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:	)	
	)	
METRICE JONES,	)	OEA Matter No. 1601-0077-09
Employee	)	
	)	Date of Issuance: September 18, 2012
	)	
	)	
D.C. PUBLIC SCHOOLS,	)	
DEPARTMENT OF TRANSPORTATION,	)	
Agency	)	
	)	

OPINION AND ORDER ON REMAND

This matter has previously been before the Office of Employee Appeals ("OEA") Board. Metrice Jones ("Employee") worked as a Motor Vehicle Operator with the D.C. Public Schools, Department of Transportation ("Agency"). On December 30, 2008, Employee received a notice terminating her from employment due to "unprofessional behavior toward a co-worker (abusive language)."[1] Employee filed a Petition for Appeal with OEA on January 30, 2009.

On January 7, 2010, the Administrative Judge ("AJ") issued his Initial Decision in this matter. He provided that prior to issuing his decision, Agency proffered that the decision to

[1] Agency provided that Employee was driving a school bus with two attendants riding along with her. During the course of dropping students off at home, Employee drove a different route than that normally taken without advising the attendants. One of the attendants questioned Employee's decision. Employee responded by yelling and using profanity at the attendant while children were present. *Agency's Response to Petition for Appeal,* p. 1-2 (March 16, 2009).

terminate Employee was based on two prior incidents of job-related discipline, including disorderly conduct which resulted in a two-day suspension. Employee vehemently disagreed and insisted that she was not previously suspended. She admitted that her behavior was inappropriate, but it did not warrant termination. Agency was unable to produce any evidence of the alleged prior suspension.[2]

Accordingly, the AJ held that Agency did not meet its burden of proof. It did not provide any evidence in the record or in Employee's official personnel file that a two-day suspension was previously imposed. The AJ further provided that Agency lacked sufficient cause to remove Employee. He reasoned that because the record lacked sufficient evidence, termination was too harsh of a penalty. Consequently, Employee's termination was vacated, and the AJ reduced her penalty to a nine-day suspension instead.[3]

On February 9, 2010, Agency filed a Petition for Review with the OEA Board ("Board"). It stated that the AJ improperly relied on the Table of Penalties. Agency argued that a penalty is not based on previous discipline for misconduct, but it is based on previous offenses. Thus, there may be a commission of an offense for which discipline was not imposed that could still be the basis for an enhanced penalty under the Table of Penalties.[4]

On May 23, 2011, the Board issued its Opinion and Order on the Petition for Review. With regard to Agency's belief that a penalty is not based on previous discipline but instead on previous offenses, the Board agreed. The Board reasoned that disciplining an employee is not a requirement of the Table of Penalties as provided in the District Personnel Regulations. However, the Board held that Agency needed to adequately document the alleged previous

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[2] *Initial Decision,* p. 2 (January 7, 2010).
[3] *Id.,* 5-8.
[4] *Agency's Petition for Review,* p. 4-6 (February 9, 2010).

offense, and the AJ should have established if it had done so.[5] Since there was no documentation in the record to prove Agency adequately documented the prior offense, the Board could not determine whether it actually occurred.[6] As a result, the Board remanded the matter and directed the AJ to request documentation from Agency to establish that the prior offense occurred.[7]

In accordance with this directive, a new AJ was assigned. She issued an order on June 1, 2011, which required Agency to submit documents relating to the prior offense.[8] Agency subsequently submitted a notarized affidavit signed by Employee's supervisor. In the affidavit, Employee's supervisor stated that on January 5, 2006, she issued a memorandum to Employee that recommended she be suspended for two days due to her inappropriate behavior.[9]

In response to Agency's submission, Employee submitted a letter on June 27, 2011, which asserted that she was "never given a copy of [the memorandum] and believ[ed] that [it] may have been created after the start of this case."[10] She also provided that Agency did not include documentation to show that there was a break in pay, nor did it provide any signatures from her or her union representative. Therefore, Employee argued that Agency's submission was not adequate proof that the prior offense occurred.[11]

On July 6, 2011, the AJ issued an Addendum Decision on Remand. In response to the affidavit submitted by Agency, the AJ held that in accordance with D.C. Municipal Regulation

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[5] The Board explained that "it [was] necessary for Agency to present [to the AJ] all evidence necessary to support its decision to remove Employee." *Id.,* p. 6.
[6] Although Agency cited a January 3, 2006 offense, there was no evidence that the offense actually occurred or that Employee ever received notice of the incident. The notice provided by Agency was not signed by Employee or her Union Representative; it was only signed by an Agency terminal manager. *Opinion and Order on Petition for Review,* p. 5 (May 23, 2011).
[7] *Id,* p. 6.
[8] *Order Requesting Documentation Relating to Employee's January 3, 2006 Offense* (June 1, 2011).
[9] Employee's supervisor explained that on January 3, 2006, she denied Employee's request to work a straight shift. Employee, displeased with the decision, began using profanity directed at her. Consequently, Employee's supervisor recommended a two-day suspension for disorderly conduct. *Affidavit of Joy Binns-Grayton,* p. 2 (June 14, 2011).
[10] *Letter to OEA* (June 27, 2011).
[11] Included with Employee's letter was a signed letter from her co-worker which provided that she worked with Employee in January of 2006 and to her recollection, there was no incident between Employee and her supervisor.

§2821.11, it is within her discretion to assess the reliability of evidence and determine the weight given to it. Ultimately, she ruled that while the affidavit provided more details of the circumstances, it was not sufficient to verify that the alleged offense occurred. The AJ explained that the January 5, 2006 memorandum was not signed by Employee or her union representative. Thus, Agency's submission was not sufficient for verification of the offense. Further, since the AJ found that Employee had a total of two offenses, she held that Agency's penalty of termination was not progressive but rather, excessive. Accordingly, the AJ reversed Agency's decision and ruled, as the previous AJ held, that the penalty should have been a nine-day suspension.[12]

Thereafter, Agency filed a Petition for Review with the OEA Board. It argues that the Addendum Decision on Remand was not supported by substantial evidence. Agency states that its submission of the affidavit established that Employee committed the prior offense. Agency also contends that the AJ failed to comply with the Board's Opinion and Order. It further explains that the Board's directive was to make a finding of whether there was proper documentation to prove that the prior offense occurred, not for proof that such documentation was properly documented. Finally, Agency claims that the AJ erred in determining credibility issues without conducting a hearing. Agency's position is that because there was a credibility issue, a hearing should have been conducted. Therefore, it requests that the Board grant its Petition and reverse the AJ's decision.[13]

Substantial evidence is defined as evidence that a reasonable mind could accept as

[12] *Addendum Decision on Remand* (July 6, 2011).
[13] *Agency Petition for Review,* p. 5-7 (August 2, 2011).

adequate to support a conclusion.[14] Therefore, this Board must determine if the evidence that Employee engaged in unprofessional behavior toward a co-worker is adequate to support Agency's termination. 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. Based on the lack of evidence provided by Agency, we agree with the AJ that it is not reasonable to accept that Employee engaged in unprofessional behavior.

As it pertains to the January 3, 2006 offense, there is no evidence that the offense occurred or that Employee ever received notice of a suspension as a result of the alleged offense. As previously noted, the notice provided by Agency is not signed by Employee or her Union Representative. It is only signed by an Agency terminal manager. Additionally, Agency provides an affidavit from the terminal manager. As the AJ provided, it is within her discretion to determine the weight given to the affidavit as evidence. She deemed it insufficient. We believe this decision is based on substantial evidence.

Because Agency provides that Employee was suspended as a result of the offense, it opened the door for this Board to address the documentation related to the penalty of the alleged offense. According to DCMR §1601.6, an official personnel action document effecting the January 3, 2006 suspension should have remained within Employee's Official Personnel Folder as a permanent record of the corrective action. Agency offered no official personnel action form for the suspension. Moreover, *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981) provides the following:

the ultimate burden is upon the agency to persuade the Board of the

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[14] *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).

> appropriateness of the penalty imposed. This follows from the fact that selection of the penalty is necessarily an element of the agency's "decision" which can be sustained . . . only if the agency establishes the facts on which that decision rests by the requisite standard of proof. The deference to which the agency's managerial discretion may entitle its choice of penalty cannot have the effect of shifting to the appellant the burden of proving that the penalty is unlawful, when it is the agency's obligation to present all evidence necessary to support each element of its decision. The selection of an appropriate penalty is a distinct element of the agency's decision, and therefore properly within its burden of persuasion, just as its burden includes proof that the alleged misconduct actually occurred . . . .

Because Agency cannot produce proof of the alleged misconduct or the penalty that resulted, this Board cannot verify that this offense occurred.

Likewise, Agency did not prove that Employee ever received the suspension memorandum, on which it relies to prove that the offense occurred. Employee provides that she did not receive such documentation because she was not previously suspended for this particular offense.[15] The Court in *Nursat Aygen v. D.C. Office of Employee Appeals,* 2009 CA 006528 P(MPA) and 2009 CA 008063 P(MPA) (April 5, 2012) held that a dated document, by itself, is insufficient evidence that the notice was actually mailed to or received by the employee. According to the Court in *Aygen*, Agency should have provided the notice of the final decision to suspend Employee to her with a request for her to acknowledge receipt of its decision. If Employee refused receipt of the document, then Agency should have provided a signed statement by a witness as evidence of Employee's refusal to receive the decision. No acknowledgment or witness statements were provided by Agency. This is another example of Agency's production of insufficient evidence to prove that the January 3, 2006 offense occurred.

As it relates to Agency's argument regarding the AJ's failure to conduct a hearing, OEA Rule 625.2 provides that "if the Administrative Judge grants a request for an evidentiary hearing,

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[15] *Employee Response to Order Requesting Documentation Relating to Employee's January 3, 2006 Offense,* p. 1 (June 27, 2011).

or makes his or her own determination that one is necessary, the Administrative Judge will so advise the parties and, with appropriate notice, designate the time and place for such hearing and the issues to be addressed." Thus, it is the Administrative Judges prerogative to hold an evidentiary hearing when it is deemed necessary. In this matter, two separate Administrative Judges determined that they could make a decision based on the record and did not require an evidentiary hearing. This was within their authority. Hence, the AJ did not err by not conducting a hearing.

As provided in *Douglas*, it is necessary for Agency to present all evidence necessary to support its decision to remove Employee. It did not provide such evidence. This Board believes that there is sufficient evidence to uphold the AJ's decision to reverse Agency's action. Accordingly, Agency's Petition for Review is denied.

ORDER

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

FOR THE BOARD:

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Clarence Labor, Chair

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Barbara D. Morgan

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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.