ found that while it may have been Agency's practice to prohibit vacuum use, it failed to submit any written policy to establish that employees had notice of the prohibition. Consequently, because the AJ determined that Agency did not meet its burden of proof to show cause for the adverse action against Employee, she reversed the fifteen-day suspension and ordered that Agency reimburse Employee all back pay and benefits lost as a result of his suspension.[9]

On April 22, 2022, Agency filed a Petition for Review. It argues that the Initial Decision did not address all material issues of law and fact raised on appeal; the decision was based on an erroneous interpretation of the relevant regulations; and the findings were not based on substantial evidence. Agency maintains that Employee violated DCMR § 1607.2(a)(12) by self-authorizing use of the vacuum to clean his personal vehicle. It explains that authorization to commit the act did not require completion of the act, but the mere authorization was enough for cause. Agency also contends that because authorization was prohibited, there was no slippery slope or misalignment when it analyzed Employee's intent and attempt to use the vacuum. Additionally, it asserts that the AJ did not properly address its self-authorization arguments. Furthermore,

[9] In her order, the AJ inadvertently provided that Employee was terminated instead of suspended. *Id.* (March 22, 2022).

Agency opines that while there is no specific written policy about vacuum usage, it was prohibited by the DCMR. Finally, Agency provides that the AJ's credibility determinations regarding Employee were not based on substantial evidence given the contradictory statements that he provided in the record. Therefore, Agency requested that its fifteen-day suspension be reinstated, or the matter be remanded to the AJ for further consideration.[10]

Employee filed his Answer to the Petition for Review on May 26, 2022. He asserts that the AJ considered Agency's "use" and "authorization of use" arguments. He also contends that Agency failed to meet its burden of proof to establish either actual use or the authorization of use of using the vacuum cleaner. As previously argued, Employee provides that Agency submitted no evidence to corroborate his use of the vacuum or any policies prohibiting its use. As for Agency's credibility arguments, Employee explains that there were no inconsistencies between his testimony and any prior statements he provided.[11]

Substantial Evidence

According to OEA Rule 633.3(c), the Board may grant a Petition for Review when the AJ's findings are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), found 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.[12] After a review of the record, this Board believes that the AJ's rulings were based on substantial evidence.

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[10] *Agency's Petition for Review* (April 22, 2022).
[11] *Employee's Answer to Agency's Petition for Review* (May 26, 2022).
[12] *Black's Law Dictionary*, Eighth Edition; *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).

Cause

Agency accused Employee of violating DCMR §§ 1607.2(a)(5) and (a)(12). Those regulations provide the following:

> 1607.2 The illustrative actions in the following table are not exhaustive and shall only be used as a guide to assist managers in determining the appropriate agency action. Balancing the totality of the relevant factors established in § 1606.2 can justify an action that deviates from the penalties outlined in the table.
>
> (a)(5) Off-duty conduct that adversely affects the employee's job performance or trustworthiness, or adversely affects his or her agency's mission or has an otherwise identifiable nexus to the employee's position.
>
> (a)(12) Use of (or authorizing the use of) District owned or leased property, services or funds for inappropriate or non-official purposes.

The AJ held that none of Agency's witnesses testified that they witnessed Employee's use of the vacuum. Moreover, she found that the pictures submitted by Agency did not show Employee using the vacuum. After a review of the record, this Board agrees with the AJ's holding. Agency's witness, Bryan Lawrence, testified that Mr. Harrison told him that Employee was "getting ready to vacuum his vehicle. . . ."[13] Additionally, he provided that he did not recall seeing Employee using the vacuum in the picture provided.[14] Witness, John Hall, testified that he never saw Employee use the vacuum. Moreover, he provided that Mr. Harrison informed him that Employee was "at the vacuum with the hose in his hand . . . [but] he did not say he used it. . . ."[15] Furthermore, this Board will note that there was no documentary evidence provided and none of Agency's witnesses testified that Employee self-authorized his use of the vacuums. Contrary to Agency's

[13] *OEA Hearing Transcript*, p. 36 and 69 (December 14, 2021).
[14] *Id.* at 70.
[15] *Id.*, 115-116.

claim, the AJ did address its self-authorized use argument.[16] Accordingly, this Board agrees with the AJ's holding that Agency failed to establish cause as provided in DCMR § 1607.2(a)(12).

Likewise, the AJ found that Agency did not meet its burden of proof related to DCMR § 1607.2(a)(5). She held that while Employee was at the vacuum site, Agency did not prove that he actually used the vacuum in his personal vehicle. Therefore, it did not establish that Employee committed off-duty conduct pursuant to the regulation.[17] This Board agrees with the AJ's ruling. There was no evidence that Employee engaged in any conduct.

Concerning the AJ's holding that there was no written policy regarding the prohibition of using the vacuum, Mr. Lawrence testified that he was not aware of any notice given to employees regarding use of the vacuums.[18] Similarly, Mr. Hall testified that there was no notice that vacuums could not be used but there was notice on the misuse of government property.[19] However, Mr. Hall admitted that the notice was provided to employees when they are first hired.[20] Employee confirmed that he received notice on the use of government property when he started at Agency thirty years prior, but he also testified that the rules and regulations change under each new administration.[21] Finally, Mr. Ryan Frasier testified that he was not aware of any signs posted regarding use of the vacuums, and he was not aware of any notice provided that the vacuums were not to be used for personal use.[22] Thus, substantial evidence exists in the record to support the AJ's ruling on this issue.

Penalty

In determining the appropriateness of an agency's penalty, OEA has consistently relied on

[16] *Initial Decision*, p. 13 (March 22, 2022).
[17] *Id.*
[18] *OEA Hearing Transcript,* p. 68 (December 14, 2021).
[19] *Id.* at 113.
[20] *Id.* at 96.
[21] *Id.*, 151-152.
[22] *Id.* at 125.

Stokes v. District of Columbia, 502 A.2d 1006 (D.C. 1985).[23] According to the Court in *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency.[24] However, because Agency was unable to establish cause, the penalty cannot be upheld in this case.

Witness Credibility

Agency contests the AJ's credibility determinations related to Employee. As this Board has previously held, it lacks the authority to question an AJ's credibility determinations.[25] The Court in *Metropolitan Police Department v. Baker,* 564 A.2d 1155 (D.C. 1989), provided that great deference to any witness credibility determinations is given to the administrative fact finder.

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[23] *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01*, Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009), *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No.1601-0211-98*, Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review (*April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[24] The D.C. Court of Appeals 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." As a result, OEA has previously held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office. *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). Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.

[25] *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); *Anita Staton v. Metropolitan Police Department,* OEA Matter No. 1601-0152-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Ronald Wilkins v. Metropolitan Police Department,* OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); *James Washington v. D.C. Public Schools, Department of Transportation*, OEA Matter No. 1601-0292-10, *Opinion and Order on Petition for Review* (December 10, 2014); and *Barry Braxton v. Department of Public Works*, OEA Matter No. 1601-0012-12, *Opinion and Order on Petition for Review* (September 13, 2016).

Similarly, the courts in *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); and *Kennedy, supra,* 654 A.2d at 856, provided that 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, although it is hard for this Board to determine how much weight the AJ gave to each witness' testimony, after a review of the hearing transcript, a reasonable mind would accept the credibility determinations the AJ made as adequate to support her conclusion. This Board does not find any statements in the record made by Employee that undermined his trustworthiness, as Agency claims.

Conclusion

Agency lacked cause in this case. Accordingly, its penalty of the fifteen-day suspension against Employee must be reversed. This Board also finds that there is substantial evidence to support the AJ's credibility determinations. Therefore, Agency's Petition for Review is denied.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED**. The Initial Decision, which reversed Employee's fifteen-day suspension, is **UPHELD**.

FOR THE BOARD:

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Clarence Labor, Jr., Chair

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Patricia Hobson Wilson

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Jelani Freeman

_____
Peter Rosenstein

_____
Dionna Maria Lewis

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.