

BEFORE THE MONTGOMERY COUNTY
COMMISSION ON HUMAN RIGHTS

Office of Zoning and Administrative Hearings
Stella B. Werner Council Office Building
100 Maryland Avenue
Rockville, Maryland 20850
(240) 777-6660
(240) 777-6665 (fax)

PETRONILA VASQUEZ,

Complainant,

v.

ATLAS CLEANERS, INC.,
(DBA WESTWOOD CLEANERS)

Respondent.

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OZAH No. HR 13-02
(OHR Case No. E-04984)

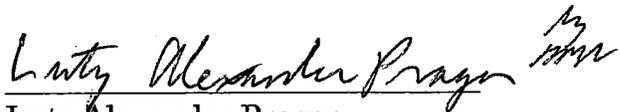
ERRATA TO HEARING EXAMINER'S REPORT AND
RECOMMENDATION

The Hearing Examiner's Report and Recommendation issued on July 30, 2014, included a reference on page 14 to an order admitting the Castro affidavit. That order of March 24, 2014 (Docket entry 49) also permitted the hearing to be reopened. The Hearing Examiner's Report issued on July 30, 2014, indicated in footnote 6 (on page 14) that the complete March 24, 2014 order had been attached to the Report as Appendix 2.

That Appendix 2 was inadvertently not attached to the Hearing Examiner's Report and Recommendation. It is therefore attached to this Errata and is hereby incorporated into the Hearing Examiner's Report and Recommendation of July 30, 2014. Its inclusion does not affect the substance of the Hearing Examiner's Report and Recommendation.

Dated: August 11, 2014

Respectfully submitted,


Lutz Alexander Prager
Hearing Examiner

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**ORDER ADMITTING CASTRO AFFIDAVIT
AND PERMITTING HEARING TO BE REOPENED**

Petronila Vasquez alleged that the owner of Westwood Cleaners, Aris Cubuk, sexually harassed her in October and November 2009. At the hearing of this case she testified to that effect.

Ms. Vasquez presented no corroborating live witnesses; instead, she attempted to introduce an affidavit executed by Maribel Castro, someone both sides agree worked at Westwood in the fall of 2009. (Proposed exhibit C-1). Although the Castro affidavit contains several inconsistencies with the Vasquez testimony, it coincides with Ms. Vasquez's testimony about an incident in October 2009 during which Mr. Cubuk allegedly demanded that she kiss him and then followed her and tried to fondle her.

At the hearing I tentatively ruled that the Castro affidavit would not be admitted because Ms. Castro could not be cross-examined and because the circumstances under which the affidavit was prepared could not be explored. See T. (1/7/14) 160-163. Nevertheless, I didn't altogether foreclose its submission. *id.* Rather, at the close of the hearing, I offered both sides an

opportunity to brief whether the Castro affidavit should be admitted. T. (118/14). Both parties subsequently filed memoranda addressing the issue. Docket nos. 45, 46.

In this order I admit the Castro affidavit but also allow for a supplemental hearing to permit Westwood Cleaners to present testimony challenging Ms. Castro's credibility, including her ability to witness the events described in her affidavit

A. Prehearing mention of the Castro affidavit.

The Castro affidavit was apparently executed September 6, 2012. (The signature line actually reads "9/6/212"). There is no indication in the record of who prepared the affidavit for Ms. Castro's signature.

The Determination issued by the Office of Human Rights, which concluded that reasonable grounds existed to believe that Westwood violated the County Human Rights Law, states that the Office's investigator interviewed Ms. Castro and her account "corroborated Complainant's allegation of sexual harassment." Docket entry 3 at 6. According to the Determination, Ms. Castro "agreed to provide information for this investigation." *id.* at 8. The Determination is dated September 11, 2012, five days after the Castro affidavit was executed.

Ms. Castro's potential role as a witness at the hearing was raised during discovery, not all of which I'm privy to. Ms. Vasquez's answer to an interrogatory stated that Maribel Castro was present during the alleged harassment. Docket no. 16, at 4. It provided a telephone number for her, 202.650.9289. (I take judicial notice that area code 202 is assigned to the District of Columbia). The Castro affidavit was apparently appended to the answers to interrogatories (although not to the copy filed with the Office of Zoning and Administrative Hearings). See *id.* at 3.

Westwood moved to require Ms. Vasquez to produce Ms. Castro for deposition. Docket no. 18(a) at 1. The motion stated that "Petitioner has identified Maribel Castro, 4403 Fourteenth Street NW, Apt 35, Washington, D.C. 20011 as a material witness." The motion noted that "on information and belief, the Petitioner is still in regular contact with the witness." *id.* Westwood's motion followed correspondence between the parties during which Ms. Vasquez's attorney wrote he could not produce the witness but produced the 4th Street address. Docket no. 19(b). I denied Westwood's motion to compel Ms. Castro to be deposed because Ms. Castro was

neither an employee nor an agent of Ms. Vasquez's. Ex. 23. If Westwood wished to depose her, it would have to subpoena her. The Order denying the motion notes that Ms. Vasquez's counsel had agreed to confirm Ms. Castro's address within a week. *Id.*

A few days after my order the parties filed a joint motion to extend the discovery period to allow Ms. Castro and Mr. Cubuk to be deposed. Docket no. 27. I granted the joint motion. Docket no. 29. It is now clear that neither side took Ms. Castro's deposition.

The next time Ms. Castro's name appears in the record is when counsel for Ms. Vasquez applied for an "Order and Certification" to subpoena her in the District of Columbia to compel her appearance at the hearing. Docket nos. 35, 34(b). The application gave the same 14th Street address and area 202 telephone number as previously. I denied the application absent a showing that District of Columbia law authorizes the issuance of subpoenas to compel its residents to appear in a foreign jurisdiction. Docket no. 36 at 1-2. Counsel for Ms. Vasquez never made such a showing. At her counsel' request, I did, however, issue a subpoena for Ms. Castro at an address in Silver Spring that had been provided by counsel. Docket no. 37.

The Castro affidavit was listed in, and appended to, the Vazquez exhibit list filed to comply with a prehearing Order requiring the parties to list all documents and non-testimonial evidence they intended to introduce at the hearing. Docket no. 40. Westwood acknowledged the authenticity of the affidavit in a joint stipulation. Docket no. 39.

B. *Discussion.*

Section 8(h) of the County Administrative Procedure Act ("APA") permits the hearing authority to admit certain types of evidence in a hearing when a witness is unavailable to testify in person, specifying depositions under oath or answers to written interrogatories:

8(h) Power of the hearing authority.

* * *

(14) To order that statements of witnesses who are beyond the jurisdiction of the hearing authority or who for sufficient reason are unavailable to testify be taken by written interrogatories or deposition made under oath. The original of any interrogatories, answers thereto or depositions must be filed in the case file of the proceedings.

Under subsection 14, the initial inquiry needs to determine if the witness is beyond the jurisdiction or otherwise unavailable to testify. The memorandum of law filed on behalf of Ms.

Vasquez states that she hired a process server to serve Ms. Castro at the Silver Spring address. Docket no. 45 at 2. In an attachment to the Vasquez memorandum the process server reported he attempted to serve Ms. Castro three times in late November and early December 2013. *id.* att. 1. On the third attempt, the process server reported, a current tenant claimed that no one named Maribel Castro lived at the address. *id.*

When counsel for Ms. Vasquez applied to subpoena Ms. Castro in the County he stated that the Silver Spring address had been provided by Westwood. See docket nos. 35. Counsel made no showing what other efforts, if any, he made to determine if Ms. Castro was living or working elsewhere in the County.

Despite that, there is enough in the record for me to conclude that Ms. Castro was beyond the County's jurisdiction in the months leading up to the hearing. As already stated, Ms. Vasquez gave Westwood the 14th Street address in the District of Columbia as Ms. Castro's current address during discovery. Her counsel later requested authorization to obtain a subpoena for Ms. Castro in the District. Both of these steps are consistent with Ms. Vasquez's present assertion that Ms. Castro is beyond County jurisdiction. For its part, Westwood has not claimed to have a current address for Ms. Castro within the County. In its response to the Vasquez memorandum, Westwood asserts that Ms. Castro and Ms. Vasquez had seen each other as recently as one month before these "proceedings." Westwood does not cite record support for that assertion but, even if true that's insufficient to undermine the proposition that Ms. Castro was beyond the County's jurisdiction at the time of the hearing or during the three-month period after the hearing date was established. Ms. Castro's absence from the County triggers APA § 8(h)(14).

By its terms, § 8(h)(14) does not refer to affidavits as material that may be admitted when a witness is beyond County jurisdiction. It refers to only two types of evidence: deposition testimony and answers to interrogatories.

The reason for admitting deposition testimony is evident. Even though the deposed witness can't be observed by the decision-maker, the opposing party will have had an opportunity to test the testimony by cross-examining the witness during the deposition. Admitting such testimony when the witness is unavailable at the hearing is usually preferable to

excluding relevant testimony. The same is true of depositions by written questions. See Md. R. 2-417. Those, too, will have been subject to direct, cross, redirect, and recross questions.

Why § 8(h)(14) lists answers to interrogatories as evidence that may be admitted when a witness is beyond the jurisdiction is less obvious. Under the APA, as under most discovery procedures, interrogatories are directed to parties, not non-party witnesses. APA § 7 (b)(4) ("a hearing authority may order *such party* to answer interrogatories); see Md. R. 2-421 ("interrogatories to *parties*") (italics added). It's not clear when, if ever, the missing witness rule could apply to interrogatory answers because the witness who answered them is either the party or the party's agent and therefore necessarily has submitted him- or herself to County jurisdiction. Normally, the answers to interrogatories will be used to impeach the other party's testimony. Still, in the hypothetical case in which a witness is somehow unavailable, interrogatory answers will have *not* been subject to cross-examination. Nonetheless, § 8(h)(14) expressly delegates discretionary authority to the presiding hearing officer to admit the answers.

Affidavits are unlike deposition answers in that they have not been tested by cross-examination but they are similar to answers to interrogatories. If the latter are admissible, there is no evident logic in support of arguing that § 8(h)(14)'s omission of them demonstrates clear legislative intent to deprive hearing authorities from exercising discretion to admit them when witnesses who executed them are unavailable.

Section 8(h)(14) does not exist in isolation; it reasonably should be read together with a related APA provision, § 8(e). That section permits – but does not require – the admission of evidence of "probative value" including hearsay that appears to be "reliable" so long as it is given "appropriate weight":

Evidence. The hearing authority may admit and give appropriate weight to evidence which possesses probative value commonly accepted by reasonable and prudent persons in the conduct of their affairs, including hearsay evidence which appears to be reliable in nature. * * *

That language strongly implies that affidavits cannot be excluded solely because they have not been subject to cross-examination. Indeed, that is how Maryland courts have interpreted similar provisions of the Maryland Code, State Government Article. § 10-213(b)-(c). Section 10-213(b) states: "The presiding officer [in an administrative hearing] may admit probative evidence that reasonable and prudent individuals commonly accept in the conduct of

their affairs and give probative effect to that evidence." Section 10-213(c) is stronger than APA § 8(e) in that it prohibits the automatic exclusion of hearsay evidence: "Evidence may not be excluded solely on the basis that it is hearsay."

Using State counterparts of § 8(e), Maryland courts have held that administrative agencies are not bound by "technical common law rule of evidence," so long as they observe the basic rules of fairness. *Dickinson-Tidewater, Inc. v. Supervisor of Assessments*, 273 Md. 245, 253, 329 A.2d 18 (1974); *Fairchild Hiller Corp. v. Supervisor of Assessments*, 267 Md. 519, 524 (1973).

The Vasquez memorandum cites the most recent case discussing the State analogs to § 8(e), *Para v. 1691 Limited Partnership*, 211 Md. App. 335, 65 A.3d 221, cert. denied, 75 A.2d 319 (2013).¹ In *Para*, the Court compiled precedent holding that hearsay is admissible in administrative proceedings when its admission "observes the basic rules of fundamental fairness." *Id.*, 211 Md. App. at 381. The *Para* Court listed three criteria to be used in analyzing proffers of hearsay evidence: "the evidence's probative value, reliability, and fairness of its utilization[.]" *Id.*, quoting *Travers v. Baltimore Police Department.*, 115 Md. App. 395, 408, 693 A.2d 378 (1997) (brackets added by *Para*). If the hearsay is sufficiently reliable and probative, it may be admitted so long as "the relaxed rules are not misapplied in an arbitrary or oppressive manner, depriving the party of his or her right to a fair hearing." *Para*, 211 Md. App. at 382.

Another recent decision (also cited by the Vasquez memorandum), *B.H v. Anne Arundel County Dep't of Social Services*, 209 Md. App. 206 (2012), helps clarify how reliability of evidence that can't be cross-examined is to be assessed. There, the Court held, a toddler's statements testified to by an impartial adult witness should have been admitted despite their hearsay status. To reach its conclusion, the Court applied the proposition that "statements that are sworn under oath, or made close in time to the incident, or corroborated [] ordinarily [are] presumed to possess a greater caliber of reliability." *Id.*, at 223-224, quoting *Travers*, 115 Md. App. at 413; brackets, the Court's.

The Maryland decisions are distinguishable on their facts to some extent but they embody two propositions: first, affidavits cannot be excluded in administrative proceedings solely on the

¹ Westwood's opposition cites no case law or statutes.

ground that they cannot be cross-examined; second, the basic question of when to admit them is one of fairness.

In the present case, Ms. Castro apparently cannot be found.² If her affidavit is excluded Ms. Vasquez loses access to the only witness prepared to corroborate her testimony. In a she-says/he-says case, corroborating evidence is of utmost importance if believed. Ms. Castro's sworn affidavit bears some indicia of reliability, even though who actually prepared it remains unidentified. It was executed shortly after Ms. Castro was interviewed by staff of the Office of Human Rights. OHR found it sufficiently consistent with statements she made during its interview to rely on it for its conclusions. That does not mean that the affidavit's contents are true, only that they should not be excluded solely because Ms. Castro cannot be found to examine and cross-examine.

Basic fairness, however, demands that Westwood be given an opportunity to challenge Ms. Castro's credibility. During the hearing, I tentatively ruled that the Castro affidavit should not be admitted. There was therefore no need for Westwood to present testimony during the hearing challenging Ms. Castro's veracity or bias. According to Westwood's memorandum opposing admission of the affidavit, Westwood "was prepared at the hearing to produce witnesses that would have attacked the credibility of Ms. Castro * * * and her inability to witness the events that gave rise to [Ms. Vasquez's] claim." Docket no. 46 at 2. In light of my reversal of my initial inclination to exclude the affidavit, Westwood must be given an opportunity to present such testimony now that the affidavit is admitted into evidence.

The affidavit will not necessarily be given the same weight as live testimony once I make my decision on the merits. Once the record closes, the parties will have the ability to file post-hearing briefs on the merits. They will be free to argue what weight should be given to Ms. Castro's statements in light of the factors that may have produced it and in light of other evidence admitted in the full record.

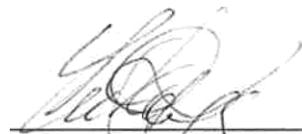
² Counsel for Ms. Vasquez has argued that Westwood cannot complain about admitting the Castro affidavit because it did not subpoena her. Memorandum at 8; T. (1/7/14) 41. Counsel can't have it both ways. If Ms. Castro's whereabouts are known, she should have been produced for the hearing or for a deposition by the party relying on her testimony, namely, Ms. Vasquez. If, on the other hand, she can't be located, Westwood could not possibly depose her. See, e.g. T. (1/7/14) 39 (counsel for Westwood: "at this point we have asked repeatedly for information on contact for Ms. Castro"); *id.* at 40 (same: "I've called Mr. Allen repeatedly and explained to him I wanted to set her deposition, I wanted information on how to locate her. He candidly told me – we work together well – he says, I'm sorry, I can't locate her either").

3. *Conclusion.*

For the foregoing reasons:

- a. The Castro affidavit (C-1) is admitted into evidence.
- b. The hearing is reopened to admit testimony by Westwood Cleaners, focusing on Ms. Castro's credibility and on her ability to witness the events described in her affidavit. In preparation for that hearing, Westwood Cleaners is ORDERED to disclose by April 7, 2014, whether it wishes to present such testimony and, if so, to provide the names of all witnesses it intends to present. No witness may testify who is not named in Westwood's prehearing statement (docket no. 33) because Westwood had no assurance when the statement was filed that the Castro affidavit would be excluded from evidence. The testimony should not duplicate testimony already in the record about Ms. Castro.
- c. Should Westwood timely request to present additional testimony as specified, the parties will be informed of a supplemental hearing date in due course.

SO ORDERED.



LUTZ ALEXANDER PRAGER
Hearing Examiner

Dated: March 24, 2014

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