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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EMPLOYEE ¹ ,)	
)	
v.)	OEA Matter No.: 1601-0009-20
)	
)	Date of Issuance: June 30, 2022
D.C. DEPARTMENT OF)	
PUBLIC WORKS,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Parking Enforcement Officer with the Department of Public Works (“Agency”). On October 22, 2019, Agency issued Employee a Final Decision on Proposed Removal. Employee was terminated based on charges of Conduct Prejudicial to the District Government (On-Duty Conduct that Employee Should Reasonably Know is a Violation of the Law); Misrepresentation; Knowingly and Willingly Making an Incorrect Entry on an Official Record; Reporting False or Misleading Material Information; and Conduct Prejudicial to the District Government (Assaulting, Fighting, Inflicting Bodily Harm while on District Property or While on Duty). The charges stemmed from a May 17, 2019, incident wherein Employee was

¹ Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

accused of assaulting a citizen while on duty. The effective date of her termination was October 25, 2019.

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on November 19, 2019. She denied each charge against her and claimed that Agency failed to meet its burden of proof in this matter.² In response, Agency contended that Employee’s arguments were unfounded, without merit, and that discipline was both warranted and appropriate under the circumstances. Therefore, it requested that OEA uphold its termination action.³

An OEA Administrative Judge (“AJ”) was assigned to this appeal in July of 2020. On October 29, 2020, the AJ held a prehearing conference to assess the parties’ arguments. He subsequently issued a post-conference order which originally scheduled an evidentiary hearing for February 16th and 17th of 2021. The order also set forth a briefing schedule to afford the parties an opportunity to address OEA’s jurisdiction because Agency objected to this Office’s ability to determine whether Employee’s removal was in retaliation for filing a sexual harassment complaint.⁴

After reviewing the submissions, the AJ issued an Order on Jurisdiction Regarding Retaliation on January 22, 2020. In his order, the AJ held that OEA may consider evidence of Employee’s claim that her termination was a pretext manufactured by Agency. He explained that this Office lacked original jurisdiction over complaints of unlawful discrimination because those claims are generally reserved for the D.C. Office of Human Rights (“OHR”). However, the AJ reasoned that the D.C. Court of Appeals in *Raphael v. Okyiri*⁵ concluded that OEA retained the jurisdictional authority to address an employee’s retaliation claim as a cognizable defense in an

² *Petition for Appeal* (November 19, 2019).

³ *Agency Answer to Petition for Appeal* (December 20, 2019).

⁴ *Post-Conference Order* (October 19, 2020).

⁵ 740 A.2d 935 (1999).

adverse action that was not a Reduction-in-Force (“RIF”).⁶ Additionally, he disagreed with Agency’s reliance on the holdings in *El-Amin v. Dist. of Columbia Department of Public Works*⁷ and *Office of the District of Columbia Controller v. Frost*⁸ in support of its position that OEA could not address Employee’s retaliation claims. As such, he determined that Employee’s retaliation argument constituted a cognizable defense to Agency’s termination action. Consequently, the AJ held that OEA retained the jurisdictional authority to address Employee’s claim.⁹

On January 28, 2021, Agency filed a Motion for Certification of Interlocutory Appeal to the OEA Board and Request for Stay of Proceedings. It reiterated its previous contention that OEA was not the proper venue to adjudicate Employee’s claims of unlawful discrimination/harassment and retaliation because the appropriate venue for addressing these arguments was OHR. On January 29, 2021, the AJ issued an Order Granting Agency’s Motion for Certification of Interlocutory Appeal to the OEA Board.¹⁰ On March 25, 2021, the OEA Board issued an Opinion and Order on Motion for Interlocutory Appeal. It denied Agency’s motion and held that the AJ was permitted to address Employee’s complaints of harassment and discrimination as they related to the underlying charges surrounding her termination.¹¹ Therefore, an evidentiary hearing was held on June 3rd and 4th of 2021, wherein the parties presented documentary and testimonial evidence in support of their positions.

The AJ issued an Initial Decision on November 16, 2021. As it related to the charges of conduct that an employee should reasonably know is a violation of law and assaulting/fighting

⁶ *Order on Jurisdiction Regarding Retaliation* (January 22, 2020).

⁷ 730 A.2d 164 (D.C. 1999).

⁸ 638 A.2d 657 (D.C. 1994).

⁹ *Order on Jurisdiction Regarding Retaliation at 2*.

¹⁰ *Order Granting Agency’s Motion for Certification of Interlocutory Appeal* (January 29, 2021).

¹¹ *Opinion and Order on Motion for Interlocutory Appeal* (March 25, 2021).

while on duty, the AJ concluded that Agency established the requisite cause to discipline Employee. He explained that the interaction between Employee and the citizen was captured on surveillance footage. According to the AJ, the testimonial evidence and video footage depicted a confrontation between Employee and the citizen wherein Employee shoved/pushed the citizen in his back, causing him to bend forward. The AJ disagreed with Employee's self-defense argument, noting that neither the citizen's elbow nor chest made physical contact with Employee's person during the incident. As such, he opined that these charges were supported by the record.¹²

Concerning the remaining charges of misrepresentation, making an incorrect entry on an official record, and reporting false or misleading material information, the AJ held that Agency met its burden of proof in establishing each cause of action against Employee. He provided that following the May 17, 2019, incident, Employee filed a police report with the Metropolitan Police Department, an internal incident report with Agency, and a statement to the Office of Risk Management ("ORM") regarding a workers' compensation claim. According to the AJ, Employee failed to indicate that she shoved or pushed the citizen during the altercation on any of the aforementioned documents. He concluded that Employee provided conflicting testimony during the evidentiary hearing because Employee testified on direct examination that she pushed the citizen after he pushed her, then denied on cross-examination that she never shoved him. Thus, the AJ reasoned that Employee submitted false statements to the police department, Agency, and ORM by knowingly providing untrue information – that Employee did not assault

¹² *Initial Decision* (November 26, 2021).

the citizen during the May 17th altercation – in the three reports that directly contradicted the video and witness accounts.¹³

Lastly, the AJ held that Employee’s retaliation claims were not supported by the record. He provided that there was no casual connection between Employee’s harassment claim and her assault on a citizen while on duty. Since termination was a permissible penalty for the first offense for each charge levied against Employee, the AJ concluded that Agency did not abuse its discretion in initiating its termination action. Therefore, Employee’s termination was upheld.¹⁴

Employee filed a Petition for Review with the OEA Board on December 20, 2021. She argues that the Initial Decision should be reversed because the AJ admitted unreliable and prejudicial hearsay evidence; the AJ failed to make proper credibility determinations and findings on material facts; Agency was erroneously permitted to impeach Employee’s testimony with a tape recording of her workers’ compensation claim; and the AJ failed to address material issues about the probative value of the video depicting the May 17th incident. Additionally, she contends that the AJ improperly allowed Agency to impeach Employee with a pre-hearing conference statement. Further, Employee avers that the AJ erred in concluding that Agency met its burden of proof in establishing that she was guilty of the charges against her. Consequently, she requests that the Initial Decision be reversed and that her Petition for Review be granted.¹⁵

Agency filed its response on January 24, 2022. It maintains that the AJ did not admit unreliable or prejudicial hearsay evidence during the evidentiary hearing. Agency believes that the AJ made the proper credibility determinations and that he did not err in permitting Employee to be impeached with a recorded statement from ORM. Additionally, it argues that the Initial

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Petition for Review* (December 20, 2021).

Decision adequately addressed material issues pertinent to the probative value of the surveillance video depicting the altercation. According to Agency, Employee could be impeached by her prehearing conference statement because her testimony during the evidentiary hearing directly contradicted the representations made in the document. It further asserts that the AJ correctly considered all evidence that Employee's termination was retaliatory. Lastly, Agency opines that it properly met its burden of proof in establishing the charges against Employee. Therefore, it requests that Employee's Petition for Review be denied.¹⁶

Substantial Evidence

OEA Rule 633.3 provides that the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. 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.¹⁷

Hearsay

Hearsay evidence is defined by the Federal Rules of Evidence as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."¹⁸ However, this Office is not prohibited from accepting hearsay evidence. OEA is guided by the Federal Rules of Evidence but is not bound by them. For example, some evidence which is hearsay and would clearly be inadmissible in a court of law

¹⁶ *Answer to Petition for Review* (January 24, 2022).

¹⁷ *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).

¹⁸ Fed.R.Evid. 801(c).

may be admissible in an OEA hearing. In *Hutchinson v. D.C. Office of Employee Appeals*, 710 A.2d 227 (D.C. 1998), the D.C. Court of Appeals noted that it is “settled that hearsay evidence may be admitted in administrative hearings...In fact, hearsay evidence can serve under some circumstances as substantial evidence on which to base a finding of fact.” Similarly, in *Jadallah v. D.C. Department of Employment Services*, 476 A.2d 671 (D.C. 1984), the Court provided that “[t]he decision to permit administrative agencies to admit hearsay evidence reflects a recognition that the reliability and probative value of evidence does not always turn simply on whether or not it falls within the legal definition of hearsay evidence, and that unlike juries [or Administrative Judges] are...capable of properly assessing the reliability and weight of evidence that is hearsay in nature.” Moreover, Administrative Judges and other fact finders are considered to have the experience and expertise to evaluate evidence, including hearsay evidence and accord it the proper weight.¹⁹

Employee first argues that the AJ admitted unreliable and prejudicial hearsay evidence during the evidentiary hearing in the form of ORM’s taped interviews with witnesses to the May 17, 2019, altercation. She asserts that the AJ failed to properly weigh the probative value of the hearsay evidence against that of the live testimony presented during the hearing. Conversely, Agency states that relevant case law supports the AJ’s decision to admit hearsay evidence during the hearing. We agree with Agency’s position and find that the AJ was permitted to admit the witness statements and accord the proper weight to their probative value in his discretion. He made specific findings of fact related to the witness statements provided to ORM, ultimately concluding that their statements, coupled with the video surveillance footage of the altercation, provided the “best evidence” of the incident between Employee and the citizen. This Board finds

¹⁹ *Lewis v. Department of Motor Vehicles*, OEA Matter No. 1601-0215-09 (July 15, 2011).

that the AJ provided a logical reasoning for reaching his conclusions regarding the admissibility of the statements. The admission of such hearsay statements was based on the AJ's first-hand knowledge of the facts forming the basis of this appeal, and we find no credible reason for disturbing his ruling.

Credibility Determinations

In addition to determining the admissibility of hearsay evidence, the Administrative Judge must also make credibility determinations where conflicting facts are presented. OEA has held that it will not question credibility determinations made by the fact finder, which is the AJ in this case.²⁰ The Court of Appeals in *Metropolitan Police Department v. Baker*, 564 A.2d 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. Therefore, this Board will not second guess the AJ's credibility determinations in this matter.

Employee asserts that the AJ failed to make credibility determinations and findings on material facts. Namely, she opines that Agency's witnesses had credibility problems which were not addressed by the AJ. However, after a review of the OEA hearing transcript, a reasonable mind would accept the AJ's credibility assessments as adequate to support his decision to uphold Agency's termination action in this case. As previously mentioned, the AJ considered witness statements, testimonial evidence, and the video surveillance, in reaching the conclusion that each charge against Employee was supported by the record. The AJ, who was in the best position to observe and analyze the credibility of each witness, determined that Employee's testimony was inconsistent and untrustworthy. In sum, the AJ made findings on each contested issue of fact and

²⁰ *Employee v. D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Employee v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); and *Employee v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009).

concluded that Employee was not acting in self-defense during the May 17th altercation. This Board finds that the AJ's conclusions of law flow rationally from the record as a whole, and we find no credible basis for remanding the matter to the AJ for the purpose of making additional credibility determinations.

Witness Impeachment

Employee contends that Agency was improperly permitted to impeach her with a tape recording of her workers' compensation interview. On May 30, 2019, Employee provided a recorded statement to a Claims Examiner for ORM, alleging that she was injured during the May 17th incident. Employee states that she was not aware of the existence of this recording until June of 2021, which violated Chapter 6, Section 623.1(f) of the D.C. Municipal Regulations ("DCMR").²¹ However, counsel for Agency provided a copy of its Exhibit Index – which identified the recording of Employee's statement to ORM – to Employee in an email dated May 28, 2021. The May 30th recorded statement was also referenced in ORM's June 13, 2019, Determination Denying Workers' Compensation Benefits, as well as the administrative hearing officer's October 18, 2019, Report of Administrative Review. Therefore, it is reasonable to conclude that Employee was provided with notice of Agency's potential use of her statement to ORM. Employee could have served a discovery request to Agency to obtain a copy of the recording prior to June of 2021 but did not. As such, Agency was permitted to use Employee's recorded statement to ORM to impeach her testimony during the evidentiary hearing.

Additionally, Employee submits that the AJ improperly allowed Agency to impeach her with her own prehearing conference statement. While Employee correctly characterizes the prehearing statement as a prior, out-of-court statement, she provides no legal basis for finding

²¹ Section 623.1(f) provides that "each party has an affirmative duty to 'furnish for inspection' exhibits that are in their 'possession, custody, or control' that they intend to use during the hearing."

that the document could not be used to impeach her subsequent testimony during the evidentiary hearing. The statement was filed by Employee and duly admitted as part of the record. As previously mentioned, OEA is guided by the Federal Rules of Evidence but is not bound by them. Therefore, this Board finds Employee's argument that her prehearing statement was impermissibly used to impeach her testimony to be unpersuasive.

Video Surveillance

Employee asserts that the AJ failed to address material issues about the probative value of the video footage of the May 17, 2019, incident between Employee and a citizen. She opines that the video is insufficient, standing alone, to establish the charges against Employee. She notes that the video is incomplete and "only shows so much." According to Employee, the video footage captured one angle and did not show the front of the citizen's vehicle. However, the AJ noted that he did not rely solely on the video in reaching his conclusion that Employee assaulted the citizen. In his analysis, the AJ explained that the one-on-one interaction between Employee and the citizen could be seen on video except for a few seconds when Employee walked out of the video frame. The AJ stated that he viewed the video during the evidentiary hearing as well as in camera while reviewing the record. His assessment of the incident was based on the video surveillance footage, witness statements, and the testimonial evidence elicited during the evidentiary hearing. This Board believes that the AJ adequately address the probative value of the video footage; therefore, we find no basis for disturbing his ruling on this issue.

Pretext

Employee also asserts in her Petition for Review that the AJ erred by failing to consider evidence that her termination was a pretext. We disagree. The AJ highlighted the holding in *Vogel v. District of Columbia Office of Planning*, 944 A.2d 1006 (D.C. 1985), which established

that the following must be met to establish a claim of retaliation: he or she engaged in a protected activity by opposing or complaining about employment practices that are unlawful under the D.C. Human Rights Act; the employer took an adverse action against the employee; and the existence of a causal connection between the protected activity and the adverse personnel action. The AJ acknowledged that it was uncontroverted that Employee filed a sexual harassment complaint against her supervisor, which is considered a protected activity. However, he opined that Employee's harassment claim was too far removed from Agency's termination action to establish a causal connection between the protected activity and Agency's decision to discipline Employee. There is no evidence in the record to suggest that that the AJ failed to adequately address the issue of retaliation. He provided a reasoned analysis detailing the basis for denying Employee's claims of pretext. Employee disagrees with the AJ's finding that she could not establish a prima facie claim of retaliation; however, a mere disagreement with his conclusions of law is not a valid basis for appeal. Consequently, Employee's argument must fail.

Burden of Proof

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states that "[t]he burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean "[t]hat 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. Further, OEA Rule 628.2 provides that "[t]he 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." According to Employee, Agency failed to meet its burden of proof in this matter because much evidence introduced during the evidentiary hearing constituted unreliable hearsay, was not probative on material issues, and was not substantial.

Employee fails to expound upon these arguments and provides no persuasive legal foundation for granting her Petition for Review on this basis. Accordingly, we find Employee's contention regarding such to be without merit.

Conclusion

This Board finds that the Initial Decision was based on substantial evidence in the record. The AJ was permitted to admit the witness statements from the May 17, 2019, incident and accord the proper weight to their probative value in his discretion. The AJ did not err in permitting Agency to use Employee's recorded statement to ORM to impeach her testimony during the evidentiary hearing. Additionally, the AJ properly addressed the probative value of the video surveillance evidence and considered evidence that Employee's termination was a pretext. We further conclude that Agency met its burden of proof in establishing the charges against Employee. As a result, we must uphold the Initial Decision and deny Employee's Petition for Review.

ORDER

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

Clarence Labor, Jr., Chair

Patricia Hobson Wilson

Jelani Freeman

Peter Rosenstein

Dionna Maria 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.