

Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA  
BEFORE  
THE OFFICE OF EMPLOYEE APPEALS

_____	)	
In the Matter of:	)	
	)	
KATHY L. JOHNSON	)	
Employee	)	
	)	
	)	OEA Matter No. 1601-0006-04
v.	)	
	)	Date of Issuance: January 17, 2006
	)	
DEPARTMENT OF CORRECTIONS	)	
Agency	)	
	)	
_____	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Kathy L. Johnson (“Employee”) worked with the Department of Corrections (“Agency”) as an Office Automation Assistant. On October 10, 2003 Agency terminated Employee based on the charge of malfeasance. Malfeasance is defined as any on duty or employment-related act or omission that interferes with the efficiency or integrity of government operations.

The charge stemmed from a series of incidents that occurred over a two-day period. Agency claims that on February 25, 2003, James Murphy, an agency administrator, asked Employee to provide him with certain information that he needed to complete an assignment. As part of Employee's duties, she was responsible for maintaining that information. According to Mr. Murphy, Employee became upset and agitated at his request and stated that she did not have the information he needed. Mr. Murphy then asked Employee whether she had asked Irma Brady for the information.<sup>1</sup> At this point, according to Mr. Murphy, Employee began speaking to him in a loud, disrespectful and hostile tone of voice.

The next day, February 26, 2003, Mr. Murphy, in the presence of Ms. Brady, asked Employee to report to his office so that he could meet with Employee and Ms. Brady. According to Mr. Murphy, Employee's first response was to ask why and then to say that she was not coming to his office. Mr. Murphy then directed Employee to report to his office at 1:30 p.m. When Employee failed to report to his office at the set time, Mr. Murphy, again in the presence of Ms. Brady, went to Employee's office and told Employee that it was time for their meeting. Employee, according to Mr. Murphy, responded by stating that she was not going to meet with him. Once again Employee became loud and disrespectful. Further, according to Mr. Murphy, Employee began circling him and taunting him. As a result of these events, Agency terminated Employee.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("Office"). The Administrative Judge scheduled an evidentiary hearing for March 22,

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<sup>1</sup> Ms. Brady was Agency's Correctional Program Officer. Supposedly she knew how to retrieve the information that Mr. Murphy needed.

2005. Prior to the hearing Agency requested, and the Administrative Judge issued, subpoenas to secure the attendance of Mr. Murphy and Ms. Brady.<sup>2</sup> On the date of the hearing, however, Ms. Brady was the only witness who appeared to testify on behalf of Agency. Finding that Ms. Brady's testimony did not support Agency's malfeasance charge, the Administrative Judge held that Agency had not proven its case. Thus in an Initial Decision issued July 8, 2005, the Administrative Judge reversed Agency's action and ordered it to reinstate Employee.

Subsequently, Agency filed a Petition for Review in which it argues that the appeal should be remanded to the Administrative Judge for further consideration. Agency bases this claim on the contention that new and material evidence is now available that despite due diligence, was not available when the Administrative Judge closed the record in this appeal. According to Agency, Mr. Murphy's "testimony formed the factual predicate upon which the matter [was] based, [and because] his testimony was so material, [ ] without it, Agency was unable to prove its case."<sup>3</sup> Agency states that at some point after the hearing, Mr. Murphy informed agency's counsel that he did not attend the hearing because he was out of town.

Prior to the actual start of the March 22, 2005 evidentiary hearing, the Administrative Judge and the agency's attorney had the following exchange:

Judge: Let me tell you, Ms. Johnson, there are important people, witnesses to the agency's case. And if they're not here to testify, that may have some effect on the agency's case.

...

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<sup>2</sup> Agency also secured a subpoena for another witness.

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

Attorney: Mr. Murphy obviously is a relevant witness because it is his complaint in his report of an incident which gave rise to the charges that bring us here today. While Mr. Murphy is the initiator of it, the department is of the position that it will be able to make its burden, will be able to support these actions by a preponderance of the evidence through the testimony of Ms. Brady, who was an eyewitness.

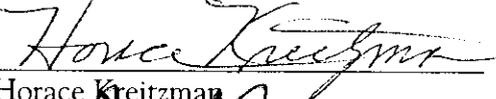
*Transcript* at 10-12. Based on this conversation, Agency seemed confident that it could prove, by a preponderance of the evidence, the charges it had brought against Employee in spite of Mr. Murphy's absence. We do not believe that Agency should now be given a second chance to make its case. Presumably Agency knew the import of this witness's testimony. Further, Agency must have, or at least should have, known what Ms. Brady would testify to. Unfortunately for Agency this strategy failed them. We will not allow Agency to benefit from this strategic miscalculation. Therefore, we deny Agency's Petition for Review and uphold the Initial Decision.

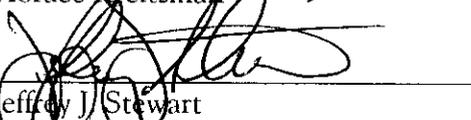
ORDER

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

FOR THE BOARD:

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

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

  
\_\_\_\_\_  
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.