THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
THERESA Y. JENKINS	)	
Employee	)	
	)	
	)	OEA Matter Nos. 1601-0121-98
	)	1602-0136-96
v.	)	
	)	Date of Issuance: October 22, 2004
	)	
D.C. FIRE & EMS DEPARTMENT	)	
Agency	)	
	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked for Agency as its Judicial Affairs Officer. Her direct supervisor was Agency's Fire Chief. As part of her duties, Employee was to attend the staff meetings which the Chief conducted every Monday morning for his senior level employees. During these meetings, Employee was to report to the Chief on any legal issues that had an impact on the agency, advise the Chief as to the proper course of action, and keep the

Chief apprised of any matters that were controversial or confidential in nature. Thus, as a senior staff member, the Chief deemed it vital to the overall operation of the agency that Employee attend these meetings.

When it became apparent to the Chief in October, 1995 that Employee was not attending the senior staff meetings and that she had not attended a meeting since April, 1995, the Chief talked to Employee about her lack of attendance and told her that it was imperative that she resume attending those meetings. On January 30, 1996, the Chief issued a memo to all of his senior staff, including Employee, in which he reiterated the importance of everyone's attendance at the senior staff meetings. The Chief went on to state that if a staff member needed to be absent from a meeting, he or she was to obtain prior approval from him or in case of an emergency, the staff member was to immediately notify the Chief's office of such emergency.

On February 6, 1996, the Chief wrote a memo to Employee. In this memo he noted the fact that Employee had failed to attend the senior staff meeting on the day before and that she had not followed the instructions for requesting leave as those instructions were outlined in the January 30, 1996 memo. The Chief went on to state that Employee had until February 7, 1996, to explain her absence and that if she had not done so by then, further disciplinary action would ensue. Employee made a timely response to this directive, and on February 8, 1996, she submitted a request to be placed on sick leave for all future senior staff meetings that were scheduled for the month of February. On February 13, 1996, the Chief wrote another memo to Employee. In this memo the Chief told Employee that it was mandatory that all senior staff

attend the staff meetings. Nonetheless, Employee continued to be absent from the staff meetings during the month of March, 1996.

On April 8, 1996, the Chief held the regularly scheduled senior staff meeting. Employee, however, did not attend that meeting. The next day, April 9, 1996, the Chief met with Employee in his office to ascertain why she had neither attended the meeting even though she had reported to work on that day, nor sought his permission in advance to be excused from the meeting. As the Chief spoke with Employee, she raised her voice and acted in a manner, according to Agency, that was discourteous and disrespectful. Also on that date Employee submitted a notice to the Chief advising him that she would be on sick leave for the next three Monday mornings of April. Thereafter, on April 11, 1996, the Chief wrote a letter to Employee in which he placed Employee on restricted leave and told Employee that any absence due to illness must be supported by medical documentation.

Based upon Employee's refusal to attend the senior staff meetings, including the April 8, 1996 meeting, and to follow the proper procedures for requesting sick leave and further based upon Employee's conduct during the April 9, 1996 meeting with the Chief, Agency proposed Employee's removal on April 23, 1996. In the notice of proposed removal, Agency stated that Employee was being removed for the causes of insubordination and discourteous treatment. Employee was removed from her position effective May 31, 1996.

Employee appealed Agency's action to the Office of Employee Appeals (Office). The Administrative Judge conducted a hearing and in an Initial Decision issued March 14, 2002, held that Agency had proven by a preponderance of the evidence both of the

charges brought against Employee. With respect to the charge of insubordination, the Administrative Judge determined that Employee knew she was to attend the April 8, 1996 staff meeting; however, Employee did not attend the meeting. Further, the Administrative Judge found that Employee "had no medical excuse to back up her sick leave claim . . ." for that day. *Initial Decision* at 6. As for the charge of discourteous treatment, the Administrative Judge determined that the Chief and another Agency witness had presented credible testimony to substantiate Agency's claim that during the April 9, 1996 meeting Employee yelled at the Chief and walked out on him. Therefore, the Administrative Judge found that Employee was discourteous to her supervisor on April 9, 1996. Accordingly, the Administrative Judge upheld Agency's action.

Employee has timely filed a Petition for Review and Agency has filed a response in opposition to the petition. In her Petition for Review, Employee essentially makes three arguments: (1) the Administrative Judge erred by not conducting a three-day hearing thereby precluding Employee from presenting crucial evidence; (2) the Administrative Judge erred by finding that Agency had proven the charges brought against Employee; and (3) the Administrative Judge erred by not considering any mitigating factors when assessing the penalty.

The record indicates that on June 12, 2001, the Administrative Judge issued an Order Convening Hearing. In that order he stated that the hearing would be held on September 10, 2001 and he listed the witnesses that he had approved for each party. In addition to testifying on her own behalf, Employee had been approved to have her social worker/therapist and one of her medical doctors testify on her behalf. It is not clear from the record why these two individuals did not testify. Nevertheless, Employee was

permitted during the hearing to enter into the record documentary evidence from these persons. Because Employee had the opportunity to have these witnesses testify, we believe Employee was not precluded from presenting what she deems would have been "crucial medical testimony" irrespective of the fact that the hearing lasted only one day. Furthermore, according to this Office's rules, it is within the administrative judge's discretion to determine whether a hearing will be held in the first instance and how long the hearing will last. Therefore, we find that the Administrative Judge did not commit reversible error in this regard.

With respect to Employee's second claim of error, we agree with Agency's position that Employee is merely in disagreement with the Administrative Judge's assessment of the evidence. Being the one to observe the demeanor of each witness during the hearing, the Administrative Judge concluded that Agency's witnesses presented more credible than Employee. Moreover, based upon our review of the entire record, including the transcript of the hearing, we believe Employee failed to sufficiently rebut Agency's evidence. Therefore, we find that the Administrative Judge did not commit reversible error in this regard.

Lastly, Employee claims that the Administrative Judge erred by not considering any mitigating factors when he considered the appropriateness of the penalty. There is nothing in the record to even suggest that Employee raised the issue of mitigating factors during the trial of this appeal. If Employee had at her disposal evidence that she believes would have been favorable to her, it was incumbent upon her to present such evidence to the Administrative Judge. Employee did not do this. As such, we will not consider at this stage of Employee's appeal any evidence that could have been, and was required to be,

presented during the trial phase of this appeal. Because there is substantial evidence in the record to uphold the Initial Decision, we will deny Employee's Petition for Review.

ORDER

Accordingly, it is hereby **ORDERED** 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.