**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| THEODORE POWELL, | ) | OEA Matter Nos. 1601-0281-10 |
| Employee | ) | 1601-0029-11 |
| | ) | |
| v. | ) | |
| | ) | Date of Issuance: June 9, 2015 |
| D.C. PUBLIC SCHOOLS, | ) | |
| Agency | ) | |
| | ) | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Theodore Powell ("Employee") was a Physical Education Teacher with the D.C. Public Schools ("Agency"). On February 2, 2010, Agency advised Employee that he would be placed on Administrative Leave from February 4, 2010 through February 10, 2010, due to his arrest for threats to do bodily harm to a student.[1] On March 8, 2010, Agency notified Employee that his period of Administrative Leave ended, and he would be placed on Enforced Leave status starting March 9, 2010.[2]

Later that year, on November 5, 2010, Agency issued another notice to Employee informing him that he would be terminated for insubordination. It explained that while

[1] Employee and a student at Woodson High School got into an altercation in the school's gymnasium on December 9, 2009. The student alleged that Employee threatened him. Employee was later charged with making threats to do bodily harm to the student.
[2] *Petition for Appeal,* p. 10 (March 12, 2010).

Employee was on Enforced Leave, he was directed to submit to a mental and physical examination, but he refused to answer the physician's questions. His effective date of the termination was November 30, 2010.[3]

Employee contested the Enforced Leave action and filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on March 12, 2010. He subsequently filed another Petition for Appeal on November 29, 2010, to contest his termination action. With regard to the Enforced Leave action, Employee argued that he should not have been subjected to the action because he was assaulted on-the-job and was diagnosed with Post Traumatic Stress Disorder/Adjustment Disorder.[4] In his second Petition for Appeal, Employee explained that although he submitted to the Fitness for Duty Examination, Agency's physician was not a mental health professional.[5] Furthermore, Employee asserted that he answered all of the doctor's questions, but the doctor ". . . had no plans, no organization and professionalism to administer a physical or mental health evaluation on anyone." Therefore, he requested to be reinstated to his position and to be reimbursed for emotional and psychological damages.[6]

In Agency's Answer to the first Petition for Appeal, it explained that the Enforced Leave action was justified because Employee's crime bore a relationship to his position at Woodson High School. It provided that the action was in accordance with D.C. Official Code § 1-616.54 (a)(3).[7] Accordingly, Agency requested that the first Petition for Appeal be dismissed for

[3] *Petition for Appeal,* p. 3 (November 29, 2010).
[4] *Petition for Appeal,* p. 3-13 (March 12, 2010).
[5] Employee provided that the physician's specialty was emergency medicine and surgery. He stated that he requested another physician, but Agency refused to provide him one.
[6] Employee also asserted that he should be returned to his position because the Superior Court for the District of Columbia found him not guilty on the charge of attempted threats to do bodily harm. *Petition for Appeal,* p. 3-7 (November 29, 2010).
[7] This section provides that:

> [n]otwithstanding any other provision of this subchapter, a personnel authority may authorize the placing of an employee on annual leave or leave without pay, as provided in this section, if . . . [t]he employee has been indicted on, arrested for, or convicted of any crime (including

Employee's failure to state a claim.[8]

In its Answer to Employee's Second Petition for Appeal, Agency provided that its termination action was in accordance with Title 5, Section 1401.2 of the District of Columbia Municipal Regulations ("DCMR"). It explained that while Employee was on Enforced Leave, he was directed to undergo the Fitness for Duty examination but failed to do so within the required timeframe.[9] Agency was later informed by Dr. Arthur Webb that Employee arrived for the exam on October 26, 2010, but he expressed that he did not wish to be evaluated. Thus, Agency requested that the Employee's Second Petition for Appeal also be dismissed for failure to state a claim.[10]

The OEA Administrative Judge ("AJ") consolidated the cases and issued an Order Convening a Pre-hearing Conference which required the parties to submit Pre-hearing Statements.[11] Employee's Pre-hearing Statement reiterated arguments that were previously submitted to OEA.[12] Agency's Pre-hearing Statement noted that Employee was terminated for cause in accordance with the DCMR.[13]

Following an Evidentiary Hearing, the parties submitted closing arguments. Employee argued that there was no good faith basis for Agency to place him on Enforced Leave. He

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conviction following a plea of nolo contendere) that bears a relationship to his or her position; except that no such relationship need be established between the crime and the employee's position in the case of uniformed members of the Metropolitan Police Department or correctional officers in the D.C. Department of Corrections.

[8] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal* (April 15, 2010). Employee submitted a Reply to Agency's Answer on May 13, 2010. He asserted that he was the one who was actually assaulted and taunted with violence. He also provided that the principal was trying to get rid of him and created a hostile work environment. Employee opined that his due process rights were violated and his arrest was not warranted. Ultimately, Employee believed that he was subjected to a hate crime, sexually harassed, and discriminated against. *Response to Answers and Claim Stated* (May 13, 2010).

[9] It explained that on March 17, 2010, Employee was directed to undergo the Fitness for Duty examination within fifteen calendar days.

[10] *District of Columbia Public Schools' Answer to Employee's Petition for Appeal* (January 10, 2011).

[11] *Order Convening a Pre-hearing Conference* (September 10, 2012).

[12] *Employee Theodore Powell's Pre-hearing Statement* (October 5, 2012).

[13] *District of Columbia Public Schools' Pre-hearing Statement* (October 12, 2012).

reasoned that Agency did not investigate the charges.[14] Employee also argued that there was no basis for Agency to require a Fitness for Duty examination. He reasoned that he was not mentally ill; he was not dangerous to himself or others; he had a history of disputes with the principal of Woodson; and he was exonerated of the charges filed against him.[15] Therefore, he requested reinstatement with back-pay and attorney fees.[16]

Agency's Closing Brief provided that Employee's arguments lacked merit. It reasoned that it had a good faith belief to place Employee on Enforced Leave because it was notified that he was arrested.[17] With regard to the Fitness for Duty examination, Agency argued that Employee's assertion that he cooperated with the examination was not credible. It contended that Employee's ". . . version of events was totally contrary to Dr. Webb's assessment."[18] Therefore, Agency requested that its termination action be upheld.[19]

The Initial Decision was issued on January 31, 2014. First, the AJ found that Agency had cause to place Employee on Enforced Leave. He reasoned that Employee's crime bore a relationship to his position and that Agency ". . . took reasonable steps to ensure the safety of the student populace."[20] With regard to the charge of insubordination, the AJ found that "Employee failed to actively participate for the Fitness for Duty so that a reasonable examination could occur."[21] He held that this failure challenged Employee's ability to effectively carry out his essential job functions. Thus, he ruled that Agency had cause to remove Employee for

[14] Furthermore, Employee believed that he should have been reimbursed for the time he was on Administrative Leave and Enforced Leave because he was exonerated of the charge of making a threat to do bodily harm.
[15] Employee also provided that he cooperated with the Fitness for Duty scheduling and examination.
[16] *Employee Theodore Powell's Closing Argument,* p. 5-7 (April 9, 2013).
[17] Agency also provided that while Employee was on Enforced Leave, he was paid Administrative Leave pay.
[18] Additionally, Agency reasoned that Employee submitted complaints against the doctor to the Commonwealth of Virginia Enforcement Division. *District of Columbia Public Schools' Closing Brief,* p. 12-13 (April 22, 2013).
[19] *Id.* at 14.
[20] The AJ found that Agency did not know the disposition of the criminal charges at the time that the Enforced Leave was initiated. *Initial Decision,* p. 10 (January 31, 2014).
[21] *Id.* at 12.

insubordination. Accordingly, Agency's action was upheld.[22]

Employee filed a Petition for Review of the Initial Decision with the OEA Board on February 21, 2014. He states that the Initial Decision was not a factual document; the AJ erred in his judgment of the witnesses; Agency provided false information to the AJ; and he was subjected to retaliation, double jeopardy, discrimination, and punishment. Employee provides that Traci Higgins, the Director of Labor Management and Employee Relations, and Gerald Austin, the Assistant Principal at H.D. Woodson Senior High School, made false statements.[23] Additionally, Employee believes that Dr. Webb was not qualified to conduct the Fitness for Duty examination.[24] Therefore, Employee believes that he was wrongfully terminated and is entitled to relief.[25]

Agency filed a Motion for Leave to File a Response to Employee's Petition for Review on April 10, 2015. Agency provides that it did not receive a timely copy of the Petition for Review.[26] Agency's Response to Employee's petition was not received before the issuance of

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[22] *Id.*

[23] Employee explains that Ms. Higgins made false statements to the AJ when she stated that he used profanity in the classroom and attacked the principal and assistant principal. Employee provides that Ms. Higgins failed to file a worker's compensation claim for his Post Traumatic Stress Disorder. Lastly, Employee provides that Ms. Higgins is dysfunctional and that she hired Dr. Webb in order to save money.

With regard to Mr. Austin, Employee states that he lied during the hearing when he claimed that he had a loss of memory. He states that Mr. Austin subjected him to sexual harassment and discrimination; he failed to file a report when he learned that Employee was hurt on the job; he committed a hate crime; he implemented the removal without due process; and that he made false statements.

[24] Employee reiterated that Dr. Webb was not board certified or a psychologist. Furthermore, he claimed that Dr. Webb did not provide a pre-medical history questionnaire during the evaluation.

[25] *Petition for Review of the Initial Decision* (February 21, 2014). Employee also filed a Motion to Amend the Petition for Review of the Initial Decision, wherein he provides that his position could not be taken away without due process. He submits that the Fitness for Duty examination had to be completed by a board certified medical specialist, and Dr. Webb was not board certified. He also states that the District Personnel Manual procedures required that he be informed of the reasons why he needed to submit to a Fitness for Duty examination. He provides that he should have been afforded an opportunity to present medical documentation from his personal physician. Lastly, Employee asserts that he was not afforded his rights under D.C. Official Code 1-615(a) and D.C. Official Code 1-615.52(a)(2). *Motion to Amend the Petition for Review of the Initial Decision* (September 24, 2014).

[26] Agency explains that it did not become aware that there was a Petition for Review filed until it conducted an audit of its cases and contacted OEA. *Motion for Leave to File a Response to Employee's Petition for Review* (April 10, 2015).

this decision.[27]

Witness Credibility

In his Petition for Review, Employee spent a great deal of time addressing the testimonies provided by Agency witnesses. The OEA Board has held that it will not question an AJ's credibility determinations.[28] 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 testimonies of Agency witnesses, Traci Higgins and Dr. Webb, were credible and more persuasive than Employee's testimony. Thus, as we have consistently ruled, we will not second guess his credibility determinations.

Workplace Injuries

Employee argues that he endured several workplace injuries while at Agency and that Agency failed to take action to address the injuries. However, OEA is not the proper forum to address these types of issues. Even if we were the proper forum, we would still be unable to

[27] In Opposition to the Motion for Leave to File a Response to Employee's Petition for Review, Employee provides that on the same day that he filed his Petition for Review with OEA, he mailed a copy of the document to Agency at 1200 First Street, N.E., 10th Floor, Washington, D.C., 20002. Employee believes that Agency's filing should be time barred because its motion is grossly untimely. Accordingly, Employee requests that his termination be vacated; that he be reinstated with back-pay and benefits; that he receive an up-to-date salary; that he be awarded damages for emotional distress, liquid damages, and pay for continued medical treatment. *Motion for Amendment and Opposition to Motion to Leave* (April 23, 2015).

Employee subsequently filed a Motion for Amendment on May 13, 2015. He reiterates previous arguments submitted to the Board. He also contends that Agency retaliated against him after an unsuccessful criminal case; the evaluation process was corrupt; his Fifth Amendment rights and Miranda rights were violated; and Agency and the AJ disregarded the CMPA. *Motion for Amendment* (May 13, 2015).

[28] *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); and *Ronald Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013).

address the workplace injuries because Employee offered no evidence to support the injury claims. He merely made statements that certain instances occurred which resulted in his injuries. These statements do not rise to the level of a viable argument to be considered by this Board, nor are his assertions proof that the injuries occurred.

Fitness for Duty Exam

Employee was arrested while employed at Agency for threatening to "put a bullet in [a student's] head." Although he was acquitted of the charges, Agency requested that a Fitness for Duty exam be performed before he return to the classroom. Traci Higgins testified during the evidentiary hearing that she considered Employee's arrest for threatening the student; the Principal's request for an exam; and her communication with Employee to require that an examination take place.[29] She also provided that she relied on an Agency Directive which outlines the parameters for requesting Fitness for Duty examinations and provides Agency with the authority to request them.[30]

In accordance with the Fitness for Duty Directive, an exam may be requested when:

> there is a question of possible hazard to the employee or others if the employee is maintained in his/her present position.[31]

Based on Employee's testimony, there was a question of possible hazard to him or others if he maintained his position. When asked if he told a student that he would "put a bullet in [his] head," Employee responded that the statement was made in "reaction to what [the student] said to [him]."[32] He also provided that he "was pretty . . . upset, and [he] probably could have said anything . . . because . . . [he] didn't like the intimidation of . . . someone challenging [him] to go

[29] *Id.*, 75-76.
[30] *OEA Hearing Transcript,* p. 33 (January 14, 2013).
[31] *Id.*, Agency Exhibit #5.
[32] *OEA Hearing Transcript,* p. 203 (January 14, 2013).

outside and fight . . . ."[33] Agency would have been placing Employee in the same environment and needed to ensure that Employee would not make future threats or actually harm a student or himself. Thus, it was reasonable for Agency to have ordered a Fitness for Duty exam under the circumstances.[34]

Adverse Action

In accordance with Title 5, Chapter 14 of the DCMR, Agency had cause to impose the adverse action against Employee. DCMR § 1401.1 provides that an "adverse action shall be taken for grounds that will promote the efficiency and discipline of the service and shall not be arbitrary or capricious." DCMR § 1401.2(e) goes on to provide that ". . . just cause for adverse action may include . . . insubordination including refusal to submit to a mental or physical examination authorized by the rules of the Board of Education or any law or regulation of the District government." The testimony provided by Dr. Webb clearly established that Employee failed to submit to the Fitness for Duty exam requested by Agency. We agree with the AJ's reasoning that Employee's failure to submit to the exam calls into question his ability to safely carry out his job duties. Therefore, we believe that the Initial Decision is based on substantial evidence. Accordingly, we deny Employee's Petition for Review.[35]

[33] *Id.* at 181.
[34] Despite Employee's contention that Agency failed to adhere to District Personnel Regulations § 2049, the record clearly provides that Agency complied with each section of the regulation. *OEA Hearing Transcript,* Agency Exhibits 6-8 (January 14, 2013).
[35] As for the enforced leave action, Agency offered evidence to prove that Employee was paid for the entire time he was on leave. Agency acknowledged that it placed Employee on Leave Without Pay status in error. As a result, Employee received back payment for nine weeks of administrative leave. Agency provided a detailed account of how the amount owed was calculated and paid to Employee. *Id.*, Agency Exhibit 10. Therefore, Employee was made whole as a result of the enforced leave action.

**ORDER**

It is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice 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.