THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BEVERLY GURARA,	)	OEA Matter No. 1601-0080-09
Employee	)	
	)	Date of Issuance: December 12, 2011
	)	
	)	
D.C. DEPARTMENT OF	)	
TRANSPORTATION,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Beverly Gurara ("Employee") works as a staff assistant with the D.C. Department of Transportation ("Agency"). On February 5, 2009, Employee was suspended for fifteen days without pay. She was charged with any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, neglect of duty.[1] Additionally, she was charged with absence without leave ("AWOL").[2]

[1] Agency's notice provided that Employee was instructed to attend City Works training sessions that were essential to the efficiency and integrity of government operations. Although Employee was scheduled to attend the training, she did not. Management met with her to discuss her failure to attend, but Employee offered no explanation. Additionally, Employee was scheduled to attend a snow program training; she, again, refused to attend the training. According to Agency, Employee informed her supervisor that she was not participating in the snow program unless the Associate Director of the Agency sent a driver to pick her up every time it snowed. *Petition for Appeal,* p. 7-8 (February 9, 2009).

[2] Agency provided that Employee was tardy on October 20, 21, and 22, 2008. She also requested "use or lose" leave on October 27 and 28, 2008. It alleged that Employee failed to follow the proper procedures for making up time and properly requesting leave. *Id.*

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on February 9, 2009. She claimed that she was unaware of the requirement to attend snow training and argued that she was never AWOL. Subsequently, she requested that the Agency's decision to suspend her be reversed.[3]

On March 13, 2009, Agency filed its answer to Employee's Petition for Appeal. As proof that Employee was neglectful in her duties by refusing to comply with direct orders and complete assigned tasks, Agency provided an email that directed Employee to attend the City Works training seminar from October 14-16, 2008.[4] Agency also provided an attendance sheet that showed that Employee failed to attend the snow training on October 11, 2008. As for Agency's charge of AWOL, it provided attendance sign-in sheets that indicated that Employee arrived more than thirty minutes late to work on October 20, 21, and 22, 2008.[5] Moreover, Agency alleged that Employee failed to utilize the proper procedure in requesting use or lose leave.[6] Therefore, it requested that Employee's suspension be sustained.[7]

The OEA Administrative Judge ("AJ") held an evidentiary hearing on November 24, 2009. Thereafter, the AJ issued his Initial Decision on this matter on July 16, 2010. The AJ found that Agency's witnesses, Mr. Hinton and Mr. Pacifico, provided credible testimony. Mr. Hinton and Mr. Pacifico offered consistent testimonies describing Employee's failure to attend the scheduled trainings and her tardiness. Agency witnesses stated that Agency would have made transportation arrangements for Employee, if she asked for assistance.

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[3] *Id.* at 3.
[4] Agency explained that this was a computer training that allowed it to generate work orders, schedule work, and manage staffing on a department-wide basis when members of the public called with service requests.
[5] Agency stated that Employee was previously suspended for nine days without pay for AWOL and tardiness.
[6] According to Agency, to request use or lose leave, an employee must receive the requisite approval from her supervisor to take this leave.
[7] *Agency's Answer to Employee's Petition for Appeal* (March 13, 2009).

The AJ found Employee's testimony to be inconsistent. He determined that Employee did neglect her duty by failing to carry out assigned tasks. The AJ also held that Agency proved the AWOL charges against Employee. Because the penalty of suspension was appropriate for the neglect of duty and AWOL charges against Employee, the AJ upheld Agency's decision to suspend her.[8]

Employee disagreed with the AJ's decision and filed a Petition for Review with the OEA Board. She argued that the AJ did not consider sections of the District Personnel Manual ("DPM") that governs training of employees. She also claimed that Agency witnesses offered contradictory statements during the evidentiary hearing. Finally, she explained that Agency failed to provide any procedures or policies that govern an employee's failure to attend snow training. Thus, Employee reasoned that Agency failed to offer clear, factual evidence that supported her fifteen-day suspension. Accordingly, she requested that the Initial Decision be reversed.[9]

Employee failed to present her arguments regarding the sections of the DPM that govern employee training to the AJ before the record was closed. This Board has held that it will not consider legal arguments which could have been raised before the AJ but were not.[10] Employee had ample opportunities to present these issues but failed to argue them. In accordance with

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[8] *Initial Decision*, p. 7-9 (July 16, 2010).
[9] *Petition for Review* (August 20, 2010).
[10] *Calvin Braithwaite v. D.C. Public Schools*, OEA Matter No. 2401-0159-04, *Opinion and Order on Petition for Review* (September 3, 2008); *Collins Thompson v. D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0219-04, *Opinion and Order on Petition for Review* (November 13, 2008); *James A. Page v. D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0015-01, *Opinion and Order on Petition for Review* (June 25, 2008); *Valerie Jones, Gerald Whitmore*, and *Emmanuel L. Peaks v. D.C. Department of Mental Health*, OEA Matter Nos. 2401-0064-03, 2401-0065-03, and 2401-0066-03, *Opinions and Orders on Petition for Review* (May 15, 2007); and *Stephanos Ulis* and *Alfred Richards v. D.C. Public Schools*, OEA Matter Nos. 1601-0092-04 and 1601-0063-04, *Opinions and Orders on Petition for Review* (September 19, 2006).

OEA Rule 634.4, these arguments will not be considered by this Board.[11]

Employee's next argument was that Agency's witnesses offered contradictory statements during the evidentiary hearing. OEA has held that it will not question an AJ's credibility determinations.[12] 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. The OEA Administrative Judge was the administrative fact finder in this matter. Thus, this Board will not second guess his credibility determinations. Moreover, the Court in *Baker* as well as 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. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[13] After review of the OEA Hearing Transcript, a reasonable mind would accept Agency's witnesses as credible and adequate to support its decision to suspend Employee.

Finally, Employee claimed that Agency failed to offer evidence that supported a fifteen-day suspension. First, we will examine if Agency had the requisite cause to suspend Employee. Then, we will address if the 15-day suspension penalty was appropriate under the circumstances.

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[11] OEA Rule 634.4 provides that "any objections or legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board."

[12] *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).

[13] *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).

As the AJ provided in the Initial Decision, DPM § 1619.1 section 6(c) defines on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, neglect of duty as "failure to follow instructions or observe precautions regarding safety; failure by a supervisor to investigate a complaint; failure to carry out assigned tasks; careless or negligent work habits." Employee failed to carry out the assigned task of attending training sessions. When asked by her attorney why she did not attend the trainings, Employee responded that she "had no way to get there" and that no one offered her transportation.[14] This is contradictory to what three Agency witnesses testified. Employee conceded in her testimony that when she attended previous trainings, she would ride with other employees, but "now [Agency] schedule[s] transportation for the employees to go to training."[15] Because Employee admitted that Agency would schedule transportation for training, her reason for not attending training is nullified.

Further, Employee was on notice that the snow training was a requirement for her position. Employee's position description provides that her "services may be required in emergency situations to perform crucial duties, i.e. snow removal . . . ."[16] Hence, she knew that she was violating an essential function of her employment duties.

As it pertains to the AWOL charges, Employee does not dispute that she was tardy on October 20, 21, and 22, 2008. She testified that she did not believe that her tardiness was " . . . more than anybody else." This is not an excuse or justification for her being tardy. She failed to take leave or make up the time that she was late on these days, thus, Agency was justified in charging her with AWOL. Likewise, it was justified in charging her with AWOL for failing to

[14] *OEA Hearing Transcript,* p. 184 (November 24, 2009).
[15] *Id.* at 185.
[16] *Agency's Answer to Employee's Petition for Appeal*, Exhibit #9 (March 13, 2009).

follow its policy in requesting use or lose leave.[17]

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of* Columbia, 502 A.2d 1006 (D.C. 1985).[18] According to the Court in *Stokes* OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties. Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. Section 1619.1 section 6(c) of the DPM clearly lists that the penalties for an on-duty or employment-related act or omission that interfered with the efficiency or integrity of government operations, neglect of duty charge ranges from a reprimand to removal for the first offense. Hence, the fifteen-day suspension was an appropriate penalty for Employee.

As Agency provided, Employee was previously charged with AWOL and tardiness prior to the current charge.[19] The penalty for a second offense of AWOL is suspension for 10-20 days. Accordingly, a fifteen-day suspension was also an appropriate penalty for the AWOL charge against Employee.

Based on the aforementioned, there is no clear error in judgment by Agency. Suspension was within the range of penalties for the neglect of duty and AWOL charge, as evidenced in Chapter 16 of the DPM. Accordingly, Employee's Petition for Review is DENIED.

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[17] Mr. Hinton testified that use or lose leave employees must submit a leave slip 24 hours in advance. Otherwise, the leave is considered unscheduled leave. *OEA Hearing Transcript*, p. 29-30 (November 24, 2009).

[18] *See also Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[19] *Agency's Answer to Employee's Petition for Appeal*, Exhibit #11 (March 13, 2009).

ORDER

Accordingly, it is hereby **ORDERED** that Employee'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.