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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	OEA Matter No.: 1601-0062-17
JAMES WILSON,)	
Employee)	
)	Date of Issuance: May 28, 2019
v.)	
)	
DEPARTMENT OF)	
PARKS AND RECREATION,)	
Agency)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

James Wilson (“Employee”) worked as a Motor Vehicle Operator with the Department of Parks and Recreation (“Agency”). On March 29, 2017, Employee received an Advance Written Notice of Proposed Removal for “any on-duty or employment-related act or omission that employee knew or should reasonably have known is a violation of law: fighting” and “any on duty or employment-related act or omission that is not arbitrary or capricious: arguing.” The charges stemmed from a February 17, 2017 incident wherein Employee had an altercation with another Motor Vehicle Operator, (“D.D.”). On February 22, 2017, Employee was placed on administrative leave. A Hearing Officer subsequently conducted a review of the incident and concluded that Agency met its burden of proof in establishing that Employee violated District Personnel Manual (“DPM”) Section 1603.3 for engaging in a physical altercation. However, the Hearing Officer

recommended that Agency mitigate the penalty based on an assessment of the *Douglas* factors and the DPM Table of Appropriate Penalties.¹ Agency issued its Final Decision on May 31, 2017. It disagreed with the Hearing Officer's recommendation and concluded that termination was the appropriate penalty. Employee's termination became effective on June 5, 2017.²

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on June 22, 2017. In his appeal, Employee argued that Agency lacked cause to terminate him. He also stated that the penalty of termination was excessive. As a result, Employee requested to be reinstated to his former position without a break in service; have any references to termination removed from his personnel file; and be awarded attorneys' fees associated with his appeal.³

On July 26, 2017, Agency filed a Motion to Dismiss and a Motion for Summary Disposition. Agency opined that Employee failed to set forth any facts in support of his allegations and that his pleadings were deficient. It further stated that Employee's removal was appropriate under the circumstances. Consequently, Agency requested that OEA either dismiss Employee's appeal for failure to state a claim, or make a ruling on its request for summary disposition.⁴

An OEA Administrative Judge ("AJ") was assigned to the matter in October of 2017. On October 10, 2017, the AJ issued an Order Denying Agency's Motion to Dismiss and held a prehearing conference on December 18, 2017.⁵ During the conference, the AJ determined that an evidentiary hearing was warranted.⁶ Therefore, a hearing was held on March 6, 2018 wherein the parties submitted testimonial and documentary evidence in support of their positions. The parties

¹ *Agency Record and Further Answer to Petition*, Exhibit M (November 14, 2017).

² *Final Agency Decision-Separation* (May 31, 2017).

³ *Petition for Appeal* (June 22, 2017).

⁴ *Agency Motion to Dismiss, or in the Alternative, Motion for Summary Disposition* (July 26, 2018).

⁵ *Order Denying Agency's Motion to Dismiss and Motion to Stay Discovery Pending Outcome of Motion to Dismiss and Convening and Prehearing Conference* (October 10, 2017); and *Order Granting Employee's Motion to Continue* (November 28, 2017).

⁶ *Order Convening Evidentiary Hearing* (December 18, 2017).

were subsequently ordered to submit closing statements on or before May 3, 2018 which also addressed whether the 2012 or the 2016 version of the DPM was applicable to this matter.⁷

An Initial Decision was issued on September 26, 2018. The AJ determined that the 2012 version of Chapter 16 of the DPM applied in this case because at the time of the February 2017 incident, Employee's Union (AFGE Local 2741) and Agency were engaged in ongoing Incident, Impact, and Effects ("I&E") bargaining. Because I&E had not concluded at the time of the incident between Employee and D.D., the AJ held that Agency properly utilized the correct version of the DPM.⁸

Next, the AJ concluded that Agency failed to meet its burden of proof with respect to the charges levied against Employee. She explained that under the applicable District regulations, a cause of action involving fighting includes an employee who has engaged in activities that carry criminal penalties or an employee who has violated federal or District laws. She highlighted the holding in *Chambers v. Office of the State Superintendent of Education*, OEA Matter No. 1601-0066-12 (January 29, 2015), wherein OEA held that it was required to make findings of fact relating to whether an employee's conduct met the legal elements of the crime they are alleged to have committed. The AJ noted that in order to establish the elements of a criminal assault, pursuant to the holdings in *Chambers* and *Stroman v. United States*, 878 A.2d 1241 (D.C. 2005), the employee must have made an attempt with force of violence to injure another; with the apparent present ability to effect the injury; and with intent to do the act constituting the assault.⁹

In analyzing the aforementioned elements, the AJ considered the video surveillance of the February 2017 altercation; witness testimony; and documentary evidence. She held that it was

⁷ *Order for Closing Statements* (April 4, 2018).

⁸ *Initial Decision* (September 26, 2018).

⁹ *Id.* at 11.

uncontroverted that Employee and his coworker (D.D.) were involved in a verbal exchange that resulted in a physical altercation. The AJ concluded that while Employee was not the initial aggressor, his reflexive, physical striking of D.D. constituted an assault.

Notwithstanding, the AJ determined that Agency failed to appropriately consider Employee's invocation of self-defense because he was harassed, threatened, and physically attacked by D.D. She found the witnesses to be persuasive and consistent in establishing that Employee was not the initial aggressor and attempted to walk away from D.D. prior to pushing her in self-defense. Therefore, the AJ held that Agency failed to appropriately consider the *Douglas* factor relating to "mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment; harassment, or bad faith, malice or provocation on the part of others involved."¹⁰ Based on the foregoing, she held that Agency failed to meet its burden of proof for the charges and specifications against Employee. Consequently, Agency's termination action was reversed and Employee was ordered to be reinstated with back pay and benefits.¹¹

Agency disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on October 31, 2018. It argues that the Initial Decision is based on an erroneous interpretation of statute, regulation, or policy because it misapplies the doctrine of self-defense. Specifically, Agency asserts that neither self-defense nor imperfect self-defense excuse Employee's conduct because the evidence did not present the AJ with a circumstance wherein Employee could have reasonably believed that he was in imminent danger of death or serious bodily harm. It further states that the Initial Decision ignored the fourth element of self-defense: that the response was necessary to save a person from danger. According to Agency, the AJ's findings are not supported by substantial evidence because the testimonial evidence, written

¹⁰ See a discussion of *Douglas* factors discussed *supra*.

¹¹ *Id.* at 13.

statements, and other evidence submitted during the evidentiary hearing establish that Employee engaged in the conduct detailed in the charges against him. It opines that contrary to the AJ's assessment, Employee was the individual who escalated the altercation with D.D. and that striking and pushing D.D. was not a reflexive or an act of self-defense. Lastly, Agency submits that the AJ failed to address the charge of arguing in a meaningful way. As a result, it requests that this Board grant its Petition for Review and reverse the Initial Decision.¹²

Standard of Review

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

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 statute, 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.

Substantial Evidence

On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), held 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

¹² *Petition for Review* (October 31, 2018). Employee did not file a response to Agency's petition.

that a reasonable mind could accept as adequate to support a conclusion.¹³ Under OEA Rule 628.1, the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. Preponderance of the evidence shall mean “that 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.”

Self Defense

The AJ concluded, and Agency does not dispute, that Employee’s physical contact with D.D. during the February 17, 2017 incident amounted to an assault. Therefore, this Board is tasked with determining whether there is substantial evidence in the record to support a finding that Agency failed to appropriately consider the affirmative defense of self-defense. Based on the review of the record, we find that the AJ did not err in concluding that Employee established a claim of self-defense, or in the alternative, imperfect self-defense.

As a preliminary matter, Agency argues that the AJ erred in concluding that it failed to consider whether Employee acted in self-defense, or whether he had a claim of imperfect self-defense, which should mitigate Employee’s actions. However, Agency mischaracterizes the AJ’s findings. In her Initial Decision, the AJ did not indicate that Agency utterly failed to consider Employee’s claim of self-defense; rather, she stated that Agency “failed to *appropriately* and *meaningfully* consider self-defense and other mitigating factors regarding this incident....” (emphasis added).¹⁴ Thus, we find Agency’s argument to be unpersuasive.

Likewise, we disagree with Agency’s contention that neither self-defense, nor imperfect self-defense excuse Employee’s conduct. In *Randolph v. District of Columbia Department of*

¹³*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).

¹⁴ *Initial Decision* at 13.

Motor Vehicles, 2014 CA 006788 P(MPA) (Super Ct. September 3, 2015), an employee was terminated for engaging in a verbal and physical altercation with a coworker while on duty. On appeal, the D.C. Superior Court held that both the agency and OEA erred by failing to conduct a meaningful consideration of the petitioner's claim of self-defense or any other mitigating factors that may have been applicable to the circumstances. Therefore, the Court remanded the matter back to the agency for the purpose of considering whether the employee's self-defense claim was supported by the record.¹⁵ Additionally, the Court provided that a claim of self-defense requires an individual to establish that there was an actual or apparent threat; that the threat was unlawful and immediate; the individual honestly and reasonably believed that he or she was in imminent danger of death or serious bodily harm; and the response was necessary to save him or her from danger.¹⁶ The Court further explained that "even if that individual is unable to establish a perfect self-defense claim, an imperfect claim of self-defense may nevertheless lie as mitigation. In establishing an imperfect self-defense claim, the onus is on whether that individual has a good faith belief even though the appearance of the circumstances turned out to be false."¹⁷

After observing witness testimony during the evidentiary hearing, the AJ concluded that Employee's witnesses were persuasive in proving that he was harassed, threatened, and physically attacked by D.D. prior to the physical incident. Ricardo Douglass ("Douglass") was approximately one foot away during the relevant time period and was in a position to observe the incident. Douglass testified that D.D. followed behind Employee while shouting expletives and calling Employee a "bitch-ass 'n-word'." He stated that D.D. proceeded to use her chest to bump Employee from behind and then pointed her finger in Employee's face in a manner to cause his

¹⁵ *Randolph* at 9.

¹⁶ *Id.* at 6.

¹⁷ *Id.*

glasses to be displaced. According to Douglass, Employee attempted to diffuse the interaction on several occasions, and did not scream at D.D. during the incident.¹⁸ Douglass completed an incident report in February of 2017. His rendition of events contained in the report was consistent with his testimony during the evidentiary hearing.¹⁹

Similarly, Preston Small (“Small”) observed D.D. shout racial profanities at Employee while she was following him from the office to the warehouse on February 17, 2017. Like Douglass, Small observed D.D. reach under Employee’s glasses and poke him in the eye.²⁰ Both Douglass and Small opined that Employee’s act of pushing D.D. to the floor was either reflexive or an act of self-defense. Small’s testimony during the evidentiary hearing was also consistent with the written statement he provided on February 17, 2017.²¹

As it relates to Employee’s rendition of events, the AJ found his testimony to be compelling in finding that D.D. was the initial instigator of the altercation. She agreed with Employee’s account that prior to the physical altercation, D.D. threatened to have Employee killed; physically bumped him with her chest; and poked Employee in the eye with sharp fingernails, which cause his eye to turn red.²² When asked why he did not walk away from D.D. in an effort to diffuse the situation, Employee testified that Agency’s policy prevented employees from leaving the physical location of the site because it would constitute job abandonment.²³

Based on the above, this Board finds that the AJ provided sound and logical conclusions detailing why Employee’s physical contact with D.D. was reflexive in nature; thereby, supporting a claim of imperfect self-defense. While Agency claims that the evidence in this case did not

¹⁸ Tr. pgs. 125-131.

¹⁹ See *Evidentiary Hearing Transcript*, Agency Exhibit I.

²⁰ Tr. pgs. 155-161.

²¹ See *Evidentiary Hearing Transcript*, Agency Exhibit J.

²² Tr. pg. 170; 191.

²³ *Id.* at 192.

present the AJ with a circumstance where Employee could have honestly or reasonably believed he was in imminent danger of death or serious bodily harm, its mere disagreement with the AJ's ultimate findings does not serve as a basis for reversing the Initial Decision. Agency asserts that the Initial Decision failed to explain why many parts of Employee's testimony were not alleged or mentioned by witnesses at any point prior to the OEA evidentiary hearing. However, it offers no legal basis in support thereof, as the AJ was permitted to rely on the evidence presented during the *de novo* evidentiary hearing as a basis for rendering her decision.

The D.C. Court of Appeals in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989), ruled 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 and was in the best position to observe the demeanor of the witness in determining the veracity of their testimony. As this Board has consistently ruled, we will not second guess the AJ's credibility determinations.²⁴ Accordingly, we agree with the AJ's finding that Employee did, in fact, make physical contact with D.D. because he was attempting to remove her from his personal space in an act of self-defense. We further conclude that the record supports a finding that at a minimum, Employee established a legal claim of imperfect self-defense as a basis to warrant reversal of the penalty.²⁵

²⁴ *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); *Derrick Jones v. Department of Transportation*, OEA Matter No. 1601-0192-09, *Opinion and Order on Petition for Review* (March 5, 2012); *C. Dion Henderson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0050-09, *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 *Theodore Powell v. D.C. Public Schools*, OEA Matter Nos. 1601-0281-10 and 1601-0029-11, *Opinion and Order on Petition for Review* (June 9, 2015).

²⁵ See *Williams v. United States*, 858 A.2d 984 (D.C. 2004). Additionally, Agency asserts that the Initial Decision failed to address the charge of arguing in a meaningful way; however, it does not provide a legal definition or supporting case law to provide an adequate framework for establishing a credible cause of action for arguing within the confines of the applicable regulations. See DPM § 1606.3(g). Additionally, under the Table of Appropriate

Consideration of Relevant Factors.

Next, Agency argues that removal was the appropriate penalty for Employee's conduct. Thus, this Board must determine if the AJ erred concluding that Agency abused its discretion in considering the relevant *Douglas* factors; namely the mitigating circumstances surrounding the offense.²⁶ Regarding the appropriateness of Agency's penalty, the D.C. Court of Appeals in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985) held that OEA must determine whether the

Penalties, a first offense for a specification of arguing carries a maximum penalty of suspension for fifteen days. Thus, even if this Board were to uphold said charge, Agency clearly exceeded the limits of punishment allowed under the Table of Appropriate Penalties. The record supports a finding that D.D. was the initial and continuing aggressor in this instance, and continuously yelled at Employee, even as he attempted to walk away. Moreover, the AJ ultimately concluded that Agency failed to establish the requisite cause to discipline Employee based on a totality of the circumstances. *See Initial Decision* at 13. Thus, the AJ was permitted to overturn the entire adverse action for a charge of fighting.

²⁶ In *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth factors that are relevant for consideration in determining the appropriateness of a penalty. Though not exclusive, the factors include the following:

1. The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3. The employee's past disciplinary record;
4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. Consistency of the penalty with any applicable agency table of penalties;
8. The notoriety of the offense or its impact upon the reputation of the agency;
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10. Potential for the employee's rehabilitation;
11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

penalty imposed 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. In *Holland v. Department of Corrections*, OEA Matter No. 1601-0062-08, *Opinion and Order on Petition for Review* (September 17, 2012), the OEA Board held that an Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion. OEA's review of an agency-imposed penalty is essentially to ensure that the agency conscientiously considered the relevant factors and did established a responsible balance within tolerable limits of reasonableness. Only if this Office finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for OEA to then specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.²⁷

Agency disagrees with the witness testimony adduced during the evidentiary hearing, characterizing many of Employee's allegations as new testimony that was not revealed in any previous written statements. As previously stated, this is not a valid basis for appeal. In reviewing the record, this Board finds that the AJ did not err in finding that Agency abused its discretion in assessing the *Douglas* factors. As such, we find no credible reason to disturb the AJ's conclusions. Based on the foregoing, the Initial Decision is based on substantial evidence and Agency's Petition for Review must be denied. Accordingly, Agency shall reinstate Employee and reimburse all back pay and benefits lost as a result of his removal.

²⁷ *Id.*

ORDER

Accordingly, it is hereby ordered that Agency's Petition for Review is **DENIED**.

FOR THE BOARD:

Clarence Labor, Chair

Patricia Hobson Wilson

Jelani Freeman

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.