THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
RONNELL DENNIS,	)	OEA Matter No. 1601-0404-10
Employee	)	
v.	)	Date of Issuance: March 3, 2015
D.C. OFFICE OF THE CHIEF MEDICAL EXAMINER,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Ronnell Dennis ("Employee") worked as an Autopsy Assistant with the D.C. Office of the Chief Medical Examiner ("Agency"). Agency removed Employee from his position for "any on-duty or employment-related act or omission that the employee knew or should reasonably have known was a violation of law."[1] He was removed from his position effective September 17, 2010.[2]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on September 14, 2010. He argued that the appropriate penalty for Agency's action was a five- to fifteen-day suspension. Further, Employee alleged that the removal action was in retaliation against him for filing an Equal Employment Opportunity Commission ("EEOC") complaint.

[1] Specifically, Agency claimed that on June 24, 2010, Employee sexually harassed and assaulted another employee, Ms. Jamison, by using sexually degrading language to describe her body. Additionally, it alleged that Employee poked Ms. Jaimson in the stomach and hit her on the hip. Moreover, Employee told the security guard, Ms. Brown, that she looked like his dog when she attempted to intervene.
[2] *Petition for Appeal,* p. 9-11 (September 14, 2010).

Therefore, he sought to be reinstated to his position with back pay and benefits.[3]

On November 8, 2010, Agency responded to Employee's appeal. It provided that Employee's termination complied with provisions of the District Personnel Manual ("DPM"). According to Agency, it relied on the Table of Appropriate Penalties to assess the penalty taken against Employee. Therefore, it reasoned that Employee's removal action was not retaliatory in nature, as he suggests. Agency relied on two reports from Ms. Jamison and Ms. Brown to conclude that Employee engaged in sexual harassment and assault. Thus, Agency requested that OEA sustain its action.[4]

The OEA Administrative Judge ("AJ") conducted an evidentiary hearing on December 4, 2012. He issued his Initial Decision in the matter on October 31, 2013. The AJ made several credibility determinations and found Ms. Jaimson to be a more credible witness than Employee.[5] He was unmoved by Employee's attempt to minimize the acts of sexual harassment and assault to mere joking. He ruled that in accordance with Mayor's Order 2004-171, Employee did engage in the sexual harassment and assault of Ms. Jamison. The AJ further found that the penalty for Employee's conduct was removal. He relied on DPM § 1619(5)(b) and (c) and Mayor's Order 2004-171 to support his decision. Finally, the AJ determined that there was no credible evidence to support Employee's contention that his removal was in retaliation to an EEOC compliant. Therefore, Employee's termination was upheld.[6]

Employee disagreed with the AJ's decision and filed a Petition for Review with the OEA Board on November 15, 2013. At the onset of his petition, Employee raised an argument that he presented during the evidentiary hearing. He claimed that Agency failed to adhere to OEA Rule

[3] *Id.* at 3.
[4] *Agency's Position Statement* (November 8, 2010).
[5] *Initial Decision*, p. 3-13 (October 31, 2013).
[6] *Id.*

607.2 which required it to file its answer to his Petition for Appeal within thirty calendar days. He contends that the AJ erred in denying his Motion to Dismiss the matter on this basis during the evidentiary hearing.[7]

Moreover, Employee asserts that Agency committed harmful procedural errors and failed to comply with the DPM and Mayor's Order 2004-171 when removing him.[8] He went on to provide that there were witness testimonies that proved that he did not engage in the alleged conduct. He also offered, what he deemed, several inconsistencies with witness testimonies.[9] Additionally, Employee claimed that there was no complaint filed by Ms. Jamison. Furthermore, he offered an alternate definition of sexual harassment and explained that the AJ relied on the wrong section of the DPM §1619.5 of the Table of Penalties. Therefore, he requested that the Board reverse the Initial Decision.[10]

On January 8, 2014, Agency submitted its Response to Employee's Petition for Review. It provided that during the evidentiary hearing, Employee admitted that the incident occurred. Agency reasoned that as the factfinder, the AJ is entitled to make his credibility findings based on the first-hand observation of witnesses. As for the other definitions of sexual harassment, Agency explained that they were considered by the AJ and deemed unpersuasive or irrelevant to the current case. Because Agency believed Employee failed to offer any evidence to contradict the AJ's findings, it requested that his Petition for Review be denied.[11]

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's

[7] *Petition for Review*, p. 1-3 (November 15, 2013).
[8] Employee lists DPM §§ 1606.1, 1606.3, 1608.3, 1608.4, 1612.2, 1612.10, and 1614.1 as regulations that Agency did not adhere to when effectuating his removal. *Id.*, 3-5. As for Mayor's Order 2004-171, Employee claims that Agency committed procedural error by violating section VII, X, and XII.
[9] *Id.*, 9-12.
[10] *Id.*, 14-19.
[11] *Agency's Response to Employee's Petition for Review* (January 8, 2014).

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 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]

Motion to Dismiss

Employee argued that the AJ erred when he denied his Motion to Dismiss. OEA Rule 621.3(b) provides that "if a party fails to take reasonable steps to . . . defend an appeal, the Administrative Judge, in the exercise of sound discretion, *may* dismiss the action or rule for the appellant. Failure of a party to prosecute or defend an appeal includes, but is not limited to, a failure to submit required documents after being provided with a deadline for such submission (emphasis added)." Employee claims that Agency failed to submit its answer to his Petition for Appeal within the designated deadline. However, OEA Rule 621.3 makes clear that the decision to dismiss the action or rule in favor of Employee rests solely within the AJ's discretion. Therefore, this Board cannot question his ruling to deny Employee's motion on this issue.

Cause

In accordance with DPM § 1603.3(e), Employee was removed on the basis of "any on-duty or employment-related act or omission that the employee knew or should reasonably have known was a violation of law." DPM § 1619(5)(b) and (c) goes on to provide that the specific causes under this category are "unwanted sexual advances or propositions" and "assault or . . . incidents of sexual harassment involving physical or financial threats." Agency clearly proved that Employee engaged in behavior that fell under subcategories (b) and (c). As the AJ provided,

[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).

Employee's actions toward Ms. Jamison were unwelcomed and involved physical contact. He used sexually degrading language to describe her body while belittling her. Additionally, the AJ provided that Employee demeaned Ms. Brown by comparing her to a dog.[13]

Moreover, as Agency contends, Employee admitted that he engaged in this behavior during the evidentiary hearing. During his opening statement, Employee testified that he "did tell Ms. Jamison that [he] would need a couple of shots of Patron to have sex with her. And [he] also told Officer Brown that she did look like [his] dog."[14] Ms. Jamison provided during the hearing that Employee stated, while poking at her stomach, that her "gut had gotten too big or [she] gained a few pounds and that he needed a few shots of Patron to actually be interested in someone [like her]."[15] The testimony offered by Ms. Jaimson is consistent with the information provided in her incident report.[16] Therefore, there is substantial evidence to prove that Employee engaged in unwarranted sexual advances or propositions and assault.

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

Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District Government employees. DPM §1619.1(5) lists the penalties for the

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[13] *Initial Decision,* p. 12-13 (October 31, 2013).
[14] *OEA Hearing Transcript,* p. 19 (December 4, 2012).
[15] *Id.* 28 and 30.
[16] The incident report provides that Employee "initiated a conversation with [Ms. Jamison] and began to ridicule [her] about [her] weight and what [she] would have to do in order for him to be sexually interested in [her]. [Employee] made several nasty comments to [Ms. Jamison], such as:

- you are a loser
- your stomach is disgusting and a turn off; [he] proceeded to poke me in the stomach
- if you lost that stomach, you would be a really nice looking person
- no man wants a full-figured woman
- I would need a couple of shots of alcohol to be involved sexually with you
- your stomach resembles "Precious" from the movie"

Furthermore, Ms. Jamison provided that "after [Employee] ended the conversation, he proceeded to hit [her] on the hip saying 'Don't be mad, I was just fucking with you . . . ." Ms. Jamison explained that despite her repeated requests for Employee to leave her alone, he continued. *Agency's Position Statement*, Exhibit #2 (November 8, 2010).

charge of any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law. As the AJ correctly held, the range of penalties for a first offense of unwanted sexual advances or propositions is suspension of thirty days to removal. The penalty for a first offense of assault or incidents of sexual harassment involving physical or financial threats is removal. Thus, removal was an appropriate penalty within the range allowed by the Table or Penalties.

The Court in *Stokes v. District of Columbia,* 502 A.2d 1006 (D.C. 1985) reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised."[17] 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.[18] 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,

[17] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).
[18] *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).

> 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)).

This Board believes that Agency and the AJ's decisions were reasonable. Agency properly exercised its authority to remove Employee for cause, and the penalty of removal was within the range allowed by the regulation.

Witness Credibility

This Board has held that it will not question an AJ's credibility determinations.[19] Moreover, the D.C. Court of Appeals ruled in *Metropolitan Police Department v. Ronald Baker,* 564 A2d. 1155 (D.C. 1989), 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. The AJ concluded that Ms. Jaimson's testimony was more credible than Employee's. Thus, this Board will not second guess his credibility determinations.

Conclusion

Based on the aforementioned, there is no clear error in judgment by Agency. Removal was a valid penalty under the circumstances. There was no evidence presented that Agency was prohibited by law, regulation, or guidelines from imposing the penalty of removal. Consequently, we must also deny Employee's Petition for Review.

[19] *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); and *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).

ORDER

Accordingly, it is hereby ordered that Employee's Petition for Review is denied.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

_____
A. Gilbert Douglass

_____
Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.