THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MADELEINE FRANCOIS,	)	
Employee	)	OEA Matter No. 1601-0007-18
	)	
v.	)	
	)	Date of Issuance: July 16, 2019
	)	
OFFICE OF THE STATE	)	
SUPERINTENDENT OF EDUCATION,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Madeleine Francois ("Employee") worked as a Bus Attendant for the Office of the State Superintendent of Education ("Agency"). On September 18, 2017, Agency terminated Employee for "(1) Any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law; (2) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations; specifically: misfeasance; (3) Any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious; (4) Any act which constitutes a criminal offense whether or not the act results in a conviction." The effective date of Employee's removal was September 18,

2017.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on October 13, 2017. She argued that her removal was unwarranted because of Agency's lack of evidence to prove the adverse action charges. Additionally, she claimed that she was not provided adequate representation by her union because her representative did not speak her language. Accordingly, Employee requested that she be reinstated to her position.[2]

On November 6, 2017, Agency filed its Answer to Employee's Petition for Appeal. It claimed that Employee inappropriately handled a student and that she was loud and used profane language while being interviewed by an investigator. Agency explained that Employee was assigned to a new route, and one of the non-verbal students had difficulty adjusting to the new staff. According to Agency, another student witnessed Employee and the bus driver put their hands on the student. Agency explained that Employee's behavior violated its policies and procedures against touching students. As a result, it reasoned that removal was appropriate and within the range of penalties for a first offense of an on-duty act that the employee knew or should have known is a violation of law, including assault or inappropriate touching. Therefore, Agency requested that Employee's appeal be denied.[3]

The OEA Administrative Judge ("AJ") held an evidentiary hearing on April 3, 2018. After considering the testimonies and documentary evidence provided, the AJ ruled that Agency did not have cause for its adverse action against Employee. She found that Agency failed to utilize the 2016 version of the District Personnel Manual ("DPM"). The AJ explained that there were substantive differences in the charges and penalties for adverse actions in the 2012 and 2016

[1] *Petition for Appeal*, p. 5 (October 13, 2017).
[2] *Id.* at 2.
[3] *The Office of the State Superintendent of Education's Answer to Madeleine Francois's Petition for Appeal*, p. 1-3 (November 6, 2017).

versions of the regulation. Because Agency failed to levy the charges under the appropriate DPM version, she ruled that it was a harmful procedural error. Furthermore, the AJ found that there was no proof that Employee committed an act that constituted a criminal offense or an act that was a violation of law. Therefore, she ruled that there was no cause for the adverse action via DPM § 1603.3(h). Moreover, she held that Agency failed to prove the charge of misfeasance against Employee. She found Employee's testimony regarding the use of profanity to be credible. As a result, she determined that the penalty of termination was inappropriate. Accordingly, she reversed Agency's removal action and ordered that Employee be reinstated to her position and reimbursed all back pay and benefits.[4]

On December 3, 2018, Agency filed a Petition for Review of the Initial Decision. Agency asserts that it relied on the investigator's report in determining the appropriate discipline. It provides that after interviewing three students, the investigator concluded that force was used against a student. Moreover, Agency contends that the AJ did not afford the appropriate weight to the consistency of the statements from the students. It is Agency's position that the AJ discounted the students' statements while failing to consider that Employee and the bus driver had "something to lose from testimony that a student was inappropriately touched." Additionally, Agency opines that the AJ substituted her judgment for its choice to terminate Employee. It claims that Employee willfully disregarded its policies and procedures through her on-duty conduct, resulting in a dereliction of duty, as well as an on-duty or employment-related reason for corrected or adverse action that is not arbitrary or capricious. Finally, Agency reasons that its use of the 2012 version of Chapter 16 of the DPM was a harmless error. It is Agency's position that it would have terminated Employee even under the 2016 version, as removal is still within the range of

[4] *Initial Decision*, p. 10-14 (October 31, 2018).

penalty for a first offense of conduct an employee should reasonably have known was a violation of law. Accordingly, Agency requests that its removal action be upheld.[5]

Employee filed her response to the Petition for Review on January 7, 2019. She argues that Agency did not present new evidence to support its removal action and contends that Agency is attempting to relitigate the facts. Employee also submits that the AJ did not substitute her judgement for that of Agency; however, the AJ exercised her authority to make credibility determinations. Employee contends that Agency's argument regarding a substitution of judgment lacks warrant because the AJ did not offer that a different penalty be imposed, like suspension. She found that it lacked cause to terminate her. Further, Employee contests Agency's assertions that its use of the 2012 DPM was harmless error. Additionally, Employee provides that the AJ's decision was based on substantial evidence; that the record demonstrates that the investigative process was sloppy; and that the investigative reporting was inaccurate. Therefore, she requests that Agency's petition be denied.[6]

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decision is 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 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.[7] After reviewing the record,

[5] *Office of the State Superintendent of Education Appeal from Decision*, p. 5-18 (December 3, 2018).
[6] *Complainant's Answer Opposing Agency's Petition for Review of the Initial Decision on Remand*, p. 2-9 (January 7, 2019).
[7] *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).

this Board believes that the AJ's ruling was based on substantial evidence.

DPM Version

Before we address if Agency had cause to terminate Employee, we must first determine which DPM regulation was applicable at the time of Employee's removal. The AJ provided a thorough assessment of the two versions of Chapter 16 of the DPM. As the AJ found in her Initial Decision, there were substantive changes in the 2016 DPM related to charges and penalties as compared to the 2012 version. As a result, she was unable to determine which charges could have been levied against Employee had Agency utilized the appropriate version.[8]

The AJ correctly provided that the 2012 DPM version was effective as of July 13, 2012 and remained effective until the 2016 DPM version went into effect on February 5, 2016.[9] According to Agency's Notice of Final Decision, Employee was terminated in accordance with DPM §§ 1603(e), (f)(6), (g), and (h). The 2012 version of DPM §§ 1603(e), (f)(6), (g), and (h) provide the following:

> 1603.3 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:
>
> (e) Any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law;
>
> (f) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include:
> (6) Misfeasance;
>
> (g) Any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or

[8] *Initial Decision*, p. 10 (October 31, 2018).
[9] The transmittal date of August 27, 2012, is reflected for the 2012 DPM version, and the 2016 transmittal date is February 26, 2016. The removal action was taken against Employee on September 18, 2017. Given the effective dates of the 2012 and 2016 regulations, Agency should have used the 2016 DPM version when determining which adverse action charges to impose on Employee.

> capricious;
>
> (h) Any act which constitutes a criminal offense whether or not the act results in a conviction;

Penalties for a first offense of DPM § 1603(e) was a suspension for five to fifteen days. The penalty for a first offense of DPM § 1603(f)(6) was suspension for fifteen days. For a first offense of DPM § 1603(g), the range of penalty was reprimand to a fifteen-day suspension. Finally, the penalty for DPM § 1603(h) was a ten-day suspension to removal.

As the AJ accurately provided, the 2016 version of the DPM does not correspond with the 2012 version to offer a true comparison. The 2016 version provided the following, as it related to adverse actions:

> 1605.4 Though not exhaustive, the following classes of conduct and performance deficits constitute cause and warrant corrective or adverse action:
>
> (a) Conduct prejudicial to the District of Columbia government, including:
> (1) Conviction of any felony;
> (2) Conviction of any criminal offense that is related to the employee's duties or his or her agency's mission;
> (3) Conduct that an employee should reasonably know is a violation of law or regulation; and
> (4) Off-duty conduct that adversely affects the employee's job performance or trustworthiness, or adversely affects the employing agency's mission or has an otherwise identifiable nexus to the employee's position.
>
> (b) False Statements, including:
> (1) Deliberate falsification of an application for employment or other personal history record by omission of a material fact or by making a false entry;
> (2) Misrepresentation, falsification, or concealment of material facts or records in connection with an official matter;
> (3) Knowingly and willfully making an incorrect entry on an official record or approving an incorrect official record; and
> (4) Knowingly and willfully reporting false or misleading information or purposely omitting material facts, to any supervisor.

(c) Fiscal irregularities;
(d) Failure or refusal to follow instructions;
(e) Neglect of duty;
(f) Attendance-related offenses, including:
(1) Unexcused tardiness;
(2) Unauthorized absence; and
(3) Falsification of official records concerning attendance (i.e. timesheets, overtime requests, etc.).
(g) Using or being influenced by intoxicants while on duty;
(h) Unlawful possession of controlled substances and paraphernalia;
(i) Safety and health violations;
(j) Discriminatory practices;
(k) Sexual misconduct;
(l) Prohibited personnel practices;
(m) Failure to meet performance standards; and
(n) Inability to carry out assigned responsibilities or duties.

The only adverse action charge that appears in both versions is "conduct that an employee should reasonably know is a violation of law or regulation." This adverse action charge is in DPM § 1603.3(e) in the 2012 version and DPM § 1605.4(a)(3) in the 2016 version. The 2016 version does not include a misfeasance charge; an adverse action charge that addresses arbitrary and capriciousness; or a comparable charge for an act constituting a criminal offense.[10]

Harmless Error

In its Petition for Review, Agency argues that its use of the 2012 version of Chapter 16 of the DPM was harmless error because it would have terminated Employee even under the 2016 version of the DPM. OEA Rule 631.3 provides the following:

> Notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to make the action.

[10] DPM § 1605.4 (a)(1) and (2) require a conviction of a felony or a conviction of a criminal offense. There were no criminal charges filed against Employee; therefore, there were no convictions.

Because the wrong version of the regulation was used, Employee could not adequately defend herself against the charges levied against her. The penalties in the 2012 and 2016 DPM versions are vastly different and could very well have resulted in a different outcome and significantly affected Agency's final decision. Agency brought three charges against Employee that did not even exist at the time of her termination. This created substantial harm and severely prejudiced Employee's rights. Consequently, this Board agrees with the AJ's ruling that Agency's use of the wrong version of the DPM does not amount to harmless error.

Cause

In accordance with the 2016 DPM § 1605.1, "District employees are expected to demonstrate high standards of integrity, both on and off the job, guided by established standards of conduct and other Federal and District laws, rules and regulations. When established standards of conduct are violated or performance measures are not met, or the rules of the workplace are disregarded, corrective action or adverse action is warranted to encourage conformity to acceptable behavioral and performance standards or to protect operational integrity." DPM § 1605.2 goes on to provide that "taking a corrective or adverse action against an employee is appropriate when the employee fails to or cannot meet identifiable conduct or performance standards, which adversely affects the efficiency or integrity of government service. Before initiating such action, management shall conduct an inquiry into any apparent misconduct or performance deficiency (collecting sufficient information from available sources, including when appropriate the subject employee) to ensure the objective consideration of all relevant facts and aspects of the situation." The incident which prompted the adverse action is Agency's allegation that Employee inappropriately handled a student and used profane language.

The AJ relied heavily on testimony offered by MPD Detective Anselmo and the credibility

determinations made as to the other witnesses. As it relates to the AJ's assessment of credibility, this Board has consistently held that it will not question an AJ's credibility determinations.[11] In accordance with *Raphael v. Okyiri*, 740 A.2d 935, 945 (D.C. 1999) (quoting *Kennedy v. District of Columbia*, 654 A.2d 847, 854 (D.C.1994); *Washington Metropolitan Area Transit Authority v. District of Columbia Department of Employment Services*, 683 A.2d 470, 477 (D.C.1996); *Kennedy*, supra, 654 A.2d at 856; and *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C.1989)), due deference must be accorded to the Administrative Judge's credibility determinations, both by the OEA, and by a reviewing court. The Court in *Raphael* held that the Administrative Judge's findings of fact are binding at all subsequent levels of review unless they are unsupported by substantial evidence. This is true even if the record also contains substantial evidence to the contrary. Thus, although it is hard to determine how much weight the AJ gave to each witness' testimony, after a review of the hearing transcript, a reasonable mind would accept the credibility determinations that the AJ made as adequate to support her conclusion.

It is clear from the Initial Decision that the AJ found Employee's witnesses to be more credible than Agency's. She found that Investigator Warren was not credible because he inaccurately reported in his final investigative report that Detective Anselmo concluded that there was evidence of criminal action on the part of Employee. However, this finding was directly contradicted by Detective Anselmo during his testimony at the evidentiary hearing. It is reasonable to believe that if Investigator Warren falsified the statements made by Detective Anselmo, he could

[11] *Ernest H. 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); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September, 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Anita Staton v. Metropolitan Police Department*, OEA Matter No. 1601-0152-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Ronald Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); and *Tameka Garner Barry v. Department of Public Works*, OEA Matter No. 1601-0083-14, *Opinion and Order on Petition for Review* (July 11, 2017).

have also provided falsified statements by the students.[12] Moreover, the AJ found Mr. Fontaine's testimony to be credible and forthcoming. As the bus driver on the day of the incident, he testified that Employee did not strike or curse at the student but only tried to get her back in the seat. Mr. Fontaine explained that Employee never hurt the student or threw her into the seat or otherwise.[13] Finally, the AJ ruled that Agency did not provide any other supporting evidence to show that Employee used profanity. She determined that Employee's testimony was more credible than Investigator Warren's on this issue. Based on the aforementioned, it is clear that the AJ's credibility rulings were based on substantial evidence. The evidentiary and documentary evidence supported the AJ's determination that Agency failed to prove that it had cause to terminate Employee.

Penalty within the Range Allowed by Law, Regulation, or Applicable Table of Penalties

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).[14] According to the *Stokes* Court, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency. The Court in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency,

[12] Agency relied heavily on the statements made by the students on the bus. However, other than the Investigator's report, there was no other proof offered to substantiate the students' statements.
[13] OEA Hearing Transcript, p. 174-176 (April 3, 2018).
[14] *Anthony Payne v. D.C Metropolitan*, OEA Matter No. 1601-00540-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 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); *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 *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

but it should ensure that "managerial discretion has been legitimately invoked and properly exercised."[15] OEA has previously held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[16] Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.

Love went on to provide the following:

> [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, it is appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. (citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981)).

Both versions of the 2012 and 2016 DPM provide a Table of Penalties for various causes of adverse actions taken against District Government employees. Penalties for a first offense of conduct that an employee should reasonably know is a violation of law or regulation was a suspension for five to fifteen days under the 2012 version. In the 2016 version, the penalty for a first offense is reprimand to removal. It could be argued that because Agency relied on the 2012 version, the maximum penalty it could have considered for this charge is a fifteen-day suspension;

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[15] *Stokes v. District of Columbia,* 502 A.2d 1006, 1010 (D.C. 1985).
[16] *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

this was the maximum penalty in the 2012 version and was within the range of penalty for the 2016 version. This is especially true because the only 2012 charge that carried the penalty of removal was DPM § 1603(h). However, it has been established that there is no comparable charge within the 2016 version of the regulation. Ultimately, Employee should not have been placed in a position where she had to speculate as to which penalty would have been used had Agency utilized the proper version. Because we are unaware of what charges Agency would have raised against Employee under the 2016 version, it is difficult to uphold Agency's action. It is unreasonable for Agency to simply assert that removal was within the range, and therefore, the penalty was appropriate. As previously provided, three out of the four causes of action did not exist under the 2016 version of the DPM, and the penalties were so vastly different. Under the circumstances, Agency's failure to utilize the proper regulation certainly cannot reasonably be viewed as harmless. Therefore, we agree with the AJ's ruling that Agency failed to follow the appropriate laws, rules, and regulations in its administration of the adverse action.

Conclusion

Agency utilized the wrong version of the regulation when terminating Employee. The Administrative Judge's rulings that Agency lacked the requisite cause to remove Employee; that the penalty was inappropriate; and her credibility determinations were all based on substantial evidence. Therefore, we must deny Agency's Petition for Review.

ORDER

It is hereby ordered that Agency's Petition for Review is **DENIED**. Accordingly, Agency is ordered to reinstate Employee and reimburse her all back pay and benefits lost as a result of her termination.

FOR THE BOARD:

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Clarence Labor, Chair

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Patricia Hobson Wilson

_____
Jelani Freeman

_____
Peter Rosenstein

_____
Dionna 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.