

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ROBERT JOHNSON)	
Employee)	
)	OEA Matter No.: 1601-0016-06
v.)	
)	Date of Issuance: May 6, 2009
D.C. FIRE AND EMERGENCY MEDICAL)	
SERVICES DEPARTMENT)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Robert Johnson (“Employee”) was an Emergency Medical Technician/Paramedic with the D.C. Fire and Emergency Medical Services Department (“Agency”). On May 28, 2005, Employee’s supervisor, Lt. Baker, issued a written notice to Employee wherein he ordered Employee to prepare a special report. The report was for the purpose of having Employee answer specific questions regarding the drop-off of a patient to the emergency room at George Washington University Hospital. The notice stated that Employee was to submit the report to Lt. Baker by May 31, 2005.

Employee failed to submit the report by the due date. Later in the day on May 31, 2005, Lt. Baker confronted Employee and asked him why he had not submitted the

report. Employee explained to Lt. Baker that he was still trying to secure union representation to help him prepare the report. Either during that conversation or some time thereafter, Employee asked for, and was granted, additional time to prepare and submit the report.

Employee submitted the report on June 8, 2005. Agency, however, deemed the report untimely and considered Employee's untimely submission as a failure to follow orders. As a result, on August 24, 2005 Agency issued to Employee an advance notice of adverse action. Agency proposed to suspend Employee for 20 days for the cause of failure to follow orders. The suspension took effect on November 3, 2006.

Employee timely appealed Agency's action to the Office of Employee Appeals ("OEA"). The Administrative Judge held an evidentiary hearing. During the hearing, Lt. Baker testified on behalf of Agency. According to Lt. Baker, he gave Employee until June 4, 2005 to submit the special report. Furthermore, according to Lt. Baker, when he went to pick up the report on June 4, 2005, it was not ready. Lt. Baker testified that he did not receive the report from Employee until June 12, 2005.

Employee testified on his own behalf. According to Employee, Lt. Baker gave him until June 8, 2005 to submit the report. Employee testified that as he was preparing the report on that date, the computer malfunctioned and erased a portion of his report. Nevertheless, according to Employee, ultimately he was able to prepare the report, print it out, and submit it to Lt. Baker on June 8, 2005.

Employee's union representative also testified. He stated that he asked Lt. Baker for an extension of time and thought that Lt. Baker had granted Employee until June 8, 2005 to submit the report. Two of employee's co-workers testified as well. They stated

that as Employee was preparing his report on June 8, 2005, the computer did in fact malfunction. They went on to state that Employee was, however, able to complete the report and submit it on that date.

In an Initial Decision issued February 12, 2007, the Administrative Judge held that Agency had not proven its case. The Administrative Judge stated that the cause of failure to obey an order came “within the ambit of ‘insubordination’”¹ and that insubordination required there to be a willful or intentional disregard of an order. Therefore, according to the Administrative Judge, the issue to be decided was “whether by failing to submit the report by 500 hours on May 31, 2005, Employee acted in willful or intentional disregard of Lt. Baker’s instructions.”²

The Administrative Judge recognized that the report was originally due on May 31, 2005. However, she found that based on the testimony, an extension had in fact been granted. Even though there was a dispute as to what the extension date was, the Administrative Judge concluded that “Agency [had] not present[ed] evidence to establish that in failing to submit the report on either [May 31, 2005 or June 4, 2005], Employee [had] engaged in conduct that was in deliberate or intentional disregard of Lt. Baker’s instructions. . . Employee’s delay in submitting the report, if indeed there was a delay, was due to miscommunication and not to insubordination.”³ The Administrative Judge went on to state that “[i]f there was a delay in submitting the report, [it was] a *de minimis* violation.”⁴ For these reasons, the Administrative Judge reversed Agency’s action.

¹ *Initial Decision* at 5.

² *Id.*

³ *Id.* at 6.

⁴ *Id.*

Thereafter, Agency filed a Petition for Review. In its Petition, Agency claims that the Administrative Judge erred when she held that the cause of failure to obey an order required Agency to prove that Employee's conduct was willful or intentional. Secondly, Agency claims that the Administrative Judge erred in her assessment of the witnesses' credibility. Lastly, Agency claims that the Administrative Judge should have left the penalty undisturbed.

Agency relies on a decision issued by the U.S. Merit Systems Protection Board to support its claim that failure to follow an order is not equivalent to insubordination and therefore does not require proving that an employee willfully or intentionally disregarded the order. Even though the U.S. Merit Systems Protection Board is our federal counterpart, there is no law, rule, or regulation which mandates that we adhere to any decision issued by that agency. While we may look to those decisions for guidance, we are not bound to follow them. Instead, we believe the Administrative Judge was correct when she determined that the specific cause of failure to follow an order came within the general category of insubordination. Moreover, this Office has consistently held that in the absence of a statutory definition, the common meaning of a term controls. *See Polite v. D.C. Dep't of Transportation*, OEA Matter No. 1601-0011-05 (February 11, 2009). As the Administrative Judge found, the law does not define the term insubordination. However, Black's Law Dictionary does define insubordination and states that the "[t]erm imports a *willful or intentional disregard* of the lawful and reasonable instructions of the employer."⁵

Agency's next argument is that the Administrative Judge erred in her credibility assessment of the witnesses. During evidentiary hearings, the Administrative Judge acts

⁵ *Id.* at 5.

as the fact-finder. Because the Administrative Judge has the opportunity to observe the demeanor and conduct of the witnesses as they testify, the Administrative Judge is the one who is in the best position to assess credibility. Moreover, as the fact-finder, the Administrative Judge “need not give any reason at all for his or her credibility determinations.” *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 232 (D.C. 1998). As a result, we must depend heavily upon the Administrative Judge’s assessment of a witnesses’ credibility and give due deference to that assessment. *Hinton v. Dep’t of Corrections*, OEA Matter No. 1601-0136-92, *Opinion and Order on Petition for Review* (July 10, 1995) ___D.C. Reg.___. Applying this standard to the present case, we find that Agency’s claims are nothing more than a disagreement with the Administrative Judge’s fact-finding and are not grounds for granting the petition.

With respect to Agency’s final argument, the charge brought against Employee was not upheld. The Administrative Judge held that Agency had failed to prove its case. As such, the Administrative Judge had no choice but to overturn Agency’s penalty as well. For these reasons, we must uphold the Initial Decision and deny Agency’s Petition for Review.

ORDER

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

FOR THE BOARD:

Sherri Beatty-Arthur, Chair

Barbara D. Morgan

Richard F. Johns

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.