THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
DERRICK JONES, Employee	OEA Matter No. 1601-0192-09
	Date of Issuance: March 5, 2012
DISTRICT OF COLUMBIA DEPARTMENT OF TRANSPORTATION, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Derrick Jones ("Employee") worked as a Parking and Traffic Enforcement Officer with the D.C. Department of Transportation ("Agency"). On July 29, 2009, Agency issued a notice of final decision against Employee. The notice stated that Employee was charged with any on-duty or employment-related act or omission that the employee knew or should have reasonably known is a violation of the law.[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on August 6, 2009. He argued in his petition that he did not violate any rule, law, or regulation.

[1] Employee was accused of misconduct after he allegedly encouraged a bicyclist to damage a motorist's vehicle with a bicycle lock. Additionally, Agency claimed that Employee threatened a co-worker. *Agency's Answer to Employee's Petition for Appeal,* Exhibits A and C (November 9, 2009).

Therefore, he requested that he be reinstated to his position.[2]

In its response to Employee's Petition for Appeal, Agency asserted that it properly terminated Employee for cause in accordance with DPM §1603.3(e). Agency further explained that the facts show, by a preponderance of evidence, that Employee committed the acts charged against him. Accordingly, it requested that Employee's termination be sustained.[3]

After conducting an evidentiary hearing, the OEA Administrative Judge ("AJ") issued her Initial Decision on November 17, 2010. With respect to the incident involving the motorist, the AJ concluded that Agency did not meet its burden of proving the allegations of misconduct. Because Agency and Employee presented conflicting versions of the same event, the AJ made credibility determinations and found Employee to be a credible witness, stating that his testimony regarding the incident was logical and reasonable.[4] The AJ found that Agency did not provide any witnesses with first-hand knowledge or testimony of the events. She held that Agency presented no evidence, other than an unsworn email from the motorist. As a result, the testimony presented was unreliable.[5]

With regard to the charge that Employee threatened his co-worker, the AJ also concluded that Agency did not meet its burden of proving Employee engaged in conduct that was threatening. In her reasoning, she cited the fact that there was no witness testimony to prove that Employee had a reputation of being a bully. Further, the AJ concluded that the alleged statements Employee made to his co-worker were not threatening but rather the reaction of

[2] *Petition for Appeal,* p. 3 (August 6, 2009).
[3] *Agency's Answer to Employee's Petition for Appeal,* p. 4-5 (November 9, 2009).
[4] In reaching this conclusion, the AJ relied on Employee's testimony that he instructed the motorist to stop while pedestrians were in the cross-walk; the motorist did not stop; and thereafter, the bicyclist struck the motorist's car with a bicycle lock. The AJ stated that motorists and pedestrians are supposed to follow the directions of the officer who is there to manage traffic and ensure safety.
[5] *Initial Decision,* p. 8-9 (November 17, 2010).

someone who is frustrated because of an alleged insult by another individual.[6]

Finally, the AJ found it of concern that Agency did not consider Employee's commendations and performance appraisals when assessing the penalty of removal, but instead relied on negative information or innuendo about Employee. As a result of these findings and conclusions, the AJ reversed Agency's removal action and ordered that he be reinstated with back pay and benefits.[7]

On December 22, 2010, Agency filed a Petition for Review of the Initial Decision. It argued that the AJ's findings were not based on substantial evidence in the record. It was Agency's position that there was substantial evidence to prove the charge against Employee that he threatened his co-worker, including written statements of the witnesses and their testimony at the evidentiary hearing. It stated that the testimony regarding Employee's language and demeanor proves that he was the aggressor.[8]

With respect to the motorist incident, it was Agency's belief that the testimony of Employee's supervisor regarding the incident is substantial evidence given the seriousness of the offense. Employee's supervisor testified that the motorist gave him a written statement and also communicated directly with him. Agency stated that the AJ's decision not to credit this evidence has prejudiced the Agency. It reasoned that it could not secure a sworn statement or request the motorist to testify because it was unable to locate her. Agency relied on the efforts made by the motorist to report the incident as proof that the incident occurred. Additionally, it considered two previous incidents of discourteous treatment by Employee to the public.[9]

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[6] *Id.*, 9-10.
[7] *Id.* at 10.
[8] *Petition for Review*, p. 6-11 (December 22, 2010).
[9] *Id.*, 12-13.

Finally, Agency argued that the AJ substituted her judgment for that of the Agency's when she opined that the Agency relied upon negative information and innuendo as evidence for the cause of action. Agency asserts that it did not rely upon negative information, but rather progressive discipline when it removed Employee from his position. Thus, it petitioned the OEA Board to reverse the Initial Decision and sustain employee's termination.[10]

DPM § 1603.3 defines the causes for disciplinary action that can be taken against a District government employee. Agency charged Employee with DPM § 1603.3(e) which is any on-duty or employment-related act or omission that the employee knew or should have reasonably known is a violation of the law. As the AJ provided in her Initial Decision, in accordance with OEA Rule 629, Agency has the burden of proving the charges against Employee. Agency must prove by preponderance of the evidence that a reasonable mind, considering the record as a whole, would accept as sufficient the contested facts are more probably true than untrue. The AJ found that Agency did not prove by preponderance of the evidence the charges against Employee.

As provided in OEA Rule 634.3 (b), it is the job of this Board to determine if the AJ's decision was based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[11] The Court of Appeals held in *Brown v. Watts,* 993 A.2d 529 (D.C. 2010) that where findings are supported by substantial evidence, OEA must accept it even though the record could support a contrary finding.

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[10] *Id.* at p. 15.
[11] *Black's Law Dictionary*, Eighth Edition (2004); *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).

Motorist Incident

As it pertains to the motorist incident, Agency alleged that Employee encouraged a bicyclist to hit a motorist's vehicle with a bicycle lock which resulted in damage to the vehicle.[12] The AJ provided that Agency failed to provide testimony from anyone with first-hand knowledge of the incident involving the motorist. Employee was the only person who testified who was present during the incident.[13] Agency provided that the testimony of Employee's supervisor, Mr. Strange, was sufficient to prove that the event occurred. Mr. Strange testified about an email exchange that he had with the motorist.[14] The emails included pictures provided by the motorist of the alleged damage to her car by the bicyclist. However, mere emails and pictures do not prove that Employee encouraged the bicyclist to hit the motorist's vehicle.[15] The AJ correctly took issue with the fact that the emails were not notarized by the motorist and that Agency failed to subpoena her to testify during the hearing.

Employee provided sworn testimony, and the AJ was able to observe his demeanor and assessed the probability of his statements during the hearing. Moreover, two of Agency witnesses supported Employee's contention that motorists often issue complaints against Traffic Enforcement Officers. Mr. Miller answered affirmatively when asked if it is a regular occurrence for officers to receive complaints for writing citations or performing their duties.[16]

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[12] *OEA Hearing Transcript,* p. 51 (July 22, 2010).
[13] Employee's supervisor admitted during the hearing that there was "no one else that [he] could have interviewed at the time that would have been on the scene that [he] would have been able to ask questions of." *OEA Hearing Transcript,* p. 68 (July 22, 2010).
[14] Employee's supervisor testified that he cannot recall why he considered the emails provided by the motorist more credible than Employee's version of events. He admitted that he did not know why or how the incident happened, but because the motorist used due diligence to report the incident, she seemed more credible than Employee. *Id.,* p. 33 and 86-88.
[15] Employee's supervisor provided that Employee indicated that he had no part in encouraging or permitting the bicyclist to hit the motorist's vehicle. *Id.* at 86.
[16] *OEA Hearing Transcript,* p. 108 (July 22, 2010).

Similarly, Valerie Saunders provided that citizens get upset when they are issued tickets and write statements against employees.[17] Because Agency witnesses testified that it is common for motorist to write statements against and complain about employees, it was not reasonable for Agency to accept the motorist's statements against Employee as proof that the incident occurred. Agency offered no evidence to support its contention that Employee engaged in behavior that he should have known was a violation of the law.

Because there were conflicting facts presented, the AJ made witness credibility determinations in assessing the charge against Employee. OEA has held that it will not question credibility determinations made by the fact finder, which is the AJ in this case.[18] The Court 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. Thus, this Board will not second guess the AJ's credibility determinations. After review of the OEA hearing transcript, a reasonable mind would accept the AJ's witnesses assessments as adequate to support its decision to reverse the Agency action in this case.

Threats Against Co-worker

Agency claimed that Employee approached a co-worker, Melvin Ray, while making threats and using profane language. The AJ found that Agency also failed to prove this charge by preponderance of the evidence. She held that the phrases used during the incident were not

[17] *Id.* at 123. Renee Snowden testified on behalf of Employee. She also provided that as a traffic officer, motorists are upset when you issue tickets, and they often call in to complain about officers. She said that sometimes motorists get so mad that they curse at her. *Id.*, 161-163. Likewise, Dena Thweatt testified that motorists get upset all the time and that she is cursed out every time she writes a ticket. *Id.* at 168.

[18] *Ernest H. Taylor v. D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinions and Orders 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).

threatening phrases. The AJ found that the incident merited counseling and a determination of the underlying reasons why Employee was upset. However, it did not rise to the level of threatening or bullying by the Employee.[19] We agree with the AJ's assessment.

A threat is defined as a communicated intent to inflict harm or loss on another or on another's property.[20] It appears from the record that Employee was not engaged in threatening Mr. Ray but was instead reacting to threats from Mr. Ray. Regarding this incident, Mr. Strange testified that he did not witness the incident, but he did receive statements from other employees pertaining to the events that occurred. He also spoke with Employee who told him that he and Mr. Ray were having some differences that reached a boiling point. Employee informed him that Mr. Ray followed him home after the incident. Subsequently, Employee went to the police to secure a "stay away" order against Mr. Ray.[21]

Agency witness, Kevin Edwards, testified that he heard Employee say to Mr. Ray that he should "stop threatening him" and that if Mr. Ray hit Employee that "he would be in big trouble." He claimed that he did not hear Employee make any threats to do something to Mr. Ray, nor were there any threats to use a weapon.[22] Similarly, Shawn Miller provided that during the incident Employee declared "I'm not going to be nobody's punk any more and you're not going to be disrespecting me no more." Mr. Miller also testified that Employee obtained a restraining order to keep Mr. Ray away from him.[23]

Ms. Valerie Sanders offered a different account of the events. She provided that Employee approached Mr. Ray while using "profanity . . . and pushed him, like he wanted to

[19] *Initial Decision,* p. 9-10 (November 17, 2010).
[20] *Black's Law Dictionary*, Eighth Edition (2004).
[21] *OEA Hearing Transcript,* p. 28-29, 69-70 (July 22, 2010).
[22] *Id.,* 127, 131, 136-137.
[23] *Id.,* 92-97.

fight." She also provided that Employee "approached Melvin Ray . . . like he wanted to fight and he had a gun or a knife." No other witness testified to Employee actually touching Mr. Ray. Ms. Sanders is also the only witness who provided that Employee cursed and said to Mr. Ray, "you've got to stop playing with me, and I'll 'F' you up . . . ." However, during cross examination, she admitted that there was no physical violence at all and there was also no threat from either party to harm the other with a weapon. Finally, Ms. Sanders provided that she did not feel threatened by Employee.[24]

During Mr. Ray's testimony, he admitted that he approached Employee after work because he suspected something was going on.[25] Mr. Ray claims that situation escalated, and he felt like Employee threatened him. He provided that the next day he was served with a restraining order. Police informed him that Employee "felt that his life was threatened by [him]."[26]

Based on the testimonies provided by Mr. Ray and Employee, it appears that Mr. Ray approached Employee to discuss a matter. The conversation between the two men escalated, and it appears that at this point many of the witnesses realized what was happening. Several of the witnesses provided that the language used by Employee was that Mr. Ray should stop threatening him. Employee's actions of securing a restraining order are consistent with him being the one who was threatened. There was only one witness, other than Mr. Ray, who provided that Employee used profanity during this incident. However, she also claimed that there was physical violence and then provided that there was none. The evidence does not show

[24] *Id.*, 112-119. Renee Snowden also provided that she did not hear any threats of a weapon and did not feel threatened by Employee. *Id.* at 160.
[25] Employee's testimony confirmed that Mr. Ray approached him after work. *Id.*, 180 and 204.
[26] *Id.*, 143, 146-148

that Employee used language that communicated intent to inflict harm on Mr. Ray. Viewing the evidence in its totality, Agency did not prove by preponderance of the evidence that Employee threatened Mr. Ray. There is substantial evidence to support the AJ's conclusion. Accordingly, Agency's Petition for Review is denied.

ORDER

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

FOR THE BOARD:

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Clarence Labor, Chair

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Barbara D. Morgan

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Richard F. Johns

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.