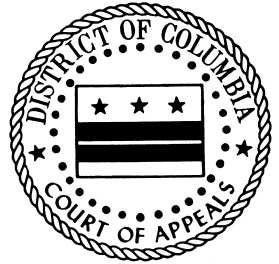


No. 24-CV-0326



IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

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KISHA SPENCER,
APPELLANT,

v.

DISTRICT OF COLUMBIA DEPARTMENT OF FOR-HIRE VEHICLES, et al.,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA, No. 2022-CA-004395-P(MPA)

BRIEF FOR APPELLANT KISHA SPENCER

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RULE 28(2) STATEMENT

Appellant Kisha Spencer appeared as an intervenor before the Superior Court and was represented by Gregory G. Watts and Andres M. Grajales. In the underlying disciplinary and Office of Employee Appeals proceedings, Spencer was represented through her union via Gina Walton.

The District of Columbia Office of Employee Appeals was represented by Lasheka Brown-Bassey before the Superior Court.

The District of Columbia Department of For-Hire Vehicles was represented by Connor Finch at the Office of Employee Appeals and the Superior Court.

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Appellant Kisha Spencer is an individual and not a nongovernmental corporation or partnership. Appellant therefore has no parent corporation or partners.

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STATEMENT OF THE CASE

The Court of Appeals should reverse the final decision of the Superior Court in this case because the lower court failed to apply the correct standard of law. This Court should, moreover, affirm the underlying decision issued by the District of Columbia Office of Employee Appeals (“OEA”) that overturned the removal of Appellant Kisha Spencer (“Spencer” or “Appellant”) and reinstated her to employment with the District of Columbia Department of For-Hire Vehicles (“DFHV” or “Agency”). The OEA’s decision was supported by substantial evidence and was founded on credibility determinations that OEA was entitled by law to make and which the Superior Court lacked the authority to second-guess.

The OEA correctly decided that DFHV failed to prove its charges against Spencer that she provided false statements and failed to follow instructions, and the OEA correctly ordered that her termination be reversed. Appx315-322.¹ The Administrative Judge (“AJ”) who conducted the underlying hearing for the OEA in this matter concluded that DFHV failed to show that Spencer knowingly and willfully provided false statements concerning her child’s school requirements, required elements for the charge of providing false statements, based on Spencer’s credible testimony and corroborating evidence. Appx318. That corroborating

¹ Citations to the Appendix will be referenced as “Appx” followed by the corresponding Bates number.

evidence included a text message from Spencer's child's teacher, a copy of the child's detailed Individualized Education Plan ("IEP") curriculum, and multiple emails and communications between Spencer and staff from the child's school. *Id.*

The AJ also found that the DFHV's charge that Spencer failed to follow instructions was not proven because the evidence and testimony at the hearing showed that Spencer did, in fact, submit her assignments in a timely manner. Appx318-319. DFHV thus failed to prove the required "deliberate or malicious refusal to comply with...supervisory instructions" to sustain its charge. Appx319-320. The AJ's findings and conclusions constitute the OEA's initial decision, which is the decision under review before this Court². The OEA decision's reasoning is based on the AJ's findings of fact after receiving testimony and exhibits at the hearing. Those findings of fact are consistent with the evidence on the record and based on credibility determinations which the AJ was entitled to make, and which are binding on subsequent reviewers, including this Court. The OEA's decision is thus supported by substantial evidence and must be affirmed.

² Because DFHV's petition for review of the OEA's initial decision to the OEA Board was denied, it was the OEA's initial decision composed by the AJ which became final and was the subject to review by the courts. 6-B DCMR § 635.4. References to the AJ's findings and OEA decision's findings are referring to the same document.

STATEMENT OF THE FACTS

The DFHV employed Spencer as a Vehicle Inspection Officer (“VIO”).

Appx059. DFHV terminated Spencer from her position via a notice of final decision dated December 4, 2020. Appx056. DFHV terminated Spencer based on two alleged charges: 1) one charge of providing false statements/records and 2) one charge of failure/refusal to follow directions. *Id.* Spencer worked as a VIO for approximately fourteen years and four months at the time of the termination.

Appx059. On January 4, 2021, Spencer appealed her termination to the OEA. The AJ for the OEA developed a substantial record in a hearing that took place January 25, 2022. Appx302.

With the onset of the COVID pandemic in March 2020, Spencer’s child was no longer able to attend school in person and was required to continue their schooling online. Appx273. Spencer testified that according to her child’s teachers, she “must be with [her child] at the time that [they’re] attending the curriculum on Zoom.” Appx274, Appx282. Spencer’s child was subject to an IEP that resulted in her child working with multiple teachers “on different schedules that [the child meets] with...at different times [online via] Zoom.” Appx273, Appx028-038. She therefore requested, and was granted, an accommodation allowing her additional time to complete and submit her VIO trainings. Appx312. The child’s school ultimately told Spencer that, due to her job schedule constraints,

it would work with her and be flexible to accommodate her and her child's IEP schedule throughout the day. Appx313. Subsequently, Spencer informed DFHV that she no longer needed her scheduling accommodation. *Id.*

It was only after Spencer requested to end the accommodation that DFHV began seeking details of her child's school schedule, thereby retroactively questioning the veracity of her initial request which had already been approved and now cancelled. *Id.* Spencer provided a screenshot of her child's schedule and authorized DFHV to contact her child's teacher to discuss their schedule and needs. Appx045, Appx317. Inexplicably, DFHV did not directly contact the child's teacher and instead exchanged emails with an administrator of the school system's headquarters. Appx317. The school administrator was unable to provide any specifics regarding the schooling needs or schedule of Spencer's child and provided only general commentary that there "was no one schedule" and the unique situation meant that "many parents are precluded from being able to work as they normally would." *Id.* In the OEA decision, the AJ credited Spencer's testimony regarding her child's schooling and schedule accommodation and noted that a DFHV witness testifying on the same topic provided inconsistent testimony regarding scheduling flexibility during COVID. Appx317-318. The AJ also cited corroborating evidence admitted to the record, including the child's IEP, the school administrator emails, a communication from the child's speech pathologist, and the

teacher's text message, to support Spencer's testimony regarding her child's school schedule and need for accommodation. *Id.*

At the evidentiary hearing before the AJ, Spencer also addressed her completion of training assignments and the charge of failure to follow instructions. Beginning in March 2020 with the COVID pandemic, DFHV required VIOs, including Spencer, to complete online training assignments in lieu of field work. Appx179. DFHV alleged that Spencer did not timely complete her trainings for May 12, 2020. Appx052. Spencer did, in fact complete her training assignments and submit her certificates on May 12th as instructed. Appx319. The OEA decision credits her testimony on the completion of the May 12th trainings and notes that the certificates bear the completion date of May 12th, as well. *Id.* Spencer credibly testified that she completed her training for May 12th and that she submitted proof of completion by "the end of [that] day...before 7:00 p.m." Appx268. She also submitted into evidence at the hearing five (5) training completion certificates indicating the assignments were completed on May 12, 2020. Appx040-044. Further, the DFHV employee responsible for collecting the complete training certificates testified that the date printed on the certificates indicated the date of completion which was May 12th. Appx171-172.

In the final decision of removal, DFHV expressly cited the timing of the May 12, 2020, trainings as the cause for the failure/refusal to follow instructions

charge. Appx056. Subsequently at the hearing, however, DFHV asserted that training assignments also failed to be timely completed by Spencer on May 13th and 14th. Appx319. Spencer disputed that any assignments on May 13th or 14th were included in the charge of failure/refusal to follow instructions because those dates were not specified in the Final Notice of termination as part of the charge. *Id.* Spencer and DFHV management did exchange several emails on May 13th and 14th regarding training assignments. *Id.* On May 13th, Spencer emailed her supervisor to inquire about the completion of the trainings and why they were different than those given to her other VIO colleagues. *Id.* Spencer's supervisor did not reply to her email questions until after 8 p.m. on May 13th—outside working hours. *Id.* Early the morning of May 14th, at 8:42 a.m., Spencer responded to her supervisor that she did not submit the training certificate on May 13th because she was awaiting a response to her queries. *Id.* Ultimately, Spencer timely submitted the certificates on May 14th after receiving a response and clarification from her supervisor. Appx319-320. The OEA decision held that if the May 13th and 14th assignments were included in the charge, *arguendo*, Spencer completed the assignments timely and acted reasonably in asking her supervisor a question about the assignments before completion. Appx320. Consequently, the OEA did not sustain the failure/refusal to follow instructions charge for those dates. Appx319-320.

On April 20, 2022, the OEA issued its initial decision finding the DFHV failed to meet its burden of proof on both charges and reversed Spencer's termination. Appx320-321. The OEA AJ, based on the totality of the evidentiary record, ordered Spencer's termination reversed and that she be reimbursed for all back pay and benefits lost. Appx322. DFHV appealed the OEA's decision via a petition for review with the OEA Board on May 25, 2022, and the OEA Board rejected the DFHV's arguments and affirmed the OEA's initial decision finding that Spencer's termination was inappropriate. Appx340-341. With the OEA Board's rejection of the DFHV's petition for review, the OEA initial decision became final. It was that OEA initial decision, with the findings of the AJ, which was the subject of the petition for review before the court below. The Superior Court granted the DFHV's petition for review in its February 29, 2024, Decision and Order and reinstated the Agency's decision to terminate Spencer. Appx026. Spencer now files this appeal.

STATEMENT OF THE ISSUES

The issues presented to the Court to decide are as follows:

1. Whether the Superior Court erred when it overturned the decision of the District of Columbia Office of Employee Appeals reinstating Appellant Kisha Spencer to her employment with the District of Columbia Department of For-Hire Vehicles.

2. Whether this Court should affirm the decision of the District of Columbia Office of Employee Appeals reinstating Appellant Kisha Spencer to her employment with the District of Columbia Department of For-Hire Vehicles because it was supported by substantial evidence.

SUMMARY OF THE ARGUMENT

I. This Court Must Affirm the OEA's Decision Because it is Supported by Substantial Evidence.

This Court must affirm the initial decision of the OEA reinstating Spencer and set aside the decision of the Superior Court because the OEA decision was supported by substantial evidence. Spencer submitted evidence at a hearing before an OEA administrative judge including seventeen (17) exhibits as well as the testimony of six (6) witnesses. Appx066. Both Spencer and the DFHV presented witnesses and exhibits, and each side had the opportunity to examine the other's evidentiary submissions and cross examine the witnesses. *Id.* Based on this substantial record, the AJ recorded her findings in the OEA decision which found that DFHV failed to prove the two charges against Spencer and reversed her termination. Appx322. In the OEA decision, the AJ credited Spencer's testimony over the DFHV witnesses, particularly in light of the corroborating evidence on the record. Appx317-321. The AJ also noted there were legitimate "questions about the efficiency and accuracy of [DFHV's] process of the administration of

[Spencer's termination]." Appx318. This Court must affirm the OEA's decision because it is based on substantial evidence.

A. The OEA's Holding That DFHV Failed to Prove the Charge of False Statements/Records is Supported by Substantial Evidence.

The OEA's finding that the DFHV failed to prove the charge of False Statements/Records against Spencer is supported by substantial evidence. The AJ evaluated the testimony and evidence submitted at the hearing and correctly found that the information Spencer provided to DFHV regarding her child's school schedule was credible and supported by evidence. Appx317-318. At issue in the charge of false statements/records was Spencer's request for an accommodation in her work schedule due to the needs of her child's variable online school schedule due to the IEP in place. Appx312. The record shows the IEP required her child to work with several teachers throughout the day at different times, "including additional training and teaching outside of normal class hours." Appx028-038.

The AJ also noted that the DFHV failed to directly contact the child's teacher to confirm the education schedule. Appx744. The AJ stated that, based on the credible testimony from Spencer, DFHV "failed to show that [Spencer] knowingly and willfully provided false statements/records." *Id.* The findings of the OEA must be afforded deference and the OEA decision affirmed because it is supported by substantial evidence.

B. The OEA's Finding That DFHV Failed to Prove the Charge of Failure/Refusal to Follow Instructions is Supported by Substantial Evidence.

The AJ's findings that DFHV failed to prove the charge of failure/refusal to follow instructions were supported by substantial evidence. The charge of failure/refusal to follow instructions involved the DFHV's incorrect assertion that Spencer did not complete her training assignments as required. Appx318. Specifically, DFHV asserted that Spencer failed to timely complete and submit her online training on May 12, 2020. *Id.* Spencer did, in fact complete her training assignments and submit her certificates on May 12th. Appx319. The OEA decision credits her testimony on the completion of the May 12th trainings and notes that the certificates bear the completion date of May 12th, as well. *Id.* A DFHV employee's testimony corroborated Spencer's testimony that the date of completion for her training certificates was May 12th. *Id.*

Likewise, the OEA found that DFHV failed to prove the charge of failure to follow instructions regarding Spencer's May 13th and 14th training assignments. Appx319. The OEA decision noted that the completion of the May 13th and 14th assignments was not included in the proposed removal, but still found that Spencer's completion of these assignments was reasonable and did not support the charge. *Id.* Specifically, Spencer emailed her supervisor questions regarding her May 13th assignments but did not receive a response to her inquiry until after

business hours. *Id.* On May 14th, after receiving the response from the supervisor, Spencer timely completed her May 13th and 14th assignments that day. *Id.* The OEA AJ credited Spencer's testimony in this regard and cited the email exchanges with her supervisor as evidence. *Id.* The OEA decision held that the DFHV failed to prove the failure/refusal to follow instructions charge for any of the dates. Appx319-320.

The OEA ultimately correctly held that all charges against Spencer were not sustained and ordered a reversal of the termination and the reimbursement of all back pay and benefits lost as a cause of the termination. Appx322. The OEA's findings of fact and credibility determinations are due deference and its decision is supported by substantial evidence. Accordingly, the Court must affirm the OEA decision and overturn the decision of the Superior Court.

C. The Superior Court's Decision Failed to Apply the Correct Standard of Law when it Failed to Give Deference to the OEA's Findings of Fact and Credibility.

The Superior Court erred because it did not defer to the factual findings and credibility determinations of the OEA decision. Instead, the court discredited the OEA findings and substituted its own version of the facts to support a contrary conclusion. A reviewing court is confined to the administrative record before it and is bound to give deference to the factual findings of the OEA. The Superior Court was therefore required to affirm the decision of the OEA because it was

supported by substantial evidence. Further, the court must still affirm an OEA decision supported by substantial evidence even when the record could support a contrary finding.

Specifically, the Superior Court failed to credit, *inter alia*, the OEA findings regarding Spencer's timely completion of training assignments on May 12-14, 2020, as well as Spencer's need for a schedule accommodation due to her child's IEP and special needs education. The OEA findings of fact and credibility determinations are binding on a reviewing court, including the Superior Court and this Court. Consequently, the Superior Court erred when it failed to accept the facts and credibility determinations made by the AJ in the OEA decision. This Court should overturn the decision of the Superior Court and affirm the OEA's decision reinstating Spencer.

STANDARD OF REVIEW

This Court must conduct the "identical review that [it] would undertake if this appeal had been heard initially in this [C]ourt" as in the Superior Court. *D.C. Gen. Hosp. v. D.C. Off. of Emp. Appeals*, 548 A.2d 70, 73 (D.C. 1988), citing *Kegley v. District of Columbia*, 440 A.2d 1013, 1019 (D.C.1982). In doing so, this Court must "confine [itself] strictly to the administrative record" developed at the OEA and not conduct its own fact-finding. *Walker v. D.C. Off. of Emp. Appeals*, 310 A.3d 597, 599 (D.C. 2024) (citations omitted).

This Court must affirm the initial decision of the OEA when the decision is supported by substantial evidence. *Dupree v. D.C. Off. of Emp. Appeals*, 36 A.3d 826, 831 (D.C. 2011) (citations omitted); *Love v. D.C. Off. of Emp. Appeals*, 90 A.3d 412, 421 (D.C. 2014) (The court “will affirm its decision so long as [it] is supported by substantial evidence in the record and otherwise in accordance with law, including conclusions of law that follow rationally from OEA's findings.”). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support” the conclusion. *Jahr v. Office of Emp. Appeals*, 19 A.3d 334, 340 (D.C. 2011). Further, this Court must affirm OEA’s decision even if the Court finds that the record could support a different result than that reached by the OEA. *Brown v. Watts*, 993 A.2d 529, 533 (D.C. 2010) (“Because the OEA's findings were supported by substantial evidence in the record and its decision was neither arbitrary nor capricious, we must uphold the OEA's decision even though the record might also support a contrary conclusion.”).

The findings of fact and credibility determinations made by the AJ in the OEA decision are entitled to deference and are **binding** on subsequent reviewers, including this Court. *Dep’t of Pub. Works v. Colbert*, 874 A.2d 353, 358 (D.C. 2005). Likewise, this Court will overturn a ruling of the Superior Court that does not provide appropriate deference to an OEA decision supported by substantial evidence. *Love*, 90 A.3d at 415; *Brown v. Watts*, 993 A.2d at 532–33 (overturning

decision of district court and affirming the decision of the OEA because the OEA decision was based on substantial evidence even when the record can support a contrary finding.).

Reflecting the high standard necessary for this Court to set aside an OEA decision, a court may only reverse a decision of the OEA if it is arbitrary, capricious, or an abuse of discretion—a fate reserved for only the most egregious OEA decisions. *Dupree*, 36 A.3d at 831; *Jahr*, 19 A.3d at 340. *D.C. Metro. Police Dep't v. Broadus*, 560 A.2d 501, 508 (D.C. 1989) (Court reversed OEA's decision to end the suspension without pay of a DC police officer based on erroneous ruling that a criminal indictment could not be considered as proof of misconduct); *District of Columbia General Hospital v. Office of Employee Appeals*, 548 A.2d 70, 77 (D.C.1988) (A court may only reverse the OEA's decision for evidence it deems not substantial when it is "so 'highly questionable in the light of common experience and knowledge' that it [is] **unworthy of belief.**") (emphasis added). But, to be sure, this Court must affirm a decision of the OEA that is supported by substantial evidence **even if the decision contains errors.** *Anjuwan v. District of Columbia Dep't of Pub. Works*, 729 A.2d 883, 886 (D.C.1998) (upholding an OEA's decision to terminate an employee despite the OEA's violation of its statute because the error "did not impair the fairness of the proceedings or the correctness of the action taken").

ARGUMENT

I. THE COURT MUST AFFIRM OEA’S DECISION BECAUSE IT IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

The OEA’s decision finding that DFHV failed to prove the charges of false statements/records and failure/refusal to follow instructions is supported by substantial evidence and must therefore be affirmed. *Dupree*, 36 A.3d at 831 (citations omitted).

A. The OEA’s Holding That DFHV Failed to Prove the Charge of False Statements/Records is Supported by Substantial Evidence.

The OEA’s decision that the charge of false statements/records was not sustained is supported by substantial evidence because it was based on the AJ’s evaluation of witness credibility and DFHV’s failure to provide credible evidence of any malicious or knowing intent in Spencer’s statements. This Court must therefore affirm the OEA decision because it was supported by substantial evidence. *Dupree*, 36 A.3d at 831 (citations omitted). The OEA’s finding was based on the hearing testimony and credibility determinations as well as examining the full record of documentary evidence. The AJ found DFHV failed to show Spencer knowingly or willfully provided the false or misleading material information, an element of the false statements/records charge. Appx316-317.

The genesis of the false statement/records charge was Spencer’s withdrawal of her accommodation request to deal with her child’s online school scheduling

during COVID. Appx316. Specifically, Spencer requested, on May 6, 2020, an alternate work schedule because of her child's online learning requirements. *Id.* DFHV did not require any proof of Spencer's child's school schedule when Spencer first requested accommodation—inexplicably, DFHV only requested such proof when Spencer notified DFHV she wished to **end** her accommodation. *Id.* at Appx316-317. It was only then that DFHV pursued the accusation that Spencer falsely claimed her child needed assistance for online schooling which precluded her from working a normal work schedule during school days. *Id.*

Spencer testified that she sought to end her accommodation because she was able to work with her child's teachers to gain flexibility in the scheduling of their schooling, thereby allowing her to attend their schooling and complete her work assignments without further accommodation. Appx277-278. At the hearing she testified she was able to request an end to her accommodation because she “spoke with [her] child's teachers and let them know what was going on with...[her] work schedule, and [she] asked [if the school could] work around” her work schedule, and that the school agreed to that scheduling flexibility. *Id.*

In the OEA decision, the AJ found that Spencer provided sufficient evidence to support that her child had an alternate schedule as she claimed, based on credible testimony and corroborating evidence. Appx315-318. It was therefore unreasonable for DFHV to determine she “knowingly provided false statements in

light of the evidence presented and the ongoing challenges of remote learning in 2020.” *Id.* (emphasis added). The OEA also found that the DFHV’s allegations against Spencer conflicted with the testimony provided by its own Human Resources Supervisor, Shalonda Frazier, “who testified consistently that [D.C. government] agencies were told to be as flexible as possible during the unprecedented times.” Appx317-318. This Court is required to provide deference to any witness credibility determinations made by the AJ in the OEA decision. *Raphael v. Okyiri*, 740 A.2d 935, 945 (1999) (“*Okyiri*”); *Metro. Police Dep’t v. Baker*, 564 A.2d 1155 (D.C. 1989); *Washington Metro. Area Transit Auth. v. District of Columbia Dep’t of Employee Services*, 683 A.2d 470, 477 (D.C. 1996). When this Court reviews an OEA decision, the Court’s decision must be based “exclusively upon the administrative record and shall not set aside the action of the [OEA] if supported by substantial evidence in the record as a whole and not clearly erroneous as a matter of law.” *Okyiri*, 740 A.2d at 945. (internal citations omitted). The OEA found Spencer’s testimony to be credible and held she therefore could not have knowingly and willfully provided false statements to the DFHV regarding her child’s school schedule. Appx318. Even if the record contained evidence that could support DFHV’s assertion that Spencer knowingly and willfully made false statements, this Court must still affirm the OEA’s decision because it is based on substantial evidence. *Okyiri*, 740 A.2d at 945, *citing Baker*, 564 A.2d at 1159

(Although it is the OEA’s decision which is subject to review, the AJ’s “findings of fact are binding at all subsequent levels of review unless they are unsupported by substantial evidence, and this is true even if the record also contains substantial evidence to the contrary.”)

The OEA AJ also considered corroborating documentary evidence in addition to the credible testimony. The actual detailed IEP was provided as an exhibit at the hearing and verified Spencer’s testimony. Appx028-038. Spencer also provided text messages from her child’s teachers supporting her testimony of a varying schedule for her child. Appx045. DFHV failed to provide any specific information to the contrary. Appx318. Rather, the AJ specifically noted that, even though Spencer gave DFHV express permission to directly contact the child’s teacher, DFHV inexplicably failed to do so. Appx318-319. Instead, DFHV chose to contact an administrator with the school system’s central office to inquire regarding school schedules generally and not specific to Spencer’s child and IEP schedule. Appx319. In that correspondence, the school administrator stated that there was “no one set schedule” and that they would need more specifics for the individualized student. Appx318. After a follow-up email, the administrator for the school’s central office still could not say with any certainty what the school schedule was for Spencer’s child but stated “having a prek-3 student at home all day (particularly when we have not been able to offer a full day of activities for our

students) means **many parents are precluded from being able to work as they normally would.**” Appx049 (emphasis added). Based on this evidence, the OEA decision appropriately deemed it “incongruous that [DFHV] would conclude that [Spencer] willfully made false statements considering the **totality of the evidence presented.**” Appx317 (emphasis added). The OEA further found that DFHV failed to investigate the matter fully when it declined to contact the child’s teacher to discuss the school schedule, despite Spencer’s permission to do so. *Id.*

OEA’s findings are based on a thorough review of the evidentiary record, including witness credibility determinations, amounting to substantial evidence that Spencer appropriately requested accommodation due to her child’s education schedule. Therefore, the OEA properly held that DFHV failed to meet its burden of proof on the charge of false statements/records. The factual findings of the OEA are binding and must therefore be adopted by the Court. *Okyiri*, 740 A.2d at 945. This Court must therefore affirm the OEA decision because it is supported by substantial evidence.

B. The OEA’s Finding That DFHV Failed to Prove the Charge of Failure/Refusal to Follow Instructions is Supported by Substantial Evidence.

The OEA’s finding that DFHV failed to prove the charge of failure/refusal to follow instructions is supported by substantial evidence and must be affirmed. OEA’s finding is based on credibility determinations, findings of fact, and a noted

lack of supporting evidence offered by DFHV. Those findings of fact and credibility determinations are binding for subsequent reviewing entities, including this Court. *Colbert*, 874 A.2d at 358; *Okyiri*, 740 A.2d at 945. At issue in this charge are the Agency's allegations that Spencer failed to complete or timely submit several online training assignments over the time period of May 12-14, 2020.³ Appx318. However, after hearing witness testimony and evaluating the evidence, particularly email correspondence between Spencer and DFHV management, OEA held that Spencer's conduct was reasonable in light of the delay in DFHV management's responses to her after business hours. Appx320.

The OEA AJ went through each date separately, carefully examining evidence submitted for each. The certificate of completion for the May 12th course clearly indicated that Spencer completed and submitted the training for that day in a timely manner. Appx319. It was found that "[b]ased on the email records and the certificates produced on the record," along with Spencer's credible testimony, that DFHV failed to meet its burden of proof that the May 12th training was not completed in a timely manner. *Id.*

³ The OEA noted that there was discrepancy about which specific assignment dates the Agency included in the charge. The May 12th assignment was expressly mentioned in the charge, but the May 13th and 14th assignments were not expressly included as a basis for the charge. Appx318. The OEA nevertheless addressed the May 13th and 14th assignments and found that neither date supported the charge, even if they were appropriately included in the charge. Appx318-320.

Turning to the correspondence between Spencer and DFHV on May 13th and 14th, the OEA likewise found that DFHV failed to meet its burden of proof that Spencer failed to follow instructions. Appx319. The OEA cited Spencer's communications to DFHV seeking clarification of her assignments and noted that DFHV responded to Spencer via her work email after working hours on May 13th and 14th. *Id.* Spencer indicated she had not turned in her assignments on May 13th because she was waiting for an answer from her supervisor to her questions regarding those assignments. *Id.* Ultimately, Spencer's assignment certificates were submitted on May 14th promptly after she received a response from her supervisor. Appx320. The OEA's decision made the factual finding that Spencer only failed to turn in the May 13th assignment on May 13th, and instead submitted the May 13th assignment on May 14th because she was waiting for a response from her supervisor to her question and did not receive a timely response on May 13th. *Id.* The OEA AJ found this to be reasonable based on credible testimony and evidence showing that Spencer was waiting on DFHV management responses to questions regarding the assignments and those responses were not given timely during business hours. The OEA decision further clarified that Spencer waiting for her supervisor to respond to her query regarding the assignment before proceeding was a reasonable action that lacked a "deliberate or malicious refusal to follow instructions" necessary to prove the charge. Appx 319-320. Therefore, there was

not enough evidence to show a deliberate or malicious failure/refusal to follow instructions for the May 13th assignment.

This Court has previously addressed a situation in which an employee who failed to follow the orders of a superior was not subject to discipline. In *Okyiri*, the D.C. Court of Appeals addressed a charge of insubordination against an employee who refused to follow orders of a superior to validate a financial document. 740 A.2d at 947. The *Okyiri* court found the employee's refusal to follow her supervisor's order was reasonable because of the employee's reliance on a memorandum from the Mayor's office which conflicted with her supervisor's order. *Id.* Based on that reasoning, the *Okyiri* court held that the employee's actions could not be grounds for discipline and reversed the termination. *Id.* Much like in *Okyiri*, the OEA's finding that Spencer acted reasonably in waiting to hear from her supervisor before filing her May 13th assignment certificates was a valid conclusion, supported by the evidence and an assessment of Spencer's credibility. The AJ's finding in the OEA decision comports with controlling law that when an employee acts reasonably not following an instruction, that reasonably excuses the employee from disciplinary action. *Id.* Such is the case with Spencer's reasonable decision to wait for her supervisor's answer, which was not received during normal business hours, and that affirmation of her actions by factual findings of the OEA.

Regarding the May 14th assignment, the OEA decision noted that the May 14th assignment was not included in the initial specifications by DFHV. Appx319. However, the OEA found that even if the May 14th assignment was included as a disciplinary specification, the DFHV could not meet its burden of proof that it supported a charge of failure/refusal to follow instructions for this assignment, either. *Id.* Specifically, the OEA's decision found that the evidence indicated Spencer submitted the May 14th certificates timely on May 14th. *Id.* Therefore, to the extent the May 14th assignment was included in the disciplinary specifications, *arguendo*, such a specification was not supported. *Id.*

The OEA's factual findings appropriately concluded that DFHV failed to prove the charge of failure/refusal to follow instructions for any of the possible dates alleged. That conclusion is supported by substantial evidence and must be affirmed.

II. THE SUPERIOR COURT'S DECISION FAILED TO APPLY THE CORRECT STANDARD OF LAW WHEN IT FAILED TO GIVE DEFERENCE TO THE OEA'S FINDINGS OF FACT AND CREDIBILITY.

The Superior Court failed to give deference to the findings of fact and determinations of credibility made by the AJ in the OEA decision. When reviewing an administrative decision, the Superior Court is bound to affirm such a decision so long as it is supported by substantial evidence. *Dupree*, 36 A.3d at 831. The law is clear that a reviewing court must affirm the OEA's decision as long as it

is supported by substantial evidence, even if the court determines the record could support a contrary decision. *Brown v Watts*, 993 A.2d at 532–33. The law is also clear that a reviewing court must “confine [itself] strictly to the administrative record” developed at the OEA and not conduct its own fact-finding. *Walker v. D.C. Off. of Emp. Appeals*, 310 A.3d at 599 (citations omitted). The Superior Court’s decision does not comport with the law of this Court.

Although the Superior Court correctly stated that the “issue before the Court is whether the [OEA’s] AJ’s initial decision is supported by substantial evidence,” Appx016, it inappropriately substituted its own version of facts for those found by the AJ in order to support its reversal of the OEA decision. This modification of the OEA’s reasonable fact-finding and refusal to defer to the OEA’s factual findings was inappropriate in not in accordance with the law. *Colbert*, 874 A.2d at 358 (holding that an AJ’s findings of fact are binding in subsequent judicial review of the administrative opinion). The Superior Court’s holding that

the record does not contain substantial evidence support the AJ’s finding that Employee’s actions do not exhibit a deliberate or malicious refusal to follow instructions

is in direct conflict with the AJ’s express factual finding that “[Spencer’s] actions do not exhibit a deliberate or malicious refusal to follow instructions.” Appx 018, Appx320. The OEA reached this conclusion based on a weighing of the totality of

the evidence in the record including the testimony of Spencer and her supervisors at the hearing and multiple exhibits in the record. *Id.*

The AJ found that it was “not unreasonable for [Spencer] to have waited for an answer from her supervisor regarding the issue of the assignments” before turning them in. Appx320. The AJ noted that since Spencer’s supervisor was not actively overseeing her daily activities during this time because they were detailed to another unit, they “responded to [Spencer’s] emails after official tour of duty hours.” *Id.* The Superior Court’s refusal to accept the AJ’s factual conclusions and imposition of its own inferences and interpretations of the evidence in the record was improper and forbidden under D.C. law. *Brown v. Watts*, 993 A.2d at 533. The case law is clear: a court must defer to the AJ’s findings of facts and “must uphold the OEA’s decision **even though the record might also support a contrary conclusion.**” *Id.* at 533, citing *Colbert*, 874 A.2d at 361. (emphasis added). To the contrary, the Superior Court discredited the AJ’s findings of fact and drew its own slew of conclusions from the record.

The Superior Court likewise failed to defer to the AJ’s findings of fact regarding whether the charge of knowingly and willfully providing false statements was supported. This charge dealt with Spencer’s need for accommodation in scheduling due to the special school schedule required for her child during COVID. Appx056-058. The Superior Court incorrectly stated that a

“brief text [message] exchange...was all that [Spencer] provided as corroboration of her claim that mandatory attendance for remote learning with her child made her unavailable daily from 9:00 a.m. to 3:30 p.m.” Appx023. This statement is not supported by the record. Spencer provided as evidence: (1) the actual IEP that the school used for her child’s necessary educational curriculum, Appx028-038; (2) an email from an administrator with the child’s school system which stated the school “fully understand[s] that having a pk-3 student at home all day...means many parents are precluded from being able to work as they normally would/would like to,” Appx049-050; and (3) a letter from a Speech Language Pathologist at the child’s school stating that the child “receives specialized instruction...and multiple related services that fall outside of the general education curriculum and require additional time spent in weekly instruction” and that Spencer “must be present in order to support their access to and participation in this instruction.” Appx055.

At the OEA hearing, the DFHV counsel at the OEA hearing asked Spencer on cross-examination why she did not provide any additional information than what she offered regarding her child’s special education and schedule needs, and she plainly stated, “I wasn’t asked to.” Appx286. Spencer also explained that she told the DFHV they “can reach out to [the] teacher [who could] further elaborate on what was needed” regarding that matter. *Id.* The record does not indicate the extent or number of communications required for Spencer to coordinate a flexible

schedule for her child's special educational needs. Therefore, the Superior Court's statement that Spencer only offered "a brief text message" in support of her need to accommodate her schedule to facilitate her child's schooling is factually incorrect based on the record. Appx023.

As listed above, Spencer offered **multiple** evidentiary documents in addition to Spencer's testimony to determine that Spencer credibly sought to accommodate her child's schooling schedule. Appx312-317. These documents, along with Spencer's testimony, were credited by the AJ and incorporated into the OEA's factual findings. *Id.* The Superior Court failed to apply deference to these findings by the AJ.

The Superior Court again improperly substituted its own version of facts not supported by the record when it examined the circumstances surrounding the cessation of Spencer's accommodation for her child's school schedule. The Superior Court made the conclusions that there may have never been a need to accommodate Spencer's schedule because, according to the Court, she was able to "quickly and easily adjust her child's [school] schedule." Appx025. This statement and finding of fact are not supported by the record. The record does not indicate that Spencer's communications with her child's school were either quick or easy. The Superior Court made these factual findings without evidentiary support and used these alternate facts to support its preferred outcome of this matter. Spencer

testified that she no longer needed a schedule accommodation at some point “[b]ecause [she] spoke with [her child’s] teachers and we all agreed that whenever [she] needed the time, that they would just work with [her child] at a time when [she’s] available.” Appx272. The record does not indicate the timeframe over which this happened or how many communications it required and the Superior Court’s assertion that it was “quick” or “easy” is therefore unsupported.

The Superior Court’s Opinion failed to give proper deference to the AJ’s findings of fact and credibility determinations as required. Instead, it inappropriately used its own selection of facts to support an alternate interpretation of the record. The Superior Court’s Opinion amounts to mere disagreement with the AJ’s and OEA’s decision and fact-finding. Such disagreement is not an appropriate means to overturn an OEA decision supported by substantial evidence. *Brown v Watts*, 993 A.2d at 532–33. (“Because the OEA's findings were supported by substantial evidence in the record and its decision was neither arbitrary nor capricious, we must uphold the OEA's decision even though the record might also support a contrary conclusion.”)

The Superior Court did exactly what D.C. law does not allow—it ignored the factual findings of the AJ and of the OEA, substituted its own version of the facts and inferences, and supplanted its judgment for that of the OEA AJ’s credibility determinations. The Court should overrule the decision below and

affirm the decision of the OEA reinstating Spencer to employment because that decision is supported by substantial evidence and is not arbitrary, capricious, or otherwise contrary to law.

CONCLUSION

Based on the foregoing, this Court should overturn the decision of the Superior Court and affirm the decision of the OEA reinstating Spencer to her employment with DFHV because the OEA decision was based on substantial evidence.

Respectfully,

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CERTIFICATE OF SERVICE

The Undersigned certifies that on July 16, 2024, a copy of Appellant Kisha Spencer's Brief was filed and served via the Court's electronic filing system on the following individuals:

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