THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LENDIA JOHNSON,	)	
Employee	)	OEA Matter No. 1601-0011-17
	)	
v.	)	
	)	Date of Issuance: May 28, 2019
	)	
METROPOLITAN POLICE DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Lendia Johnson ("Employee") worked as a Community Outreach Coordinator with the Metropolitan Police Department ("Agency"). On October 19, 2016, Agency terminated Employee for "any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations, to include incompetence. Incompetence includes: careless work performances; serious or repeated mistakes after receiving appropriate counseling or training; failing to complete assignment timely." The effective date of Employee's removal was October 19, 2016.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on

[1] *Petition for Appeal*, p. 5-6 (November 18, 2016).

November 18, 2016. She argued that she was improperly removed from Agency. Employee claimed that she received little or no supervision, and she did not receive training on new policies and expectations of Agency. Accordingly, Employee requested that she be reinstated to her position.[2]

On December 19, 2016, Agency filed its Answer to Employee's Petition for Appeal. It contested Employee's assertions regarding her removal. Additionally, Agency requested that a hearing be conducted.[3]

The OEA Administrative Judge ("AJ") scheduled a Pre-hearing Conference and ordered both parties to submit Pre-hearing Statements.[4] Agency's Pre-hearing Statement provided that Employee's termination was appropriate and in compliance with D.C. law pursuant to District Personnel Manual ("DPM") § 1603.3(f). Agency also argued that there were three specifications listed to support the charge of incompetence. The first specification included an incident that occurred on October 28, 2015, wherein Employee prepared letters soliciting Halloween candy donations from businesses in the Seventh District. Agency explained that Employee drafted the letters using Agency letterhead under the signature of the Vice President of the Citizen's Advisory Committee ("CAC").[5] Agency asserted that Employee's action was clear evidence of incompetence and a violation of General Order 201.26, Part V(A)(6).[6] Agency provided that the second specification occurred on October 9, 2015. It explained that Employee ordered goods, but

[2] *Id.*, 2-3.
[3] *Metropolitan Police Department's Answer to the Petition*, p. 1-2 (December 19, 2016).
[4] *Order Convening a Pre-hearing Conference* (May 15, 2017).
[5] The CAC is an advisory panel in each police district that provides the district commander with information and recommendations from the community on the public's safety problems and police service needs. Regular CAC meetings in each district allow residents to meet and discuss police-related issues with the commander. The meetings also provide an opportunity for police officials to assess the impact of their crime-fighting efforts in the community. *OEA Hearing Transcript Employee Exhibit # 6* (April 11, 2018).
[6] General Order 201.26, Part V (A)(6) provides that "members shall not accept a gift or gratuity from organizations, businesses, or individuals with whom he/she has or could reasonably be expected to have an official relationship or business with the District of Columbia Government."

when the delivery truck came with the items, Employee made a unilateral decision to send the delivery driver back. The result was that Agency incurred a re-delivery fee. Thus, it is Agency's assertion that this was further evidence of Employee's incompetence. Finally, Agency argued that Employee had three other disciplinary actions imposed against her within one calendar year for charges of insubordination, providing misleading information, and absence without leave.[7]

Employee explained in her Pre-hearing Statement that Agency improperly removed her and included past discipline as a specification within the charge. She further submitted that Agency's discipline was untimely and that Agency violated the Collective Bargaining Agreement, which required that discipline be issued in a timely manner. Additionally, Employee argued that the truck driver did not inform her that there would be a charge for re-delivery. However, once she learned of the charge, she informed her supervisor who provided her with an ultimatum to pay the re-delivery fee or have an investigation conducted. Employee provided that she could not pay the fee; therefore, an investigation was conducted. As for the drafted letter, Employee explained that it was prepared at the request of the CAC and similar letters had previously been used by Agency personnel working with the organization. Moreover, Employee argued that the penalty of termination was not consistent with the discipline imposed on other employees for the same or similar offences.[8]

Thereafter, the AJ issued an order requiring both parties to submit additional briefs addressing whether Agency had cause to take the adverse action against Employee and whether removal was appropriate.[9] In its brief, Agency reiterated that there was sufficient cause to take adverse action against Employee for her violation of DPM § 1603.3(f)(5). Further, Agency

[7] *Agency's Pre-hearing Statement*, p. 5-7 (August 8, 2017).
[8] *Appellant's Pre-hearing Statement*, p. 5-7 (August 8, 2017).
[9] *Post Pre-hearing Conference Order* (August 17, 2017).

explained that the Table of Appropriate Penalties permitted it to terminate Employee for her third offense involving incompetence. It argued that the charge against Employee was a violation of Agency's General Order 120.21, Part VIII, Attachment A: Table of Penalties (16),[10] further specified in General Order 201.26, Part V(A)(6), which prohibits members from accepting a gift or gratuity from organizations, businesses, or individuals that could reasonably be expected to have an official relationship or business with the District of Columbia Government.[11]

Employee asserted in her brief that she was not incompetent in performing her duties. She argued that Agency improperly charged her with incidents involving past discipline, rather than using the charges as aggravating factors under *Douglas*.[12] Employee opined that she could not be charged with incompetence for drafting the letter because she was completing a task, as instructed by the Vice President of CAC. She explained that as provided in her Position Description, part of her job is to work with the CAC members and to organize events. Moreover, she reasoned that it was improper for Agency to discipline her for the delivery driver's refusal to make a delivery and failure to inform her that there was a fee associated with having the items delivered at a later date. As for Agency's claim that she violated General Order 120.26, Part V, Employee provided that she did not personally accept any gifts or gratuities, nor did she solicit any donations on behalf of Agency. Additionally, Employee reiterated her claim that Agency's termination action was untimely and unduly harsh. It was Employee's position that Agency lacked cause to terminate her because she did not engage in misconduct, nor did her conduct violate DPM § 1603.3(f)(5). Employee contended that Agency failed to provide sufficient evidence to prove that there was

[10] Agency submitted that in its Final Investigative Report, the General Order incorrectly cited Part V of General Order 120.21; however, this was an error and the correct subpart is Part VIII. *Agency Brief*, p. 5 (October 16, 2017).
[11] *Id.* at 3-13.
[12] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).

cause to remove her. Therefore, she requested that the AJ reverse Agency's removal action.[13]

Before issuing her Initial Decision, the AJ held an evidentiary hearing on April 11, 2018. After considering the testimonies and documentary evidence provided during the hearing, the AJ ruled that Agency lacked cause to take the adverse action imposed on Employee. She explained that Agency commenced the adverse action within ninety days of the time in which it had notice of Employee's acts. However, the AJ determined that Agency failed to prove that Employee refused delivery of the items. She found that the delivery driver made the decision that he was unable to deliver the items on that date because he was unable to maneuver the truck in a manner conducive to make the delivery. Thus, the AJ concluded that Employee did not act in a manner consistent with the definition of incompetence. With regard to the solicitation allegation, the AJ explained that the language of General Order 201.26, Part V, cites to the prohibition of a member's *personal* solicitation or receipt of gratuity from organizations, businesses or individuals (emphasis added). The AJ found that the letters authored by Employee and signed by the CAC Vice President did not solicit personal gifts for Employee but were provided specifically for a CAC Halloween Safe Haven party. As a result, the AJ ruled that Employee did not violate General Order 201.26, Part V. Because Agency lacked cause, she found that termination was inappropriate under the circumstances. Accordingly, she ordered that Agency's action be reversed and that it reinstate Employee to her position with back pay and benefits.[14]

On November 2, 2018, Agency filed a Petition for Review of the Initial Decision. It argues that there is substantial evidence to support its claim that Employee was incompetent with regard to the specifications. Agency contends that the AJ based her decision solely on Employee's

[13] *Employee's Brief,* p. 5-16 (November 17, 2017).
[14] *Initial Decision,* p. 15-19 (September 28, 2018). As it related to Employee's claim of disparate treatment argument, the AJ determined that Employee failed to meet the burden of proof for the claim.

testimony that the delivery driver allegedly refused delivery and that Employee could not find anyone to assist her with the delivery. Agency explains that if the delivery driver could not deliver the items, Agency would not have been charged with a re-delivery fee. It claims that Employee made the decision to send the products back to the store despite being advised of the incurrence of a re-delivery fee. Therefore, Agency posits that Employee performed her duties incompetently with regard to the delivery incident. Additionally, Agency asserts that there is no language in the provision of General Order 201.26 that states that the solicitation of gratuities must be for personal use. It acknowledges that subsection (a) of General Order 201.26, Part V (A)(6) states in pertinent part that members are prohibited from accepting personal or business favors; however, the entirety of Part V (A)(6) is not limited to the prohibition of personal favors. Agency argues that the AJ cites no legal authority to support her interpretation of that provision of the General Order. Moreover, Agency asserts that Employee violated its rules and authored a letter on Agency letterhead instead of the CAC's letterhead. Therefore, Agency requests that the Board grant its petition and reverse the Initial Decision.[15]

Employee filed her response to Agency's Petition for Review on November 30, 2018. She argues that Agency's petition should be denied because the appeal fails to present evidence for the OEA Board to grant Agency's request, as required by OEA Rule 628.1. Additionally, Employee asserts that Agency used the wrong standard of review. According to Employee, Agency incorrectly asserts that there is substantial evidence that Employee was incompetent. However, the standard or review is whether the Administrative Judge's findings were based on substantial evidence. Moreover, she notes that mere disagreements with the AJ's ruling in this matter is not a valid basis for appeal. Accordingly, Employee requests that Agency's Petition for Review be

[15] *Agency's Petition for Review*, p. 8-12 (November 2, 2018).

denied.[16]

Burden of Proof/Standard of Review

As the AJ and Employee correctly provide, OEA Rule 628.1 clearly highlights the burden of proof. The rule provides the following:

> The burden of proof with regard to material issues of fact shall be by preponderance of the evidence. Preponderance of the evidence shall mean the 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.

OEA Rule 628.2 goes on to provide that "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." Therefore, Agency had the burden of proving its case by preponderance of the evidence to the Administrative Judge.

When an Initial Decision is appealed to the Board, OEA Rule 633.3 provides the following:

> 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:
> (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 statue, regulation, or policy;
> (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.

Therefore, as Employee provided, the standard of review is whether the Administrative Judge's findings were based on substantial evidence, not if there is substantial evidence that Employee was incompetent. Accordingly, this Board must determine if the findings of the Administrative Judge are supported by substantial evidence.

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[16] *Employee's Answer to Agency's Petition for Review of Administrative Judge's Decision*, p. 4-12 (November 30, 2018).

Substantial Evidence

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[17] 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. Therefore, this Board must accept the AJ's findings, if there is evidence that a reasonable mind could accept as adequate to support her ruling, despite that there may be substantial evidence in the record to support Agency's argument (which is contrary to the AJ's findings).

Cause of Action

In its Notice of Final Decision, Agency proposed termination of Employee's employment on the basis of her violation of DPM § 1603.3(f)(5) which was "any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations, to include incompetence." Incompetence is defined in the DPM Table of Penalties as "careless work performance; serious or repeated mistakes after given appropriate counseling or training; failing to complete assignment timely." The two specifications made against Employee were her alleged refusal to accept a delivery which resulted in Agency incurring additional delivery costs, and her alleged improper solicitation of donations from businesses.

As it relates to the delivery charge, the AJ found that Agency failed to prove that Employee refused delivery of the items. After a thorough review of the record, this Board agrees with the AJ's determination. As provided in OEA Rule 628.2, Agency has the burden of proof on all issues except jurisdiction. Agency's witnesses offered nothing more than speculation of what they

[17] *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).

assumed happened with the delivery; none of them testified that they were privy to the exchange between Employee and the delivery driver. During the evidentiary hearing, Captain Shelton admitted that there was no evidence that contradicted Employee's statement that the driver said he could not access the elevator to make the delivery.[18] He also admitted that Employee had no way of controlling the driver's actions and that there was no evidence that Employee knew of the re-delivery fee prior to the company's email to her.[19] Employee and Agency disagree about who was present at the station at the time of the delivery.[20] However, we know that Employee and the delivery driver were present. Surprisingly, Agency offered no testimony or documentary evidence by the driver to support its claim that Employee refused delivery. Because Agency could not definitively prove that it was Employee and not the delivery driver who requested that he come back another day to make the delivery, we agree with the AJ's determination that Employee did not refuse delivery.

As it relates to the alleged solicitation, Agency asserts that Employee violated Agency's General Order 120.21, Part VIII, Attachment A: Table of Penalties (16), further specified in General Order 201.26, Part V(A)(6). It should be noted that the record did not include General Order 120.21, Part VIII, Attachment A: Table of Penalties (16) for review. However, General Order 201.26, Part V(A)(6) was submitted and provides the following:

> Members shall not accept a gift or a gratuity from organizations, businesses, or individuals with whom he/she has or could reasonably be expected to have an official relationship or business with the District of Columbia Government.
>
> a. Members are prohibited from accepting personal or business favors (e.g., social courtesies, loans, discounts, services, or other

[18] *OEA Hearing Transcript*, p. 42 (April 11, 2018).
[19] *Id.*, 43-46.
[20] Shelton admitted that he did not confirm how many officers were available at the station during the time of the delivery but provided that there is always someone working. *Id.* at 43. Employee provided that she made multiple calls to officers, but no one was available. *Id.,* 355-356.

> considerations or monetary value) which might influence or be reasonably suspected of influencing their decisions as representative of the District of Columbia Government.
>
> b. Members shall guard against any relationship which may be construed as evidence of favoritism, collusion, or a conflict of interest.[21]

The AJ ruled that the General Order cites to the prohibition of member's personal solicitation of receipt of gratuity. However, this Board disagrees with the AJ's reading of the General Order. Only subsection (a) of the General Order mentions personal favors. It cannot be assumed that the entire General Order 201.26, Part V(A)(6) relates to personal favors because it is not specifically mentioned in the main section (6) of the order. Section (6) relates to the prohibition of members from receiving gifts or gratuities. Subsection (a) of Section (6) pertains to the prohibition of personal or business favors for loans, discounts, services, etc. Finally, Subsection (b) of Section (6) prohibits member relationships that can be construed as favoritism or a conflict of interest. Agency clearly intended for its solicitation specification to fall under the main section (6); it highlights the specific language of section (6) throughout the record.[22]

However, this Board will still uphold the AJ's ruling regarding this specification because Agency did not adequately prove that Employee solicited gifts or gratuities. Agency's witness, Captain Shelton, testified that he could not point to any evidence that Employee accepted gifts or gratuity or that she solicited anything for herself.[23] Shelton also conceded that the candy was for the Safe Haven activity, and there was no evidence that Employee was soliciting for herself.[24] Anthony Muhammad, the Vice President of the CAC, testified that the drafted letter was sent on

[21] *Agency Brief,* Tab #1 (October 16, 2017).
[22] *Agency's Pre-hearing Statement,* p. 2 and 5 (August 8, 2017) and *Agency Brief*, p. 5 and Tab #1 (October 16, 2017).
[23] *OEA Hearing Transcript,* p. 47-48 (April 11, 2018).
[24] *Id*., 47-48.

behalf of the CAC and that Employee did not receive a benefit from sending out the letters.[25] Agency offered no proof that Employee was ever in receipt of or that she accepted any gifts or gratuities, as required by the General Order. Accordingly, there is substantial evidence in the record to support the AJ's conclusion that Agency did not prove its charge of solicitation.

In accordance with the DPM, incompetence is defined as ". . . serious or repeated mistakes *after* given appropriate counseling or training . . . ." (emphasis added). Employee's direct supervisor, Vendette Parker, provided that Employee received no training on solicitation because it was an Agency policy. However, Parker admitted that even she was unaware of Agency's solicitation policy until it was addressed with Employee. Additionally, Parker testified that she did not think that Employee was incompetent, but she did consider her actions defiant.[26] Sergeant Shan testified that counseling regarding solicitation was provided to Employee after the solicitation charge. She conceded that there was no discussion about solicitation before the charge.[27] According to her testimony, the alleged solicitation occurred, then counseling was performed. Consistent with the aforementioned Agency witnesses, Employee also testified that she did not receive counseling prior to the October 2015 incident. Employee asserted that she was counseled on an unrelated incident involving use of the Agency's purchase card.[28] Based on the testimonies provided, Employee did not commit the alleged mistake after she was counseled. She was not counseled until after the alleged solicitation mistake was made. Therefore, Employee's alleged action, on its face, does not rise to the level of incompetence as provided in the definition.

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[25] *Id.*, 272-273 and 280.
[26] *Id.*, 99, 115, and 138.
[27] *Id.*, 71-72. Likewise, Parker testified that Employee received solicitation counseling about the letters after the letters were drafted. She also offered that there was no documentary evidence available to show that Employee was counseled prior to the letter incident. *Id.*, 157-158. Furthermore, Sergeant Alberta Holden provided that she counseled Employee several times about solicitation; however, she could not locate any written record of the meetings or counseling. *Id.*, 186-188.
[28] *Id.*, 304-305.

This Board must also note that Vendette Parker testified that she informed Employee that she should "contact Mr. Muhammad and let him know he couldn't use those letters."[29] Thus based on this assertion, it appears that the letters were never sent out to the intended businesses. Consequently, if the letters were not delivered, then there is no evidence of actual solicitation by Employee. Additionally, there were witnesses who provided that the letters drafted by Employee were not on actual Agency letterhead. [30]

Penalty

In accordance with the DPM Table of Penalties, the range of penalty for the first offense of incompetence is suspension for five to fifteen days. The range for a second offense is a twenty- to thirty-day suspension. Finally, for a third offense of incompetence, the penalty is removal. Because there is substantial evidence to support the AJ's conclusions on both charges of incompetence, we agree with her determination that Agency failed to prove cause for its adverse action in this case. Therefore, the penalty of removal was improper.

Conclusion

Agency did not have cause for the adverse action taken against Employee. Termination was not appropriate. Therefore, this Board denies Agency's Petition for Review and upholds the Administrative Judge's decision reversing Employee's termination. Accordingly, Agency shall reinstate Employee and reimburse all back pay and benefits lost as the result of her removal.

[29] *Id.* at 116.
[30]Vendette Parker testified that the letterhead used was not MPD letterhead. *Id.*, 107-109. Similarly, Commander Willie Dandridge provided that the drafted letters did no use the MPD logo, but he believed that providing the tax ID information violated the solicitation policy. *Id.*, 203-205.

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 the result of her improper termination.

FOR THE BOARD:

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Clarence Labor, Chair

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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.