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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
LARRY L. CORBETT,)	OEA Matter No. 1601-0211-98
Employee)	
)	Date of Issuance: September 5, 2007
)	
D.C. DEPARTMENT OF CORRECTIONS,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Mr. Larry Corbett ("Employee") worked as a Deputy Warden for the Department of Corrections ("Agency"). On July 31, 1998, he received a notice of final Agency decision. Employee was faced with an adverse action for inexcusable neglect of duty *and* other conduct during and outside of duty hours that would affect adversely the employee's or agency's ability to perform effectively. The causes were brought as a result of a sexual harassment allegation that Officer Roebuck, also employed at Agency, made against Employee.¹

Agency had the United States Investigations Service ("USIS") perform an external

¹ Officer Roebuck was Employee's subordinate and performed administrative duties for him. She claimed that Employee made inappropriate comments about her legs and hair. She also alleged that he appeared at her home unannounced and on one occasion invited her to go shopping in Williamsburg and to spend the night with him while there. She further claimed that Employee tried to hug and kiss her while at work.

investigation to determine if there was probable cause that the alleged sexual harassment occurred. The USIS investigator concluded that there was probable cause. He relied heavily on testimony given by Lieutenant Clark, who corroborated Officer Roebuck's account of the alleged hugging and kissing incident. As a result, Adrienne Poteat, Deputy Director for Institutions, proposed termination in an advance notice of proposal sent to Employee.²

However, the Disinterested Designee ("DD") in this matter recommended that the charges be dropped in their entirety against Employee. The DD found Officer Roebuck and Lieutenant Clark to be less credible witnesses than Employee.³ Agency ultimately decided that a demotion was the more appropriate penalty for Employee's actions. Employee went from a DS-13, Deputy Warden to a DS-9, Sergeant. The demotion was effective on August 16, 1998.⁴ The decision to demote Employee was outlined in Agency's final decision.

On August 25, 1998, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). Employee requested that the Administrative Judge ("AJ") restore his rank, grade, and pay with any applicable step increases. He claimed that the USIS investigation was flawed and that Agency violated its own procedures. It was Employee's position that witnesses lied to the USIS investigator, and the investigator failed to interview some of his witnesses. Therefore, the investigation was flawed.⁵ Employee also made a loose claim of disparate treatment.⁶

² Ms. Poteat provided that Employee's behavior could not be tolerated from a high-ranking supervisor in light of the Agency's Zero Tolerance policy on sexual harassment. *Agency's Pre-hearing Statement and Supporting Documents*, Exhibit #1 (December 7, 1999).

³ *Id.*, Exhibit #4.

⁴ *Petition for Appeal*, p. 10-13 (July 31, 1998).

⁵ *Petition for Appeal* (July 31, 1998).

⁶ Employee provided that imposed penalties for sexual harassment claims ranged from ten-day suspensions without pay to an official reprimand.

On December 7, 1999, Agency submitted its Pre-hearing Statement and Supporting Documents in response to Employee's Petition for Appeal. It argued that Employee's petition was a restatement of the arguments made to the DD. It was Agency's position that these issues were addressed in its Final Notice of Decision, and Employee presented no new or material issues of dispute. Furthermore, the sexual harassment claims were investigated and adjudicated in accordance with Department Order Number 3310.4C and the District Personnel Manual ("DPM") Chapter 16.⁷ Agency reasoned that because OEA has held that it will not substitute its judgment for that of the agency, then the penalty it imposed was proper.⁸

The AJ issued her Initial Decision on October 22, 2004. In it, she first addressed the issue of whether the 45-day rule was violated by Agency.⁹ Finding that Agency did not violate the rule, the AJ went on to assess the testimonies given at the two-day OEA hearings. She held that the evidence presented during the hearings supported Agency's finding that Employee committed the alleged acts of sexual harassment. Consequently, because demotion was within Agency's discretion to impose, the AJ upheld its decision to demote Employee to a DS-9.

⁷ Department Order 3310.4C (VI)(F) defines sexual harassment as unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

- (1) submission to such conduct is made either explicitly or implicitly a term or condition of employment;
- (2) submission to or rejection of such conduct by an employee is used as the basis for employment decisions affecting such employee; or
- (3) such conduct has the purpose or effect of unreasonably interfering with an employee's work performance or creating an intimidating, hostile, or offensive working environment.

Sexual harassment may include, but is not limited to, verbal conduct with sexual overtones, subtle pressure for sexual activity, patting or pinching, brushing against another employee's body, and demands for sexual favors.

⁸ *Agency's Pre-hearing Statement and Supporting Documents*, p. 1-6 (December 7, 1999).

⁹ According to D.C. Code § 1-617.1(b-1)(1), adverse actions should start no more than 45 days after the agency knew or should have known about the alleged cause. Officer Roebuck claimed that the kissing and hugging incident occurred on December 25, 1997. However, she did not file a complaint until January 21, 1998. The AJ held that January 21, 1998, was the commencement date for the 45-day rule, not December 25, 1997.

Sergeant.¹⁰

Employee filed a Petition for Review with the OEA Board on November 26, 2004. He argued that new and material evidence was now available that, despite due diligence, was not available when the record was closed. His main argument was that Lieutenant Clark was now recanting his previous statements and testimony.¹¹ Employee included the documents from Lieutenant Clark in his Petition for Review as proof that Clark now supported his version of events and as proof of an alleged conspiracy between Clark and Officer Roebuck.¹²

The OEA Board is charged with determining if an agency's decision is supported by substantial evidence; whether there was harmful procedural error; and whether it was in accordance with the laws or applicable regulations. While considering these points, OEA may not substitute its judgment for that of an agency. Additionally, OEA must generally defer to the agency's credibility determinations made during its trial board hearings.¹³

Because this is a matter of the Employee's word against Officer Roebuck's, the case really hinges on whom the fact finder deemed more credible. According to the Court in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989), great deference to any witness credibility determinations are given to the administrative fact finder. 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

¹⁰ *Initial Decision* (October 22, 2004).

¹¹ It should be noted Clark mailed the AJ documents after he gave his testimony at the OEA hearing but before she issued her Initial Decision. However, the AJ refused to consider such documents and did not enter them in the record; Clark was advised to come to pick up the documents from OEA. The AJ reasoned that because Clark was not a party to the matter, he did not have a right to independently submit evidence. *Letter from Administrative Judge to All Parties Involved in Larry Corbett v. D.C. Department of Corrections* (April 9, 2003).

¹² *Petition for Review*, p. 1-6 (November 26, 2004).

¹³ *District of Columbia Metropolitan Police Department v. Elton L. Pinkard*, 801 A.2d 91-92 (D.C. 2002).

evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.

The OEA Board relies heavily on the AJ and Agency's assessment of witness credibility. Both the AJ and Agency found Officer Roebuck to be a credible witness who clearly remembered specific instances of harassment by Employee. The AJ found that Officer Roebuck's son, Jermaine Roebuck, corroborated her claims that Employee appeared at her home unannounced. The AJ and Agency also found Lieutenant Clark's written statement to be credible. Clark claimed that he saw Employee trying to kiss Officer Roebuck at work on December 25, 1997.¹⁴ However, the AJ found that Clark's testimony during the OEA hearing was very unclear in comparison to his written statement. She believed the discrepancy existed because Clark felt threatened by Employee and attempted to recant his accounts of what occurred. Additionally, the AJ found Employee's testimony about times he went to Officer Roebuck's home not to be credible.¹⁵

After review of all the evidence and the transcripts, we believe that a reasonable mind would accept Agency's decision to demote Employee. This Board found it interesting that Employee admitted to making a comment to Officer Roebuck about wearing uniform pants instead of a skirt because she was allegedly sitting with her legs open.¹⁶ Additionally, because Jermaine Roebuck was able to corroborate Officer Roebuck's claim of Employee's unannounced visits and because Clark's written statements support her claim that Employee attempted to kiss

¹⁴ *Agency's Pre-hearing Statement and Supporting Documents*, Tab #9 - USIS Report of Investigation, Exhibit E (December 7, 1999).

¹⁵ Employee claimed that he went to Officer Roebuck's home on one occasion to take some deviled eggs for a Christmas party, but when he arrived at her home he failed to deliver the eggs. This made the AJ question Employee's real motive for going to Officer Roebuck's home.

¹⁶ Employee claimed he apologized when he saw the expression on Officer Roebuck's face after the comment was made.

her, we will not second guess the AJ and Agency's conclusion that Agency's witnesses were more credible than Employee.

As for the issue of harmful procedural error, the AJ provided an excellent analysis of the 45-day rule in this case. As previously stated, D.C. Code § 1-617.1(b-1)(1) provided that "no corrective or adverse action shall be commenced pursuant to this section more than 45 days, not including Saturdays, Sundays, or legal holidays, after the date that the agency knew or should have known of the act or occurrence allegedly constituting cause." The AJ properly ruled that because Officer Roebuck filed her complaint on January 21, 1998, then this is the date that Agency knew or should have known about the alleged harassment. Accordingly, Agency did not violate the 45-day rule, therefore, Employee was not the victim of harmful procedural error.

The final issue that must be considered is if the decision to remove Employee was in accordance with the laws or applicable regulations. According to the Court in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), when considering this issue, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency.¹⁷

The Court in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), provided that an agency should consider the following when determining the penalty of adverse action matters:

- (1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- (2) the employee's job level and type of employment, including supervisory

¹⁷ Demotion was within the range of penalty for the charges of inexcusable neglect of duty *and* other conduct during and outside of duty hours that would affect adversely the employee's or agency's ability to perform effectively.

- or fiduciary role, contacts with the public, and prominence of the position;
- (3) the employee's past disciplinary record;
 - (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
 - (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
 - (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
 - (7) consistency of the penalty with any applicable agency table of penalties;
 - (8) the notoriety of the offense or its impact upon the reputation of the agency;
 - (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
 - (10) potential for the employee's rehabilitation;
 - (11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
 - (12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Agency applied these factors to the facts of Employee's case and found several reasons to remove him. However, there were mitigating factors that convinced Agency to demote Employee instead of removing him. Those mitigating factors were that he had no past disciplinary action taken against him, and he was a 22-year veteran. Therefore, the decision to demote Employee was based on relevant factors and was not an error in judgment by Agency.

As for Employee's argument regarding the new and material evidence of Lieutenant Clark's recanted version of his previous statements and testimony, this Board rejects it. Clark had the obligation to honestly provide what occurred when he was under oath during the OEA hearings. He was aware of what he witnessed or did not witness from the date of the alleged incident; the truth did not present itself to Clark after the OEA hearing. Therefore, his recanted version of the events are neither new nor material. The Board will not consider any information that was not made available to the AJ during the hearings.

Furthermore, we support the AJ's decision not to consider Clark's submission after the hearing. According to OEA Rule 630.1 "when an evidentiary hearing has been provided, the record shall be closed at the conclusion of the hearing, unless the Administrative Judge directs otherwise. . . ." Moreover, OEA Rule 630.2 provides that "once the record is closed no additional evidence or argument shall be accepted into the record unless the Administrative Judge reopens the record pursuant to Rule 631."¹⁸

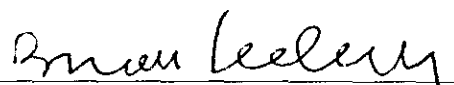
Agency was able to prove through substantial evidence that Employee was properly demoted; there was no harmful procedural error; and his removal was in accordance with laws and applicable regulation. Employee was unable to prove the existence of new or material evidence as he claimed in his petition. Accordingly, Employee's Petition for Review is DENIED.

¹⁸ Rule 631.1 provides that "the Administrative Judge may reopen the record to receive further evidence or argument at any time prior to the issuance of the initial decision." Therefore, it is within the AJ's discretion to accept or reject additional evidence after concluding an evidentiary hearing.

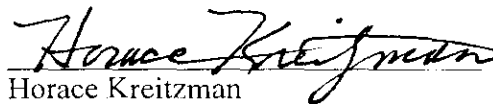
ORDER

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

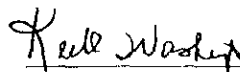
FOR THE BOARD:



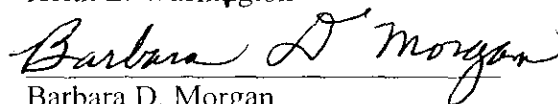
Brian Lederer, Chair



Horace Kreitzman



Keith E. Washington



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.