

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Administrative Assistant of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
DEEPAK T. BUTANI)	
Employee)	
)	OEA Matter No. 1601-0093-98
)	
v.)	Date of Issuance: January 14, 2004
)	
D.C. WATER AND SEWER)	
AUTHORITY)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Agency removed Employee from his position as a Supervisory Environmental Engineer based on the charge of discourteous treatment of the public, a supervisor, or other employee; to wit: (a) fighting, threatening, or inflicting bodily harm on another; (b) use of abusive or offensive language or discourteous or disrespectful conduct toward the public or other employees; and(c) use of insulting or threatening language to an official superior. Agency took

this action as a result of an incident that supposedly occurred during a meeting on September 9, 1997.

On this date, Employee, Employee's supervisor, and two attorneys from the Office of Corporation Counsel ("OCC") met with a City Council staff member to discuss proposed legislation regarding a wastewater treatment program. At the conclusion of the meeting, Employee and his supervisor and one of the attorneys returned to the OCC offices to continue discussing the legislation. Employee's supervisor mentioned that consultants could be used to implement a particular program proposed by the legislation. By his own admission, Employee became upset when his supervisor mentioned the use of consultants for this purpose. At this point, the OCC attorney left the room and closed the door behind her. Employee and his supervisor were alone in the room and it is at this point, as the discussion continued, Employee's supervisor claims that Employee called him a "slime" and "low-life" and threatened him. With respect to the alleged threat, Employee's supervisor claims that Employee got in his face, yelled at him, and said, "I'm going to wait for you outside and we are going to settle it like men[,]'" to which Employee's supervisor replied "I'll see you later." Based on these events, Agency proposed Employee's removal.

Employee filed a timely Petition for Appeal with this Office. On March 30, 2001, the Administrative Judge issued an Initial Decision in which she reversed Agency's removal action and ordered Agency to reinstate Employee. The Administrative Judge held that Agency had not proven by a preponderance of the evidence that Employee had committed the alleged

misconduct. In reaching this conclusion, the Administrative Judge found that the testimony of Employee's supervisor was confusing and that the testimony elicited at the hearing from the OCC attorney conflicted with certain statements that Agency had attributed to her in its proposed notice of removal.

Further, the Administrative Judge held that "[i]n order to prove that a threat occurred, fear on the part of the recipient of the threat is not required." However, "a perception that an attempt to harm will ensue" is required. *Initial Decision* at 3. (See *Ingram v. Dep't of Justice*, 44 MSPR 578 (1990) and *Metz v. Dep't of Treasury*, 780 F.2d 1001 (Fed. Cir. 1986)). Employee's supervisor's response to Employee's alleged threat was to write down what he believed Employee had just said and to reply that "I'll see you later." This response, according to the Administrative Judge, minimized the supervisor's apprehension of harm. Considering all of the evidence, the Administrative Judge held that Agency had not met its burden of proof.

Agency has since filed a timely Petition for Review. In its Petition for Review Agency puts forth two arguments: (1) the Administrative Judge applied "an erroneous legal standard in evaluating whether the Employee's conduct was threatening"; (2) the Administrative Judge ignored certain evidence that, according to Agency, would have been probative in showing that Employee threatened his supervisor; and (3) the Administrative Judge failed to resolve issues of credibility. *Agency's Petition for Review* at 1-3.

The Administrative Judge found persuasive the standard enunciated in the cases of *Ingram* and *Metz*, for determining whether Employee threatened his supervisor. In prior

decisions of this Office in which an employee has been charged with similar misconduct, the administrative judge assigned to the appeal has often relied upon the standard applied in the instant appeal. (citations omitted) We do not believe that Agency has put forth a legally sufficient reason for applying a different standard in an appeal wherein an employee has been charged with this type of misconduct.

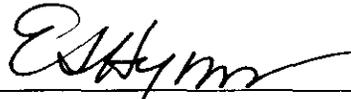
The legal standard for evaluating whether an employee's conduct was threatening requires a perception that an attempt to harm will ensue. The Administrative Judge found that the response of Employee's supervisor to Employee's alleged threat minimized the supervisor's apprehension of harm. Based upon that finding, whether the Administrative Judge ignored the evidence to which Agency refers in its Petition for Review is immaterial as none of that evidence would impact the issue of whether the supervisor perceived such harm.

With respect to Agency's last claim of error, that the Administrative Judge failed to resolve issues of credibility, we disagree. The Administrative Judge has the responsibility of assessing the witnesses credibility. We have reviewed the record and it is clear that the Administrative Judge made proper credibility findings. Moreover, we must give deference to the Administrative Judge's assessments in this regard because it is the Administrative Judge who is present to hear the witnesses testify and to observe their demeanor. *See Hinton v. Dep't of Corrections*, OEA Matter No. 1601-0136-93, *Opinion and Order on Petition for Review*, (July 10, 1995), __D.C. Reg.__ (.). Thus, we accept her findings on this issue and uphold the Initial Decision and deny Agency's Petition for Review.

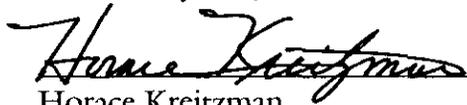
ORDER

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

FOR THE BOARD:



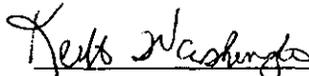
Erias A. Hyman, Chair



Horace Kreitzman



Brian Lederer



Keith E. Washington

The initial decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance 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.