THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
WIDMON BUTLER, Employee	
v.	OEA Matter No.: 1601-0236-12 1601-0069-14
METROPOLITAN POLICE DEPARTMENT, Agency	Date of Issuance: April 18, 2017

OPINION AND ORDER
ON
PETITION FOR REVIEW

Widmon Butler ("Employee") worked as a Claims Examiner with the Metropolitan Police Department ("Agency"). On July 24, 2012, Agency issued a notice to Employee ordering him to serve a twenty-five day suspension based on "[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Insubordination and Misfeasance."[1] The suspension commenced on August 6, 2012. On April 14, 2014, Employee filed a second Petition for Appeal for a separate adverse action in which Agency suspended him for thirty days based on a charge of "[a]ny on-duty or employment-

[1] *Petition for Appeal* (September 5, 2012).

related act or omission that interferes with the efficiency and integrity of government operations: Insubordination." The thirty-day suspension commenced on April 21, 2014.[2]

In his first Petition for Appeal, Employee argued that the twenty-five day suspension was unfounded because the charges against him were false and that he was properly performing his duties as a Claims Examiner. In addition, he claimed that the suspension was too severe.[3] In his second Petition for Appeal, Employee argued that the thirty-day suspension was arbitrary, capricious, and violated District of Columbia law.[4] He, therefore, requested that both the twenty-five day and thirty-day suspensions be reversed with back pay and benefits.

Agency filed answers to Employee's petitions on October 10, 2012 and May 15, 2014, respectively. In both submissions, Agency denied the allegations against it and requested that an oral hearing be held.[5]

An OEA Administrative Judge ("AJ") was assigned to the cases on March 19, 2014, and July 18, 2014, respectively. After holding several conferences in both matters, the AJ issued an order on October 23, 2014 for the purpose of scheduling an evidentiary hearing and to consolidate the twenty-five and thirty-day suspensions into one matter. An evidentiary hearing was held on February 5, 2015, wherein the parties presented documentary and testimonial evidence in support of their positions. The parties were subsequently ordered to submit written closing arguments on or before April 30, 2015.[6]

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[2] *Petition for Appeal* (April 14, 2014). Initially, Agency proposed to terminate Employee due to his insubordination. However, after reviewing the evidence, the Deciding Official elected to reduce the Hearing Officer's recommendation from termination to a thirty-day suspension without pay.
[3] *Petition for Appeal* (September 5, 2012).
[4] *Petition for Appeal* (April 14, 2014).
[5] *Agency Answer to Petition for Appeal* (October 10, 2012) and *Agency Answer to Petition for Appeal* (May 15, 2014).
[6] *Order Requesting Closing Arguments* (February 25, 2015).

An Initial Decision was issued on September 28, 2015. With respect to the twenty-five day suspension, the AJ held that Agency met its burden of proof for both the insubordination and misfeasance charges. According to the AJ, Agency had cause to discipline Employee because he circumvented the chain of command by emailing the Director of the Human Resource Management Division, Diana Haines, concerning a Form PD-42 (Injury and Illness Report) without first consulting with the Director of the Medical Services Division, William Sarvis. In reviewing the Table of Appropriate Penalties provided in Chapter 16 of the District Personnel Manual ("DPM"), the AJ determined that the penalty for a second offense for charges of insubordination and misfeasance ranged from a fifteen-day suspension to a thirty-day suspension. Therefore, Employee's twenty-five day suspension was upheld.[7]

Regarding the thirty-day suspension, the AJ held that Agency met its burden of proof for the insubordination charge. He provided that Employee was given a direct order to submit electronic copies of his Worker's Compensation Claim Recommendations to his supervisor, Lieutenant Gregory Stroud, because Employee was scheduled to go on annual leave for two weeks. According to the AJ, Employee willfully disobeyed a direct order from his supervisor when he failed to leave electronic copies of his work prior to going on annual leave. Accordingly, the AJ held that Employee's actions constituted insubordination and that a thirty-day suspension was appropriate under the circumstances. Consequently, Employee's suspension was upheld.[8]

Employee disagreed with the Initial Decision and filed a Petition for Review of both suspensions with OEA's Board on November 3, 2015. In his petition, Employee asks this Board

[7] *Initial Decision* at 10.
[8] *Id.* at 12.

to reconsider the AJ's findings of fact because they are unsupported by the evidence. Regarding the twenty-five day suspension, Employee argues that the AJ erroneously placed the burden of proof on him, instead of Agency, to prove that the suspension was taken for cause. Employee also posits that his suspension was retaliatory because he filed a complaint with the D.C. Office of Equal Opportunity ("EEO") in August of 2011 and was successful in appealing a performance review rating in February of 2012. In addition, Employee disagrees with the AJ's findings pertinent to the veracity and consistency of the testimony provided by Agency's witnesses.

Concerning the thirty-day suspension, Employee asserts that Agency wrongfully punished him for performing his duties as a Claims Examiner. He also states that Agency suspended him in retaliation for making complaints about his supervisors to Director Haines on several occasions. According to Employee, Agency exhibited a pattern of charging him with misconduct for "relatively trivial incidents." He further claims that Agency failed to prove that his conduct affected the efficiency of government operations. As a result, Employee requests that both the twenty-five day and thirty-day suspensions be reversed with back pay and benefits.[9]

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:
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> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
>
> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;

[9] *Petition for Review* (November 3, 3015). Agency did not file a response to the Petition for Review.

(c) The findings of the Administrative Judge are not based on substantial evidence; or

(d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Burden of Proof

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) provides that "the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence." Preponderance of the evidence is defined as "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."[10] Under OEA Rule 628.2, the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

In this case, the AJ correctly determined that Agency was required to prove that it had cause to suspend Employee by a preponderance of the evidence. In his Initial Decision, the AJ specifically stated that Agency met its burden of proof with respect to the twenty-five day suspension and the thirty-day suspension. Employee did not have the burden of proof in this case, and there is no evidence to support a finding that the burden of proof was erroneously placed on him. Thus, this Board finds his argument to be without merit.

Retaliation

Next, Employee argues that both the twenty-five day and thirty-day suspensions were retaliatory because he previously filed complaints with EEO and his supervisors. Employee also contends that Agency retaliated against him because he was successful in appealing a performance review rating in February of 2012. However, it should be noted that in accordance

[10] OEA Rule 628.1

with OEA Rule 633.4, "any…legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." The D.C. Court of Appeals held in *District of Columbia Metropolitan Police Department v. Stanley*, 942 A.2d 1172 (D.C. 2008) that "it is a well-established principle of appellate review that arguments not made at trial may not be raised for the first time on appeal." Additionally, the Courts ruled in *Brown v. Watts*, 993 A.2d 529 (D.C. 2010) and *Davidson v. D.C. Office of Employee Appeals*, 886 A.2d 70 (D.C. 2005) that any arguments are waived when a party never attempted to reopen the record to introduce any evidence supporting their argument before the issuance of an OEA Initial Decision. Moreover, this Board has consistently held that an argument is waived if it was not raised on appeal before the AJ.[11]

In this case, Employee had numerous opportunities to present evidence in support of his arguments to the AJ during the course of this appeal, but he did not. Employee also failed to present evidence in support of his retaliation claims during the evidentiary hearing. Accordingly, Employee cannot now raise these arguments on Petition for Review. Therefore, this Board will not address the merits, if any, of Employee's newly-presented arguments.

Finally, Employee's petition raises many of the same arguments that were presented to the AJ on Petition for Appeal. There is no new evidence presented that was not available or

[11] *Sharon Jeffries v. D.C. Retirement Board*, OEA Matter No. 2401-0073-11, *Opinion and Order on Petition for Review* (July 24, 2014); *Latonya Lewis v. D.C. Public Schools*, OEA Matter No. 1601- 0046-08, *Opinion and Order on Petition for Review* (April 15, 2014); *Markia Jackson v. D.C. Public Schools*, OEA Matter No. 2401-0138-10, *Opinion and Order on Petition for Review* (August 2, 2013); *Darlene Redding v. Department of Public Works*, OEA Matter No. 1601-0112-08R11, *Opinion and Order on Petition for Review* (April 30, 2013); *Dominick Stewart v. D.C. Public Schools*, OEA Matter No. 2401-0214-09, *Opinion and Order on Petition for Review* (June 4, 2012); *Calvin Braithwaite v. D.C. Public Schools*, OEA Matter No. 2401-0159-04, *Opinion and Order on Petition for Review* (September 3, 2008); *Collins Thompson v. D.C. Fire and EMS*, OEA Matter No. 1601-0219-04, *Opinion and Order on Petition for Review* (November 13, 2008); *Beverly Gurara v. Department of Transportation*, OEA Matter No. 1601-0080-09, *Opinion and Order on Petition for Review* (December 12, 2011) and *Yordanos Sium v. Office of State Superintendent of Education*, OEA Matter No. 1601-0135-13, *Opinion and Order on Petition for Review* (May 10, 2016).

previously considered by the AJ. The arguments made by Employee on Petition for Review seem to merely be disagreements with the AJ's ruling in this matter. That is not a valid basis for appeal.

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions 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), 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 as evidence that a reasonable mind could accept as adequate to support a conclusion.[12]

Based on a review of the record, this Board finds that there was no clear error in judgment by Agency or the AJ. There is substantial evidence in the record to support a finding that Employee was suspended in each instance for cause. Furthermore, the Initial Decision addressed all issues raised by Employee in his petitions. Consequently, we must deny his Petitions for Review.

[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).

ORDER

Accordingly, it is hereby ordered that Employee's Petitions for Review are **DENIED**.

FOR THE BOARD:

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Sheree L. Price, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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P. Victoria Williams

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.