THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BARRY BRAXTON,	)	
Employee	)	OEA Matter No. 1601-0012-12
	)	
v.	)	
	)	Date of Issuance: September 13, 2016
DEPARTMENT OF PUBLIC WORKS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Barry Braxton ("Employee") worked as a Motor Vehicle Operator with the Department of Public Works ("Agency"). On September 30, 2011, Agency issued a final notice of removal to Employee. The causes of action alleged were "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include neglect of duty, failure to carry out assigned tasks; careless or negligent work habits" and "any other on-duty or employment-related reason for corrective or adverse action: may include any activities for which the investigation can sustain that it is not 'de minimis' (i.e., very small or trifling matters)." Specifically, Agency argued that Employee engaged in sexual activity in a public area during his tour of duty.[1]

[1] *Petition for Appeal,* p. 30-36 (October 26, 2011).

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on October 26, 2011. He asserted that the disciplinary action that Agency took was too harsh and was not consistent with other cases similar in nature. Therefore, he requested a modification of the penalty with reinstatement and back pay.[2]

Agency filed its response to Employee's Petition for Appeal on December 5, 2011. It contended that in an interview with his supervisor, James Carter, Employee admitted to engaging in sexual activity. However, he subsequently offered varying versions of what occurred on the night in question.[3] Agency found that Employee's explanations were inconsistent and not credible. Therefore, it decided – after considering the *Douglas* factors[4] – that removal was the most appropriate penalty under the circumstances. Furthermore, Agency claimed that there were

[2] *Id.* at 3. In subsequent filings, Employee claimed that he was urinating into a cup when a citizen, Ms. Roch, entered the building. He asserted that he and Ms. Bushby, Ms. Roch's neighbor, were not engaged in oral sex. *Employee's Response to Agency's Brief in Support of Cause,* p. 1-2 (March 12, 2014) and *Closing Argument of Employee Barry Braxton,* p. 2-3 (December 23, 2014).

[3] *Agency's Answer,* p. 2-3 (December 5, 2011).

[4] The *Douglas* factors are provided in the matter *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The court held that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed 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 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.

no other cases similar in nature. Hence, it requested that Employee's removal action be upheld.[5]

Before issuing his Initial Decision, the OEA Administrative Judge ("AJ") held an evidentiary hearing on September 9, 2014. After considering the testimonies provided during the hearing and documentary evidence, the AJ ruled that Agency had cause for both charges. He held that both actions of receiving oral sex or urinating into a cup amounted to negligence or carelessness while Employee was on duty. The AJ found the testimony provided by Ms. Roch to be credible. Moreover, he found that Agency's witnesses, Mr. Howland and Mr. Carter, offered credible testimonies regarding Agency's bathroom policy for employees working on public streets. Consequently, he concluded that Employee was engaged in oral sex in a public place during work hours.[6]

Additionally, the AJ ruled that despite having an alleged medical condition which resulted in frequently urination, Employee neglected to inform Agency so that it could accommodate his condition. He found that urinating in the stairwell, to which Employee admitted, was enough to prove the charge of "any other on-duty or employment-related reason for corrective or adverse action: may include any activities for which the investigation can sustain that it is not de minimis." The AJ held that Agency adequately proved the charge.[7] The AJ opined that in accordance with the Table of Penalties, removal was an appropriate penalty for the charges. Accordingly, Agency's removal action was upheld.[8]

On March 25, 2015, Employee filed a Petition for Review with the OEA Board. He asserts that the AJ failed to consider his health issues when issuing the Initial Decision. Employee also contends that Ms. Roch did not offer truthful testimony during the evidentiary

[5] *Agency's Answer,* p. 4-8 (December 5, 2011).
[6] *Initial Decision,* p. 9-11 (February 18, 2015).
[7] *Id.*, 11-12.
[8] *Id.* at 12.

hearing and that Ms. Roch harassed Ms. Bushby after the incident to force her to move. Therefore, he requests that the Board reconsider his case.[9]

Agency filed a Response to Employee's Petition for Review and provides that the AJ addressed Employee's medical condition and the nature of the relationship between Ms. Bushby and Ms. Roch. It opines that removal was within the range of penalty for the first offense of a neglect of duty charge. Therefore, it requests that Employee's petition be denied.[10]

As Agency explained, the AJ thoroughly addressed Employee's medical condition. In the AJ's summary of witness testimonies, he clearly states Employee's position as it related to his medical condition.[11] In his analysis of this argument, the AJ found that Employee's testimony regarding his medical condition was not credible and ruled that he was indeed engaged in sexual activity.[12] Therefore, Employee's argument that the AJ failed to consider his medical condition lacks merit.

As for his position that Ms. Roch made untruthful statements during her testimony, OEA has consistently held that it will not question an AJ's credibility determinations.[13] The Court in *Metropolitan Police Department v. Ronald Baker*, 564 A2d. 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. The AJ found that the

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[9] *Petition for Review* (March 25, 2015).
[10] *Agency's Reply to Employee's Petition for Review,* p. 3-4 (May 20, 2015).
[11] *Initial Decision,* p. 7-8 (February 18, 2015).
[12] *Id.,* 9-10.
[13] *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).

testimonies of Agency witnesses, Ms. Roch, Mr. Howland, and Mr. Carter, were credible and more persuasive than Employee's testimony. Thus, as we have consistently ruled, we will not second guess his credibility determinations. Accordingly, we must deny Employee's Petition for Review.

ORDER

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

FOR THE BOARD**:**

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Sheree L. Price, Interim Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.