**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| TARA BLUNT, | ) | |
| Employee | ) | |
| | ) | OEA Matter No.: 1601-0067-16 |
| v. | ) | |
| | ) | Date of Issuance: June 30, 2020 |
| D.C. DEPARTMENT OF | ) | |
| PARKS AND RECREATION, | ) | |
| Agency | ) | |
| | ) | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Tara Blunt ("Employee") worked as a Recreation Specialist in the Aquatics Division of the D.C. Department of Parks and Recreation ("Agency"). On June 1, 2016, Agency issued Employee an Advance Written Notice of Proposed Removal, charging her with "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: insubordination." The charge was based on Employee's failure to complete a mandatory International Lifeguard Training Program ("ILTP"). A hearing officer conducted an administrative review of the charges and recommended that the termination action be sustained. On June 29, 2016, Agency issued its Notice of Final Decision on Proposed

Removal.[1] Employee's termination became effective on June 29, 2016.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 27, 2016. In her appeal, Employee argued that Agency initiated a personnel action against her because she questioned the legality of the changes to the aquatics training and certification policies. She stated that Agency failed to notify her union, AFGE Local 2741 ( "Union"), that the certification requirements for Recreation Specialists were changed from the American Red Cross ("ARC") to ILTP. Additionally, Employee contended that Agency violated D.C. Code § 1-617.04(a)(5) because it failed to bargain collectively, in good faith, with the exclusive representative. As a result, she requested that Agency be required to engage in bargaining and implementation with the Union and asked that Agency provide notice regarding the changes in the aquatics training and certification policies.[2]

Agency filed a Motion to Dismiss or in the Alternative Motion for Summary Disposition on August 29, 2016. It contended that Employee's arguments related to the Union's alleged unfair labor practices constituted claims which were properly adjudicated before the Public Employee Relations Board ("PERB"). Agency also asserted that removal was appropriate under the District Personnel Manual ("DPM"). Therefore, its requested that the matter be dismissed or that OEA grant its motion for summary dismissal.[3]

The matter was assigned to an OEA Administrative Judge ("AJ") in September of 2016. On September 20, 2016, the AJ issued an order stating that this Office's jurisdiction was at issue and ordered the parties to submit briefs.[4] After reviewing the parties' initial submissions, the AJ

[1] Employee previously served a five-day and a fifteen-day suspension based on charges of insubordination for her failure to complete the ILTP certification.
[2] *Petition for Appeal* (July 26, 2016). Employee, through counsel, filed an Amended Petition for Appeal on (December 21, 2017).
[3] *Agency's Motion to Dismiss or in the Alternative Motion for Summary Disposition* (August 29, 2016).
[4] *Briefing Order* (September 20, 2016).

determined that jurisdiction in this matter was not yet established. Therefore, on December 18, 2017, the parties were ordered to submit additional briefs addressing whether Employee was deemed at-will at the time of her termination.[5] After several continuances and oral arguments on the jurisdiction issue and other outstanding motions, the AJ determined that an evidentiary hearing was required. Hearings were subsequently held on February 6th, February 7th, and March 14th of 2019. The parties were ordered to submit written closing briefs by order dated July 3, 2019.[6]

The AJ issued an Initial Decision on September 30, 2019. With respect to the certification requirement, the AJ concluded that Agency made a reasoned and necessary decision to change from the ARC certification to the ILTP certification based on its determination that the former failed to meet national standards for pool safety. She explained that Agency did not violate the Collective Bargaining Agreement ("CBA") with the Union by changing the standard for certification and that Agency had the authority to mandate the ILTP training even though the affected employee's position descriptions did not reflect the change.[7] Additionally, the AJ stated that Employee's duties as a lifeguard required her to obtain the ILTP certification, but she failed to do so after being notified in writing, on several occasions, that the failure to comply could result in an adverse action. The AJ noted that Employee had no impediment that prohibited or delayed her from obtaining the ILTP certification and provided that Employee refused the training because she believed that the CBA prevented Agency from implementing the new

[5] *Order Requesting Briefs on Jurisdiction* (December 18, 2017).
[6] *Order Granting Extension to File Closing Briefs* (July 3, 2019).
[7] According to Agency, position descriptions for employees affected by the ILTP certification requirement were not permitted to be altered because a moratorium existed at the time of the certification change, as the District government was conducting a comprehensive review of its classification and compensation system. The moratorium was lifted in 2018 and the position descriptions for Aquatics Division employees were updated to reflect the ILTP certification. Tr., Volume 1, pp. 187-188.

certification requirement.[8]

As it related to Employee's affirmative defense of disparate treatment, the AJ held that the documentary and testimonial evidence did not support a finding regarding such. She concluded that, during the relevant time, the position descriptions for the Aquatics Division staff were generic and outdated; Agency had the authority and discretion to waive the ILTP certification requirements for employees who did not have actual lifeguard duties; and that Agency offered reasonable explanations regarding why the individuals alleged by Employee to be similarly situated were not terminated. As a result, she found Employee's argument to be unpersuasive.[9]

Additionally, the AJ held that Agency presented sufficient evidence to establish that Employee knowingly and intentionally refused to comply with a directive given by her supervisor. She noted that Employee offered no reasonable defense to show extreme or unusual circumstances, such as irreparable harm or danger, which would warrant a refusal to comply with Agency's directive. Additionally, the AJ determined that Agency complied with Article 24, Section 2.2 of the CBA which requires that employees and the Union are provided with notice of proposed disciplinary within forty-five business days after the date the employer knew or should have known or the act or occurrence allegedly constituting cause. Lastly, she concluded that Agency met its burden of proof in establishing that the penalty of termination was appropriate under the circumstances. Therefore, Agency's termination action was upheld.[10]

Employee disagreed with the AJ's findings and filed a Petition for Review with the OEA Board on November 4, 2019. She argues that the AJ unfairly and constantly interrupted the evidentiary hearing during the direct and cross examination of witnesses, which resulted in

[8] *Initial Decision* (September 20, 2019).
[9] *Id.*
[10] *Id.*

transcript errors, omissions, and an unfair evidentiary hearing. Employee states that the Initial Decision should be reversed because the AJ erroneously determined that Agency complied with the notice requirement contained in Article 24, Section 2.2, of the CBA. Additionally, she opines that the AJ erred in determining the admissibility and veracity of testimony entered into the record based on relevancy, consistency, and credibility for several hearing witnesses. Employee disagrees with the AJ's conclusion that she was required to have the ILTP certification, and not the ARC certification, to perform the functions of a Recreation Specialist.[11]

Regarding the issue of disparate treatment, Employee submits that the AJ erred in determining that certain aquatics division employees with the same position description and lifeguard duties were not required to take and pass the ILTP. Concerning the substantive charge of insubordination, she states that Agency did not have the authority to order her to take the ILTP course in 2015 because the certification change had not been bargained for with the Union, as required by the CBA. Thus, Employee believes that she was not insubordinate in refusing to obtain the new certification. Therefore, she requests that this Board reverse the Initial Decision; reinstate her with back pay and benefits; remove all adverse information related to the personnel actions leading up to termination action; award damages for emotional distress; and award attorney's fees.

Substantial Evidence

On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), held 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

[11] *Petition for Review* (November 4, 2019).

as evidence that a reasonable mind could accept as adequate to support a conclusion.[12]

Witness Credibility

In her Petition for Review, Employee disagrees with nearly all of the AJ's credibility determinations. However, the AJ concluded that Agency's witnesses provided credible and consistent testimony in establishing that it was necessary to require the ILTP certification to ensure the safety of those using District pools and that Agency retained the managerial right to implement the change from ARC to ILTP. The AJ also found Agency's witnesses credible in establishing that it was not required to revise Employee's position description because the change did not significantly alter her working conditions. Conversely, the AJ found the testimony of Employee's witness, Union President, David Brooks ("Brooks"), to be tentative, confusing, and unreliable. Additionally, she was not persuaded by Employee's position that Agency failed to satisfy the notice requirement under the CBA.

The D.C. Court of Appeals in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. The OEA Administrative Judge was the fact finder in this matter. As this Board has consistently ruled, we will not second guess the AJ's credibility determinations.[13] Moreover, Employee's assertions regarding witness testimony are merely disagreements with the AJ's findings. This is not a valid basis for appeal. Accordingly, we find

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[12] *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).

[13] *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); *Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Jones v. Department of Transportation*, OEA Matter No. 1601-0192-09, *Opinion and Order on Petition for Review* (March 5, 2012); *Henderson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0050-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); and *Powell v. D.C. Public Schools*, OEA Matter Nos. 1601-0281-10 and 1601- 0029-11, *Opinion and Order on Petition for Review* (June 9, 2015).

her arguments to be without merit.[14]

Agency's Authority to Change the Certification Requirement from ARC to ILTP

Employee disagrees with the AJ's finding that Agency retained the managerial right to implement the change from the ARC to the ILTP certification pursuant to the terms of the CBA and that the AJ erred in concluding that Agency could make the adjustment without revising her position description. Article 31 of the CBA addresses the rights of management and provides the following in pertinent part:

> The Department shall retain the sole right, authority and complete discretion to maintain the order and efficiency of the public service entrusted to it, and to operate and manage the affairs of the District in all aspects, including but not limited to, all rights and authority held by the Employer prior to the signing of this Agreement. Such management rights shall not be subject to the negotiated grievance procedure or arbitration, unless specifically abridged and abrogated in a separate distinctive Article of this Agreement. The Employer retains the following rights, which in no way are wholly inclusive:
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> 1. To direct employees of the Department.
> 4. To maintain the efficiency of the District government operations entrusted to them.

After reviewing the documentary evidence and testimony provided during evidentiary hearing, the AJ held that Agency had the managerial right to change the certification requirement for Aquatics Division employees because the new certification met national guidelines which were designed to increase the lifeguard skills of the employees; thereby, increasing the overall safety of the public. Additionally, the AJ determined that Agency was precluded from changing the position descriptions to reflect the new ILTP certification because of the District-wide moratorium.[15] Further, she found the testimony of the Director of the Aquatics Division, Tyrell

[14] Counsel for Employee also takes exception to the AJ's interruption of her direct and cross examination of witnesses. This is also not a valid basis for appeal, as the AJ was permitted to question the witnesses during the course of the hearing.
[15] *See* Footnote No. 7 *supra*.

Lashley ("Director Lashley"), to be convincing in establishing that Agency met with Employee's union to discuss the certification change in 2014, and that the Union did not seek bargaining at that time.[16]

This Board believes that the AJ's findings are supported by the record. The AJ was permitted to make credibility determinations in assessing witness veracity. She assessed Director Lashley's testimony that Agency complied with Article 31 of the CBA as truthful in light of his considerable skills and tenure with Agency. Moreover, the AJ provided a sound and rational analysis in concluding that the change from the ARC to the ILTP certification did not significantly alter the working conditions of Aquatics Division employees. As a result, we find to credible reason to disturb the AJ's conclusions regarding such.

Insubordination

Under D.C. Code §1-616.51 (2001), disciplinary actions may only be taken for cause. DPM Section 1603.3 defines cause to include any on-duty employment related act or omission that interferes with the efficiency and integrity of government operations, to wit, insubordination. D.C. Municipal Regulation ("DCMR") Title 16, § 1619.1 authorizes an employee to be charged with insubordination if he or she refuses to comply with a direct order, accept an assignment, or refuses to carry out assigned duties and responsibilities. Employee's primary argument with respect to this charge is that Agency was not authorized to order her to take the ILTP course. As previously discussed, Agency acted within the directives of the CBA in changing its licensure requirements. Employee concedes that she was directed to attend the training sessions for the ILTP course but willfully refused to comply. Accordingly, her actions constitute a refusal to comply with a direct order from her supervisor, Director Lashley. As a result, this Board finds

[16] The AJ noted that the Union subsequently filed two Unfair Labor Practice ("ULP") appeals in 2015. However, the ULPs were settled.. The AJ held that the settlement agreement did not reference the certification changes.

that the AJ correctly sustained the charge of insubordination in accordance with DPM § 1603.3 and DCMR § 1619.1.

Notice

Employee asserts that Agency failed to comply with the notice requirement under the CBA regarding proposed disciplinary actions. She argues that Agency first became aware of her alleged insubordination in June of 2015, when she was placed on administrative leave for refusing to take the ILTP course. Employee further contends that Agency's violation of the CBA precluded it from taking adverse action because it did not serve its Advance Notice of Proposed Removal in a timely manner. Article 24, Section 2.2, of the CBA provides the following in part regarding notice of proposed disciplinary actions:

> An employee and the Union shall be notified in writing of any proposed disciplinary or adverse action within forty-five (45) days, no[t] including Saturdays, Sundays, or legal holidays, after the date that the Employer knew or should have known of the act or occurrence…The failure of the Employer to issue such notice shall precluded the discipline pursuant to the law.

In *Rodriguez v. Office of Employee Appeals*, 145 A.3d 1005 (D.C 2016), the District of Columbia Court of Appeals examined a similar provision of a CBA which provided that the failure of the agency to notify both the employee and their union with written notice of any proposed disciplinary actions within forty-five days from the time the agency knew, or should have known, of the act allegedly constituting cause, precluded the agency from imposing the discipline. The Court held that the agency's failure to provide the employee's union with a timely notice required a "permanent retraction" of any proposed discipline based on the mandatory nature of the provision. Additionally, the Court in *Rodriguez* noted that OEA's application of the harmless error rule might have warranted a ruling in favor of the agency if the CBA provided only that the union be notified in writing within forty-five days without

specifying a consequence for the failure to give the requisite notice. Because Article 24, Section 2.2 of the CBA in this matter specifies both a time limit for complying with the forty-five-day rule, and a consequence for the failure to comply, Agency's failure to adhere to the provision would preclude it from taking adverse action against Employee.

This Board agrees with the AJ's finding that both Employee and the Union were notified of Agency's proposed termination action in accordance with the CBA. On June 6, 2016, Employee was emailed a copy of Agency's June 1, 2016 Advance Notice of Proposed Removal.[17] Employee's union was notified of the removal action by way of an email dated June 2, 2016. Testimony provided during the evidentiary hearing supports a finding that Human Resources Director, Kwelli Sneed ("Sneed"), sent a copy of the Advance Written Notice of Termination to Employee's Union President Brooks on June 2, 2016.[18] Employee infers that the June 2, 2016 email was not sent to Brooks, and if it was, that Agency somehow tampered with the email. Again, the AJ was the finder of fact in this matter and we will not second guess her credibility determinations. Accordingly, this Board finds no reason to disturb the AJ's ruling that both Employee and the Union were provided with written notice of Agency's proposed termination action.

With respect to the forty-five-day notice requirement, Employee claims that Agency first became aware of her alleged misconduct in June of 2015, when she was placed on administrative leave for the failure to complete the ILTP certification. We find this argument to be misguided. Employee was charged with insubordination a total of three times, the last resulting in her termination. Therefore, each charge would require a separate analysis of the forty-five-day rule.

In this case, on February 24, 2016, Employee was provided with written notice to attend

[17] Tr., Joint Exhibit 20.
[18] Tr., Joint Exhibit 21.

mandatory ILTP training sessions on March 19th, March 26th, and April 2nd of 2016.[19] Employee did not addend the training as instructed; therefore, Agency initiated the current removal action. Forty-five business days from the last day on which Employee refused to report for ILTP training, April 2, 2016, was June 7, 2016.[20] Agency's issued its Advance Written Notice of Proposed Removal on June 1, 2016. Therefore, Agency complied with the forty-five-day rule as provided under Article 24, Section 2.2 of the CBA. Consequently, we find that the AJ's conclusions regarding notice are supported by substantial evidence.

Disparate Treatment

In her petition, Employee contends that Agency engaged in disparate treatment because other employees in the Aquatics Division with the same position description and lifeguard duties were not required to take and pass the ILTP course. However, she fails to expound upon this argument and offers no legal authority or case law in support of her position. Therefore, we find Employee's argument to be without merit.

At-Will Employment

Assuming *arguendo* Agency violated Article 24, Section 2.2 of the CBA by failing to issue its Advance Written Notice of Removal in a timely manner, this matter may still be dismissed jurisdictional grounds. This Office has previously held that employees who do not fulfill required certification or licensing requirements lose their career status and become at-will employees.[21] In *Frazier v. D.C. Public Schools*, OEA Matter No. 1601-0161-12R17 (December 21, 2017), OEA held that it lacked jurisdiction over an appeal from a terminated employee who

[19] *Advance Written Notice of Proposed Removal* (June 1, 2016).
[20] The AJ in this matter did not specifically address which date was used as an "anchor" date in calculating the forty-five-day period under Article 22 of the CBA. This Board believes that April 2, 2016, the last date on which Employee was provided with the opportunity to appear for certification training, is reasonable date from which to calculate the deadline for Agency to issue its Advance Notice of Proposed Removal.
[21] *See Robin Suber v. D.C. Public Schools*, OEA Matter No. 1601-0107-07-R10 (January 22, 2010) and *Bowling-Bryant v. D.C. Public Schools*, OEA Matter No. 1601-0090-16 (May 30, 2017).

failed to meet the mandatory licensing requirements for teachers. The AJ in *Frazier*, relying on the holding in *Wubishet v. D.C. Public Schools*, OEA Matter No. 1601-0106-06 (March 23, 2007), reasoned that an employee who failed to meet mandatory licensing or certification requirements became at-will because he or she lacked the requisite qualifications to perform the functions of their position. Moreover, in *Hillman v. Office of Employee Appeals*, No. 2018 CA 8613 P (MPA) (D.C. Super. Ct. October 18, 2019), the Superior Court of the District of Columbia addressed the issue of whether the employee's failure to obtain his ILTP certification rendered him at-will at the time of his termination. The Court held that the employee was deemed at-will because he did not have the requisite ILTP certification, which was required for lifeguards employed by Agency. The Court noted that it has previously upheld OEA's rulings that this Office lacks jurisdiction over at-will employees because they may be discharged "at any time and for any reason, or for no reason at all."[22]

Similar to the employee in *Hillman*, Employee in this case failed to obtain her ILTP certification even though Agency established it as a mandatory licensing requirement. Employee was provided with several opportunities, dating back to 2015, to attend the ILTP trainings at the Wilson Aquatic Center.[23] Agency issued numerous written notices to Employee, informing her that the failure to successfully complete the certification course may result in corrective or

[22] *See, e.g., Ellis et. al. v. D.C. Department of Consumer and Regulatory Affairs*, No. 2011 CA 001529 P(MPA) at 6 (D.C. Super. Ct. Nov. 28, 2011) (affirming OEA Board decision that it lacks jurisdiction over appeals from terminated at-will employees) and *Ellis, et. al. v. D.C. Department of Consumer and Regulatory Affairs*, Nos. 2011 CA 001529 P(MPA), 2011 CA 001533 P(MPA), 2011 CA 001534 P(MPA), 2011 CA 001557 P(MPA), 2011 CA 001560 P(MPA), 2011 CA 001561 P(MPA), 2011 CA 001562 P(MPA), and 2011 CA 001567 P(MPA) (D.C. Super. Ct. November 28, 2011).

[23] Employee was provided with notice on December 15, 2015 to attend the ILTP training from January 4th to January 6th of 2016. She refused to participate in the training. Employee was subsequently enrolled in an ILTP training course on January 10, 2016, which she also refused to complete. After imposing a five-day suspension, Agency notified Employee on January 14, 2016 that she was required to attend training from January 23rd to February 6th of 2016; however, she failed to attend. Thereafter, Agency imposed a fifteen-day suspension. Employee was further provided with notice of the ILTP certification requirement on February 24, 2016. Employee was informed of the requirement to complete the training on March 19th, March 26th, and April 2nd of 2016. *See Tr. Joint Exhibits* 7, 13, 15, 20, and 22.

adverse action.[24] However, Employee outright refused to obtain the required certification. The failure to obtain the ILTP license rendered Employee at-will at the time of her removal. OEA does not retain jurisdiction to hear appeals from at-will employees.[25] Accordingly, this matter may be dismissed based on lack of jurisdiction.

Conclusion

Based on the foregoing, this Board finds that the Initial Decision is supported by substantial evidence. Employee's disagreements with the AJ's credibility determinations do not serve as a basis for reversal of the Initial Decision. Agency acted in accordance with the CBA and retained the managerial right to implement the change from the ARC to ILTP as a mandatory licensing requirement for Employee's position as a Recreation Specialist. Employee's refusal to obtain the ILTP certification constituted insubordination and subjected her to adverse action in accordance with DPM § 1603.3 and DCMR § 1619.1. Both Employee and her Union were provided with timely notice of Agency's proposed termination action as required by Article 24, Section 2.2 of the CBA. Additionally, Employee has failed to establish a legal basis for a finding of disparate treatment. Lastly, Employee's failure to obtain the essential ILTP certification rendered her at-will at the time of her termination and serves as an alternate basis for dismissal. Based on the foregoing, Employee's Petition for Review must be denied.

[24] *See Agency's Closing Statement* (August 6, 2019).
[25] *See also Michael Brown, et. al. vs. D.C. Dept. of Consumer and Regulatory Affairs*, OEA Matter Nos. 1601-0012-09 to 1601-0027-09, 1601-0052-09 to 1601-0054-09, *Opinion and Order on Petition for Review* (January 26, 2011).

**ORDER**

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

**FOR THE BOARD:**

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Clarence Labor, Jr., Chair

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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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.