THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
THOMAS J. GARDNER, Ph.D	)	
Employee	)	
	)	
	)	OEA Matter No. J-0119-99P02
	)	
v.	)	
	)	Date of Issuance: January 28, 2005
	)	
D.C. PUBLIC SCHOOLS	)	
Agency	)	
	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee was a Social Worker with Agency until he was removed for insubordination on March 15, 1996. Prior to being removed, Employee had been suspended three days for insubordination, effective November 6, 1995; five days for insubordination, effective December 4, 1995; and 10 days for insubordination, effective

January 22, 1996. On May 14, 1999, Employee appealed all four of these disciplinary actions to the Office of Employee Appeals (Office).

It became apparent during the early stages of the proceedings that the Washington Teachers Union, the union to which Employee belonged, and Agency had entered into a collective bargaining agreement on January 27, 1993. Both parties agreed that the terms of the collective bargaining agreement provided for an exclusive appeal process that did not permit its union members to appeal adverse actions to this Office. Therefore, the question arose as to whether the 1993 agreement was in effect at the time that Employee was disciplined. If it was in effect, this Office would not have jurisdiction over Employee's appeal since Employee would be precluded from appealing the suspensions and removal to this Office.

In an Initial Decision issued January 11, 2002, the Administrative Judge found that the 1993 agreement was in effect at the time that Agency brought the four disciplinary actions against Employee. Even though the contract was set to expire September 30, 1993, the Duration of Agreement clause prevented this from occurring. That clause contained the following language:

> [This Agreement] shall be automatically renewed from year to year . . . unless either party shall notify the other in writing one hundred eighty (180) days prior to the anniversary date that it desires to modify or terminate this Agreement. In the event that such notice is given, this Agreement shall remain in full force and effect during the period of any negotiations.

Relying on this provision, the evidence presented at the hearing, and the fact that Employee, who bore the burden of establishing this Office's jurisdiction, failed to present

any evidence to the contrary, the Administrative Judge dismissed Employee's appeal for lack of jurisdiction.

Thereafter, on February 19, 2002, Employee filed a Petition for Review. Employee puts forth two reasons as to why he thinks the Initial Decision should be reversed, or alternatively, why a new hearing should be ordered: 1) Agency failed to produce the 1993 agreement but rather had two witnesses testify as to its effectiveness; and 2) Agency failed to call as witnesses the union officials who could have corroborated the testimony of the agency witnesses who did testify.

It is unclear as to why Employee thinks that the 1993 agreement was not made a part of the evidentiary record compiled in this appeal. During the discovery phase of this appeal, the Administrative Judge issued, on Employee's behalf, several subpoenas duces tecum to union officials and Agency officials. The subpoenas required those persons to produce, *inter alia,* all documents relating to the 1993 agreement. In fact a copy of the entire 1993 agreement is in the record.

Moreover, as part of this argument, Employee makes mention of the parol evidence rule and the best evidence rule. The parol evidence rule is a rule of contract law. It precludes the admission of certain evidence in those cases where the contract that is in dispute has been deemed fully integrated and complete on its face. Because the issue in this appeal is the jurisdiction of this Office and not the contents or terms of the 1993 agreement, the parol evidence rule is not relevant. The best evidence rule is an evidentiary rule that requires the production of a written document when the terms of that document are in dispute. It is believed that the written document itself is the best evidence of its contents and terms. We believe, however, that this rule is not relevant to

this appeal for the same reasons that the parol evidence rule is not relevant. Thus we find that Employee's argument on this point is without merit.

Regarding Employee's second argument, the following exchange took place between the Administrative Judge and Employee's attorney at the end of the evidentiary hearing:

> Judge Hollis: I have to ask this very specific question, now. As both of you know, Ms. Bullock was supposed to appear here today in her role as president of the Union. I also know that she could not be here due to a family emergency and that's fine. Do either of you feel the need to question her on [this jurisdictional issue]? Because I'll tell you right not, if either of you feel that way we can continue this hearing to get her in here but it's your call.
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> . . .
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> Mr. Burgan (Employee's attorney): Yes, Your Honor, I think we need to.
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> . . .
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> Judge Hollis: I think that in the context of the hearing right now concerning jurisdiction, that either one of you certainly has the right to ask Ms. Bullock because she was certainly supposed to be here.
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> Obviously at this point in time we don't know when she is going to be available.
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> . . .
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> Obviously, Ms. Segar (Agency's attorney), you were going to call her originally. . . . Mr. Burgan because you're calling her now—and that's fine I don't have a problem with that.
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> . . .
>
> Mr. Burgan: Your Honor, my understanding is that she was subpoenaed by the Agency and for whatever reason she did not show up. I would like to have her as someone that I can cross-examine versus my own witness where I will be limited from leading her.

. . .

Judge Hollis: Let me just point this out. You know as well as I do that parties list witnesses and they list any number of witnesses. That doesn't necessarily mean that they are going to call that witness. That may have been a strategic error on your part not to call Ms. Bullock is you wanted her as a witness. There is nothing that I can do at this point because my understanding now is that [Agency] is not going to call her now. That is certainly [Agency's] right.

. . .

I certainly cannot require [Agency] to call Ms. Bullock as [its] witness so that you can cross-examine her. [Agency] has decided [that it] is not going to call her. You have the right, or at least I'm giving it to you, to call [Ms.] Bullock on your own. . . .

. . .

Let me ask the question again, Mr. Burgan. Do you want to call Ms. Bullock as your own witness pursuant to [this issue]?

Mr. Burgan: Yes, Your Honor, at this point we would like to. If for whatever reason in the future we decide strategically not to do that, I will inform the Court.

Judge Hollis: That's fine.

Thus at the end of the hearing it appears that Employee intended to call at least one particular union official to testify during a second day of hearing. For whatever reason, however, Employee later decided not to call any union officials to testify in this matter. In an order issued October 17, 2001, the Administrative Judge wrote that Employee's attorney had informed him that Employee would not be calling the union official as he had originally planned. Accordingly, the Administrative Judge ordered that the final briefs would be due on November 16, 2001 and also that the record would be closed on that date.

Clearly Employee was given the opportunity to call as his own witness the union official that he believes Agency should have called. We agree with the Administrative Judge that Agency can not be compelled to call a particular witness just so that Employee can have the benefit of cross-examining that witness. The Administrative Judge found credible, without any further corroboration, the witnesses that Agency did produce and the testimony elicited from those witnesses. We believe there is substantial evidence in the record to support this finding and uphold the Initial Decision. Therefore, we deny Employee's Petition for Review.

ORDER

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

FOR THE BOARD:

Erias A. Hyman, Chair

Horace Kreitzman

Brian Lederer

Jeffrey J. Stewart

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.