THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
METRICE JONES,	)	
Employee	)	OEA Matter No. 1601-0077-09
	)	
v.	)	Date of Issuance: July 06, 2011
	)	
D.C. PUBLIC SCHOOLS,	)	
DEPARTMENT OF TRANSPORTATION,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Metrice Jones, Employee *Pro Se*
Frank McDougald, Esq., Agency Representative

ADDENDUM DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

On January 30, 2009, Metrice Jones ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the D.C. Public Schools, Department of Transportation's ("Agency") decision to terminate her. At the time of her termination, Employee was a Motor Vehicle Operator. Employee was terminated on December 30, 2008, for "unprofessional behavior toward a co-worker (abusive language)."

This matter was assigned to Administrative Judge ("AJ") Rohulamin Quander on August 19, 2009. AJ Quander convened a prehearing conference on September 15, 2009. According to AJ Quander, during the prehearing conference, Agency noted that its decision to terminate Employee was based on two prior disciplinary actions.[1] Agency asserted that disciplinary action was taken against Employee on January 5, 2006. Employee disagreed and insisted that she was not previously suspended. Additionally, Employee requested that Agency provide evidence in support of the alleged January 2006 offense. Per Agency's request, AJ Quander granted Agency three days in which to produce any evidence relating to the January 2006 offense. Unable to provide any document within that time, Agency requested an extension of time in order to conduct in-depth research into the alleged matter. AJ Quander accorded Agency 30 days to provide the information, and then, briefly extended the time again. On November 30, 2009, Agency filed *Agency's Submission* advising AJ Quander that "…Agency has been unable to produce any evidence that demonstrates Employee was suspended for the period of January 10 – 11, 2006." Agency also asserted that Employee's termination was based upon her admitted misconduct on November 21, 2008, and the prior four days suspension effective March 24, 2006.

On January 7, 2010, AJ Quander issued an Initial Decision in this matter wherein, he determined, *inter alia*, that Agency did not have enough evidence to support the January 2006 disciplinary action and accordingly, did not meet its burden of proof by preponderance of the evidence. AJ Quander reasoned that,

[1] January 5, 2006, and March 13, 2008, letters sent to Employee recommending disciplinary action for Employee's misconduct.

because Agency lacked sufficient evidence, the termination of Employee was too harsh of a penalty, and as such, Employee's termination was vacated. Further, AJ Quander ordered that Employee be reinstated and suspended for nine days instead. On February 9, 2010, Agency filed a Petition for Review with the OEA Board. Agency argued that AJ Quander improperly relied on the Table of Penalties. Agency also argued that the penalty is not based on previous discipline for misconduct, but rather on previous offenses. Therefore, there may be a commission of an offense for which discipline was not imposed. And that this offense could still be the basis for an enhanced penalty under the Table of Appropriate Penalties ("TAP").[2]

On May 23, 2011, the OEA Board issued an Opinion and Order on Petition for Review, remanding this matter for the limited purpose of requesting documents to prove the January 3, 2006, offense occurred. In effectuating the remand, the OEA Board stated as follows:

> However, as it pertains to the January 3, 2006, offense, there is no evidence that the offense occurred or that Employee ever received notice of this incident. The notice provided by Agency is not signed by Employee or her Union Representative. It is only signed by an Agency terminal manager. Consequently, this Board cannot verify that this offense occurred or that it was properly document.
>
> As provided in *Douglas*, it is necessary for Agency to present all evidence necessary to support its decision to remove Employee. This burden includes proving that the alleged misconduct actually occurred. This issue is extremely important because it will determine if Employee's penalty should have been suspension, as the AJ ruled or removal, as suggested by Agency. Accordingly, we remand this matter to the AJ for the limited purpose of requesting documentation to prove that the January 2006 offense occurred.[3]

I was assigned this matter on or about May 26, 2011. I then issued an order on June 1, 2011, requesting both parties to submit any and all documents in their possession relating to the January 3, 2006, Offense. Both parties complied. The record is now closed.

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

> 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.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

Whether there is enough evidence to establish the occurrence of the January 2006 offense.

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[2] Agency's Petition for Review, pg. 6.
[3] *Metrice Jones v. D.C. Public Schools, Department of Transportation*, Opinion and Order on Petition for Review, May 23, 2011.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

Agency's Position

Agency responded to my June 1, 2011, order by forwarding a signed and sworn affidavit from Ms. Joy Binns-Grayton.[4] In her affidavit, Ms. Binns-Grayton asserted that she was Employee's supervisor in January 2006 and had been her supervisor since April 2003. She further asserted that on January 3, 2006, Employee made a verbal request to be allowed to work a straight shift, which Ms. Binns-Grayton disapproved and required Employee to work her routine split shift. She noted that, pursuant to her disapproval of Employee's verbal request, Employee in "a loud and raised voice began using profanity directed at me." And with that, Ms. Binns-Grayton, in a memorandum dated January 5, 2006, recommended that Employee be suspended for two days.[5]

Employee's Position

In her reply to the above-mentioned affidavit, Employee alleged that the January 5, 2006, Memorandum was created after the start of her case because it had only Ms. Binns-Grayton's signature; it was not signed by Employee and/or her Union Representative; and that there is no documentation in the record showing any break in her pay. Employee also included a signed letter from Ms. Tyeshia Robinson (Employee's co-worker), dated September 14, 2009. In her written statement to this Office, Ms. Robinson noted that she worked with Employee on route 60 in January 2006. And that to the best of her recollection, there was no incident of conflict of any kind between Employee and Ms. Binns-Grayton. Ms. Robinson went further to note that, Ms. Binns-Grayton has always been on the evening shift.

Analysis and Conclusion

An affidavit contains statements which are sworn to, under oath of perjury, as truthful statements by the individual executing the document. Thus, in executing this document, the affiant is testifying that they are not lying or presenting misleading information. And as a result, they are deemed truthful statements. D.C. Municipal Regulations ("DCMR"), Title 4, § 424 (1)(a) provides in pertinent parts that, when a witness is unavailable, the hearing examiner may admit the content of the proffered testimony in an alternative form such as an affidavit attested by the witness. 1 DCMR § 2821.11 also does not forbid the use of affidavits as evidence. However, 1 DCMR §2821.12 gives the Administrative Judge the discretion to assess the reliability of the evidence and determine the weight of the evidence. In the matter at hand, Agency's witness Ms. Binns-Grayton was unavailable to testify during the initial phase of this matter due to an extended leave as a result of an accident.[6] And while the affidavit from Ms. Binns-Grayton seems to shed more light into the circumstances that may have led to the creation of the January 2006 Memorandum, this evidence alone is not sufficient to verify the occurrence of that offense.

After carefully reviewing the documents on record, it appears that apart from the January 5, 2006, Memorandum from Ms. Binns-Grayton, the only other evidence in the record from Agency of the alleged January 2006 incident is the affidavit from Ms. Binns-Grayton. And while greater weight is normally given to affidavits because they typically contain statements which are sworn to, under oath of perjury as truthful, they do not give this Office an opportunity to assess the credibility of the witness. Nor does it allow for cross-examination. Moreover, as opposed to the March 13, 2008 letter which is signed by Employee's Union Representation; and contains a handwritten statement "I refuse it,"[7] the January 5, 2006, Memorandum from Ms. Binns-Grayton to Employee is not signed by either Employee or her Union Representative. Consequently,

[4] Assistant Terminal Manager and author of the January 5, 2006, Memorandum.
[5] *See* Memorandum from Joy Binns-Grayton to Matrice Jones dated January 5, 2006.
[6] *See Agency's Submission*, dated November 30, 2009.
[7] It can be reasonably assumed that this handwritten statement was made by Employee.

I find that, Agency failed to properly document this offense and therefore, has failed to prove the January 2006 offense by a preponderance of evidence.

The TAP lists offenses and not discipline for the imposition of penalties. I find that Agency failed to properly document or adequately prove the existence of a January 2006 offense, and as such, this alleged offense cannot be used in determining the appropriate penalty for Employee's November 21, 2008, offense. Absent sufficient information to prove the January 2006 offense by a preponderance of evidence, I also find that Employee's November 21, 2008 offense is her second offense[8] and Agency's penalty of terminating Employee is not progressive. Employee's penalty for this offense should have been suspension not termination. Accordingly, I find that Agency's penalty of terminating Employee is excessive, and as such, should be reversed.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of terminating Employee is **REVERSED**; and

2. Agency shall immediately reinstate Employee; reimburse her all back-pay and benefits lost as a result of her termination; and

3. A penalty of nine days suspension is imposed for Employee's November 21, 2008, offense; and

4. Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

_____
MONICA DOHNJI, Esq.
Administrative Judge

[8] I find that the March 2008 offense was her first offense.