**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| BEVERLY DAY, | ) | |
| Employee | ) | OEA Matter No. 1601-0035-12 |
| | ) | |
| v. | ) | |
| | ) | Date of Issuance: March 29, 2016 |
| DEPARTMENT OF PUBLIC WORKS, | ) | |
| Agency | ) | |
| | ) | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Beverly Day ("Employee") worked as a Staff Assistant with the Department of Public Works ("Agency"). Agency issued a notice of final decision to Employee on October 25, 2011. The notice provided that Employee was being removed from her position for "any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law: assault or fighting on duty."[1]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on November 25, 2011. She asserted that she engaged in a heated argument with a co-worker, but she did not assault her or any other co-workers. Employee argued that given the mitigating circumstances – her past disciplinary record; length of employment; her ability to perform her

[1] *Petition for Appeal,* Attachment #3 (November 25, 2011).

job with her supervisor's confidence; the lack of notoriety of the incident; her potential for rehabilitation; alternative sanctions; and learning of her mother's cancer diagnosis the week of the incident – she should have received a lesser penalty than removal. Therefore, she requested reinstatement to her position with back pay and benefits.[2]

Agency filed its response to Employee's appeal and explained that Agency Director, William O. Howland, issued a directive prohibiting bad conduct which included fighting, threatening, or inflicting bodily harm while on duty. It contended that on July 28, 2011, Employee verbally and physically attacked, Ms. Green, a co-worker. Agency claimed that Employee swung, and while attempting to hit Ms. Green, she hit Ms. Chance instead. It provided that under the Table of Penalties, removal was an appropriate penalty for a first offense of fighting. Therefore, Agency requested that OEA sustain its removal action.[3]

Before issuing his Initial Decision, the OEA Administrative Judge ("AJ") held an evidentiary hearing. After reviewing the record and considering the testimonies of both Agency and Employee's witnesses, the AJ determined that an assault did not occur.[4] He ruled that Employee did not swing to hit Ms. Green or Ms. Chance. He reasoned that the swinging motion by Employee was her attempt to resist being pulled away from Ms. Green. Additionally, the AJ held that Employee may have hit Ms. Chance in the shoulder, but the punch was not powerful. Hence, he opined that the punch was not intended for Ms. Chance or Ms. Green. As a result, he ruled that Agency did not have cause to remove Employee and ordered that she be reinstated with back pay and benefits.[5]

Agency disagreed with the AJ's Initial Decision and filed a Petition for Review on

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[2] *Id.*, 1-8.
[3] *Agency's Action,* p. 1-7 (December 20, 2011).
[4] The AJ relied on the following elements when defining assault: (1) an attempt, with force or violence, to injure another; (2) with the apparent ability to effect the injury; and (3) with the intent to do the act constituting the assault.
[5] *Initial Decision,* p. 9-12 (July 7, 2014).

August 11, 2014. It argues that even though it provided the definitions of assault used in the adverse action, the AJ decided to utilize another definition of assault all together. Agency provides that the AJ's failure to apply the proper assault definition to the facts of this case amounts to an erroneous interpretation of statute, regulation, or policy. Agency posits that Employee did assault Ms. Green when she approached her in a fighting stance. It explains that the stance would have presented itself as a danger to any reasonable person, and it showed that Employee displayed the apparent present ability to injure Ms. Green. Agency also contends that Employee approaching Ms. Green in a fighting stance was a menacing threat. Finally, Agency provides that the AJ's logic is flawed in that Employee's punching motion was an attempt to regain balance, and his decision is not based on substantial evidence. Therefore, it requests that this Board reverse the Initial Decision or remand the matter to the AJ for further conclusions which flow rationally from the facts of this case.[6]

On July 29, 2015, Employee filed a Motion for Injunctive Relief. She requested that she be reinstated to her position immediately due to financial hardship. Alternatively, Employee requested that the OEA Board expedite her case.[7]

In accordance with OEA Rule 633.3, this Board may grant a petition for review when the petition establishes one of the following:

> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
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> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
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> (c) The findings of the Administrative Judge are not based on substantial evidence; or
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> (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

[6] *Agency's Petition for Review,* p. 4-14 (August 11, 2014).
[7] *Employee's Motion for Injunctive Relief* (July 29, 2015).

In the current matter, Agency argues that the AJ's Initial Decision was based on an erroneous interpretation of statute, regulation, or policy, and it was not based on substantial evidence. This Board agrees with both claims and remands the matter to the AJ for further findings.

Definition of Assault

As Agency provided in its Petition for Review, there are several definitions of assault outlined in the D.C. Official Code. Therefore, at the close of the evidentiary hearing the AJ asked the parties to address which definition of assault was used in this matter.[8] In its response to the AJ's request, Agency provided that it based its action on assault as defined by the Black's Law Dictionary. In Black's Law, assault is defined as "the threat or use of force on another that causes that person to have a reasonable apprehension of imminent harmful or offensive contact, or the act of putting another person in reasonable fear or apprehension of an immediate battery by means of an act amounting to an attempt or threat to commit a battery." Additionally, Agency explained that it also considered assault as defined by D.C. Official Code § 22-404 as "threatening another in a menacing manner."[9]

Agency asserted that it relied on D.C. Official Code § 22-404 when analyzing its assault action against Employee. It argued that the definitions of assault upon which it relied were intent to frighten assault or assault derived from threatening another in a menacing manner. The case law on both types of assault is clear. The D.C. Court of Appeals ruled in *Joiner-Die v. U.S.*, 899 A.2d 762 (D.C. 2006), that to establish intent-to-frighten assault, the government must prove: (1) that the defendant committed a threatening act that reasonably would create in another person a fear of immediate injury; (2) that, when he or she committed the act, the defendant had the apparent present ability to injure that person; and (3) that the defendant committed the act

[8] *OEA Hearing Transcript*, p. 182 (May 13, 2014).
[9] *Agency's Proposed Initial Decision,* p. 23 (June 27, 2014).

voluntarily, on purpose, and not by accident or mistake. As it relates to assault by threatening another in a menacing manner, the Court in *U.S. v. Barnes*, 295 F.3d 1354, 353 U.S. App.D.C. 87 (July 23, 2002), held that assault in a menacing manner consists of: (1) an act on the part of the accused (which need not result in injury); (2) the apparent present ability to injure the victim at the time the act is committed; and (3) the intent to perform the act which constitutes the assault at the time the act is committed.

The AJ's analysis of this matter did not consider either of the definitions that Agency relied upon when assessing whether it had cause to remove Employee. The AJ's reasoning stemmed from another type of assault which includes the following elements: (1) an attempt, with force or violence, to injure another; (2) with the apparent ability to effect the injury; and (3) with the intent to do the act constituting the assault. Thus, the AJ clearly considered a definition of assault other than that used by Agency. This Office has historically held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[10] Therefore, we must remand this matter to the AJ to properly analyze the facts of this case using the actual definitions relied upon by Agency.

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. 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

[10] *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011); *Rashid Jones v. Office of the Chief Medical Examiner*, OEA Matter No. 1601-0176-08SJR11, *Opinion and Order on Petition for Review* (March 4, 2014); and *Richard Hairston v. Department of Corrections*, OEA Matter No. 1601-0307-10, *Opinion and Order on Petition for Review* (September 16, 2014).

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.[11]

Agency claims that the AJ's decision regarding the punch or swing by Employee was not based on substantial evidence. Similar to Agency, this Board is puzzled by the AJ's determination that even though Employee swung and may have hit Ms. Chance, it is somehow diminished because Employee did not come in contact with her intended target and that her swing was not powerful. Given the definitions of assault relied on by Agency, the force of the swing is not a factor to be considered. Moreover, the record does not support the AJ's conclusion that Employee was swinging to counter the resistance of being separated from Ms. Green. In her statement during the Workplace Violence Investigation, Employee admits that she tried to strike Ms. Green.[12] Additionally, the record is replete with testimonies and reports that Employee raised her hands in a fighting stance and/or swung. Ms. Grant testified during the hearing that Employee "had her hands up like they were getting ready to really fight."[13] Ms. Hedgeman testified that she "saw [Employee] throw her hands up like in a fighting position [ ]. Then Ms. Elneta Chance intervened[,] and [she] didn't know if a punch landed or what[,] but the hands were thrown up."[14] Additionally, Ms. Green testified that as Employee was swinging her arms, she hit Ms. Chance.[15] Furthermore, Ms. Chance provided that Employee "threw her hands up in a fighting stance" and "swung and hit [her] . . . in the shoulder area. . . ."[16] Similarly, Mr. Harrison testified that after speaking with witnesses as part of his Workplace Violence

[11] *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).
[12] *Agency's Action,* Tab #5 (December 20, 2011). Additionally, the Hearing Officer provided that Employee stated that she and Ms. Green made "'swing motions' but . . . no contact was made because Ms. Chance was standing between them." The Hearing Officer also asserted that in Employee's submission to her, she claimed that "the reference to her mother . . . provoked her to take a swing at Ms. Green." *Id.*, Tab #11.
[13] *OEA Hearing Transcript*, p. 22 (May 13, 2014) and *Agency's Action,* Tab #5 (December 20, 2011).
[14] *OEA Hearing Transcript*, p. 28 (May 13, 2014) and *Agency's Action,* Tab #5 (December 20, 2011).
[15] *OEA Hearing Transcript*, p. 47 (May 13, 2014).
[16] *Agency's Action,* Tabs #8 and 5 (December 20, 2011) and *OEA Hearing Transcript*, p. 59-60 (May 13, 2014).

Investigation, he concluded that Employee "did throw a punch, even though she did not hit the person she was intending to hit."[17] It should be noted that the AJ determined that Grant, Hedgeman, and Chance offered credible testimonies.[18] The record is clear that Employee intended to hit Ms. Green. Thus, the AJ's determination that Employee was trying to balance herself is not evidenced by the record and is not based on substantial evidence.

Conclusion

The AJ did not use the proper definition of assault when issuing his ruling. Therefore, we must remand this matter for the AJ to apply the facts of this case to the definition of assault used by Agency to remove Employee. The AJ can then determine, based on his findings, if Agency had adequate cause to terminate Employee and whether the penalty of removal was appropriate.

[17] *Id.* at 78.
[18] *Initial Decision,* p. 9-10 (July 7, 2014).

## ORDER

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** to the Administrative Judge for further findings.

FOR THE BOARD:

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Sheree L. Price, Vice Chair

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Vera M. Abbott

_____
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.