THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
YORDANOS SIUM,	)	
Employee	)	OEA Matter No. 1601-0135-13
	)	
v.	)	
	)	Date of Issuance: May 10, 2016
OFFICE OF THE STATE	)	
SUPERINTENDENT OF EDUCATION,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Yordanos Sium ("Employee") worked as a School Bus Driver with the Office of the State Superintendent of Education ("Agency"). Agency issued a final notice of removal on April 12, 2011. The notice provided that Employee was terminated for "neglect of duty – failure to follow instructions or observe precautions regarding safety: failure to carry out assigned tasks; careless or negligent work habits."[1] Agency alleged that Employee was involved in an accident while driving a school bus. It claimed that she backed into a vehicle and fled the scene of the accident.[2]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on August 15, 2013. She provided that she was involved in a minor car accident while on duty.

[1] *Petition for Appeal,* p. 8 (August 15, 2013).
[2] *Office of State Superintendent of Education's Brief in Support of Termination,* p. 1-2 (July 2, 2014).

However, she was cleared to return to work after one week. She asserted that after being back to work for one month, she received the proposed notice of termination. Employee stated that the notice was delivered while she was on sick leave from Agency and that she was too ill to respond before she was terminated. Therefore, she requested that she be reinstated to her position.[3]

Agency filed its Response to Employee's Petition for Appeal on September 18, 2013. It argued that Employee was terminated on April 12, 2011. However, she did not file her Petition for Appeal until August of 2013. Agency reasoned that in accordance with D.C. Official Code § 1-606.03, Employee only had thirty days to file her appeal with OEA. Therefore, it explained that the OEA Administrative Judge ("AJ") should dismiss her appeal because it was untimely.[4]

Before the AJ issued her Initial Decision, the parties engaged in mediation. However, they were unsuccessful in settling the matter. Therefore, the AJ requested that each party submit briefs addressing, *inter alia*, whether Agency's decision to terminate Employee was in accordance with District statutes, laws, and regulations and whether the penalty of termination was appropriate.[5]

In its brief, Agency provided that when initially speaking with the investigator regarding the accident, Employee denied ever hitting the car. According to Agency, it was not until she was informed that there was a witness and a video recording of the accident that Employee changed her story and admitted to committing the accident. It noted that this was Employee's second, preventable accident within a twelve-month period. Agency explained that the investigator concluded that Employee failed to report a collision; backed up the bus without assistance from the attendant; fled the scene; and lied about the accident until presented with

[3] *Petition for Appeal,* p. 2 and 10 (August 15, 2013).
[4] *Office of the State Superintendent of Education's Motion to Dismiss Yordanos Sium's Petition for Appeal,* p. 2 (September 18, 2013).
[5] *Post Status Conference Order* (June 11, 2014).

evidence that it took place. As a result, it reasoned that Employee failed to follow the policies and procedures for handling a collision, and it had cause to remove her. Moreover, Agency asserted that removal was within the range of penalties for neglect of duty. Therefore, it contended that Employee's Petition for Appeal should be denied.[6]

In her brief, Employee noted that she was cleared to return to work by Agency after the accident. Therefore, she was entrusted with the safety of students and District personnel. Moreover, she claimed that Agency took more than the required ninety days to terminate her after the accident. Additionally, Employee opined that there was no forensic test of paint samples which confirmed the collision of the bus and vehicle. Further, she provided that Agency did not perform a drug or alcohol testing on her after the accident. Thus, Employee contended that she did not neglect her duties. As for the penalty, Employee provided that the range of penalties for this offense was reprimand to removal. However, Agency did not prove that it selected the appropriate penalty.[7]

The AJ issued her Initial Decision on October 10, 2014. She held that Employee was negligent in her duties because she aware of, but failed to report, the accident and did not follow the accident policy as provided in Agency's Policy and Procedure Manual. The AJ went on to find that after watching the video of the accident, any reasonable person would have felt the impact from the collision. However, Employee did not get off the school bus to assess the damage; she instead left the scene.[8]

As for Employee's claim that she was cleared to return to work, the AJ reasoned that just because she returned to her normal duties pending an official decision, does not mean that Employee was cleared of the accident. Similarly, the AJ held that Employee's ninety-day rule

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[6] *Office of State Superintendent of Education's Brief in Support of Termination,* p. 2-5 (July 2, 2014).
[7] *Employee's Response to Post Status Conference Order* (August 7, 2014).
[8] *Initial Decision,* p. 4 (October 10, 2014).

argument lacked merit. She noted that if Agency was indeed held to a ninety-day rule, the accident occurred on January 5, 2011, and Agency issued its proposed notice of termination on March 28, 2011. Therefore, it was within the ninety-day period. Finally, the AJ ruled that because removal was within the range of penalties for neglect of duty, Agency's removal of Employee was appropriate.[9]

On November 13, 2014, Employee filed a Petition for Review with the OEA Board. She argues that the AJ did not examine the photographs and video of the accident to test their evidentiary value through a hearing. Moreover, she asserts that she did not follow Agency's policy for reporting an accident because she was unaware that the accident occurred. Additionally, Employee contends that absent mathematical formulas, the AJ could not determine that she could have felt the impact of the accident. Further, she claims that Agency failed to provide a clearance certificate when she was allowed to return to work after ten days. Therefore, Employee requests that the matter be remanded for the AJ to conduct an evidentiary hearing or alternatively, that Employee be reinstated to her position with back pay and benefits.[10]

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), found that if administrative findings are supported by substantial evidence, then they 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.[11] Therefore, if there is substantial evidence to support the AJ's decision, then this Board must accept it.

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[9] *Id.,* 5-6.
[10] *Petition for Review* (November 13, 2014).
[11] *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).

Employee contends that the AJ's decision was not based on substantial evidence. However, she does not directly address the cause of action or penalty on Petition for Review. To determine if the AJ's decision was based on substantial evidence, we must consider the cause and penalty.

Agency removed Employee for "neglect of duty – failure to follow instructions or observe precautions regarding safety: failure to carry out assigned tasks; careless or negligent work habits."[12] Agency relied on District Personnel Manual ("DPM") §1603.3(f)(3) to remove Employee. This regulation provides the following:

> For the purposes of this chapter, except as provided in section 1603.5 of this section, cause for disciplinary action for all employees covered under this chapter is defined as follows:
> (a) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include:
> (3) Neglect of duty

Agency provided that Employee specifically violated section 207.1(E) and 207.2 of its Policies and Procedures Manual. Section 207.1(E) states that "a Driver with two preventable accidents . . . in a one-year period . . . involving any damage . . . may not continue operating a school bus . . . ." Moreover, Section 207.2 outlines the procedures that a driver must take when there is an accident. They include, *inter alia*, visually inspecting the bus; notifying the terminal dispatcher of the accident; and not moving the bus unless directed to do so by the police.

As the AJ held, Employee does not deny that she had a collision with the parked car. Employee admitted in her Petition for Appeal that she had a "minor accident . . . while . . . on duty."[13] Similarly, she informed the investigator that she struck the vehicle while backing up. Employee also admitted to the investigator that she did not perform a pre- or post-inspection of the bus and was not aware of any damages. The investigator's report also noted that Employee

[12] *Petition for Appeal,* p. 8 (August 15, 2013).
[13] *Id.* at 10.

had a previous, preventable collision on February 25, 2010.[14] Therefore, the AJ's decision that Agency had cause to remove Employee was based on substantial evidence. The record supports Agency's decision that Employee violated section 207.1(E) and 207.2 of its Policies and Procedures Manual.

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of* Columbia, 502 A.2d 1006 (D.C. 1985).[15] According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency.

Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. DPM § 1619.1(6)(c) lists the range of penalties for the charge of "neglect of duty – failure to follow instructions or observe precautions regarding safety: failure to carry out assigned tasks; careless or negligent work habits." As the AJ ruled, the penalty for the first offense of neglect of duty is reprimand to removal. Thus, removal was appropriate because it was within the range of penalties.

As for Employee's arguments regarding the lack of an evidentiary hearing, this Board relies on OEA Rule 624.2 which provides that "if the Administrative Judge grants a request for an evidentiary hearing, 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

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[14] *Office of the State Superintendent of Education's Brief in Support of Termination,* Exhibit B (July 2, 2014).
[15] *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 No. 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); and *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 place for such hearing and the issues to be addressed." Thus, it is the Administrative Judge's prerogative to hold an evidentiary hearing when it is deemed necessary.[16]

As it relates to Employee's argument regarding the AJ's inability to rule on the impact of the accident absent mathematical formulas and Agency's failure to provide a clearance certificate, these arguments were not raised on appeal before the AJ. In accordance 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." Similarly, 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 where a party never attempted to reopen the record to introduce any evidence supporting their argument before the issuance of an OEA Initial Decision. Employee had numerous opportunities to present these arguments to the AJ, but she chose not to. This Board has held in several cases that an argument is waived if it was not raised on appeal before the AJ.[17] Thus, because these arguments were only raised on Petition for Review, we cannot consider them on their merits.

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[16] *Metrice Jones v. D.C. Public Schools, Department of Transportation,* OEA Matter No. 1601-0077-09, *Opinion and Order on Petition for Review* (September 18, 2012) and *Linda DuBuclet v. D.C. Public Schools,* OEA Matter No. 2401-0245-10, *Opinion and Order on Petition for Review* (December 17, 2013).

[17] *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 *Ilbay Ozbay v. Department of Transportation,* OEA Matter No. 1601-0073-09R11, *Opinion and Order on Petition for Review* (October 28,

There is substantial evidence to support the AJ's ruling that Agency had cause to remove Employee. Removal was within the range of penalty for neglect of duty. The AJ was not required to conduct an evidentiary hearing in this matter, and the Board cannot consider arguments not previously raised before the AJ. Accordingly, we must deny Employee's Petition for Review.

2014).

ORDER

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

FOR THE BOARD:

Sheree L. Price, Interim Chair

Vera M. Abbott

A. Gilbert Douglass

Patricia Hobson Wilson

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.

CERTIFICATE OF SERVICE

I certify that the attached **OPINION AND ORDER** was sent by regular mail on this day to:

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Katrina Hill
Clerk

May 10, 2016
Date