

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
William Hudson, Jr.,)	OEA Matter No. 1601-0025-14
Employee)	
)	Date of Issuance: April 23, 2015
)	
Office of the State Superintendent of Education,)	Joseph E. Lim, Esq.
Agency)	Senior Administrative Judge
)	
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Sameera Ali, Esq., Employee Representative		
Hillary Hoffman-Peak, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION

On December 4, 2013, William Hudson, Jr. (“Employee”), a Bus Attendant in the Career Service, filed a Petition for Appeal from Office of the State Superintendent of Education’s (“Agency”) final decision removing him from his position for “Any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law.”

After a mediation session proved unsuccessful, this matter was assigned to me on July 9, 2014. I held a Prehearing Conference on August 18, 2014, and a Hearing on February 4, 2015. The record was closed at the end of the hearing.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

Whether Agency's action was taken for cause.

Position of the Parties

By advance notice dated October 29, 2013, Agency charged Employee with the cause of “Any on-duty or employment-related act or omission that the employee knew or should

reasonably have known is a violation of law.” Specifically, Agency charged that on October 1, 2013, Employee made violent threats regarding the workplace while on duty. With a final notice on November 13, 2013, Employee was removed effective the same day.

Employee denies any wrong-doing, and declares his innocence.

EVIDENCE

1. Kenneth Faunteroy (transcript, pages 5 –30)

As the Fifth Street Terminal Manager, Kenneth Faunteroy knew Employee as one of his bus attendants in the school bus service that Agency operates. After hearing a complaint from Jackie Graves on October 1, 2013, Faunteroy testified that he held a meeting that day with Employee, Jackie Graves, Matthew Curry, and Ayesha Ali-Floyd to discuss their problems. Ms. Graves stated that Employee had made threatening comments about shooting up the bus terminal. Employee did not deny making such a comment, but stated that he was joking. The other bus attendants did not hear the threat as they were not paying attention. An hour or so after the meeting, Ms. Graves called the police and they took Employee away. Faunteroy testified that Agency had written policies against horseplay and pranks. *See* Agency Exhibit 3. Faunteroy admitted that he never had any prior problems with Employee.

2. Employee (transcript, pages 31 – 84)

Employee testified that he was a retired firefighter before working at Agency as a school bus attendant for three years. He described his job responsibility as primarily making sure their special education children had a safe, reliable ride back and forth to school. On October 1, 2013, Employee and Bus Attendant Ayesha Ali-Floyd were riding the school bus with Ms. Graves as the bus driver. Once at the school, Employee got permission from Ms. Graves to use the bathroom. However, when he got back, Ms. Graves began yelling at him without good reason. When he objected, Ms. Graves threatened to report him.

Back at the bus terminal, Employee was called into a meeting with Manager Faunteroy, Ms. Graves, Ayesha, and Union Representative Tessfoo Tucker. Graves then began ranting about being afraid to ride with Employee and demanding that Faunteroy discipline Employee. Employee denied making any threats, stating that as a former firefighter for 27 years, he saves lives, not threaten them. As a firefighter for Alexandria, Virginia and the District of Columbia, he had delivered 70 babies and received four (4) medals of valor. But at the urging of his union representative, he apologized to Graves for making her feel uncomfortable. After the meeting, he asked Graves to take a walk with him. After talking it over, Graves tore up her written statement after Employee and Graves hugged.

However, two days later on October 3, 2013, the police arrived and arrested him. Employee spent the night in jail but was freed the next morning with a warning to stay away from Graves. Employee was never charged with threatening anyone but the search warrant executed on his home resulted in his pleading guilty to possessing an unregistered firearm and

ammunition. *See* Employee Exhibit 2.

As for Agency's advance notice of proposed action, (Agency Exhibit 1), Employee admitted that he did not read the entire notice and thus failed to respond to it. He testified that he had heard that Graves wanted to get him fired. Employee explained that his 54-year-old brother had previously dated Graves but then dumped her. Employee also testified that Graves started having a negative attitude towards him prior to October 1, 2013, at one time even stranding him at the terminal. Although Employee reported this to his supervisor, nothing was done.

3. Ayesha Ali-Floyd (transcript, pages 85 – 111)

Ayesha Ali-Floyd testified that she worked alongside Employee as a school bus attendant. She recalls that Graves was often hostile towards Employee. Ayesha attributed this to Employee's brother's dating history with Graves. Ayesha described Employee as hardworking, conscientious, caring, and never one to make any angry or threatening remarks. After their October 1, 2013 shift, she recalled seeing Employee and Graves talking and then hugging afterwards.

Ayesha described Graves as a rude, bossy, and hostile person, not just with Employee, but also with others. Ayesha herself had reported Graves several times for rudeness. In fact, with all the disciplinary problems Graves had caused, Ayesha could not understand why Graves is still employed. Contrary to Faunteroy's testimony, Ayesha testified that the meeting Faunteroy convened was on October 2, not October 1.

4. Matthew S. Curry (transcript, pages 111 – 117)

Matthew S. Curry is also a school bus attendant with Agency. Curry testified that he often heard Graves vowing to get rid of Employee from her bus. Curry described Graves as a disturbed woman who constantly had problems with other people on the job. On the other hand, he described Employee as a level-headed good man who never raised his voice even when provoked by Graves.

5. Van Eubanks (transcript, pages 117 – 126)

Mr. Eubanks, Employee's younger brother, testified that he used to date Jackie Graves for about three weeks. He met her around Labor Day at a dance where Graves learned he was Employee's brother. Graves informed him that she was close with Employee and she described Employee as a "...big teddy bear."¹ When Eubanks began to feel that Graves was too controlling, he broke off all contact with her and ignored her phone messages.

Shortly thereafter, Eubanks received a call from his niece informing him that Employee was arrested. He retrieved Employee's belongings from the police and was shocked to learn from Employee upon his release that Graves had made up a complaint against Employee. Later Eubanks

¹ Transcript, pg. 119.

met a female friend of Graves who informed him that Graves was lying about Employee and that she was willing to be their witness. Eubanks described Employee as a big old teddy bear and reiterated his belief that his brother did not make any threats to anyone. Eubanks speculated that Graves made up the threat to get back at him.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Whether Agency's action was taken for cause.

Here, Agency charged Employee with: "Any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law." Agency accuses Employee of making criminal threats at the workplace.

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

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.

As Agency is the charging party, it must prove Employee made a criminal threat by a preponderance of the evidence. Based on their courtroom demeanor and consistency of their testimonies, I find Employee and his witnesses to be more credible than Agency's sole witness. Employee and his witnesses were forthright and consistent in their testimony while Agency's sole witness, Manager Kenneth Faunteroy, made a key mistake in his testimony. Faunteroy insisted that Employee was arrested the day of the alleged incident and the day of their group meeting. In fact, the charging documents and the police report (Employee Exhibit 1) clearly indicates Employee was arrested on October 3 and not October 1 of 2013.

Ultimately, however, Agency's charge hinges entirely on hearsay.² Agency does not dispute that Faunteroy was not a witness to Employee's alleged threat. Agency failed to produce their fact witness, Ms. Graves, who was the complainant against Employee. Indeed, the only testifying eyewitnesses to the incident are Employee and fellow Bus Attendant Ayesha Ali-Floyd. Employee denies making any threats and Ms. Ali-Floyd backs up his claim. Two other witnesses familiar with Complainant Graves, Curry and Eubanks, described Graves as an angry, vindictive woman. Thus, determining the culprit in this conflict necessarily involves the weighing of live testimony against

² The Federal Rules of Evidence provide a general definition of hearsay as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Subject to two classes of "exemptions," this definition classifies a statement as hearsay if the statement meets two requirements: (1) the statement must be extra-judicial (i.e. not made by this witness in this proceeding). (2) The statement must be offered to prove the truth of what the statement asserts if anything. Fed. R. Evid. 801(c).

hearsay evidence.

“It 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.” *Hutchinson v. D.C. Office of Employee Appeals*, 710 A.2d 227, 232-233 (D.C. 1998). (citations omitted). “The decision to permit administrative agencies to admit hearsay evidence reflects a recognition that the reliability and probative value of evidence does not always turn simply on whether or not it falls within the legal definition of hearsay evidence, and that, unlike juries, ‘[Administrative Judges] are . . . capable of properly assessing the reliability and weight of evidence’ that is hearsay in nature.” *Jadallah v. D.C. Department of Employment Services*, 476 A.2d 671, 676 (D.C. 1984), citing *Kopff v. D.C. Alcoholic Beverage Control Board*, 381 A.2d 1372, 1385 (D.C. 1977). “The weight to be accorded hearsay evidence is determined by the item’s ‘truthfulness, reasonability, and credibility.’” *Wisconsin Avenue Nursing Home v. D.C. Commission on Human Rights*, 527 A.2d 282, 288 (D.C. 1987), citing *Johnson v. United States*, 628 F.2d 187, 190-191 (D.C. Cir. 1980). Further:

[T]he central point [is] that the evaluation of hearsay . . . cannot be accomplished in the abstract; the evidence must be examined in the light of the particular record. This includes . . . an examination of the quality and quantity of the evidence on each side, as well as the circumstantial setting of the case.

McCormick on Evidence, § 351(d), p. 846 (2nd ed. 1972). (footnote omitted).

Hence, the probative value of Graves’s hearsay statement rests upon her truthfulness, reasonability, and credibility. Yet here Agency asks us to rely on hearsay piled on top of hearsay. Agency’s witness, Mr. Faunteroy, asks us to rely on the non-testifying Graves’ alleged statement to him that Employee made a criminal threat against her. We do not even have Graves’ written or unsworn statement.

Based upon the above evidence, I find that Agency failed to meet its burden of proving its charges against Employee. Accordingly, I conclude that the Agency has not met its burden of establishing cause for taking adverse action.

ORDER

It is hereby ORDERED:

1. Agency’s decision to remove Employee from his position is reversed.
2. Agency is directed to reinstate Employee, issue him the back pay to which he is entitled and restore any benefits he lost as a result of the removal, no later than 35 calendar days from the date of issuance of this Decision.

3. Agency is directed to document its compliance no later than 45 calendar days from the date of issuance of this Decision.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge