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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0122-15
MODIBO HYLTON,)	
Employee)	
)	Date of Issuance: October 21, 2016
v.)	
)	
DISTRICT OF COLUMBIA DEPARTMENT OF)	
TRANSPORTATION,)	
Agency)	
_____)	
Gina Walton, Employee Representative)	Arien P. Cannon, Esq.
Michael O'Connell, Esq., Agency Representative)	Administrative Judge

ERRATA INITIAL DECISION¹

INTRODUCTION AND PROCEDURAL BACKGROUND

Mobido Hylton (“Employee”), filed a Petition for Appeal on August 13, 2015, with the Office of Employee Appeals (“OEA”), challenging the District of Columbia Department of Transportation’s (“Agency” or “DDOT”) adverse action of suspending him for thirty (30) days without pay from his position as an Engineering Technician. Employee’s suspension became effective August 3, 2015. Agency filed its Answer on September 11, 2015.²

I was assigned this matter on October 21, 2015. A Prehearing Conference was initially convened on January 8, 2016. After a number of continuances due to a change in Employee’s representation, this matter was ultimately scheduled for an evidentiary hearing, which was held

¹ In the original Initial Decision, issued on October 19, 2016, the Order section on page ten states, “Agency’s termination of Employee is REVERSED.” This matter was a thirty (30) day suspension, not a termination. Thus, this Errata Initial Decision correctly provides that Agency’s adverse action of suspending Employee for thirty (30) day is reversed. Other than the correction to this portion of the Order, there are no substantive changes in this Errata Decision.

² Agency also filed an Answer on September 16, 2015. It is unclear why Agency filed two separate answers; both Answers are from Agency’s Office of General Counsel.

on July 13, 2016. Both parties presented testimonial and documentary evidence at the evidentiary hearing. At the conclusion of the evidentiary hearing, the parties were afforded the opportunity to submit written closing statements. Both parties submitted their closing statements accordingly. The record is now closed.

JURISDICTION

OEA has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUE

1. Whether Agency had cause to take adverse action against Employee for “[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Malfeasance, pursuant to DPM § 1603.3(f)(7)”; and
2. If so, whether the Agency’s decision to suspend Employee for thirty (30) days without pay was the appropriate penalty under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.³ “Preponderance of the evidence” shall mean:

That 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.

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.⁴

SUMMARY OF TESTIMONY

The following represents a summary of the relevant testimony given during the Evidentiary Hearing as provided in the transcript (hereinafter denoted as “Tr.”) which was generated following the conclusion of the proceeding.

Agency’s Case-in-Chief

Michael Mills (“Mills”) Tr. 8-26

Mills is a District of Columbia resident and lives on L Street, SE, close to Agency’s main building located at 55 M Street, SE, Washington, D.C. He is a former Inspector General for the Air Force and first reported observing vehicles that were not D.C. government vehicles with

³ 59 DCR 2129 (March 16, 2012).

⁴ OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

government parking placards displayed in them in 2012. Mills testified that he did not believe that the placards should have been inside non-government vehicles. *Tr. 11-12*. In 2012, Mills took pictures of these vehicles and reported his observation to Agency's former Director Bellamy. *Tr. 17-18*. Mills also sent Twitter messages and an e-mail to Agency's Director on April 27, 2015. In the e-mail, he explained that he observed several vehicles had reflective vests over the steering wheels and displayed government placards. He noticed that Agency's placards did not correlate with the appropriate license plate numbers and knew that the placards were supposed to correspond with the correct vehicle and conveyed the discrepancy to Mr. Bellamy. *Tr. 11-13*.

Maduabuchi Udeh ("Udeh") *Tr. 27-52*

Udeh currently works for Agency in the Transportation Operation Administration ("TOA") and is Employee's supervisor. Prior to working in TOA, Udeh worked in Agency's Infrastructure Management Project Administration ("IMPA") for twenty-five years. *Tr. 28-29*.

Udeh was aware that Employee was suspended for using an official Agency parking placard to park his personal vehicle at Agency's 55 M Street location. Udeh testified that employees were unable to receive free parking at any time for their personal vehicles. He was unsure if Agency provided employees with information on how to properly use the placards. He also stated that although it was not allowed, everyone in the department, including the chief engineer, was aware that employees used their personal vehicles to go to different work sites if government vehicles were not available. Udeh admitted that a shortage of government issued vehicles, and employees driving their personal vehicles to work site locations, was an ongoing problem within Agency. *Tr. 29-36*. Udeh opined that it was reasonable for an employee to believe that they should be afforded the same privilege of using the placard for their personal vehicle for government business to avoid being ticketed. *Tr. 50-52*.

Udeh explained that the government had an issue with acquiring additional leased vehicles for employees. Thus, employees had to use their own personal vehicles due to the discontinued lease agreement. He stated that when employees used government vehicles they had a placard that corresponded with the rental vehicle's license plate number. Because of the placard, employees did not have to pay for parking. If an employee used their personal vehicle while at Agency's 55 M Street location, they were responsible for their own parking. *Tr. 49*. Udeh posited that it was the chief engineer's decision as to whether the employees were expected to pay for parking. *Tr. 42*.

Udeh stated that he was aware that numerous employees used placards and enjoyed parking privileges going to and from the 55 M Street location in their personal vehicles and that disciplinary action was not taken. *Tr. 37-44*. Mr. Udeh explained that he was the proposing official by default. Although his signature was on the Advanced Written Notice of the Proposed Action, he contended that the decision regarding Employee's adverse action was made in his absence. He stated that the document was drafted by Muhammed Khalid with Agency's Human Resources ("HR") Department. Eric Ampedu was also a part of the decision making process. *Tr. 46-48*.

Eric Ampedu (“Ampedu”) Tr. 53-83

Ampedu is employed with Agency, and has been so for twenty years. He was the Operations/ HR Manager for four years. Prior to that position he was a Program Analyst and worked with the HR department. While in that position, Ampedu was responsible for HR, labor and employee relations, and performance management. He worked with the Project Management Administration and the Public Space Regulation Administration. *Tr. 54-55.*

Ampedu testified that he was notified via e-mail, with pictures, that Employee used placards for personal use that were meant for government vehicles. He explained that he met with Employee and Employee’s supervisor and informed Employee that there would be repercussions for his actions. Employee told Ampedu that he did not think it was a violation of policy, and Ampedu explained to Employee that the placards were not for his personal use, but for official use only. Ampedu further stated that Agency employees did not have free parking regardless of an employee’s duty. Employees are expected to pay for parking even if they had access to government vehicles during the course of their tour of duty. Ampedu stated that Employee admitted to using the placards for work. Employee also admitted to using the placards to park his vehicle at the 55 M location. Ampedu reiterated that the placards were solely meant for official use only, and once the leases on the rented vehicles ended and returned to the company, the placards were no longer supposed to be used. *Tr. 55-66.*

Ampedu attested that there was a need for additional vehicles for the investigators to work in the field. He explained that Agency leased vehicles from a Virginia company, and the vehicles were parked on the streets with Virginia license plates, which attracted parking tickets for these vehicles. Ampedu stated that Agency decided to create the placards so that parking enforcement officers could identify the vehicles as District government vehicles associated with Agency. He also stated that employees were not assigned to a specific leased vehicle. The placards were assigned to specific vehicles, and the individuals who operated the vehicle was responsible for the vehicle during that time. Ampedu stated that Agency did not collect the placards once the leased vehicles were returned, as he believed it was the responsibility of the managers and supervisors to collect them. Ampedu opined that Agency’s policy on the use of the placards on personal vehicles was unclear because they were not used on a regular basis. *Tr. 67-71.*

Ampedu stated that Agency worked with its General Counsel’s Office to have the tag numbers verified with the Department of Motor Vehicle (“DMV”). It was determined that the particular vehicle in the photo attached in a May 2015 e-mail, was a vehicle tag which belonged to Employee. Ampedu was unaware that the placards were still in existence once the vehicles were returned to the rental company. He stated that Employee claimed there were others who had the placards, but Agency was unable to identify the individuals and the investigation ceased regarding the other employees. Therefore, Employee was the only individual subject to adverse

action. Ampedu stated that he was unaware that employees used their personal vehicles to go to worksites. He asserted that the reason Agency rented the vehicles was to ensure that all inspectors had government vehicles for their official duties. *Tr. 71-81.*

Mr. Ampedu testified that the e-mails Mr. Mills submitted indicated that employees' use of the placards in their personal vehicles date back to 2012. However, Ampedu stated that there was not sufficient evidence to support this contention, and Agency was unable to further investigate. *Tr. 81-82.*

Employee's Case-in-Chief

Modibo Hylton ("Employee") Tr. 84-115

Employee has been employed with Agency since 1998. He first began with Agency as a consultant for three years and in 2001, he became a permanent employee. He became a Project Manager in 2015, but his official title was Construction Inspector. He monitored the contract workers to ensure the work was up to par and within D.C. specifications. *Tr. 85-86.*

Employee testified that for his first ten years with Agency, he was never provided with a government vehicle. He stated that he was required to go to a job site and then return home, or go into the office if he did not have field work. He asserted that there have always been problems with Agency employees' transportation to and from worksites. There were occasions when Employee would drive his vehicle to a job site from Agency's headquartered location. *Tr. 86-87.*

Employee stated that in 2014, the issue with government vehicles was resolved because the government decided to lease vehicles and every member of the Asset Management team was assigned a vehicle. He explained that employees were originally informed that they would have computers and a mobile work station because they may not have had desks at the 55 M Street location. The vehicle they received would be considered their mobile office. He stated that designated parking was not available for leased vehicles, so employees were forced to park these vehicles on the street. Employees could park and pay at the meters closer to the office buildings, or employees could find free parking three or so blocks away from the building. *Tr. 88-89.* Employee would often times park on South Capitol Street during the hours of 9:30 a.m. to 4:00 p.m. because there were no meters in this area. He admitted that he previously received tickets and contested those tickets, but he stated that he has also paid for parking while on duty. *Tr. 96-98.*

Employee recalled a time when he was issued a parking ticket while using a leased vehicle despite there being a placard in the vehicle. Employee explained that he received the ticket and confronted the officer who issued the ticket, who apologized and admitted that she did not check everything before she issued the ticket. Employee took the parking ticket to Agency to handle. *Tr. 101-102.* Employee further denied that he used the placard to park at the 55 M Street location to avoid paying for parking tickets and reiterated that he had paid for parking in the past. *Tr. 99.*

Employee explained that the lease for the government vehicles expired in late 2014 or early 2015. Prior to returning the vehicles, the metallic D.C. flags, placards, air test meter, and any equipment that was kept in the vehicles were removed. These items were then kept at the employees' desk. *Tr. 90-91*. Employee testified that after his suspension he received two federal contracts to manage offsite, but maintained that he would not complete his work until Agency fixed the vehicle situation. *Tr. 95*.

Employee testified that he has used the placard to avoid paying tickets when he was on the jobsite. He affirmed that he parked with the contractors located in the designated staging area on site, and he made sure that the placard and his vest were visible to the parking enforcement officers. He did that because he did not want to get a ticket on his personal car for conducting government business. *Tr.100*.

Employee explained that the license plates from the leased vehicles were from Virginia. In 2015, he had a Toyota Corolla and an Infiniti Q45 that was registered to him with D.C. plates. He stated that he never owned a Lexus vehicle. Employee was aware that the Virginia license plate on the placard did not match with the license plate on his personal vehicle. He contended that he never used the placard to park at the 55 M location to avoid paying for parking for his personal vehicle; he stated the placard was only displayed on the dashboard but he asserted that he paid for parking. *Tr. 103-107*. Employee was aware of other employees who used placards in their personal vehicles but did not know if any disciplinary action was taken. *Tr. 113*.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Whether Agency's adverse action was taken for cause

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

- (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or *suspension for 10 days or more* (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

Here, Employee's suspension was based on any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations: Malfeasance, pursuant to DPM § 1603.3(f)(7) and § 1619.1(6)(g). Malfeasance is generally described as

“[d]oing something illegal. This term is often used when a professional or public official commits an illegal act that interferes with the performance of his or her duties. This includes misuse, mutilation or destruction of government property; concealment, misuse, removal, mutilation, alteration of government property, public records or funds; misuse of official position for unlawful or personal gain.”⁵ Agency contends that Employee’s use of the parking placard on his personal vehicle constitutes use of government property for personal gain.

The issue of Agency’s employees using parking placards in non-government issued vehicles first came to light in 2012 when Mills, a resident near Agency’s 55 M Street location, reported it to Agency’s former Director. Mills also tweeted messages in April 2015 to a local news station regarding the issue of Agency’s employees using placard that did not match with the vehicle’s license plate.⁶ In an e-mail sent to Agency on May 13, 2015, Mills states that he has years’ worth of pictures showing parking placards being used in non-government issued vehicles (beginning in 2012). Mills further states that, “[it’s] bigger than a handful of employees [using the placards]—[it’s] a systemic problem but it is fixable.”⁷ The use of parking placards by Agency employees in their personal vehicle around Agency’s 55 M Street location became a problem with residents because parking is a hot commodity, like many other areas in the District, especially considering the fact that Nationals baseball stadium is in the neighborhood.

Udeh currently supervises Employee and was also his supervisor at the time the issues arose regarding the use of parking placards in non-government issued vehicles. Udeh testified that everyone in the department in which Employee works, including the Chief Engineer, was aware that employees sometimes used their personal vehicles to go to and from different work site locations if government vehicles were not available. Udeh acknowledged that there was a shortage of government issued vehicles for employees to use to go to offsite work locations. He also stated that the policy on whether an employee enjoys parking privileges while visiting these offsite work locations in their personal vehicles was unclear.⁸

It is uncontroverted that there was a shortage of government-issued vehicles for Agency’s employees to use while going to and from Agency’s 55 M Street location, to off-site inspection sites. Udeh acknowledged that there was also an ongoing problem with employees using their personal vehicles while going to off-site work locations. When employees were in government-issued rental vehicles, the vehicles were assigned a parking placard that allowed employees to enjoy parking privileges and not have to pay for parking when coming to Agency’s 55 M Street location. However, this issued became muddled when an employee used their personal vehicle to come and go from Agency’s 55 M Street location to various off-site work locations.

Udeh opined, and the undersigned agrees, that it was reasonable for Employee to believe that if he was able to use a placard on a rental or leased vehicle while on government business, that he should also be able to use the placard on his personal vehicle while conducting

⁵ See DPM § 1619.1(6)(g).

⁶ See Agency’s Exhibit 1.

⁷ *Id.*

⁸ Tr. at 36-37.

government business.⁹ The type of work that Employee was required to do—frequently traveling between Agency’s 55 M Street location to various off-site locations throughout the District—should call for him, along with other similarly situated employees, to enjoy the benefit of a parking pass when using their personal vehicles while on official duty. Agency’s policy regarding the use of parking placards and its shortage of government-issued vehicles placed Employee and his fellow colleagues in a difficult position of using their personal vehicles to do official government business, but not enjoy the same parking privileges they would be afforded if there was an adequate supply of government-issued vehicles.

It is further noted that Employee did not exclusively use this parking placard on every occasion to enjoy parking privileges around Agency’s 55 M Street location. Employee provided debit card transactions demonstrating that on occasions he did in fact pay for parking while not on official government business.¹⁰

Agency’s assertion that Employee violated policy by using the parking placard on his personal vehicle is defective. It is clear from the testimonial evidence that the policy regarding employees using their personal vehicles, along with the parking placards on their personal vehicles, while conducting official government business was unclear. While Agency contends that it was against policy for employees to use their personal vehicle while conducting official business unless approved in writing, it is apparent that Agency employees were using the parking placards on their personal vehicles dating back as early as 2012, when first reported by Mills. Because of Agency’s acquiescence in its employees using parking placards in their personal vehicles, I find that Agency did not have cause to take adverse action against Employee.

Disparate treatment

In *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, Opinion and Order on Petition for Review (September 29, 1995), this Office’s Board set forth the law regarding a claim of disparate treatment:

[An Agency must] apply practical realism to each [disciplinary] situation to ensure that employees receive fair and equitable treatment where genuinely similar cases are presented. It is not sufficient for an employee to simply show that other employees engaged in misconduct and that the agency was aware of it, the employee must also show that the circumstances surrounding the misconduct are substantially similar to [her] own. Normally, in order to show disparate treatment, the employee must demonstrate that he or she worked in the same organizational unit as the comparison employees and that they were subject to [disparate] discipline by the same supervisor [for the same offense] within the same general time period.

⁹ Tr. at 50-52.

¹⁰ See Transcript, Employee Exhibit 2.

An employee who raises an issue of disparate treatment bears the burden of making a *prima facie* showing that he or she was treated differently from other similarly-situated employees.¹¹ If such a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue.¹² “In order to prove a disparate treatment, [Employee] must show that a similarly situated employee received a different penalty.”¹³

Here, Employee raises a disparate treatment argument. Specifically, Employee argues that because other employees also used parking placards on their personal vehicles, and were not subject to discipline, constitutes disparate treatment. There was uncontroverted testimony from Udeh and Employee that numerous other employees were using placards and enjoyed parking privileges to go to and from the 55 M Street location in their personal vehicles and that disciplinary action was not taken.¹⁴ Udeh further testified that although his signature is on the proposing document for Employee’s discipline, he was not a part of the decision making process and was asked to signed the proposing document, presumably because he was Employee’s direct supervisor.

In identifying employees which were using the parking placards on their personal vehicles, Agency asserts that it was only able to identify Employee’s vehicle. I do not find this argument persuasive. Ampedu stated that Agency’s Office of General Counsel was able to verify with the Department of Motor Vehicles that the photographs in an e-mail sent to Agency’s Director was a photo of Employee’s vehicle. Given that Agency was first notified in 2012 of the use of parking placards on personal vehicles, I am not persuaded that Agency acted reasonably in identifying all of its employees who may have used a parking placard in personal vehicles. I find that Agency’s actions amount to acquiescence of its employees using parking placards in personal vehicles. Agency first became aware of this issue in 2012 when Mills e-mail Agency’s then-Director with photographs of the parking placards being used on personal vehicles; however, no action was taken at this time. It was not until Mills tweeted messages to a local news reporter that Agency elected to take action against Employee for using parking placards on his personal vehicle. Although Mills made clear that the issue had been ongoing for years, and the issue was with several employees, Agency still only took disciplinary action against one employee, Mr. Hylton. Because the policy is unclear as to the parking privileges afforded to Agency employees who use their personal vehicle, and because of Agency’s implied consent of employees using the parking placards on their personal vehicles until being brought to light again in 2015, I find that Agency did not apply practical realism in applying disciplinary action against Employee. Thus, I must find that Employee was subject to disparate treatment.

¹¹ See *Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-01190-90, Opinion and Order on Petition for Review (July 22, 1994).

¹² *Id.*

¹³ *Social Sec. Admin. v. Mills*, 73 M.S.P.B. 463 (1991).

¹⁴ Tr. at 43-44.

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency's thirty (30) day suspension of Employee is **REVERSED**; and
2. Agency shall rescind Employee's thirty (30) day suspension and reimburse him all back-pay and benefits lost as a result of his suspension; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge