THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
DWAYNE COVINGTON Employee	OEA Matter No. 1601-0029-16
v.	Date of Issuance: February 28, 2018
DISTRICT OF COLUMBIA DEPARTMENT OF MOTOR VEHICLES Agency	Lois Hochhauser, Esq. Administrative Judge

Gina Walton, Employee Representative
Nada Paisant, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Dwayne Covington, Employee, filed a petition with the Office of Employee Appeals (OEA) on March 3, 2016, appealing the final decision of the District of Columbia Department of Motor Vehicles, to suspend him for ten days without pay, effective February 3, 2016.

The matter was assigned to this Administrative Judge (AJ) on May 4, 2016. The prehearing conference (PHC), initially scheduled for July 20, 2016, was continued until August 25, 2016, at Employee's unopposed request. At the PHC, Employee adamantly denied engaging in the charged misconduct. Nada Paisant, Agency counsel, stated that she had not yet interviewed individuals identified in the charges. The AJ directed that she do so prior to scheduling an evidentiary hearing in order to ascertain if Agency could meet its burden of proof. In the *Order* issued on August 26, 2016, Agency counsel was given time to interview these individuals, and directed to file a status report.

In its first status report, filed on September 26, 2016, Agency requested additional time to both investigate and resolve the matter, stating that settlement was possible. The AJ granted the request, and directed that another status report be filed by November 17, 2016. In its second status report, Agency stated it was rescinding one of the two charges, reducing the suspension

from ten or two days, and paying Employee for the eight days of the unpaid suspension. Agency advised the AJ that since Employee was now subject to only a two day suspension, it intended to file a motion to dismiss based on lack of jurisdiction. By Order dated November 28, 2016, the AJ directed that the seek dismissal if the matter was settled, or if it was not settled, that Agency file a motion to dismiss. The AJ referenced several judicial and administrative decisions which held that jurisdiction, once established, is not lost even if the remaining penalty is below the jurisdictional threshold.[1]

Agency filed its motion to dismiss the appeal for lack of jurisdiction on November 29, 2016. It attached a copy of the Amended Final Decision dated November 15, 2016, in which Agency eliminated one of the two charges and reduced the suspension from ten days to two days.[2] Agency confirmed that Employee would be paid for the eight days of unpaid suspension. By *Order* dated December 27, 2016, Employee was directed to notify the AJ if he still wanted to pursue his appeal. Employee responded in the affirmative. The AJ thereafter issued an *Order*, denying Agency's motion to dismiss,[3] and scheduling the evidentiary hearing.

The evidentiary hearing took place on October 18, 2017. At the proceeding, the parties were given full opportunity to, and did in fact, present testimonial and documentary evidence.[4] The deadline for submission of closing briefs was extended, at the parties' request, from December 20, 2017, to January 11, 2018. Briefs were timely filed, and the record closed on January 11, 2018.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUES

Did Agency meet its burden of proof in this matter? Is so, is there any basis for disturbing the penalty imposed by Agency?

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[1] *See, e.g., Craig Royal v. District of Columbia Metropolitan Police Department,* OEA Matter No. 1601-0003-10 (March 28, 2013); *Edwards v U.S. Postal Service*, 112 M.S.P.R. 196 (MPSB, August 28, 2009); and *Gulf Refining Company v Price*, 232 F.2d 24 (5th Cir 1956).

[2] Agency, noting that it had not received the November 28 *Order* until December 13, 2016, filed a third status report, essentially repeating the arguments contained in its motion to dismiss.

[3] The rationale and precedent relied on by the AJ for her ruling is contained in the *Order* issued on July 5, 2017, and is not repeated in this *Initial Decision*.

[4] Witnesses testified under oath. The proceeding was transcribed, and the transcript is cited as "Tr" followed by the page number. Exhibits are identified as "A" (Agency) or "E" (Employee) followed by the exhibit number.

FINDINGS OF UNDISPUTED FACTS, POSITIONS OF THE PARTIES, AND SUMMARY OF THE EVIDENCE

Findings of Undisputed Facts (UF)

1. Employee was in career status and held a permanent appointment as a Legal Instrument Examiner when he was suspended. At that time, he had held this position for about ten years, and had worked for the District of Columbia Government for 30 years.

2. During the relevant time period, Agency and the American Federation of Government Employees, Local 1975. Union, were parties to a collective bargaining agreement (CBA). (Ex A-10).

3. Employee was assigned to the Georgetown Service Center (GSC). From 2014 through late 2016, Adrian Polite was Service Center Manager (SCM), and Employee's supervisor was Shirley Shepard. The GSC served customers between 8:15 a.m. and 4:00 p.m., but any customer arriving before 4:00 p.m. would be seen by a Legal Instrument Examiner.

4. On December 9, 2015, Agency issued its Advance Written Notice of Proposed Suspension of 10 Workdays, notifying Employee of its decision to suspend him for ten days without pay. (Ex A-1). In the Notice, Mr. Polite, the proposing official, stated that the action was taken based, in pertinent part:

> Causes: Any on-duty employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically: any other on-duty or employment related reason for corrective adverse action that is not arbitrary or capricious, specifically: Creating A Hostile Working Environment, Neglect of Duty and Insubordination: [See section 1603.3(f) (3) (4) and (g) of Chapter 16 of the regulations].
>
> Specification(s):
> On November 5, 2015, you slapped the back of a female co-worker's leg while within the Service Center and made the comment, "Oh girl those boots." The physical contact was such that it could be heard by me, Adrian Polite – Service Center Manager, who was within 2 feet of when the incident occurred. Please see the attached statement from the employee about the incident (Enclosure 1).
>
> In accordance with the D.C. Department Handbook:
>
> > The DMV is committed to providing a safe and secure working environment for all employees/contractors. In keeping with this

> commitment, all employees/contractors are expected to assist in maintaining an environment that is free of harassment, violence and threats of violence…
>
> DMV will not tolerate…
>
> * Engaging in dangerous, threatening, or unwanted horseplay
> * Striking, punching, slapping, pushing, or assault another person

It is the expectation that you do not make any physical contact with any persons while on duty. Your actions were inappropriate and constitute section 1603.3(g) of Chapter 16 of the regulations.

Further, on November 25, 2015 at 4:10 pm, Georgetown Service Center Supervisor Shirley Shepard requested that you join her in the Georgetown Service Center Manager's office after you finished [with] your current customer. You refused. Ms. Shephard then gave you a directive to comply with her previous request and informed you that the meeting was not an investigation. At that time you stated the following: "I don't care. I'm not going in there." You did all of this in the presence of customers.

After this, at 4:31 pm, you entered the manager's office yelling, interrupting a meeting that was already going on. You were informed that you would have to wait until the current meeting was finished if you wished to have a meeting. After this, you began screaming "It's ridiculous" at a loud level within the service center.

It is the expectation that you comply with directives given by members of the management team regardless of any assumptions that you may have. Further, it is the expectations that you conduct yourself in a professional manner at all times while at work.

Below is an excerpt from an email that Chief Shop Steward Gina Walton reported that she sent out to all staff members at the Georgetown Service Center (Enclosures 4 & 5).

> *"Additionally, orally refusing to do a work assignment, even if you subsequently do that work or follow the instruction/procedure can be considered insubordination. Lastly insubordination can also be defined as flagrant, open or hostile disrespect."*

Your deliberate refusal to comply with proper supervisory instructions and open and hostile disrespect is cause for disciplinary action in accordance with section 1602.2(f)(3)(4) of Chapter 16 of the regulations.

5. On February 2, 2016, Agency issued its Final Decision on Proposed Suspension of 10 Work Days, in which Joan Saleh, Deciding Official, found "that the causes for the proposed suspension" were supported by the evidence and sustained the ten day suspension. (Ex A-4).

6. Employee served the suspension between February 3, 2016 and February 27, 2016. (Ex A-9).

7. Employee filed his petition for appeal with this Office on March 3, 2016. At the August 25, 2016 PHC, Employee denied engaging in the charged misconduct. With regard to the November 5 incident, he maintained that he had not created a hostile work environment, noting that the named co-worker was a good friend and was not offended by his comment or conduct. As noted above, Ms. Paisant had not yet interviewed this co-worker, and was given time to do so. (*Infra*, 1-2).

8. On November 15, 2016, Agency issued its Amended Final Decision on Proposed Suspension for 10 Work Days, which eliminated the November 5 incident as a basis for the adverse action. (Ex A-9). Ms. Saleh, Deciding Official, stated in part:

> After careful review of the advance written notice, and due consideration of your response, as well as the activities which took place before OEA, I find that the cause of Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, specifically: any other on-duty or employment related reason for corrective or adverse action that is not arbitrary or capricious, specifically: Creating A Hostile Work Environment in violation of section 1603.3(g) of Chapter 16 of the regulations is not fully supported by the evidence, and it is my decision to dismiss this cause with prejudice. Please be advised that a dismissal "with prejudice" prevents the alleged charge or charges against you from being re-filed.
>
> I am sustaining the remaining causes for the reasons set forth in the final notice dated February 2, 2016 and reducing the suspension to two (2) days, which have already been served. The Agency will take appropriate administrative action to credit your payroll records for the remaining eight (8) days you served of your suspension.

Positions of the Parties and Summary of Evidence:

Agency's position is that Employee's loud and disrespectful conduct at work on November 25, 2015 constituted insubordination. It maintained that his loud and disrespectful comments were made in the presence of customers, and that he refused to meet with Mr. Polite despite being directed to do so and being told that the meeting was not investigatory. It concluded that Employee's "deliberate refusal to comply with proper supervisory instructions and open and hostile disrespect is cause for disciplinary action in accordance with section 1602.2(f)(3)(4) of Chapter 16 of the regulations."

Adrian Polite, Agency witness, began his employment with Agency in 2014 as a SCM. He said that as SCM, he is responsible for "all operations" at the service center, managing about 22 employees, including a supervisor and a lead position. (Tr, 19). He testified that on November 25, 2015, he was directed to deploy[5] a GSC employee to the Brentwood site. He selected Employee, and at about 4:15 p.m., having drafting the email notification to Employee about the deployment, he asked Ms. Shephard to tell Employee that he needed to meet with them. (Tr, 46). He said that in addition to notifying the employee being deployed by email, he also meets with the employee as a matter of courtesy. (Tr, 24-25, 29). He said that since the meeting is informational, and not investigatory or related to an adverse action, the CBA does not give the employee the right to union representation at the meeting. (Tr, 31).

Mr. Polite stated that he saw Ms. Shephard tap Employee on the shoulder and heard her tell him that he needed to meet with them after he finished with his customer. He stated that Employee "turned and kind of brushed it off." He said that Ms. Shepard then told him that Employee did not agree to the meeting, so he instructed her to assure Employee that the meeting was "not an investigation, and that [Employee] needs to comply." (Tr, 25-26). Mr. Polite said that after Employee's customer left, Employee became "very, very loud," saying that he would not meet without Union representation. (Tr, 26-27).

The witness stated that he had discussed the problem of employees not wanting to meet with management for any reason without Union representation, with Ms. Walton, Union representative, and as a result, she sent the following email to all employees at the Service Center on June 10, 2014, about actions which constituted insubordination. (Tr, 33-34; Ex A-6):

> Simply defined, Insubordination is the act of willfully disobeying an authority figure. The typical way an employee gets into trouble for insubordination is by refusing to perform an action that their supervisor, or other authority figure requests …Additionally, orally refusing to do a work assignment, even if you subsequently do that work or follow the instruction/procedure can be considered insubordination. Lastly insubordination can also be defined as flagrant, open or hostile disrespect.

Mr. Polite testified that the Advance Notice accurately reflected the conduct that resulted in charging Employee with insubordination. (UF 4; Ex A-1; Tr, 39). He stated that he proposed disciplinary action because Employee's conduct was "open and hostile disrespect," that Employee was yelling loudly in front of coworkers, security guards and remaining customers. (Tr, 40). He said that he was not certain if there were any customers at the time, but knew that Employee's customer had left. (Tr, 47). He did not recall if he had deployed Employee before. He said that he did not meet with Employee about this deployment because Employee refused to meet with him. (Tr, 39, 49).

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[5] The parties and witnesses used the words "deploy" or "deployment" to describe a short-term temporary reassignment of an employee to another Service Center because it is short-staffed. However, they agree "deploy" is not used in the CBA. According to Ms. Walton, "deployment" is a word used by Agency, and is not the same as a "reassignment, transfer or detail." (Tr, 135). The AJ notes that Article 17 of the CBA refers to a reassignment due to a shortage or emergency, which appears consistent with how deployment was described by witnesses at the hearing. (Tr, 136; Ex A-10).

Joan Saleh, Agency witness, has held the position of Driver Services Administrator for about 15 years. She is responsible for the daily operations of all Service Centers, and all Service Center managers, including Mr. Polite, report directly to her. She stated that before an adverse action is proposed, the SCM must obtain her approval, and before the notice is issued, a management team reviews the notice, the supporting documents. and the *Douglas*[6] factors. She said employees may respond to the proposed notice, as Employee did in this matter. (Tr, 93, 110; Ex A-2).

Ms. Saleh stated that she knew Employee, having worked with him for about as long as she has been with Agency. With regard to the November 25 incident, she stated that she asked Mr. Polite to assign an employee to Brentwood, and he had selected Employee. She stated that when an employee is going to be temporarily assigned to another Service Center, it is common practice and "proper" for the manager to both notify the employee by email and in person. (Tr, 109). She said that it was her understanding that Mr. Polite told Ms. Shepard to ask Employee to meet with him to tell him of the deployment; but Employee would not meet without a Union representative, even after Ms. Shepard assured him that the meeting was not investigatory. She stated that it was only at the end of the day, when he had Union representation, that Employee went to speak with Mr. Polite. (Tr, 92). The witness testified that she issued the February 2, 2016, Final Decision, after reviewing all the documentation, including Employee's responses. With regard to the November 25 incident, she explained that the CBA does not entitle employees to Union representation unless "the conversation [with managers or supervisors] may lead to an investigation or possibly disciplinary action." She said that otherwise, management has the right, pursuant to Article 4 of the CBA to meet with employees without Union presence. (Tr, 105-107; Ex A-10). The witness stated that employees are not entitled to ask the subject of the meeting, and that in this instance communication was more limited because Employee was with a customer." (Tr, 114). Ms. Saleh testified that she was not aware that Employee was "loud and/or yelling during this time, during this interaction," and so it did not factor into her decision. (Tr, 100). She testified that Employee should have met with Mr. Polite and Ms. Shepard, and if he then had reason to believe the matter could lead to disciplinary action, he could then ask for Union representation. (Tr, 97-98).

Ms. Saleh testified that she sustained the neglect of duty and insubordination charges, describing them as "kind of parallel" since "both are related to not following manager's direction or refusing to follow an…order," coming from the same event. (Tr, 99; 117; Ex A-3). She testified that she issued the November 15, 2016 Amended Final Decision, sustaining only the charges of insubordination and neglect of duty and imposing a two day suspension. (Tr, 104; Ex A-9).

Tychia Magruder, Employee witness, has been a Legal Instrument Examiner for about 15 years, and during the relevant time period worked with Employee at the GSC. She stated that on November 25, 2015, Employee approached the area where she was sitting and told her that he had wanted to speak with his Union representative about something "going on between him and Mr. Polite," but that once he got his Union representative on the telephone, Mr. Polite told him that he was meeting with someone else and could not meet with him. (Tr, 124-125). She

[6] *See, Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).

said that she did not hear Employee yell or become loud. She stated that she did not see or hear the interaction between Employee and Ms. Shepard. (Tr, 127; Ex A-1)[7].

Ms. Magruder testified that she was deployed by Mr. Polite several times, and was never asked to meet with Mr. Polite alone or with Ms. Shepard regarding the deployment. She said she was always notified by email, and that Mr. Polite would stop her and advise her to check her emails because he had sent her something. (Tr, 126, 129-130).

Tina Davis, Employee witness, testified that she knows Employee, having been trained by him when she began working as a Legal Instrument Examiner with Agency about 11 years ago, and then working with him. During the relevant time period, she was assigned to the GSC. Ms. Davis testified that on November 25, 2015, she was seated two stations from Employee, and that at the time of the incident, she could see and hear what took place where Employee was stationed because the employees assigned to those stations had left for the day, so the stations were empty. (Tr, 151-153; Ex E-2). The witness testified that she saw Ms. Shepard approach Employee, and that although she did not hear "exactly" what was said, because Employee had customers in front of him so Ms. Shepherd spoke "towards [Employee's ear]" but that she did hear Ms. Shepard tell Employee to go to Mr. Polite's office, and heard Employee respond by asking if they both wanted to see him. (Tr, 143-144). She said that Employee was not loud but was "speaking in his normal voice." (Tr, 144).

The witness said that "in the past [she has] been in that situation of being called into a meeting, and it "normally [meant] that you're going to get written up." (Tr, 139). She said that she heard Employee, who was with a customer, tell Ms. Shepard that he needed his Union representative. (Tr, 140; Ex E-2). She stated that she then turned away and prepared to leave, explaining that she did not want to get involved since she believed that she was being "targeted" by Mr. Polite and was "scared for [her] job." (Tr, 146, 149-150). Ms. Davis testified that she has been deployed a number of times, and was notified only by email each time. She said she never asked to meet about the deployment. (Tr, 141).

Employee testified that he was not insubordinate or neglectful of his duties on November 25, 2015. He stated that he never refused to meet with Mr. Polite or Ms. Shephard, but explained that he wanted to reach his Union representative. He stated that at about 4:15 p.m., he was serving a customer when Ms. Shepard told him, without giving him a reason, that he needed to go to Mr. Polite's office. (Tr, 167). He said that he asked if she was going to be present, and she responded in the affirmative. (Tr, 154). Employee explained that he asked that question because in his experience, when an employee is called into the office at that time of day, "it's for some type of adverse or disciplinary action," so he therefore thought that he was entitled to Union representation. (Tr, 169; Ex A-2). He said that Mr. Polite then came out of his office and said, while Employee was still with a customer, that he needed to meet with Employee. He testified that as soon as he finished with his customer, he contacted his Union representative and went to Mr. Polite's office. He said that he asked Mr. Polite if they were going to meet, and that Mr. Polite responded that he was busy meeting with another employee.

[7] The exhibit is an undated statement written by Ms. Magruder about the incident. Although there was no objection to the admission of the exhibit into evidence; the AJ noted that where it conflicted with the witness's testimony, which it did in part, her sworn testimony would be credited. (Tr, 133-134).

Employee testified that he did not raise his voice, but that he was upset because he had been asked to meet but then told by Mr. Polite that he was too busy to meet. (Tr, 160-161).

Employee stated that Mr. Polite had deployed him about three times in the past, and never met with him about it. (Tr, 162, 166). He testified that he and Mr. Polite had "a history of issues," explaining that his problems with Mr. Polite began after he made complaints about Mr. Polite to Ms. Saleh. (Tr, 178).

On cross-examination, Employee agreed that he had not testified on direct that Mr. Polite had threatened to charge him with insubordination if he did not come to the meeting, although he made the allegation in his December 14, 2015 written statement to Ms. Saleh. He explained that the written statement was completed closer to the time of the incident and was probably more accurate. (Tr, 171-173; Ex A-2). He maintained that he had a right to Union representation pursuant to the terms of the CBA, because he believed that the meeting involved disciplinary action. (Tr, 176).

Analysis, Findings and Conclusions

This Office's jurisdiction is conferred upon it by law. It was initially established by the District of Columbia Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Official Code §1-601-01, *et seq*. (2001); and amended by the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124. Both the CMPA and OPRAA confer jurisdiction on this Office to hear appeals, with some exceptions not relevant here, of permanent employees in the Career or Education Service. Pursuant to D.C. Official Code § 1-616.51 (2001), disciplinary actions may only be taken for "cause." The District Personnel Manual (DPM) § 1603.3 includes any "on duty or employment related act or omission that interferes with the efficiency and integrity of government operations" as cause for discipline.

The District of Columbia's personnel regulations provide that an employee can be charged with "neglect of duty" when the employee: fails to follow instructions or observe safety precautions, fails to carry out assigned tasks, or has careless or negligent work habits. *See* D.C. Mun. Regs. Title 16, §1619.1(6)(c). The personnel regulations authorize an employee to be charged with "insubordination" if the employee refuses to comply with a direct order, accept an assignment, or refuses to carry out assigned duties and responsibilities. *See* D.C. Mun. Regs. Title 16, § 1619.1(6) (d). Negligence is inaction or failure to perform an act through omission or carelessness, while insubordination is deliberate, requiring a decision. (Black's Law Dictionary, 6th ed). In this matter, there was no argument or evidence that Employee's misconduct was a result of negligence. In questioning Mr. Polite about the contents of the advance note, Agency counsel referred to the "facts and the cause for insubordination." (Tr, 39). Mr. Polite responded that he proposed the discipline based on the description and table of penalties, "open and hostile disrespect," and the yelling in front of co-workers and possibly customers. (Tr, 40). The testimony refers to deliberate conduct, related to the insubordination charge. There was no testimonial evidence regarding the charge of "neglect of duty."

In disciplinary matters, Agency carries the burden of proof. It must meet this burden by a "preponderance of the evidence," defined in OEA Rule 628.2 as "[t]hat degree of relevant

evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue."

Upon careful review of the record, and consideration of the arguments, the AJ concludes that Agency did not meet its burden of proof in this matter. As noted above, Agency has the burden of presenting enough relevant evidence to convince a reasonable person to find a contested fact "more probably true that untrue."

There were a considerable number of contested facts presented in this matter, and the AJ was required to not only weigh the evidence, but in some instances, to make credibility determinations. The District of Columbia Court of Appeals has emphasized the importance of credibility determinations by the factfinder, in this case, the Administrative Judge, who can make "first hand" observations. *Stevens Chevrolet Inc. v. Commission on Human Rights, 498 A.2d* 440 (D.C. 1985). This AJ has more than 30 years of experience as an Administrative Judge and Arbitrator in making credibility assessments. In resolving issues of credibility, the AJ assessed demeanor, the inherent probability of the witness's version, inconsistent statements made by the witness, and the witness's opportunity and capacity to observe the event or act at issue. *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987). Demeanor includes, among other factors, the witness's tone of voice, posture, eye contact, and behavior while testifying. It is imperative that these assessments be made while the witness is testifying, because these factors cannot be ascertained from a review of the transcript. *See, e.g., Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 496 (1951). Even if parts of a witness's testimony is discredited; other parts can be accepted as true. *DeSarno, et al., v. Department of Commerce*, 761 F.2d 657, 661 (Fed. Cir.1985).

The first disputed fact was whether Employee was loud, and yelling in a disrespectful manner. Mr. Polite testified that Employee was loud and yelling in front of co-workers and any remaining customers; and was loud and disrespectful to him. Employee denied these allegations, and his position was supported by both Ms. Magruder and Ms. Davis, both of whom the AJ found to be credible in their testimony. Ms. Saleh testified that she was not aware that Employee was loud or yelling, and she did not consider those allegations in reaching her decision. (Tr, 100). Since the Deciding Official was not aware of these allegations and did not consider them in reaching her decision, they are no significant. The AJ determines that Agency did not meet its burden not only on this disputed fact, or that it was considered in reaching a decision to charge Employee with insubordination. The second disputed fact is whether Employee refused to meet with Mr. Polite. Agency maintained he did. Employee denied the allegation. It is undisputed that Employee was with a customer at about 4:15 a.m., when Ms. Shepard first approached and told him to meet with Mr. Polite and her when he was finished. There was no allegation or evidence that Agency expected Employee to leave the customer for the meeting. There was no evidence presented that conflicted with Employee's testimony that he went to meet with Mr. Polite as soon as he finished his work with his customer, and that he had his Union representative on the telephone. Mr. Polite's statement that he went on to another meeting because Employee twice refused the directive to meet with him, is not supported by the facts since there was no evidence presented that contradicted Employee's testimony that he went to meet with Mr. Polite as soon as he finished with his customer.

It may be that Mr. Polite based his conclusion that Employee refused to meet with him on Employee's statements that he wanted to contact his Union representative. Agency argues that Employee was told that the meeting was not investigatory, while Employee contends no such representation was made. The only participants in those conversations were Ms. Shepard and Employee and Ms. Shepard was not offered as a witness. The AJ found Employee to be credible in his testimony. Since Employee was directed to attend the meeting twice, if he refused to attend, Agency could have a basis to charge him with insubordination. But the evidence established that, even if Employee had said something about having a Union representative, he nevertheless, went to Mr. Polite's office to meet with him as soon as he was finished with his customer. Agency did not charge Employee with misconduct for going to the meeting with his Union representative on the telephone, or failing to go to the meeting upon completing his work with the customer. Agency did not allege that Mr. Polite declined to meet with Employee because the Union representative was on telephone, or argue that Employee was ordered but refused to meet without the representative on the telephone.

The remaining disputed fact, which is of considerable significance, is whether Employee left Mr. Polite's office after being told to wait for him. In the advance notice, Mr. Polite stated that when Employee came to his office, he told Employee to wait until the other meeting was finished. Employee maintained that Mr. Polite did not direct him to wait, but just told him that he was meeting with someone else. The AJ finds that Agency did not meet its burden on this disputed fact, largely because Mr. Polite's sworn testimony was at considerable odds with the representations in the advance notice prepared by Mr. Polite. Mr. Polite testified several times that he declined to meet with Employee because Employee "didn't come" to the meeting, and that since Employee refused to meet with him, he moved on to other things. (Tr, 39, 49). Mr. Polite did not testify that he directed Employee to wait until he finished the meeting, and/or that Employee did not follow this directive. The AJ credits Mr. Polite's testimony over the unsworn allegations in the advance notice, that he declined to meet with Employee based on his belief that Employee would not meet with him without a Union representative present, that he then went on to another meeting, and that he did not tell Employee upon his arrival, to wait until he completed the meeting. The evidence established that Employee was first notified of the meeting at about 4:15 p.m., and that he appeared at Mr. Polite's office at about 4:30 p.m.. There is nothing in the record to dispute Employee's statement that he was able to contact his Union representative by telephone right away so was not delayed in getting to Mr. Polite's office once he was finished with his customer.

Agency has the primary responsibility for managing its employees. Those rights are codified by law and also contained in Article 4 of the parties' CBA (Ex A-10). Article 10, Section E requires Agency to notify an employee of his right to Union or other representation if an investigatory meeting is likely to result in disciplinary action. In reaching her decision, the AJ does not conclude that Employee had the right to refuse to attend the meeting unless he had Union representation. She does not conclude that Employee could refuse to attend the meeting based on his unilateral determination that the meeting was investigatory in nature. Rather, her decision is limited to the facts presented in this matter.

In sum, based on a careful review of the testimonial and documentary evidence and consistent with the findings and conclusions discussed herein, the Administrative Judge concludes that Agency failed to meet its burden of proof in this matter.

ORDER

It is therefore

ORDERED: Agency's decision to suspend Employee for two days without pay is reversed. Agency is directed to reimburse Employee back-pay and benefits lost as a result of the suspension. Agency shall file with this Office documentation of its compliance with this Order within 30 days from the date on which this decision becomes final.

FOR THE OFFICE:

_____
Lois Hochhauser, Esq.
Administrative Judge