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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
SONDRA PHILLIPS-GILBERT	)	
Employee	)	
	)	
	)	OEA Matter No. 1601-0059-99
v.	)	
	)	Date of Issuance: December 21, 2005
	)	
DEPARTMENT OF HUMAN SERVICES	)	
Agency	)	
	)	
_____	)	

**OPINION AND ORDER**  
**ON**  
**PETITION FOR REVIEW**

Sondra Phillips-Gilbert ("Employee") was a Social Services Representative until she was terminated on January 12, 1999. The Department of Human Services ("Agency") terminated her for the causes of discourteous treatment and insubordination. With respect to the discourteous treatment charge, Agency claimed that Employee was rude and disrespectful toward a client and a supervisor; that Employee engaged in loud and boisterous conduct that was disruptive to the work place; and that Employee was

physically intimidating to the client and the supervisor. With respect to the insubordination charge, Agency claimed that Employee failed to go upstairs to complete an Unusual Incident Report even though the supervisor had asked her to do so.

The charges stem from an incident that occurred on December 1, 1998. On that date Employee was working in her office when she received a telephone call from a security guard who was at the front desk in the lobby. He asked her to come to the lobby. When Employee arrived, she saw a client sitting beside the guard's desk. Employee noticed that the client was someone whom she had counseled previously. During the previous counseling session, this client had become angry with Employee, cursed at her, and thrown a piece of paper at Employee. Thus when Employee saw this same client in the lobby on December 1, 1998, Agency claims that Employee overreacted. Specifically Agency alleges that Employee loudly berated the client, glared at a supervisor who had asked Employee to go back upstairs, shouted, gestured wildly, and became agitated and physically intimidating to both the client and the supervisor. Moreover, according to Agency, Employee failed to return to her office to complete an Unusual Incident Report after having been asked by the supervisor to do so. Hence Agency terminated Employee.

A two-day hearing was held and among the witnesses that Agency had testifying on its behalf were the client, a supervisor who had observed the December 1, 1998 incident, and another supervisor who had been summoned to the lobby. The client's testimony consisted primarily of the events that transpired during the counseling session that ended with the client balling up a piece of paper and throwing it at Employee. With respect to what took place in the lobby on December 1, 1998, the client testified that when Employee saw her sitting beside the guard's desk, Employee began speaking loudly

and in an unprofessional tone. She did not, however, remember what happened after that.

The supervisor who supposedly observed the incident testified next. She testified that as she was riding the elevator down from an upper floor to the basement, the elevator stopped at the lobby floor. Even though she testified that she never left the elevator, she stated that while the elevator doors were open into the lobby, she saw that Employee was loudly berating the client. She then decided to go back upstairs to summon a higher ranking supervisor.

The higher ranking supervisor testified that when she got to the lobby, Employee asked her if she had come to the lobby to take a complaint. She testified that in her opinion, Employee was overreacting to having seen the client sitting at the guard's desk. She said that she asked Employee to go back upstairs so that they could discuss the whole situation.

Based on the record as a whole, the Administrative Judge found that Agency had not proven the charges it brought against Employee. The Administrative Judge found that none of Agency's witnesses had presented any evidence to support its claim that Employee had been disrespectful toward the client and the supervisor or that Employee had used abusive or offensive language. Further, according to the Administrative Judge, there was no testimony whatsoever regarding Agency's claim that Employee was physically intimidating during the December 1, 1998 incident. With respect to the insubordination charge, the Administrative Judge held that although the agency official had asked Employee to go back upstairs, she did not give Employee a direct order. Thus in an Initial Decision issued May 17, 2002, the Administrative Judge held that because

Agency had not proven either of the charges brought against Employee, it must reinstate Employee and reimburse her all of the salary and benefits she lost.

Agency timely filed a Petition for Review. In the Petition for Review Agency claims that the Administrative Judge did not properly assess the credibility of the witnesses, that a portion of the Initial Decision is internally inconsistent, and that the finding that Agency failed to prove the insubordination charge is not based on substantial evidence. For these reasons Agency now asks us to reverse the Initial Decision.

Agency uses the case of *Hillen v. Department of Army*, 35 M.S.P.B. 453 (1987) to support its claim that the Administrative Judge did not properly assess the credibility of the witnesses. Agency states that "there is no indication that the Administrative Judge considered each of the factors set out in *Hillen . . .*"<sup>1</sup> Even though we recognize that the Merit Systems Protection Board ("MSPB") is our federal counterpart, we have not, however, adopted every practice of the MSPB. Moreover, there is no law, rule or regulation that requires us to do so.

Because the Administrative Judge was present to hear the testimony and to observe the demeanor of the witnesses, we give deference to her assessment. See *Hinton v. Dep't of Corrections*, OEA Matter No. 1601-0136-92, *Opinion and Order on Petition for Review* (July 10, 1995), \_\_\_ D.C. Reg. \_\_\_ ( ) (the Board must depend heavily upon the Administrative Judge's assessment of the witness' credibility). In the Initial Decision the Administrative Judge fully and adequately explained why she discredited the testimony of Agency's witnesses. The Administrative Judge found that the higher ranking official testified in contradiction to what she had previously said in an earlier written statement.

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<sup>1</sup> *Petition for Review* at 6.

As such, the Administrative Judge gave more credibility to that person's live hearing testimony. Further, the Administrative Judge found that no one gave any testimony regarding Agency's claim that Employee was physically intimidating or disrespectful and the evidence that was intended to show that Employee disrupted the workplace was unconvincing. Agency tries to make much of the fact that the Administrative Judge did not credit the written statement of a security guard that witnessed the incident. Even though unsworn statements are admissible, they are not generally reliable enough to constitute substantial evidence in support of an agency's charges where the witness is unavailable for cross-examination. See *Dietrich v. District of Columbia Bd. Of Zoning Adjustment*, 293 A.2d 470 (D.C. 1972). Although Agency disagrees with these assessments, there is substantial evidence in the record to support the Administrative Judge's findings. In view of the deference we accord the Administrative Judge on issues of credibility, we find no reason to reverse the Initial Decision on this basis.

Agency next argues that a portion of the Initial Decision is internally inconsistent. The relevant portion states, "[i]n addition, Ms. Muhammad's testimony that Employee shouted at her, on December 1, 1998, is diminished by her own prior behavior, which, more likely than not, caused Employee to react as she did."<sup>2</sup> According to Agency this statement amounts to a "concession by the Administrative Judge that Employee engaged in the acts of misconduct."<sup>3</sup>

Employee was charged with discourteous treatment and insubordination. Agency relied on three different specifications to show that Employee was discourteous and one

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<sup>2</sup> Initial Decision at 9.

<sup>3</sup> Petition for Review at 9.

specification to show that Employee was insubordinate. It has never been disputed that Employee displayed some emotion and showed some reaction at seeing the client in the lobby. We believe that the Administrative Judge's statement was merely an acknowledgment of this fact. Even so, Agency's claim was that Employee committed certain specific acts that amounted to discourteous treatment and insubordination. The Administrative Judge found that based on the evidence, Agency did not prove those charges.

Lastly, we believe there is substantial evidence in the record to support the Administrative Judge's finding that Agency failed to prove that Employee was insubordinate. Substantial evidence is "relevant evidence such as a reasonable mind might accept as adequate to support a conclusion." *Mills v. District of Columbia Dep't of Employment Servs.*, 838 A.2d 325, 328 (D.C. 2003) (quoting *Black v. District of Columbia Dep't of Employment Servs.*, 801 A.2d 983 (D.C. 2002)). As long as there is substantial evidence in the record to support the decision, the decision must be affirmed "notwithstanding that there may be contrary evidence in the record (as there usually is)." *Ferreira v. District of Columbia Dep't of Employment Servs.*, 667 A.2d 310, 312 (D.C. 1995).

No where in the record does it state that Agency *ordered* Employee to do something and Employee failed to follow that order. In fact Agency's notice of proposed removal states that the supervisor *asked* Employee to go back upstairs to discuss the situation. Moreover, the supervisor who was summoned to the lobby during the incident testified that she *asked* Employee to go back upstairs. Clearly these were requests and not orders. Thus we believe the Administrative Judge was correct in finding that Agency

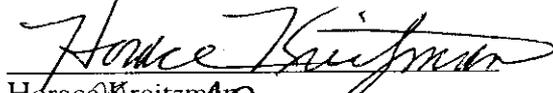
failed to prove this charge. For the foregoing reasons, we deny Agency's Petition for Review and uphold the Initial Decision.

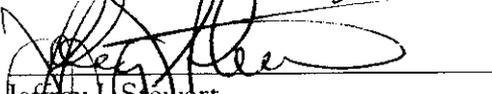
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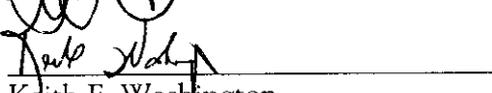
Accordingly, it is hereby **ORDERED** Agency's Petition for Review is **DENIED**.

FOR THE BOARD:

  
\_\_\_\_\_  
Brian Lederer, Chair

  
\_\_\_\_\_  
Horace Kreitzman

  
\_\_\_\_\_  
Jeffrey J. Stewart

  
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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 date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.