THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MORRIS BEY	)	
Employee	)	
	)	OEA Matter No.: 1601-0118-02
v.	)	
	)	Date of Issuance: July 31, 2007
DEPARTMENT OF PARKS AND RECREATION	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Morris Bey ("Employee") was a Carpenter with the Department of Parks and Recreation ("Agency"). On March 11, 2002, Agency issued to Employee a proposed notice of removal and stated therein that on February 13, 2002 Employee approached Ms. Bobbi Moss, a co-worker, asking whether she, her daughters, or another female could sexually gratify his virgin son. According to the notice, Employee asked Ms. Moss this same question again on February 16, 2002. Agency further alleged in the notice that on February 19, 2002 Employee verbally attacked Ms. Moss by cursing at her for smoking a cigarette and threatening that her job security was dependent upon the performance of

sexual favors. As a result of these allegations, Agency charged Employee with committing employment-related acts that interfered with the efficiency or integrity of government operations. The removal took effect September 18, 2002.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on September 19, 2002. The Administrative Judge conducted an evidentiary hearing on August 31, 2004. Based on the evidence presented at the hearing and the record as a whole, the Administrative Judge found that Agency had not met "its burden of establishing cause for taking the adverse action" against Employee.[1] Thus in an Initial Decision issued March 14, 2005, the Administrative Judge reversed Agency's removal action.

On April 18, 2005 Agency filed a Petition for Review. Agency claims that the Initial Decision is based on an erroneous interpretation of statute, regulation or policy and that it is not based on substantial evidence. Specifically Agency believes that the Administrative Judge failed to adequately assess the credibility of witnesses and failed to recognize that Agency had presented substantial evidence to sustain the charge brought against Employee.

Agency uses the case of *Hillen v. Dep't of Army*, 35 M.S.P.B. 453 (1987) to support its claim that the Administrative Judge did not properly assess the credibility of the witnesses. Agency states that the Initial Decision "does not comply with the required analysis set forth in *Hillen*."[2] Even though we recognize that the Merit Systems Protection Board ("MSPB") is our federal counterpart, we have not, however, adopted

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[1] *Initial Decision* at 10.
[2] *Petition for Review* at 5.

every practice of the MSPB. Moreover, there is no law, rule, or regulation that requires us to do so.

Because the Administrative Judge was present to hear the testimony and to observe the demeanor of the witnesses, we give deference to her assessment. *See 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.___ ( )(the Board must depend heavily upon the Administrative Judge's assessment of the witnesses' credibility). In the Initial Decision the Administrative Judge fully and adequately explained why she discredited the testimony of Agency's witnesses. Although Agency disagrees with these assessments, there is substantial evidence in the record to support the Administrative Judge's findings. In view of the deference we accord the Administrative Judge on issues of credibility, we find no reason to reverse the Initial Decision on this basis.

Agency's next claim is that because it introduced into evidence a memo which stated that Ms. Moss would be assigned to a different unit, there was then substantial evidence in the record to uphold the charge brought against Employee. We disagree. Substantial evidence is "'relevant evidence such as a reasonable mind might accept as adequate to support a conclusion'." *Millis v. District of Columbia Dep't of Employment Servs.,* 838 A.2d 325, 328 (D.C. 2003) (quoting *Black v. District of Columbia Dep't of Employment Servs.,* 801 A.2d 983 (D.C. 2002)). As long as there is substantial evidence in the record to support the decision, the decision must be affirmed "notwithstanding that there may be contrary evidence in the record (as there usually is)." *Ferreira v. District of Columbia Dep't of Employment Servs.,* 667 A.2d 310, 312 (D.C. 1995).

None of Agency's witnesses specifically testified that Ms. Moss was in fact assigned to a different unit as a direct result of the alleged incidents. We believe that if Agency had intended to rely upon a transfer of Ms. Moss to support the charge brought against Employee, it should have elicited direct testimony on this point either from Ms. Moss or from the agency employee who authored the aforementioned memo. Agency failed to do this. Based on the record as a whole, we believe the Administrative Judge was correct in finding that Agency failed to prove its case. For the foregoing reasons, 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:

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Brian Lederer, Chair

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Horace Kreitzman

_____
Keith E. Washington

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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.