**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| DENISE E. CANNON | ) | |
| Employee | ) | |
| | ) | OEA Matter No. 1601-0075-95 |
| | ) | |
| v. | ) | Date of Issuance: July 11, 2003 |
| | ) | |
| D.C. BOARD OF PAROLE | ) | |
| Agency | ) | |
| | ) | |

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

Agency removed Employee from her position as a Parole Officer based on the following charge:

> Misuse of official position or unlawful coercion of an employee for personal gain or benefit;

> To wit: Soliciting or accepting a loan, service, or other item of more than nominal value from a subordinate, or from a person or organization who has a personal or pecuniary interest in the manner in which the soliciting or accepting employee administers official regulations or performs his or her official duties;
>
> Acceptance of loans, endorsement or guarantees of loans, gratuities, favors, and the like, from persons, firms or corporations with whom the employee has official relations.

The charges stem from Employee's dealings with one of her parolees known throughout the proceedings as "L.M." Employee began supervising L.M.'s parole on March 9, 1994. For several months thereafter, until the end of July 1994, L.M. either visited or contacted Employee at least twice each month. During this same period of supervision L.M. gave urine samples which tested negative. Beginning in August 1994, Employee reduced the frequency of L.M.'s visits. From that time through October 1994, L.M. reported to Employee once per month. Also beginning in August, L.M. no longer gave urine samples. L.M. did not report to Employee during the month of November and on December 2, 1994 Employee learned that L.M. had been killed on November 23, 1994. Employee did not receive the authorization that was required for a parole officer to lessen the frequency of a parolee's visits.

When Employee began supervising L.M.'s parole, L.M. informed Employee that he was to receive $30,000 as a settlement for an injury he had sustained while at Lorton. He told Employee that once he received the money, he was going to use it to take a trip to the Bahamas with his family and that he was going to finance a trip to the Bahamas for Employee

and her mother. Employee did not make any entries in her log book regarding L.M.'s plans nor regarding L.M.'s offer to finance a trip for Employee. During L.M.'s visit with Employee on July 20, 1994, he informed her that he had in fact received the settlement. Employee told L.M. to ask the travel agent to call her to discuss L.M.'s plans. Thereafter, in September and again in October Employee received a call from the Somerset Travel agency. Employee spoke with the travel agent and they discussed the itinerary for the trip. The travel agent spoke with Employee for the last time on January 9, 1995. It was during this conversation that the travel agent told Employee about the tickets that L.M. had bought for Employee to go to the Bahamas. Employee told the travel agent that she would pick up the tickets on January 11, 1995.

Agency became aware of what transpired between Employee and L.M. through a report prepared by the Federal Bureau of Investigation ("FBI"). The FBI had begun investigating Employee's actions after it had received a videotape recording prepared by a local news reporter. The videotape contained conversations between Employee and L.M. and conversations between Employee and the news reporter who was posing as a travel agent. The conversations revolved around the trip L.M. was offering to Employee and the arrangements that the travel agent was supposedly making in that regard. According to the FBI report L.M. had informed a local news reporter that Employee had asked him to pay for two round trip tickets to the Bahamas. In return, she was to provide him with clean urine samples when he took his monthly drug tests. Based on this report and the contents of the videotape Agency conducted an investigation that culminated with the removal of Employee.

The Administrative Judge held in the Initial Decision that Agency had proven by a preponderance of the evidence that Employee had committed the acts with which she was charged.[1] Thus, Agency's action of removing Employee was upheld. Employee has filed a timely Petition for Review. In her Petition for Review Employee claims that the Administrative Judge based the decision on an erroneous interpretation of statute, regulation and policy and that the findings contained within the decision are not based on substantial evidence. [2]

With respect to the first claim of error, Employee argues that she was entitled to have a hearing before a Disinterested Designee prior to Agency removing her. She contends that because she never admitted to accepting the two travel tickets, there was a material issue in dispute that should have been put to a Disinterested Designee. The Administrative Judge addressed this issue and concluded that Agency had acted properly when it denied Employee a hearing. DPM § 1613.4 provides:

> Except under the conditions [regarding the emergency adverse action procedure], a hearing shall be conducted by the disinterested designee when all of the following criteria are met:

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[1] The Administrative Judge found that there was no evidence that Employee had solicited a trip from L.M. Therefore, the Administrative Judge held that Agency had not proven that portion of the charges.

[2] Employee also makes reference to the District of Columbia Administrative Procedures Act in her Petition for Review and cites two cases that also make reference to the act. That portion of the act which Employee relies upon refers to the procedures to be followed in a "contested case." Pursuant to D.C. Code § 2-502(8) this appeal is not a "contested case" because this appeal involves the "tenure of an . . . employee of the District[.]" Therefore, Employee's argument in this regard is without merit.

(a) The proposed penalty is removal;
(b) There is a dispute of material fact; and
(c) The Employee requests a hearing.

The Administrative Judge found that, based on this provision, all three criteria must be met before an agency is required to conduct a hearing. Thus, the Administrative Judge stated the following:

> Here, Employee made an admission at the inception of the investigation before the Board of Parole that she had accepted two (2) travel tickets which she believed were purchased by a parolee . . . . After Employee's admission, any testimony by Employee before a [Disinterested Designee] served as arguments or explanations for her actions. Thus, there were no material facts in dispute. Under [subsection (b)], the [Disinterested Designee] is not required to hold a hearing when there are no material facts in dispute. Thus, Employee was not wrongfully deprived of a hearing . . . .

Contrary to what Employee claims, the Administrative Judge found that "Employee's statement that she agreed to pick up two tickets from Somerset Travel in January 1995, is an admission that she indeed accepted two (2) travel tickets knowing they were from L.M." *Initial Decision* at 15. Employee made this admission to Agency during its investigation of this matter. Further, according to the Administrative Judge, Employee did not deny her admission but instead tried to advance several defenses as explanations. We, too, believe this is an admission that Employee accepted the two travel tickets. As such we agree with the Administrative Judge's finding that there was no material issue in dispute and therefore, no right to a hearing before a Disinterested Designee.

Employee's second claim of error is that absent the admission of the videotape, "there exists **no** evidence in the record that disputes the Employee's testimony in this proceeding." (emphasis in original).[3] Although Employee does not specify which testimony she is referring to, we believe, based on the Initial Decision, that Employee's testimony can be grouped into four categories. The first category is Employee's testimony regarding her failure to document the conversations she had pertaining to the trip. Employee testified that she merely exercised poor judgement when she failed to document any trip-related conversations she had with L.M. The second category is Employee's testimony regarding why she reduced the frequency of L.M.'s visits. Employee testified that the reason she cut back, beginning in August, on the number of times L.M. had to report to her, was because she had a caseload of more than 150 parolees and because L.M. had complied with all of her requests and not gotten into any trouble. Moreover she testified that she had not gotten permission to decrease the contacts because her supervisor was on an extended absence. The third category is Employee's testimony as to why she discontinued administering drug tests to L.M. after the July visit. Employee testified that the reason she stopped testing L.M. was because Agency did not have the chemical needed for drug testing. Agency did not challenge any of Employee's testimony on these issues. Therefore, none of Employee's testimony on these issues is in dispute.

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[3] Because the videotape could not be properly authenticated, the Administrative Judge did not rely upon it to establish any facts portrayed therein. Instead, she relied only on Employee's statements made to Agency during its investigation and on Employee's own testimony.

The last issue on which Employee testified was regarding her reason for why she spoke with the travel agents arranging the Bahamas trip and why she went along with the conversations. Employee testified that her reason for doing this was so that she could obtain information regarding L.M.'s travel plans. Essentially Employee argued that she was working undercover "to learn whether L.M. was leaving the country, and when and where he was going." *Initial Decision* at 9. Employee testified that while working in her undercover role "she instructed L.M. to have the travel agency call her about the trip because it was her duty to report the whereabouts of the parolees. . ." and that she accepted calls from the travel agencies concerning the trip "because she. . .[had to] see what date L.M. intended to leave the country and where he was actually going." *Id.* at 13. Further, Employee testified that the reason she told one particular travel agent "that she could go on the trip only if L.M. paid for it. . ." was so that she would not incur any expenses while working undercover. *Id.* at 13-14.

The Administrative Judge did not find this portion of Employee's testimony to be credible. In fact, the Administrative Judge found that Employee's reason for saying that she could go on the trip only if L.M. paid for it was not believable. According to the Administrative Judge "there [was] no reasonable explanation for this comment . . . [because] [t]he travel agency could not force [Employee] to pay for tickets unless she willingly presented cash, a check or a credit card." *Id.* at 14. Moreover the Administrative Judge stated that L.M. had voluntarily informed Employee of his travel plans and had arranged for two travel agencies to contact her regarding the trip. Therefore, the Administrative Judge found that Employee's "explanation for working undercover lack[ed] substance[,]" and "appear[ed] to be a fabricated

afterthought and . . . not believable." *Id.* Additionally Employee gave various explanations as to why she had told the travel agent that she would pick up the tickets. The Administrative Judge found, however, that "these shifting explanations [gave] rise to suspicion and further weakened [Employee's] credibility." *Id.* Also, according to the Administrative Judge, Employee's alleged undercover defense was further undermined when, during the January 9, 1995 conversation with the supposed travel agent, Employee agreed to pick up the tickets knowing that L.M. was already dead. "There was no longer a reason to continue her alleged undercover work." *Id.* at 15. Thus the Administrative Judge held that "Employee accepted two (2) tickets to the Bahamas, which she knew were financed by L.M. and [which] . . . were worth more than a mere nominal value[,]" and "that by virtue of their Parole Officer/Parolee relationship, L.M. had a personal interest in the way in which Employee performed her duties." *Id.* at 15.

We have consistently held that in reviewing an Initial Decision we will look to see whether it is supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Hutchinson v. D.C. Office of Employee Appeals*, No. 96-CV-87 (D.C. Apr. 30, 1998) (quoting *Ferreira v. D.C. Dep't of Employment Servs.,* 667 A.2d 310 (D.C. 1995)). On questions of witness credibility we must rely heavily upon the Administrative Judge's assessment. In fact we defer to the credibility assessment of the Administrative Judge because it is the Administrative Judge who is present to hear the testimony and observe the demeanor of the witnesses. *See Hinton v. Dep't of Corrections*, OEA Matter No. 1601-0136-92, *Opinion and Order on Petition for Review*

(July 10, 1995); *Galloway v. Dep't of Corrections*, OEA Matter No. 1601-0025-95P96, *Opinion and Order on Petition for Review* (July 27, 1999) 47 D.C. Reg. 1769. For the reasons just mentioned, the Administrative Judge did not find Employee to be credible. There is substantial evidence in the record to support this conclusion. Therefore, we uphold the Initial Decision and deny Employee's Petition for Review.

## ORDER

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

FOR THE BOARD:

RECUSED
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.