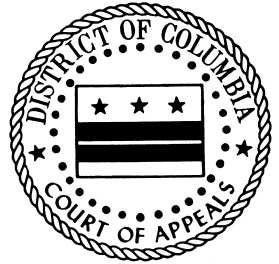


No. 24-CV-0326



IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

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KISHA SPENCER,
APPELLANT,

v.

D.C. 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)

REPLY BRIEF FOR APPELLANT KISHA SPENCER

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Pursuant to Appellate Rule 28(c), Appellant Kisha Spencer submits this reply brief.

ISSUE ON APPEAL

Whether the decision of the D.C. Office of Employee Appeals (“OEA”) to reinstate Appellant Kisha Spencer (“Spencer” or “Appellant”) to employment with the District of Columbia Department of For-Hire Vehicles (“DFHV”) was supported by substantial evidence.

ARGUMENT

This Court should reverse the Superior Court and sustain OEA’s decision because it was supported by substantial evidence. The Court must defer to OEA’s factual findings that Spencer reasonably complied with instructions.¹ This Court may not reweigh those findings and it was reversible error for the Superior Court to do so. In this regard, OEA’s finding that the DFHV’s charge of refusing to follow instructions was supported by substantial evidence because Spencer’s efforts to clarify her training assignments with her supervisor was reasonable. Appx319-20. Moreover, OEA’s discussion regarding the penalty determination if,

¹ The DFHV conceded that it only relies on the charge of refusing to follow instructions to the remove Spencer and will not rely the charge of reporting false or misleading information. DFHV Brief (“DFHV Br.”) at 1, n.1. The latter charge is therefore not before this court.

arguendo, it did sustain the charges was appropriate because the OEA would have necessarily conducted such a determination if the charges were actually sustained. Appx320-21.

I. THE OEA’S DECISION TO REINSTATE SPENCER MUST BE SUSTAINED BECAUSE IT WAS SUPPORTED BY SUBSTANTIAL EVIDENCE AND THIS COURT MUST DEFER TO THE OEA’S FACTUAL FINDINGS.

A. The DFHV Concedes that the OEA Decision was Supported by Substantial Evidence.

This Court must sustain the OEA’s decision to rescind Spencer’s removal and reinstate her to employment because the OEA’s decision is supported by substantial evidence. *Dupree v. D.C. Off. of Emp. Appeals*, 36 A.3d 826, 831 (D.C. 2011) (In reviewing an appeal of an OEA decision, the court is confined “strictly to the administrative record” and “must affirm the OEA’s decision so long as it is supported by substantial evidence in the record”) *quoting Settlemire v. District of Columbia Office of Emp. Appeals*, 898 A.2d 902, 905 n. 4 (D.C.2006). Although the Court should independently reach this conclusion in its *de novo* review of the OEA decision, Spencer’s argument is bolstered by the DFHV’s failure to argue otherwise.

At no point in DFHV’s brief is there any challenge to Spencer’s contention that the OEA decision was supported by substantial evidence. Because the DFHV failed to rebut this dispositive argument, the issue should be treated as conceded.

Hopkins v. Women's Div., General Bd. of Global Ministries, 284 F. Supp. 2d 15, 25 (D.D.C. 2003) (“It is well understood ... that when a plaintiff files an opposition to a dispositive motion and addresses only certain arguments raised by the defendant, a court may treat those arguments that the plaintiff failed to address as conceded.”), *aff'd*, 98 F. App'x 8 (D.C. Cir. 2004).

The DFHV mentioned the substantial evidence standard only in the “standard of review” and “statement of facts” sections of its brief. It did not present any substantive arguments challenging Spencer’s assertion that the OEA decision was supported by substantial evidence. DFHV Br. at 17-29. Because the DFHV failed to rebut Spencer’s argument that the OEA decision is supported by substantial evidence, a key issue, it must be treated as conceded, and it follows that this Court must affirm the OEA’s decision because it is based on substantial evidence. *Dupree*, 36 A.3d at 831.

B. The OEA’s Finding that Spencer Reasonably Complied with Supervisor’s Instructions was a Finding of Fact and This Court Must Defer to That Finding.

The OEA concluded that Spencer reasonably followed her supervisor’s instructions based on the evidence presented during the OEA hearing. Appx320. Specifically, the OEA evaluated email correspondence between Spencer and her supervisor(s), training assignment certificates, and witness testimony from DFHV witnesses and Spencer. Appx318-20. This conclusion was reached after evaluating

the evidentiary record and assessing the credibility of witnesses, leading to the finding that Spencer's actions of seeking clarification on her assignments constituted reasonable compliance with her assignments, and thus, the charge against her was unsupported. *Id.* This factual determination is entitled to deference from this Court. *Baldwin v. D.C. Off. of Emp. Appeals*, 226 A.3d 1140, 1144 (D.C. 2020) ("...we defer to credibility determinations of the OEA factfinder.").

The OEA's decision rested on a proper finding of fact rather than on the interpretation of a law or regulation, contrary to the DFHV's claim in its brief. The OEA decision correctly identified the legal standard that "a Failure/Refusal to Follow Instructions includes a deliberate or malicious refusal to comply with rules regulations, written procedures or proper supervisory instructions." Appx320, 6-B DCMR § 1607.2(d)(2). The DFHV does not assert that the OEA applied the incorrect legal standard, nor does it argue that the legal standard was incorrectly applied. The DFHV contended that the OEA misapplied the factual findings to the correct, relevant legal standard. Essentially, the DFHV's arguments reflect a disagreement with the OEA's factual findings, which resulted in Spencer's reinstatement. This amounts to mere disagreement and is not valid basis for overturning OEA's decision.

Simply because the DFHV claimed a legal analysis should be in their favor, does not make the actual OEA decision unlawful. Rather, the case law is clear that

OEA's findings of fact are binding on this Court and that the OEA decision must be affirmed as long as it is supported by substantial evidence. *Dupree*, 36 A.3d at 831. The law is also clear that even if this Court finds that the OEA could have reached a contrary decision, it must still affirm the OEA decision. *Brown v. Watts*, 993 A.2d 529, 532–33 (D.C. 2010) (holding this court must accept findings based on substantial evidence even though the record could support a contrary finding). Therefore, even assuming solely for the sake of argument that this Court could reach a different conclusion based on the facts adduced below, it must still affirm the OEA's decision to reinstate Spencer because OEA's determinations were reasonable and supported by substantial evidence. *Id.*

The OEA made a factual finding that Spencer's conduct was not a deliberate or malicious refusal of a supervisor's directions in the least, but rather a reasonable request for clarification from her supervisor that was not timely answered. Appx320. Moreover, OEA's finding that Spencer, in fact, took steps to comply with supervisor's directions is clearly established in the record. Appx319-20. The OEA expressly found, for example, that it is not "unreasonable for [Spencer] to have waited for an answer from her supervisor regarding the issue of assignments." *Id.* These are factual findings based on substantial evidence and credibility determinations which this Court may not overturn. *Baldwin*, 226 A.3d at 1144.

The DFHV knew that to succeed at the hearing, it needed to present evidence supporting the specific charge of “deliberate or malicious refusal” under 6-B DCMR § 1607.2(d)(2). This is because in charging Spencer, DFHV chose to rely on subsection (d)(2) of 6-B DCMR § 1607.2, which requires proof of deliberate or malicious refusal. DCHV did not charge or rely on subsection (d)(1), which requires only negligence or careless failure to comply with rules. And OEA found that the evidence provided by the DFHV did not meet the necessary element of intent to prove the charge under subsection (d)(2). Appx320. The OEA arrived at this finding after a careful examination of the facts and a reasonable assessment of the witnesses’ credibility, which was based on testimony and exhibits at the hearing.

Further, which no interpretation of 6-B DCMR § 1607.2 is at issue here, the DFHV’s arguments would still fail because OEA’s interpretations would be entitled to deference and, based on the plain language and structure of section as a whole, is reasonable. *Murray v. Dep’t of Youth Rehab. Servs.*, 330 A.3d 1036, 1038 (D.C. 2025) (“[w]e ordinarily defer to OEA’s reasonable interpretation of statutes under which OEA acts”) *citing Butler v. Metro. Police Dep’t*, 240 A.3d 829, 835 (D.C. 2020) (brackets and internal quotation marks omitted).

The DFHV’s efforts to characterize Spencer’s attempts to seek clarification of her training assignments as a deliberate refusal to follow instructions also fails.

The facts, as heard and determined by the OEA after an extensive hearing, revealed that Spencer reasonably complied with the instructions she received from the DFHV regarding her assignments “based on the email records and the certificates produced in the record.” Appx319. Accordingly, the OEA held that the DFHV failed to meet its burden of proof. Appx319-20. In fact, the record shows that the DFHV supervisors poorly communicated the assignments in question to Spencer, largely because DFHV replied to her queries after working hours. *Id.*

Similar attempts by DFHV to mischaracterize facts in the record also fail. The DFHV cannot concede on the one hand, as it does, that OEA correctly find unsupported the charge that Spencer provided false information regarding her child’s educational needs, yet still assert in its brief that the information she provided caused the DFHV “to doubt the legitimacy of her May 7 accommodation request.” DFHV Br. at 5. This type of “eat their cake and have it, too” argument does not work because they both amount to an allegation that Spencer acted deliberately while in direct logical conflict.

The DFHV also included references to a “network-wide remote learning plan” for the entire grade of Spencer’s son’s school without appropriate context. *Id.* at 6. But this information is incomplete, out of context, and fails to support their argument because the referenced information: 1) is not specifically tailored to the educational needs of Spencer’s son as required by his individualized education

plan, and 2) it serves to provide no probative value on an argument that the DFHV conceded in its brief before this Court. This Court must accordingly disregard the DFHV's mischaracterization of facts and defer to the OEA's findings.

The OEA's decision to reinstate Spencer should be affirmed because it was based on findings of fact and witness credibility and this Court must defer to those findings.

II. THE DFHV'S ARGUMENTS SEEKING TO LIMIT WHAT MAY BE CONSIDERED BY THIS COURT ARE MISPLACED.

DFHV's argument that Spencer cannot challenge the holdings of the Superior Court's decision and cannot present arguments regarding the May 13, 2020, assignments is misplaced. This Court's *de novo* review is of the OEA decision alone and the totality of the OEA's findings regarding Spencer's May 13th assignments are part of its decision and supported by substantial evidence.

A. The Court Must Conduct a *De Novo* Review of the OEA Decision and Administrative Record.

Established law is clear that this Court must confine itself "strictly to the administrative record" developed at the OEA and not any fact finding from the Superior Court. *Walker v. D.C. Off. of Emp. Appeals*, 310 A.3d 597, 599 (2024) (citations omitted). 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.” *Raphael v. Okyiri*, 740 A.2d 935, 945 (1999). (internal citations omitted). This Court must conduct the “identical review [of the OEA decision] that [it] would undertake if this appeal had been heard initially in this 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).

As stated in Spencer’s opening brief, the Superior court failed to give deference to the OEA’s findings of fact and credibility determinations. Spencer Opening Brief at 11-12. In section I(B) of its brief, the DFHV asserts that Spencer cannot object to the Superior Court’s consideration of the May 13th training assignments as part of the charges. This argument is misplaced because this Court is not reviewing the findings in the Superior Court’s decision; rather, its review is confined to the OEA decision alone, as established in *Walker*, 310 A.3d at 599, and *D.C. Gen. Hosp.*, 548 A.2d at 73. Therefore, the Court need not address any errors in the Superior Court’s ruling, no matter how flawed, but must focus on whether the OEA decision is supported by substantial evidence. Consequently, the DFHV’s points about the Superior Court’s decision are moot and serve only as procedural or contextual background, not grounds for appeal.

Although the Superior Court’s decision was flawed, this Court need not directly address those flaws because it may simply find that the OEA decision was

supported by substantial evidence and accordingly sustain that OEA decision. Spencer highlighted the Superior Court's errors in his opening brief to prevent this Court from misapplying its review to the OEA decision. The Superior Court's decision, *inter alia*, failed to credit the OEA's findings regarding Spencer's timely completion of her training assignments and improperly substituted its factual findings for those of the OEA. *Raphael*, 740 A.2d at 945 (The OEA ALJ's findings of fact are binding at all subsequent levels of review unless unsupported by substantial evidence); *Baldwin*, 226 A.3d at 1144 ("...we defer to credibility determinations of the OEA factfinder."). Thus, it is evident that that Superior Court failed to follow precedent for reviewing an OEA decision and this Court should not make the same mistake,

Based on the record from the OEA hearing and its factual findings, the decision to reinstate Spencer is well-supported by substantial evidence and should be affirmed by this Court.

B. This Court May Consider Whether the OEA's Findings Regarding Spencer's May 13th Assignments Were Supported by Substantial Evidence.

As established, this Court reviews the decision of the OEA *de novo*. The OEA's findings regarding the inclusion of the May 13th assignments in the charges against Spencer should be sustained by this Court because they are supported by substantial evidence. The DFHV incorrectly asserted that Spencer's "only oblique

reference to the [allegations relating to] May 12/May 13” were in a footnote in her brief. DFHV Br. at 23. This is categorically untrue. Looking at Spencer’s initial brief before this Court, there are over twenty (20) express references to the assignments and allegations regarding May 13th. In Spencer’s brief before the Superior Court, she asserted the following:

The September 2, 2020, notice of proposed separation only cites the alleged untimely submission of May 12th trainings, and does not allege such conduct on any other dates. Again, in the final decision of separation, DFHV expressly cites the completion of the May 12, 2020, trainings as the cause for the failure/refusal to follow instructions charge. Now, however, DFHV ostensibly asserts training assignments failed to be timely completed by Spencer on May 13th and 14th. Spencer disputes that any assignments on May 13th or 14th could be used to support a charge of failure/refusal to follow instructions because those dates were not specified in the Final Notice of termination as part of the charge. (internal citations omitted).

Spencer Superior Court Brief at p.6 (April 7, 2023). Spencer further noted the DFHV’s flawed inclusion of the May 13th and 14th dates in a footnote to indicate that, although she disputed the inclusion of these dates in the charges, she nonetheless addressed the charges on those dates as discussed in the OEA’s decision. Spencer has consistently argued that the OEA’s findings regarding these assignments are supported by substantial evidence and must be sustained.

Most importantly, the DFHV’s focus on whether arguments regarding the May 13th assignments were preserved is misplaced because it fails to rebut Spencer’s arguments that the OEA’s findings were supported by substantial

evidence. The OEA’s findings regarding the May 13th assignments are part and parcel of the OEA decision in its entirety. It is that entire OEA decision that must be sustained.

Further, once claims are presented below, parties are free to make any arguments in support of that claim and “are not limited to making the precise arguments they made below.” *Williams v. United States*, 283 A.3d 101, 106 (D.C. 2022) quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). The OEA and Spencer have consistently asserted that the May 13th assignments should not have been considered disciplinary actions. So, even if those assignments were properly included as discipline, DFHV did not provide sufficient evidence to prove their charges regarding those assignments. The OEA decision not only found that the May 13th assignments were beyond the scope of the charges, but it also found that the charges from those dates were not proven by a preponderance of the evidence based on the record presented at the OEA hearing. Appx319-20.

Specifically, the OEA decision held that even if the May 13th assignments were included in the charge, Spencer completed those assignments timely and acted reasonably in asking her supervisor a question about them. *Id.* The OEA decision held that the DFHV’s failure/refusal to follow instructions charge could therefore not be sustained. *Id.* Essentially, the OEA made two holdings regarding the May 12th/13th allegations: 1) that the “notice [of removal] does not

cite...misconduct” based on the May 12th/13th dates, and 2) even assuming *arguendo* that DFHV did include those date(s) in its allegations, the factual record did not support them. *Id.* This means that OEA’s decision should be sustained.

The OEA based its decision on a thorough review of exhibits and witness testimony. Spencer has consistently argued that the **entire** OEA ruling is supported by substantial evidence, including that the May 13th allegations were either improperly charged or, if charged, that DFHV failed to prove them. Thus, the OEA’s findings regarding the May 13th issues are supported by substantial evidence, and this Court must affirm the OEA decision.

C. This Court has the Authority to Sustain the OEA’s Finding That the DFHV’s Penalty Determination was not Supported.

Although this Court need not address the penalty determination analysis because the OEA found that the DFHV failed to meet its burden of proof on the charges against Spencer, the OEA nonetheless assessed the DFHV’s penalty and found it unreasonable based on the totality of the circumstances. Specifically, the OEA determined that even had the Agency met its burden of proof, removal would not have been an appropriate penalty. Appx321 This conclusion, like the entire OEA decision, was supported by substantial evidence.

The OEA found that, if the DFHV had met its burden of proof on the charges, termination exceeded the limits of reasonableness because the “Agency failed to consider relevant *Douglas* factors in its assessment of this action.”

Appx321. OEA's conclusion was thus based on the factual record and properly combined with appropriate mitigating factors, the doctrine of progressive discipline, and the nature of the alleged offense. Appx320-21. This Court has held, in this regard, that reversal or mitigation of a penalty is appropriate when an agency fails to weigh the relevant factors, or the penalty is outside the limits of reasonableness. *Jahr v. D.C. Off. of Emp. Appeals*, 19 A.3d 334, 340 (D.C. 2011), *as amended* (May 26, 2011) *citing Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). Applied here, OEA's penalty mitigation should be sustained.

CONCLUSION

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

Respectfully,

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CERTIFICATE OF SERVICE

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