THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
TANYA ANTHONY Employee	
v.	OEA Matter No.: 1601-0179-97
DEPARTMENT OF PUBLIC WORKS Agency	Date of Issuance: June 14, 2006

OPINION AND ORDER
ON
PETITION FOR REVIEW

The Department of Public Works ("Agency") suspended Tanya Anthony ("Employee") for 30 days from her position as an Administrative Assistant. Agency had charged Employee with inexcusable neglect of duty, discourteous treatment of the public, insubordination, and inexcusable absence without leave. The charges stemmed from several work-related incidents in which Employee refused to complete assigned tasks, failed to follow the office's procedures for answering the telephone and forwarding messages, and failed to report to work on time and return from lunch at the appointed

time. On October 16, 1996 Agency issued a proposed notice of its intention to suspend Employee and thereafter issued its final notice on January 6, 1997. The suspension commenced on Monday, January 13, 1997 and ended on Tuesday, February 11, 1997.

On January 13, 1997 Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). The Administrative Judge conducted a two-day evidentiary hearing and at the end of the first day, Agency rested its case.[1] On the second day of the hearing, Employee failed to appear and thus did not testify nor have anyone present to testify on her behalf. Employee's attorney, unable to account for her absence, rested his case.

On October 17, 2000 the Administrative Judge issued an Initial Decision in which she upheld Agency's action. Based on the testimony presented at the hearing, the Administrative Judge held that in view of the "totality of the circumstances, and in the absence of any contrary evidence, I find the testimony of Agency's witnesses reliable. I, therefore, conclude that it is more probable than not that Employee committed the offenses for which she was charged."[2]

Employee then filed a Petition for Review. Employee argued in that filing that Agency did not prove, by a preponderance of the evidence, the charges brought against Employee. Specifically Employee claimed that because Agency did not call to testify those employees who had witnessed, and reported, Employee's misconduct, Agency did not carry its burden of proof. Agency had called to testify on its behalf Employee's immediate supervisor and an acting administrator.

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[1] Agency did not call Employee to testify on the first day of the hearing.
[2] *Initial Decision* at 7.

In an Opinion and Order on Petition for Review issued September 28, 2001, we upheld Agency's action. We reviewed the entire record including the transcript produced from the evidentiary hearing and found that Employee had not effectively challenged or disputed the evidence which Agency produced at the hearing. Therefore, we held that there was substantial evidence in the record to uphold the Initial Decision.[3]

Employee then filed an appeal in the Superior Court of the District of Columbia. Employee argued that our September 28, 2001 decision should be reversed and the appeal remanded because "her due process rights were denied when the Agency failed to serve the *Notice of Proposed Adverse Action* on her" and because the Administrative Judge had failed to "make the requisite findings of fact with respect to each of the specific violations of misconduct. . . ."[4] After reviewing the administrative record, the court concluded that there were "no findings of fact that demonstrate that the Administrative Judge or the [Board] weighed the evidence against all six specific violations of misconduct."[5] Therefore, the court remanded the appeal to the Administrative Judge with instructions to make findings of fact with respect to each violation of misconduct and to determine whether Employee was served with the notice of proposed adverse action.

On August 22, 2003 the Administrative Judge issued an Initial Decision on Remand. In adherence to the instructions of the court, the Administrative Judge made findings of fact for each specification related to the inexcusable neglect of duty, discourteous treatment, insubordination, and inexcusable absence without leave charges.

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[3] One Board Member dissented from the majority opinion. He believed that the Administrative Judge had failed to make factual findings with respect to each of the charges brought against Employee and thought that the appeal should have been remanded for that reason.

[4] *Order*, Civil Action No. 01MPA0017, November 20, 2002.

[5] *Id.* at page 2.

She found that there was substantial evidence to support the inexcusable neglect of duty, insubordination, and inexcusable absence without leave charges. However, with respect to the discourteous treatment charge, she found that there was substantial evidence to support only two of the three specifications listed for this charge.

Regarding the issue of whether Employee was served with the notice of proposed adverse action, the Administrative Judge noted the fact that the proposed notice itself contained a notation which reflected that "Employee refused to accept or 'sign for [the] notice when presented to her on 10/16/96. She left [the] office.'"[6] The Administrative Judge found that there was no evidence in the record to dispute this fact. As a result, the Administrative Judge concluded that Agency had not committed harmful procedural error. Thus the Administrative Judge once again upheld the 30-day suspension.

On September 16, 2003 Employee again filed a Petition for Review. Employee's first argument is that Agency did not prove by a preponderance of the evidence that it served her with the proposed notice of adverse action. She believes that this continues to be a disputed issue of material fact. We disagree.

The record clearly shows that on October 16, 1996 Agency issued its proposed notice of adverse action. The notice states that Agency proposed to suspend Employee for 30 days without pay and it details very specifically the reasons for the proposed action. The last page of the notice contains a blank space for Employee's signature to acknowledge her receipt of the notice. Additionally, it contains a blank space for the signature of the person who would witness Employee's receipt. This witness line contains

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[6] *Initial Decision on Remand*, page 9.

the signature of John E. Eaton, Jr., and it is dated October 16, 1996. Below Mr. Eaton's signature is the following language:

> Employee, Ms. Anthony, refused to accept letter twice when presented to her on 10/16/96. She left office. A copy of letter will be kept to present to her again and the original will be mailed to her home address via registered mail. Mr. Eaton witnessed both refusals.

The relevant portion of the District Personnel Manual that was in effect at the time of this action is found in chapter 16, part II, subpart 1, § 1.6, Delivery of Notice. Section A is applicable in this instance and it provides the following:

> If the employee is in a duty status . . . any notice required to be given under this chapter (i.e., advance written notice of proposed corrective or adverse action . . .) is to be delivered to the employee. The employee is required to sign a copy of the notice, acknowledging receipt or, *if the employee refuses to sign, the copy of the notice must be signed by a witness indicating that the employee refused to sign.* (Italics supplied).

It is clear that Agency complied with this regulation. As a result, we find that Agency did indeed serve Employee with the proposed notice of adverse action.

Notwithstanding this finding, on the first day of the evidentiary hearing—March 29, 2000—the proposed notice was admitted into evidence without objection. During the hearing the proposing official, whose signature appears on the next to the last page, identified the document and briefly testified as to its contents. Admittedly, no specific testimony regarding the notation on the last page was elicited. However, when this document, including the last page containing that critical notation, was admitted into evidence, we believe a presumption that Agency served the proposed notice on Employee was created. It then became incumbent upon Employee, who was being represented by

an experienced attorney, to rebut this presumption. Employee did not then, and has not now, effectively challenged this presumption.

Employee's second argument in her Petition for Review is that the Administrative Judge once again failed to "make adequate factual findings with respect to each of the charges, because the charges and specifications are not supported by substantial evidence in the record."[7] Again, we disagree. On remand the Administrative Judge looked at each incident of misconduct listed under the four separate causes and cited to the specific testimony and evidence that Agency put forth to prove each incident. The Administrative Judge found that Employee had failed to present any evidence to the contrary even though a second day of hearing was convened for that very purpose. As noted earlier, Employee inexplicably failed to appear for the second day of hearing and her attorney rested his case without putting forth any evidence on her behalf. As a result, the only evidence that the Administrative Judge had before her was that of Agency. Accordingly, she held that each cause was supported by substantial evidence.[8] Just because Employee disagrees with the outcome of her appeal does not negate the fact that there is substantial evidence in the record to uphold the ruling. Because there is substantial evidence in the record to uphold the Initial Decision on Remand, we deny Employee's Petition for Review.

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[7] *Petition for Review*, page 9.

[8] Substantial evidence is defined as any "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) (Internal citations omitted). 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).

ORDER

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

FOR THE BOARD:

Brian Lederer, Chair

Horace Kreitzman

Keith E. Washington

Jeffrey J. Stewart

Barbara D. Morgan

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.