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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
HERBERT DOUGLAS)	OEA Matter No. 1601-0032-08
SHANTELL HATTON)	1601-0033-08
LOWANDA HINTON-SAUNDERS)	1601-0034-08
LORENZO JENNINGS)	1601-0035-08
DIONNE MAKINS)	1601-0037-08
LACHONE STEWART)	1601-0038-08
CYNTHIA WASHINGTON,)	1601-0039-08
Employees)	
)	Date of Issuance: October 25, 2010
)	
)	
D.C. DEPARTMENT OF CORRECTIONS,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Herbert Douglas, Lachone Stewart, Lorenzo Jennings, Lowanda Hinton-Saunders, Shantell Hatton, Dionne Makins, and Cynthia Washington (“Employees”) worked at the D.C. Department of Corrections (“Agency”). Employees were accused of negligence after two inmates escaped from the D.C. Central Detention Facility.¹ The escape took place on

¹ Employee Douglas was charged with failing to properly supervise one of the escapees during a work detail, thereby, allowing the escape to occur. Additionally, Agency accused Douglas of providing one of the escapees with a knife and accepting \$100 to assist in the escape. Agency claimed that Employee Stewart aided and abetted the prison escape by providing the escapees with blue uniforms. Employee Jennings was charged with failing to prepare a disciplinary report to remove an inmate from his environmental detail and failing to turn in a confiscated

June 3, 2006. Employees received notices on June 5, 2006, placing them on paid administrative leave pending an investigation of their roles in the escape. On August 24, 2006, Employees were issued notices removing them from employment with Agency. Subsequently, they appealed their cases to the D.C. Office of Administrative Hearings on August 30, 2006.²

Although the Office of Administrative Hearings ruled that Employees be reinstated to their positions, Agency insisted on removing them and issued another notice of termination that was effective on January 16, 2008. Employees then filed Petitions for Appeal with the Office of Employee Appeals (“OEA”). They argued in their petitions that they were terminated without cause which is a violation of the Comprehensive Merit Protection Act. Employees requested to be reinstated with all costs and attorney’s fees.³

Agency replied by contending that Employees were within their rights to appeal the January 16, 2008, removal action. However, it suggested that OEA lacked jurisdiction to consider arguments that Employees’ terminations lacked cause because those claims constitute a grievance. Accordingly, Agency asked that the matters be dismissed with prejudice.⁴

After conducting a three-day hearing, the OEA Administrative Judge (“AJ”) issued his Initial Decision. He addressed each Employee’s charges separately. Ultimately, the AJ found that Employees should be reinstated to their positions with back pay and benefits.

On July 27, 2009, Agency filed a Petition for Review of the Initial Decision. It argued

identification card for said inmate. Agency alleged that the card was used by one of the escapees. Employee Hinton-Saunders was charged with negligence for failing to verify a pass of one of the escapees. Employees Hatton, Makins, and Washington were charged with negligence in issuing an unauthorized movement pass to the infirmary to one of the escapees.

² Agency and the Office of Administrative Hearings entered into an agreement for the Office of Administrative Hearings to conduct an administrative review of Employees’ removals.

³ *Petition for Appeal* (January 14, 2008).

⁴ *Agency’s Response to the Petition for Appeal*, p. 9-11 (April 14, 2008).

that the AJ abused his discretion in denying its motion to disallow the testimonies of Employees Douglas and Stewart because they refused to be deposed. It was Agency's position that Employees could have requested a protective order pursuant to OEA Rule 618. Because they did not, their failure to be deposed was willful. Agency believed that as a consequence of the AJ's ruling, it was forced to rely on the escapee's allegations because it was not allowed to depose Douglas and Stewart. As a result, this impacted its case against the other Employees. Thus, it petitioned the OEA Board to reverse the Initial Decision and sustain its decision to remove Employees.⁵

Employees responded by filing an Answer to Agency's Petition for Review on August 26, 2009. Employees contended that Agency cannot use the discovery process to determine if it had proper grounds for removal. They stated that Agency had the opportunity to depose Employees Douglas and Stewart, but it failed to do so. Finally, Employees presented the weakness in Agency's attempt to tie all of the Employee appeals to Stewart and Douglas. They provided that one appeal had nothing to do with the other. More importantly, they claimed that Agency failed to prove that any of the Employees were negligent in their duties.⁶

Agency takes issue with and focuses on Employees Douglas and Stewart in its Petition for Review, while addressing the other Employees peripherally. It claimed that the AJ improperly denied its motion to dismiss Stewart and Douglas' appeals as a sanction for their refusal to be deposed.⁷ During the December 8, 2008 hearing, the AJ addressed Agency's arguments to depose Employees Douglas and Stewart. He provided that:

⁵ *Agency's Petition for Review*, p. 4-10 (July 27, 2009).

⁶ *Answer to Agency's Petition for Review*, p. 8-18 (August 26, 2009).

⁷ It also argued that Employees could have requested a protective order pursuant to OEA Rule 618.

. . . employees had good reason to delay the deposition before because they needed to find out whether that particular deponent needed to assert his Fifth Amendment right, and once that was settled and cleared on or around November 19, agency should have scheduled as soon as possible deposition[s] if they really wanted to depose him which they basically failed to do so after that date. And now its December 8 and now at this late date they want to depose him, what, three days from now? I don't see any really compelling argument Now they want to depose him. Once again, they had the burden of proof. They decided to bring the charges against these employees and they had all the evidence they really needed basically to fire them and now they're arguing that they need to depose this employee [who] was under the[ir] control. I'm going to deny the motion.

OEA Rule 618.4 provides that:

The Administrative Judge may limit the frequency or use of discovery if:

- (a) The discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive;
- (b) The party seeking discovery has had ample opportunity by discovery in the appeal to obtain the information sought; or
- (c) The discovery is unduly burdensome or expensive, in light of the nature of the case, the relief sought, the limitations on the parties' resources, and the importance of the issues involved in the case.

Consequently, the AJ was within his authority to deny Agency's motion. Based on the AJ's above-mentioned statements, it is clear that he based his decision to deny the motion on 618.4(a) and (b). Agency could have deposed Employees Douglas and Stewart during the investigation immediately following the escape while both were still under its control. Further, Agency had ample opportunities after November 19th to depose the Employees. Hence, the AJ's decision to deny Agency's motion was well within his discretion.⁸

The final argument presented in Agency's Petition for Review was that it was forced by

⁸ As for Agency's argument that Employees could have requested a protective order in accordance with OEA Rule 618, this Board finds no reference to such protections under the OEA Rules.

the AJ to rely on the escapee's allegations because it was not allowed to depose Douglas and Stewart, and as a result, this impacted its case against the other Employees. Agency seemingly argues that the escapee's statement was adequate to terminate Employees, but it falls short of being sufficient to defend its case against Employees. As the Employees properly presented in their response, this Board has held that it will "not allow any agency to terminate an employee while using the appeals process to determine if they had reasonable grounds to do so.

This is not only unfair, but it is an abuse of the appeals process."⁹

In accordance with OEA Rule 634.3(b) and (c), the Board can grant a petition for review if it is determined that the Administrative Judge's decision was based on an erroneous interpretation of regulation or policy or if it was not based on substantial evidence. Substantial evidence is defined as "evidence that a reasonable mind could accept as adequate to support a conclusion."¹⁰ The AJ relied heavily on witness testimonies and credibility determinations made during the evidentiary hearings.¹¹ Based on our review of the record, it is clear that the AJ's decision that Agency lacked cause to terminate Employees was based on substantial evidence.¹²

⁹ *Wanda Hoston v. D.C. Public Schools*, OEA Matter No. 1601-0022-04, *Opinion and Order on Petition for Review* (January 26, 2007), ___ D.C. Reg. ___ ().

¹⁰ *Black's Law Dictionary*, Eighth Edition (2004).

¹¹ The Court in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989) provided that great deference to any witness credibility determinations are given to the administrative fact finder. Similarly, 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. See *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007), ___ D.C. Reg. ___ (); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007), ___ D.C. Reg. ___ (); *Paul Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009), ___ D.C. Reg. ___ (); and *Anthony Jones v. D.C. Department of Transportation*, OEA Matter No. 1601-0084-08, *Opinion and Order on Petition for Review* (July 23, 2010), ___ D.C. Reg. ___ ().

¹² D.C. Personnel Regulations, Section 1603.2 provides that "in accordance with section 1651 (1) of the CMPA (D.C. Official Code § 1-616.51 (1)) (2006 Repl.), disciplinary actions may only be taken for cause."

Employee Douglas

Employee Douglas was charged with failing to properly supervise one of the escapees during a work detail, thereby, allowing the escape to occur. The AJ found that other witnesses supported Employee's claims that his supervisor, Captain Holmes, instructed officers to leave inmates unattended to ensure that others are performing their assigned tasks. Hence, the AJ held that Agency failed to prove that Douglas intentionally failed to supervise the escapee. He reasoned that Agency could not fault its employees for following a supervisor's order.¹³

This Board finds that the AJ's decision to reverse Employee Douglas' termination was not based on an erroneous interpretation of Agency's regulation or policy. During the hearing, Director Devon Brown conceded that there is not an Agency regulation or Post Order that requires a correctional officer to have an inmate within his sights at all times.¹⁴ Additionally, witnesses testified that it was Agency's policy to have correctional officers "float" to supervise several groups of inmates. Lieutenant Sharon Cain-Smith provided that the way the jail is designed, if you have six details, you could be supervising inmates in six different locations. Thus, it is not possible to be at all six locations at once.¹⁵ Sergeant Jenkins supported Lieutenant Cain-Smith's testimony by providing that he objected and complained to the Warden about having to float between inmates working at different locations.¹⁶ Even Captain Holmes provided that officers were authorized by the Agency to move from one level to another to supervise inmates.¹⁷

¹³ *Initial Decision*, p. 17-18 (June 22, 2009).

¹⁴ *OEA Hearing Transcript*, p. 379 (December 10, 2008).

¹⁵ *OEA Hearing Transcript*, p. 847 (December 12, 2008).

¹⁶ *Id.*, p. 946-949.

¹⁷ *Id.* at 1061.

Additionally, Agency accused Employee Douglas of providing one of the escapees with a knife. The AJ highlighted that Agency's accusations were based solely on the escapee's hearsay allegations. He also noted that Agency did not question the credibility or motives of the inmate in accusing Douglas of such serious claims. The AJ took into account that the escapee did not testify, thus, he could not judge his credibility.¹⁸

Correspondingly, Investigator Benjamin Collins, who investigated the escape, provided that other than interviewing the escapee, he did not retrieve any evidence or additional testimony to corroborate that Douglas took \$100 to assist the inmates in the escape or provided the inmates with a knife as alleged.¹⁹ Moreover, when asked by the AJ if she found the escapee to be credible, another investigator, Investigator Wanda Patten, responded that the escapee was "as credible as an inmate can be. He is [an] inmate with a long litany of . . . charges."²⁰ Based on the aforementioned, we are confident that the AJ's decision to reverse Employee Douglas' removal was based on substantial evidence.

Employee Stewart

Similarly, the AJ provided that Agency failed to produce any evidence that Employee Stewart aided and abetted the prison escape. Again, Agency relied on the allegations made by one of the escapees to substantiate its claim against Employee Stewart. It never interviewed

¹⁸ *Initial Decision*, p. 17 (June 22, 2009).

¹⁹ *OEA Hearing Transcript*, p. 610-612 (December 10, 2008). It should be noted that Investigator Collins testified that investigators did find the knife where the inmate told them it would be, but they could not confirm that Employee Douglas brought the knife into the facility and gave it the inmates. *Id.* at 641. More importantly, Collins confirmed that the escapee was promised that he would not be criminally prosecuted for any information that he provided if he spoke with investigators. Additionally, he noted that the escapee was not under oath when he offered his statements against employees. *Id.*, 626 and 637.

²⁰ *OEA Hearing Transcript*, p. 914 (December 12, 2008)

Employee Stewart to evaluate her account of what took place.²¹

In establishing cause for the charges against Employee Stewart, Director Brown provided that Agency relied on an interview from one of the escapees to conclude that Stewart aided in the escape by providing clothes to the inmates.²² Director Brown also testified that at the time of the escape, there were a large number of blue uniforms similar to those worn by the escapees stockpiled and unaccounted for. However, since the escape, those uniforms have been destroyed.²³ Agency failed to produce any witnesses who could tie Employee Stewart to the uniforms. Hence, as the AJ reasoned, Agency did not prove that Stewart aided or abetted in the escape.

Employee Jennings

Although Agency does not present any arguments for why the Board should reverse the AJ's decision regarding the other Employees, we believe that substantial evidence also exists to uphold the Initial Decision in their matters. Employee Jennings was charged with failing to prepare a disciplinary report to remove an inmate from his environmental detail and failing to turn in a confiscated identification card for said inmate. The AJ held that Jennings was a credible witness whose version of events was supported by Employee Douglas. He also considered that Agency offered no evidence to establish bias for Douglas or his version of events. The AJ found Agency's witness, Captain Holmes, to be evasive in his answers and not as credible as Jennings and Douglas. Thus, he reasoned that Agency failed to prove by preponderance of the evidence that Jennings committed the acts for which he was

²¹ *Initial Decision*, p. 18-19 (June 22, 2009).

²² Investigator Collins provided that investigators did not weigh the escapee's credibility when determining if Stewart provided the uniforms for the escape. He also testified that they found no motive for Employee Stewart to aid the inmates in their escape. *OEA Hearing Transcript*, p. 589-591 (December 10, 2008).

²³ *Id.*, 405-407 and 423-424.

accused.²⁴

The AJ relied on testimony from Employee Douglas because he was present when Jennings provided the identification card in question to Captain Holmes. Douglas testified that once Jennings provided the card to Holmes, it was Holmes' responsibility to give the card to another coordinator or destroy it. Douglas testified that Holmes had a stack of passes in his drawer and that inmates who cleaned his office had access to his drawer.²⁵ Furthermore, Director Brown testified that there was nothing connecting the identification card that Employee Jennings confiscated to the escapee.²⁶

However, it was Director Brown's position that even if Employee Jennings submitted the card to his supervisor, he was still obligated to write a disciplinary report against the inmate. Employee Jennings contends that Captain Holmes instructed him not to file a disciplinary report. In his assessment of this argument, the AJ found Sergeant Chase and retired Officer Hal Washington to be credible witnesses. Chase provided that it was Agency's policy to utilize "progressive discipline" with inmates. Therefore, it was within an officer's discretion to use other forms of discipline "in lieu of immediately writing [a disciplinary report] up." Chase also provided that officers are mandated by General Orders to follow the directives of their supervisors. Thus, if Jennings' supervisor directed him not to issue a disciplinary report against the inmate, then he had to follow his orders.²⁷ Similarly, Washington provided that it was Agency's policy for officers to use progressive discipline.²⁸ This Board finds that the AJ's determination to reinstate Employee Jennings was based on substantial evidence.

²⁴ *Initial Decision*, p. 13-14 (June 22, 2009).

²⁵ *Id.*, 530-531.

²⁶ *OEA Hearing Transcript*, p. 384 (December 10, 2008).

²⁷ *OEA Hearing Transcript*, p. 803 and 832-834 (December 12, 2008).

²⁸ *Id.* at 960.

Employee Hinton-Saunders

Employee Hinton-Saunders was charged with negligence for failing to verify the pass of one of the escapees. Employee admits that she failed to verify the escapees pass, however, the AJ found that she offered a valid defense. At the time that the escapee passed her work station, he was being escorted by Employee Douglas. The AJ found that based on testimony and Agency's regulations, it was standard practice for officers to rely on the escorting officer to verify that inmates were properly authorized to move within the facility.²⁹ Thus, it was not Employee Hinton-Saunders' responsibility to re-verify the identity of an inmate who was escorted by Douglas. Because she did not violate Agency's regulation, the AJ held that Agency failed to prove that she was negligent.³⁰

Investigator Patten testified that the investigation did not determine if Officer Hinton-Saunders or Officer Douglas led the escapee through the gate to the area from which he eventually escaped. Patten stated that there was no camera in that area of the facility to show that Employee Hinton-Saunders let the inmate through the gate.³¹ Additionally, Sergeant Jenkins provided that officers were not responsible for checking inmate passes if they were being escorted by another officer.³²

Employees Hatton, Makins, and Washington

Employees Hatton, Makins, and Washington were charged with negligence in issuing an unauthorized movement pass to one of the escapees. The AJ found that although their

²⁹ The AJ relied on Agency's Post Order for Administrative Module Two, Sections V. 2d, Post Order for Southeast Housing Unit Section V. 8a and V.11a to prove that verifying the identity of an inmate rests on the officer escorting the inmate through the facility.

³⁰ *Initial Decision*, p. 21-22 (June 22, 2009).

³¹ *OEA Hearing Transcript*, p. 905-907 (December 12, 2008).

³² *Id.* at 951.

testimonies contradicted each other as it related to who created the movement pass, Agency still failed to prove that they were negligent in their duties. Employees received a call that the inmate who eventually escaped, should report to the infirmary. One of the Employees issued a pass for him to go. Agency asserted that Employees should have called the infirmary to verify the call requesting for the inmate. However, the AJ ruled that it failed miserably to provide any witnesses who provided that the infirmary did not request the inmate. He also found that Agency failed to present evidence of the infirmary list proving that the inmate was not there. Finally, Agency did not prove which employee did which negligent act. Hence, the AJ found that Agency failed to prove that Employees Hatton, Makins, or Washington were negligent.³³

The AJ, again, relied on testimony from Sergeant Pamela Chase. She provided that contrary to Director Brown's argument that officers had a duty to verify the legitimacy of infirmary calls, there was absolutely no obligation to call back to the infirmary to confirm requests for inmates. It was Agency's policy for officers to simply issue the pass for inmates who were requested by the infirmary.³⁴

Agency lacked cause to remove any of the Employees. Based on the aforementioned, the AJ's decision to reinstate each of the employees was supported by substantial evidence. Thus, Agency's Petition for Review is denied. In accordance with the Initial Decision, Employees are ordered to be reinstated to their positions with back pay and benefits.

³³ *Initial Decision*, p.27 (June 22, 2009).

³⁴ *OEA Hearing Transcript*, p.798 (December 12, 2008).

ORDER

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

FOR THE BOARD:

Clarence Labor, Chair

Barbara D. Morgan

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.