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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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In the Matter of:	)	
	)	
KISHA SPENCER	)	OEA Matter No. 1601-0033-11
Employee	)	
v.	)	Date of Issuance: August 6, 2013
	)	
DISTRICT OF COLUMBIA	)	Lois Hochhauser, Esq.
TAXICAB COMMISSION	)	Administrative Judge
Agency	)	

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Margaret Radabaugh, Esq., Agency Representative  
Gina Walton, Employee Representative

**INITIAL DECISION**

INTRODUCTION AND STATEMENT OF FACTS

Kisha Spencer, Employee, filed a petition with the Office of Employee Appeals (OEA) on December 3, 2010, appealing the final decision of the District of Columbia Taxicab Commission, Agency, to suspend her for 15 days without pay from her position as Public Vehicle Enforcement Inspector, effective November 23, 2010. At the time of the adverse action, Employee was in permanent career status.

This matter was assigned to me on October 18, 2012. The prehearing conference, scheduled for November 29, 2012, was continued until December 7, 2012, at the request of Employee. At the prehearing conference, the parties agreed that the evidentiary hearing would take place on January 30, 2013. At the hearing, the parties were given full opportunity to, and did in fact, present testimonial and documentary evidence.<sup>1</sup> Employee was present at the hearing and was represented by Ms. Gina Walton. Margaret Radabaugh, Esq. represented Agency.<sup>2</sup> Closing briefs were submitted on May 7, 2013, at which time the record was closed.

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<sup>1</sup>Witnesses were sworn and the hearing was transcribed. The transcript is cited as “Tr” followed by the page number. Two joint exhibits were introduced. The first is identified as Ex J-1, followed by the Tab (T) number. Tab 9 of J-1 was substituted at the hearing with the same document on which Employee had added “some underlinings to make things more clear.” (Tr, 8). Ex J-2 are Joint Stipulations.

<sup>2</sup>In addition, Erin Johnson, Agency Assistant General Counsel; Karen Hu, and Lolita Youmans were present as observers, at the request of Agency and with the consent of Employee. (Tr, 5).

## JURISDICTION

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

## ISSUE

Did Agency meet its burden of proof in this matter?

## SUMMARY OF EVIDENCE, FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

On October 22, 2010, Agency issued a notice proposing to suspend Employee for 15 days without pay. (Ex J-1, T2). On October 28, 2010, Employee was provided with the documentation used by Agency to support its decision. Employee, through her representative, responded on November 10, 2010. (Ex J-1, T11). On November 19, 2010, Agency issued a Notice of Final Decision in which it suspended Employee for 15 days without pay from her position as Public Vehicle Enforcement Inspector (PVEI). (Ex J-1, T3). As stated in the Notice of Final Decision:

This action was based on the following cause as outlined in the District Personnel Regulations, Chapter 16, Section 1603.3: “Cause for disciplinary action for all employees covered under this chapter is defined as follows (f) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: (3) Neglect of duty; and (4) Insubordination; and (g) Any other on-duty or employment-related reason for adverse or corrective action.”

Agency contends that on October 19, 2010, Employee telephoned Shawn Laster, her supervisor, and asked to start work at 11:00 a.m. instead of 3:30 p.m., her scheduled starting time, since she had a Bureau of Traffic Adjudication (BTA) hearing at noon on that day. Ms. Laster denied the request and directed Employee to attend the scheduled hearing. Agency asserts that Employee said she would not attend the proceeding unless her request was granted. Leon Swain, Agency Chairperson, telephoned Employee and told her that she was expected to attend the BTA hearing and that failure to do so would be considered insubordination. According to Agency, Employee again stated she would not attend unless her tour-of-duty was changed. Employee did not attend the October 19 BTA hearing. She called Agency later that day stating that she was ill and would not report to work. The following day, October 20, 2010, Employee reported to work. She met with Ms. Laster and Mr. Swain who notified her that she was being placed on administrative leave with pay while Agency determined what to do in view of her actions the day before. Agency asserts that Employee objected, and engaged in “loud, argumentative, and combative behavior, and of disrupting the public area of the Agency.”

Agency contends that a major responsibility of Public Vehicle Enforcement Inspectors is to attend and provide evidence at enforcement proceedings at BTA involving the public vehicle operators and owners who the PVEI has cited for violating regulations. It asserts that Employee was notified of the hearing and was not excused from attending. It considered her failure to attend a neglect of her duty. Agency also charged Employee with insubordination in that she violated direct orders from her supervisor and the Chairperson to attend the hearing. The third charge was a

violation of 6-B DCMR Section 1603.3(g), i.e., any other on-duty or employment-related reason for corrective action, based on her conduct on October 20, 2010, which according to Agency was loud and disruptive.

In the Final Notice, Richard Matiello, the Deciding Official, discussed the arguments raised by Employee in response to the proposed notice. He concluded that all of Agency's charges should be sustained. In determining the penalty, he reviewed the factors he considered when determining the appropriateness of the penalty<sup>3</sup> and concluded that the proposed 15 day suspension without pay was appropriate. (Ex J-1, T3).

The parties entered into the following stipulations which are considered uncontested facts:

1. The Office of Employee Appeals has subject matter jurisdiction pursuant to D.C. Code Section 1-606.03.
2. Employee began her employment with Agency as a Public Vehicle Enforcement Inspector in April 2006. Employee held this position at all times relevant to this proceeding.
3. Employee was suspended without pay effective from the start of her tour of duty on November 23, 2010, through December 14, 2010 (15 work days).
4. The applicable Collective Bargaining Agreement in place at all relevant times to this proceeding was the Collective Bargaining Agreement between Agency and American Federation of Government Employees Local 1975 (AFGE).(Ex J-2).

In addition, the following facts are essentially undisputed:

5. PVEIs enforce Title 31 of the D.C. Code, ensuring that taxicabs in the District are operating safely and that the operators and owners are in compliance with regard to their licenses and insurance. (Tr, 22). PVEIs issue citations if they find violations. The person charged can pay the citation or challenge it at a hearing.

6. BTA hearings are scheduled by the Department of Motor Vehicles (DMV). Hearings usually take place between 7:30 a.m. and 3:00 p.m.. Shawn Laster, supervisor of the PVEIs, works with BTA to accommodate PVEIs' duty hours when scheduling hearings, but her requests were not always honored. (Tr, 36). PVEIs receive the schedule of proceedings between two weeks and one month in advance of the proceeding. The PVEI who issues the citation is required to attend the BTA hearing. (Tr, 23). The consequence of non-attendance at a hearing by a PVEI is that "the ticket is dismissed and the government loses revenue." (Tr, 24).

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<sup>3</sup> See, *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981) .

7. During the time relevant to this matter, PVEIs worked the following shifts: 8:15 a.m.- 4:30 p.m., 3:30 p.m.-midnight, midnight-8:30 a.m., and 11:30 p.m.-8:00 a.m.. Shifts were changed quarterly.

8. Employee worked the 11:30 p.m. – 8:00 a.m. shift during the relevant time period. She was scheduled to attend a proceeding at noon on October 19, 2010.

### Summary of Evidence

Shawn Laster has served as Administrative Officer with Agency since March 2008. At the time of the charged misconduct, she supervised staff, including Employee. She was also the individual responsible for granting permission to PVEIs to change their schedules. Ms. Laster testified that attending BTA hearings is an essential part of a PVEI's duties, and that when PVEIs are hired, they "absolutely" understand that attendance at BTA hearings are "part of their required duties. (Tr, 48). She stated that even though this requirement is not identified as a "major duty" in the PVEI position description (PD), the PD states that "the incumbent will be required to appear and/or testify at court and adjudication hearings." (Tr, 42, Ex J-1, T5).

Ms. Laster explained that the disciplinary action was not taken in this matter because Employee did not attend the hearing, noting that PVEIs have failed to attend BTA hearings without having disciplinary actions imposed based on illness or other reasons. (Tr, 45; Ex J-1, T9). She stated that Agency imposed the suspension based on Employee's "blatant refusal to attend a scheduled hearing that she originally acknowledged." (Tr, 42). She asserted that no other PVEI has ever been given a "direct order...to attend a particular hearing." (Tr, 48).

According to the witness, PVEIs are issued copies of hearing schedules and schedules are also posted in the reception area. (Tr, 25). She said that PVEIs are required to attend hearings even if they are scheduled outside of their duty hours, but that they are "compensated appropriately." (Tr, 26). On August 11, 2010, Ms. Laster sent an email to all PVEIs, reminding them of this requirement. (Ex J-1, T7). She sent another email to them on August 25, 2010, stating that she was working to adjust hearing dates to fit the PVEIs working hours, but that even if the hearing times were not changed, PVEIs were still required to attend scheduling BTA hearings. (Ex J-1, T8). She said she issued the memoranda because although there had not been any problems with PVEIs, including Employee, not attending hearings, she had heard there might be problems and so she decided to reinforce this responsibility. (Tr, 39).

The witness stated that on the morning of October 19, 2010, she was informed by Linda Roberts, Agency program specialist that Employee had telephoned and asked that her starting time be changed from 11:00 a.m. to 7:30 p.m. She stated that Employee had not requested sick leave and that if sick leave had been requested, she was required to grant it. (Tr, 50). She further stated that it was unusual for a PVEI to request a change in duty hours in order to attend a hearing on the same day as the hearing. (Tr, 50). She instructed Ms. Roberts to notify Employee that she could not change her duty hours, and that she would receive overtime pay. (Tr, 28). Ms. Laster said Employee was aware of the hearing because she telephoned that morning specifically to request a change in her duty hours so

that she could attend the BTA hearing on that day. (Tr, 49). Ms. Laster then advised Chairperson Swain of Employee's request, and they both went to the office of Dana Reed, General Counsel, where Mr. Swain telephoned Employee. Ms. Laster said the telephone was kept in speaker mode so that she could hear the conversation. She testified that Mr. Swain directed Employee to report to work and to attend the hearing, and that Employee responded that she was not going to attend unless her schedule was changed. Mr. Swain reiterated the directive, and Employee responded she had been told by the Union that she did not have to attend hearings scheduled outside of her normal duty hours and that she would not attend unless her hours were changed. The witness testified that Employee was upset and was hollering and screaming, and that she got so irate that she hung up on Mr. Swain. (Tr, 30).

Ms. Laster stated that Employee did not attend the scheduled hearing, and that the matter was dismissed by BTA. She said Employee texted her about an hour and 40 minutes after the hearing to request sick leave. (Tr, 31). She said Employee never mentioned being ill until she called in after the hearing to request sick leave. She said that if Employee had notified her that morning that she was ill, she would have been excused from the hearing. (Tr, 32). She testified that Employee never discussed any medical issues or problems with her. (Tr, 47). Ms. Laster stated that Employee was not disciplined because she failed to attend the hearing, but rather because of her "blatant refusal to attend a scheduled hearing that she originally acknowledged and her failure to attend." (Tr, 42).

Ms. Laster testified that when Employee arrived at work on October 20, she was asked to meet with her and Mr. Swain in her office. She said the purpose of the meeting was to give Employee a memorandum placing her on administrative leave while it was determined how Employee's conduct the previous day would be handled. She said that Employee was on the telephone, and told her that she was trying to reach her Union representative. Ms. Laster stated that when they attempted to present Employee with the memorandum, Employee "became very irritated, loud, upset, angry, and started to shout and scream." She said she tried unsuccessfully to calm Employee, who turned to Mr. Swain and said something like she was going to get him back "for this." (Tr, 33). She said Employee "continued hollering and screaming and ...stormed out of [the witness's] office." (Tr, 34). Ms. Laster testified that Employee then went to the common area for customers, where she continued "shouting and screaming and hollering" which caused a "total disruption" of Agency operations because employees stopped serving customers. At that point, she said, she asked Ms. Reed to assist her in trying to calm Employee. (Tr, 34).

The witness testified that PVEIs "absolutely" understand when they are hired that attendance at the BTA hearings is part of their required duties. (Tr, 48). She said that even if it was not listed as a primary duty on the position description, it is an identified duty. She said employees receive overtime if hearings take place outside their duty hours, and that overtime was available during this period of time. She described the overtime as "mandatory." (Tr, 139). Ms. Laster said employees are notified a month in advance of the hearing. (Tr, 49). Ms. Laster testified that PVEIs may request that a hearing be rescheduled, but must do so well in advance, usually at least seven days. (Tr, 136, 142). She stated that four other PVEIs missed hearing on same date, but she did not know the reasons. (Tr, 46). She said Employee did not request leave when she first called, she only asked to change her hours. She testified that if Employee had called in sick, she would have been excused. (Tr, 50). She said Employee requested leave at about 1:43 that afternoon. (Tr, 47).

Leon Swain was Chair of the D.C. Taxicab Commission during the relevant time period, and as Chair was “responsible for the overall operation” of the Commission. (Tr, 52). He testified that on the morning of October 19, Ms. Laster told him that Employee telephoned, asking to change her work hours that day, stating that she would not attend the BTA hearing unless her hours were changed; and that Ms. Laster had refused the request. He said that when he telephoned Employee, she told him that she would not attend the BTA hearing unless her hours were changed. He described her tone as “argumentative.” (Tr, 57). He said that he directed her to attend the hearing and that her failure to do so would be considered insubordination. He said that he had the authority to give her a direct order. He said that “a few more words were exchanged,” and then Employee hung up the phone. (Tr, 69). He said he then repeated his directive in a text message to her. (Tr, 54-56, Ex J-1, T5). Mr. Swain stated that PVEIs are not required to work if they are ill, but that Employee did not mention being ill. (Tr, 68).

Mr. Swain said that when he and Ms. Laster met with Employee the following day to give her the letter placing her on administrative leave, Employee “became loud.” He said she had her telephone earpiece in her ear, saying that she was on the telephone with her union representative. (Tr, 66). He said her conduct “escalated” when she went into the “common area” where citizens are assisted. (Tr, 60). Mr. Swain stated he did not dislike Employee and had no bias against her. (Tr, 66-67).

Mia Bowden, Lead Hack Inspector, stated that PVEIs are given schedules of BTA hearings several weeks in advance and can change the hearing date if they notify their supervisor at least seven days in advance (Tr, 77). She testified that if a BTA hearing is scheduled outside the PVEI’s duty hours, the PVEI receives overtime. If overtime is not available, then the PVEI and supervisor have to agree if the PVEI will receive compensatory time or change the work schedule. (Tr, 77, 82).

Ms. Bowden testified that she saw Employee leave Ms. Laster’s office and enter the reception area on October 20. She described Employee as “yelling and kind of being a bit loud and disruptive.” (Tr, 79). She said Employee was the only person yelling.

Sherry Tillman is a program analyst with Agency. She said that when Employee left Ms. Laster’s office on October 20, she was “visibly upset, disgusted, mad, angry.” (Tr, 97). She said that Employee entered the common area and was still visibly “very upset” about whatever took place in Ms. Laster’s office. (Tr, 89). The witness said that Employee was “very loud” and was saying things such as “I’m not signing this. You all are tripping.” (Tr, 90).

Employee testified that she had “really bad cramps” when she woke up at 9:30 a.m. on October 19. She thought she had a hearing that morning, and confirmed with Wanda Goodwin, a co-worker, that she had a hearing at noon. She told Ms. Goodwin that she was not feeling well and asked to speak with Ms. Laster. She said she asked Ms. Laster if she could come in and do her tour of duty beginning at about 11:00 a.m. because of the noon hearing. She said she told her that she did not want overtime or compensatory time because she was not feeling well and was going to take medication.” She explained that when she works from 3:30 p.m. until midnight, she is the only person in her vehicle and does not want to be driving if she is taking medication. (Tr, 94).

Employee stated that Ms. Laster asked her how many hearings she had, and when she did not know, Ms. Laster said she would check the schedule and call Employee. According to Employee, Ms. Laster did not telephone her back, and she said that she telephoned Ms. Laster at close to 11:00 a.m., but there was no answer. (Tr, 95). She testified she then telephoned Linda Roberts, a co-worker, who told her that Ms. Laster was meeting with Mr. Swain. Employee said she asked Ms. Roberts to ask Ms. Laster if she agreed to let Employee change her schedule and that Ms. Roberts asked her and then returned to the phone and told Employee that she was told that Employee could not change her schedule, but could receive overtime or compensatory time. Employee stated that she was “not going to be able to work 13 hours” that day and would call to request sick leave. (Tr, 96).

Employee stated that at about 11:30 a.m., Mr. Swain telephoned her on his “personal cell phone” and she explained that she had called at about 9:30 a.m. and explained to Ms. Laster that she was not feeling well and wanted to change her schedule so she could go to the hearing. She said that Mr. Swain responded by demanding that she attend the noon hearing, and that she told him that there was no way she could get to the hearing by noon, noting that she had called back at about 10:30 a.m. and that neither he nor Ms. Laster spoke with her. Employee stated that Mr. Swain responded that if she did not come in she would be charged with insubordination. (Tr, 98). She testified that she told him that he could not charge her with insubordination when she was at home and off duty. According to her testimony, she then told him:

“Technically, I just called to ask for permission, and in the past tense (sic) I have never had to ask you all for permission. I just either went to my hearing or I didn’t go to my hearing.” He says, “Well, I demand or you’re going to be charged with insubordination.

I said, “Mr. Swain, I’m not going to do it. I’m not going to sit on my personal phone and argue with you on your personal phone about what I’m doing outside of my tour of duty. (Tr, 99).

She said he repeated the demand that she report to the hearing at noon by text message from his cell phone at about 11:45 a.m.. (Tr, 99).

Employee testified that she then contacted Clifford Lowery, her Union representative, who told her that since her tour-of-duty began at 3:30 p.m., she was not required to attend the noon BTA hearing. She said he asked her if she had been offered compensatory time or overtime, and she told him she was not willing to accept either. She stated that he told her that he would contact Agency to discuss the matter, but she told him that she was not going to attend the hearing and was going to call in sick. (Tr, 100). She said she then telephoned Ms. Laster, but Ms. Laster did not answer, so she left a voicemail message that she was requesting eight hours of sick leave. Employee stated that she received a response from Ms. Laster requiring her to bring in a doctor’s note, and that she texted Ms. Laster to “take this up with [her] union rep”. (Tr, 101-102). She said she was paid for the sick leave.

Employee testified when she reported to work on October 20, Mr. Lowery contacted her and told her to call him if there was a problem. She then was asked by Ms. Laster to meet with her and Mr.

Swain. She said she had Mr. Lowery on the phone when she entered Ms. Laster's office. She testified that she was asked for her badge, keys and ID, and told she was being placed on administrative leave and that she could return to work on Friday. (Tr, 103-104). She said when she asked why this action was being taken, she was reminded of the telephone call with Mr. Swain the day before. She said that she told Ms. Laster that Mr. Swain had used his personal cell phone and called her on her personal cell phone, so to her "it wasn't business." (Tr, 105).

Employee stated she told Ms. Laster that other PVEIs call in sick or change their hours, and nothing happens to them. She said she was crying when she left the office, and was loud because she was upset. (Tr, 108). She said she told Dana Reed, a co-worker, that she gets cysts every month and that Ms. Laster was aware of this problem. She testified that she had told Ms. Laster that she was "trying to conceive and dealing with cysts," and that it was painful. She said she had previously told Ms. Laster that she was taking Motrin and Percocet, and that Ms. Laster told her that when she was having a problem to let her know if she could not report to work. (Tr, 110-111). She said she told Ms. Laster that she was not trying to avoid the hearing, but wanted to do her eight hours and go home, without compensatory time or overtime. (Tr, 108). She said that she left after Ms. Reed gave her the paperwork placing her on administrative leave. (Tr, 109).

Employee testified that she had reviewed most of her answer to the charge prepared by Mr. Lowery, which included the statement that because of Agency's "aggressive posture" towards Employee, "she was never given the opportunity to explain to the parties that she was sick." She stated that the statement was incorrect because she had explained the reason to Ms. Laster. She also testified that she was not so sick that she could not have worked eight hours, she was just too sick to work the extra hours. (Tr, 117).

Wanda Goodwin, Agency staff assistant, testified that Employee telephoned her the morning of October 19 and asked if she had a hearing. When she confirmed that Employee had a scheduled hearing, Employee asked to speak with Ms. Laster. (Tr, 121).

Carl Martin, Employee's lead PVEI, testified that he was in charge of scheduling hearings before Ms. Laster assumed that responsibility. He said when he was in charge, he would schedule hearings during an PVEI's tour-of-duty. He said when Ms. Laster assumed the duties, if a hearing was scheduled outside a PVEI's duty hours, the PVEI would come in two hours early to attend the hearing, and then would leave two hours early. (Tr, 126). He said PVEIs were not instructed to attend BTA hearings outside their duty hours and receive overtime (Tr, 129).

Timothy Evans, Lead PVEI, testified that when BTA hearings were scheduled outside his duty hours, he would either receive compensatory pay or change his hours. (Tr, 132). He said the PVEI would not ask Ms. Laster for permission to change hours, but described it "more like a notice." (Tr, 133). He said PVEIs would be given overtime, but "during the time that we had, they said there was no overtime available." (Tr, 134).



### Analysis, Findings and Conclusions

D.C. Law 12-124. D.C. Official Code § 1-616.51 (2001) (Code) authorizes the Mayor to “issue rules and regulations to establish a disciplinary system that includes...1) a provision that disciplinary actions may be taken for cause... [and]... 2) The definition of the causes for which a disciplinary action may be taken” for employees of agencies for whom the Mayor is the personnel authority. Agency is under the Mayor’s personnel authority. In this matter, the charges, as stated in the Final Notice, *supra*, are included as “causes” for which an employee can be disciplined. *See*, Section 1603.3, 46 D.C. Reg. 7096.

The charge of insubordination is based on Employee’s refusal to comply with direct orders from her supervisor and Agency Chairperson that she attend the October 19 proceeding. Employee’s position is that she was not insubordinate, but rather that she did not attend the BTA hearing because she was ill and wanted to be placed on sick leave. She also challenges the appropriateness of the directive since she was off duty and was contacted by the Chairperson on his cell phone. The neglect of duty charge is based on Employee’s failure to attend the scheduled matter which was part of her required duties. Employee maintains that she did not neglect her duty, rather she requested sick leave. The basis for the third charge is that Employee engaged in loud and disruptive conduct on October 20, 2010. Employee argues that she was understandably upset, and that there was no one from the public present.

Agency contends that if Employee had sought sick leave when she first contacted Agency, it would have granted the leave and postponed the proceeding. It argues, however, that Employee did not mention being ill until several hours after her request to change her duty hours was rejected. Employee argues that she told Ms. Laster that she was ill, and that she was willing to go to the hearing if her schedule could be changed but that she was too ill to both attend the hearing and then work her full tour-of-duty. She said she has previously advised Ms. Laster of her medical problems. Ms. Laster denied that Employee told her of any medical problems or mentioned being ill. Mr. Swain also denied that Employee mentioned being ill when she asked to change her duty hours.

Due to the conflicting testimony, credibility was thereafter at issue in this case. The District of Columbia Court of Appeals has emphasized the importance of credibility evaluations by the individual who sees the witness “first hand”. *Stevens Chevrolet Inc. v. Commission on Human Rights*, 498 A.2d at 440-450 (D.C. 1985). In making credibility determinations, the Administrative Judge considered the demeanor and character of the witness, the inherent improbability of the witness’s version and inconsistent statements of the witness. *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987). However, the Administrative Judge may find some parts of a witness’s testimony as credible even though other parts are found not to be credible. Based on these considerations, the Administrative Judge found Agency witnesses to be credible. Their testimony was consistent and presented in an objective manner. On the other hand, the Administrative Judge did not find Employee or her witnesses to be credible on all pertinent issues. Employee stressed irrelevant facts to support her case, such as the fact that the conversations on October 19 took place while she was off duty and that the telephone call from Mr. Swain was made on his personal cell phone. These factors are irrelevant and do not negate the fact that the telephone conversations with

Ms. Laster and then with Ms. Laster and Mr. Swain were a result of her request to change her duty hours. In addition, Employee's testimony was not always consistent. For example, Employee testified that she contacted Mr. Lowery after she spoke with Mr. Swain and that when Mr. Lowery told her that he would contact Agency to discuss the matter, she told him that she was not going to attend and was going to call in sick to Ms. Laster. (Tr, 100). This is at variance with Employee's testimony regarding her discussion with Agency about being ill. Although Employee stated that not all of Mr. Lowery's summary was correct, the Administrative Judge credits the representations in the summary since Mr. Lowery, as Employee's representative, would have presented her position as strongly and accurately as possible. In addition, Employee reviewed the summary and could have corrected it if an error had been made, but she did not do so. The Administrative Judge finds that this summary supports Agency's position that Employee advised Agency she was ill and called in sick only after she was told she could not change her duty hours and had to attend the BTA hearing or risk the charge of insubordination.

In addition, Employee, Mr. Martin and Mr. Evans presented inconsistent testimony on the issue of whether PVEIs could change their duty hours. Carl Martin testified that if a hearing was scheduled outside a PVEI's duty hours, the PVEI would come in two hours early to attend the hearing, and then would leave two hours early. He stated that PVEIs were not instructed to attend BTA hearings outside their duty hours and receive overtime. Timothy Evans testified that PVEIs did not need to ask Ms. Laster for permission to change their hours, but provided her with notice of the change. Employee did in fact contact Ms. Laster in order to request permission to change her duty hours on October 19. In her testimony, she stated that she had telephoned for permission to change her duty hours even though that was not required in the past. It may be that Mr. Martin and Mr. Evans were not testifying about current practices, but were comparing the practices prior to the changes initiated by Ms. Laster. The Administrative Judge recognizes that Employee and others may have had concerns about this "mandatory" overtime policy, but those objections could have been addressed through the grievance process. It would not excuse conduct that was unacceptable.

Based on the evidence presented, and on credibility assessments, the Administrative Judge finds the following facts:

- a. PVEIs was required to attend BTA hearings as part of their duties.
- b. PVEIs could request that scheduled BTA hearings be changed provided the request was made in a timely manner, generally at least a week in advance.
- c. If a BTA hearing was scheduled outside the PVEI's duty hours, the PVEI would receive overtime or compensatory time.
- d. A PVEI would be excused from a hearing if sick leave was requested in advance.
- e. Employee was aware of these requirements and procedures prior to October 19, 2010.

- f. Employee was on notice that she had a BTA hearing at noon on October 19, 2010.
- g. Employee requested permission to change her schedule on the morning on October 19 so that she would not have to attend the hearing and then work her normal duty hours from 3:30 p.m. to 11:30 p.m.
- h. Employee's request was denied by Ms. Laster and Mr. Swain.
- i. Mr. Swain notified Employee that her failure to attend the BTA hearing would constitute insubordination; and Employee again refused to attend.
- j. Following the telephone conversation between Employee, Ms. Laster and Mr. Swain; at or after noon, Employee contacted Agency and asked to be placed on sick leave.
- k. The request by Employee, stated above, was the first time that Employee made any reference to being ill.

Based on these facts the Administrative Judge concludes that it was reasonable and lawful for supervisors to direct PVEIs to attend scheduled BTA hearings.

Insubordination is included as a cause for which disciplinary action can be taken. *See*, Section 1603.3, 46 D.C. Reg. 7096. Since the D.C. Code does not provide a definition of insubordination, the common meaning of insubordination controls. *See, Davis v. District of Columbia Fire Department, MPA 94-0015* (D.C. Super. Ct. September 26, 1995). Insubordination is defined in Black's Law Dictionary (5<sup>th</sup> Ed., 1979) as the "[r]efusal to obey some order which a superior officer is entitled to give and have obeyed. The term imports a willful or intentional disregard of the lawful and reasonable instructions of the employer". Insubordination is based on a refusal of a subordinate to obey an order that a supervisor is "entitled to give and entitled to have obeyed". *Stephens v. Department of State Police, 532 P.2d 788* (Or. 1975). *See also, Mazares v. Department of Navy, 302 F.3d 1382*(CAFC 2002). Having found that Ms. Laster and Mr. Swain were entitled to order Employee to attend the BTA proceeding, that Employee did not comply with the Order; that there was no good cause for Employee's noncompliance; and that her refusal was intentional; the Administrative Judge concludes that Agency met its burden of proof on the charge of insubordination.

The neglect of duty charge is also related to Employee's failure to attend the BTA proceeding. Neglect is defined as an omission or failure to do what is required to be done. It includes an "unwillingness to perform one's duty". Black's Law Dictionary (5<sup>th</sup> Ed., 1979). In order to establish that Employee neglected her duty, Agency must establish that she had an actual duty, that she neglected the duty, and that the neglect was inexcusable. *Richardson v. Department of Corrections, OEA Matter No. 1601-0095-95* (December 11, 1995). Consistent with the analysis herein, the Administrative Judge finds that Employee had an actual duty to attend the BTA hearing, that she

neglected the duty, and that the neglect was inexcusable. When an Agency charges an employee with similar charges for the same conduct, the Administrative Judge must determine if both charges can stand. In this case, she has determined that Agency could properly charge Employee with both neglect of duty and insubordination, based largely on the specific order and warning issued by Mr. Swain. As noted above, neglect of duty can be considered benign or deliberate. It has to do with the failure to perform a required duty without good cause. Both Mr. Swain and Mr. Laster directed Employee to attend the BTA hearing. Mr. Swain cautioned her when they spoke and later by email, that her failure to attend would be considered insubordination. Employee refused these directives. Therefore, in this instance, the Administrative Judge concludes that Agency could properly charge Employee with both neglect of duty and insubordination.

The final charge relates to Employee's conduct on October 20, when Ms. Laster and Mr. Swain met with her to give her the letter placing her on administrative leave. Employee explained that she was very upset and crying because she felt the action was unjust. However, that does not excuse conduct that is disruptive and inappropriate. Agency witnesses described Employee's conduct as disruptive and loud. Employee exhibited this loud and disruptive conduct in Agency's public area where citizens are served. Employee contended that no citizens were there at the time. Ms. Laster's testimony was that Agency employees stopped serving citizens because they were focused on Employee. The conduct took place during Agency's business hours when it provides services to the public in this common area. The Administrative Judge credits Ms. Laster's testimony that service to customers was interrupted, but even if no customers were present at the time, the fact that it took place during business hours in a public area where members of the public are served would be sufficient to establish that the conduct was disruptive.

Agency has the primary responsibility for managing its employees. Part of that responsibility is determining the appropriate discipline to impose. *See, e.g., Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994). This Office will not substitute its judgment for that of an agency when determining if a penalty should be sustained. Rather this Office limits its review to determining if "managerial discretion has been legitimately invoked and properly exercised". *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). A penalty will not be disturbed if it comes "within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C.Reg. 2915 (1985). Agency established that it considered relevant factors in determining the penalty and that the penalty was within the range of appropriate penalties under the circumstances presented.

Based on a careful review of the testimonial and documentary evidence and on the findings and conclusions as discussed herein, the Administrative Judge concludes that Agency met its burden of proof in this matter and that the petition for appeal should be dismissed.

#### ORDER

It is hereby

ORDERED: This petition for appeal is DISMISSED.

FOR THE OFFICE:

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LOIS HOCHHAUSER, ESQ.  
Administrative Judge