THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BRIAN BACON	)	OEA Matter No. 1601-0198-09
Employee	)	
	)	Date of Issuance: February 1, 2011
v.	)	
	)	
	)	Lois Hochhauser, Esq.
D.C. DEPARTMENT OF MOTOR VEHICLES	)	Administrative Judge
Agency	)	
	)	

Gina Walton, Employee Representative
Justin Zimmerman, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

Brian Bacon, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on August 10, 2009, appealing the final decision of the D.C. Department of Motor Vehicles, Agency herein, to terminate his employment, effective August 11, 2009.[1] At the time of the removal, Employee, a Legal Instrument Examiner (LIE), was in permanent and career status. He had been employed by Agency for seven years.

The matter was assigned to this Administrative Judge on June 2, 2010. The prehearing conference took place on June 25, 2010. The hearing took place on August 16, 2010. Employee was present at the hearing and was represented by Gina Walton, AFGE Local 1975 Representative.[2] Agency was represented by Justin Zimmerman, Esq.. At the proceeding, the parties were given full opportunity to, and did in fact, present documentary and testimonial

[1] Agency issued two notices of final decision. The first, issued on August 7, 2009, had an effective date of August 10, 2009. The revised noticed issued on August 10, 2009 had an effective removal date of August 11, 2009.

[2] Clifford Lowery, President Local 1975, was present as an observer.

evidence.[3] Following the submission of written closing arguments, the record closed on October 13, 2010.

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? If so, is there a basis for disturbing the penalty imposed by Agency?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

On February 27, 2009, Agency issued its advanced notice of proposed removal to Employee, which stated in pertinent part:

> The proposed action is based on a cause that includes any knowing or negligent material misrepresentation on [any] other document given to governmental agency; any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law; any on-duty act that interferes with the efficiency or integrity of government operations. Misfeasance; any on-duty act that interferes with the efficiency or integrity of government operations. Malfeasance: any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious; and any act which constitutes a criminal offense whether or not the act results in a conviction…Also you used your position for private gain and your actions affected adversely the confidence of the public in the integrity of government…
>
> Specification: As a Legal Instrument Examiner your duties include scheduling hearings, through the ticket processing system eTIMS when requested by customers who appear in person, at our service center or who have written in. Your eTIMS use profile allows you to "suspend" tickets when performing a scheduling transaction. Suspending a ticket effectively places the ticket on hold to allow the agency time to conduct a hearing and render a decision on the ticket. During the suspend period (6 months) the ticket fine does not increase, collection notices are not mailed, the vehicle associated with the ticket cannot be booted or towed and the ticket is not referred to collections for failure to pay.
>
> On September 25, 2007, at 2:25 pm, you suspended eight (8) tickets issued to your personal vehicle, a 2005 Dodge Magnum registered to you with DC tag

[3] Testimony was presented under oath. The transcript is cited as "Tr", followed by the page number. Only Agency introduced documentary evidence. Exhibits ("Ex") are cited as "A" followed by the exhibit number.

number CM8424. On March 17, 2008 at 11:32 am, one week before the suspensions were set to expire, you entered a second suspend on each of the eight (8) tickets, extending the suspend period an additional 6 months. On June 11, 2008 at 6:22 pm you suspended a ninth ticket, ticket number 3800616340 issued to your Dodge on May 14, 2008.

On March 20, 2008 at 9:19 am, you suspended ticket number 375802980 issued to your 2007 Toyota Camry registered to you as the primary owner and to Shakieta J. Campbell as the co-owner with DC tag CS5207. It should be noted that 2 years earlier you followed proper agency procedure for adjudicating two parking tickets issued to this vehicle. At that time, you submitted your mail adjudication request to a Lead Clerk, Barbara Allen. Your ticket was properly suspended by Ms. Allen and submitted to the Chief Hearing Examiner for review and disposition.

As an Adjudication Services employee, like all citizens, you retain the right to contest a ticket and have a hearing, but the process of review is necessarily different to address the agency's need for integrity and security. You cannot place yourself in a position that is more beneficial than any member of the general public.

Your actions were in violation of agency rules prohibiting employees from performing transactions on their personal DMV records. You also violated agency procedures for adjudicating personal tickets. In addition, your actions allowed you to avoid the potential for liability of the tickets.

You used your position for private gain. By suspending your personal tickets late penalties were never assessed, collection notices were never mailed to your home and your unpaid tickets were never referred to collections. You have avoided paying $720 in ticket fines and penalties - $615 for the 9 tickets issued to your 2005 Dodge and $105 for the outstanding ticket issued to your 2007 Camry. Eight (8) of the 10 tickets have been outstanding since 2007. Your actions, which if know would adversely affect the confidence of the public in the Department of Motor Vehicles and the District government as a whole. (Ex A-18).

Agency issued its first notice of final decision on August 7, 2009, with August 10, 2009 as the effective date of removal. On August 10, 2009, Agency issued a revised notice of final decision, changing the effective date of removal to August 10, 2009. (Ex A-19).

1. Summary of Evidence, Positions of the Parties and Undisputed Facts

A. Background and Undisputed Facts: Agency's Office of Adjudication Services is responsible for the adjudication of parking tickets.[4] A citizen can contest a parking ticket either in person or in writing, using the mail adjudication procedure. The citizen has 30 days from the date of issuance of the ticket to respond and request that the matter be adjudicated. If the citizen does not respond, the amount of the fine will double on the 31st day. If the citizen does respond, Agency will enter a "suspend" on the ticket so that it will not double during the decision making process. The matter is assigned to a hearing examiner who reviews the matter and issues a disposition. The examiner can dismiss the ticket, uphold the ticket, and/or eliminate the penalty. If the citizen does not respond in 60 days, the ticket goes into "demand admission status" on the 61st day, which means that Agency assumes that the citizen is admitting the violation because the individual did not answer the ticket. The citizen then has an additional 60 days to file a motion to vacate default, a period of 120 days from the date of issuance of the ticket. (Tr, 13). If the citizen goes to 301 Indiana Avenue to contest a parking ticket, the individual is assisted at a service window by a legal instrument examiner (LIE), who schedules the matter for a hearing on a "walk-in" basis. If the citizen chooses not to wait, the individual can request a written adjudication.

Employees of Agency have the same options for contesting their tickets, but they must present the request to contest the matter to a supervisor. If the employee asks for a hearing, the chief hearing examiner is notified, since an employee's hearing cannot be scheduled on a "walk-in" basis. Only the chief hearing examiner can hear employees' cases. Most employees choose to contest a ticket by mail, and in that case, the employee would inform the supervisor of the decision for mail adjudication. During the period of time at issue, the supervisor entered the suspend for the ticket on a paper log, a transmittal sheet containing ticket information and any evidence submitted by the employee The chief hearing examiner reviewed the matter and determined the resolution.

All transactions and information related to the ticket are entered by Agency employees into Agency's Electronic Ticket Information Management System (eTIMS). Agency employees using the system are issued usernames and passwords. Agency assigns profiles based on the category of the position which will limit access in certain areas for certain positions. For example, an LIE does not have the profile that allows the LIE to dismiss a ticket. while a hearing examiner does have that access. At the time the alleged misconduct took place, LIEs had access to the system so that they could place "suspends" on tickets, although Agency contends they were not permitted to do so on tickets issued to employees. Agency eliminated this access after the charged misconduct was discovered. Employees who work at a service center issuing drivers' licenses do not have access to schedule hearings, but may have access to look into the ticket database to provide information to a citizen.

[4] The Office has other functions, but for the purpose of this proceeding, this is the only relevant one.

Parking citations are issued to the vehicle. In addition to the ticket database stored in ETIMS, Agency has a "destiny system" which provides a database for drivers' licenses and vehicle registration. Between December 2006 and May 2008, approximately 13 traffic citations were issued to vehicles registered to Employee. Enforcement was suspended on approximately eleven of these tickets using eTIMS.

B. Agency's Case: Agency contends that Employee placed the suspensions on 14 tickets issued to vehicles which are registered to him and that by doing so, he violated Agency procedures. It maintains that his conduct constitutes "misrepresentation of material facts in the data…criminal theft…criminal fraud, misfeasance, malfeasance, and misuse of a government position for personal gain". (Tr, 6).

Wanda Butler, Agency's Adjudication Administrator, manages Agency's administrative hearings. She testified that Agency's procedures and policies, particularly those forbidding employees from taking action on their own tickets, are communicated to employees in memoranda and verbally. (Tr, 45-46). She said one reason she knew Employee received training and memoranda on this matter, was that she spoke with his supervisors, and that Employee was assigned to "one of the stronger supervisors" who had regular staff meetings with written agendas that the witness would review. (Tr, 47, 63).

The witness stated that the documents provided by Agency's data system, established that Employee was the registered owner of DC tag number CM8424, one of the vehicles that had been issued tickets. (Exs A-1, A-2). Reviewing the ticket issued on December 6, 2006, she said there was a request for mail adjudication entered into the system on December 20, 2006. At that time, a suspension until June 18, 2007 was entered. The next transaction was another suspend, issued on September 25, 2007 extending the suspension to March 23, 2008. The witness testified that Employee is identified as the person who entered that data since "W56L4", the User ID, is assigned to Employee. Ms. Butler said the final entry, was another suspend entered on March 17, 2008, suspending the matter until September 13, 2008. She said according to the User ID, Employee entered this into the database. (Tr, 27, Ex A-3).

The witness reviewed the history of the other tickets issued to vehicles registered to Employee. The ticket issued on March 20, 2007 had the first suspend entered into by Gloria Hardy, a non-supervisory LIE, on March 29, 2007 suspending adjudication until September 25, 2007. The other two suspends, entered into on September 25, 2007, extending the suspend until March 23, 2008; and on March 17, 2008 extending the suspension until September 13, 2008 were entered by Employee. (Tr 28-29, Ex A-4). With regard to the ticket issued on January 10, 2007, the first two suspends were issued by Arndrea Butler, a non-supervisory LIE, but the last two were issued by Employee. (Tr, 30-31, Ex A-5). Ms. Butler said the pattern was the same with the other tickets, i.e., the initial suspension was entered by another non-supervisory LIE, and the others were entered into by Employee. (Tr, 31-32, Exs A-6 – A-10). Only Employee entered suspensions for a ticket for an expired meter. (Tr, 32, Ex A-11).

The Adjudication Administrator stated that a print-out of the Camry registered to Employee and Saquetta Campbell lists five tickets, and that two of the tickets had been handled properly in that the tickets were suspended by supervisors or lead clerks (Leads), and then reviewed and dismissed by the chief hearing examiner in 2006. (Tr,33-36, Exs A-12 - A-15). She stated that with regard to the ticket issued on March 29, 2007, the suspension had expired and was not re-suspended and therefore the fine doubled and the car could be booted or towed. Payment was made on December 4, 2007. (Tr, 37, Ex A-16). With regard to the ticket issued on March 20, 2008, Employee suspended the ticket, placed a mail adjudication suspension on the ticket that was scheduled to expire on September 16, 2008. (Tr, 38, Ex A-17).

The witness testified that before the system became automated, Employee worked in the correspondence unit and as an LIE, was "instructed and allowed to suspend tickets" for citizens since he was handling mail adjudications. (Tr, 67). She stressed that even when the LIE had access to suspend tickets, the LIE was still prohibited from suspending his or her own tickets. (Tr, 68). The witness said that it would be "very unusual" for a supervisor to allow an employee under that person's supervision to suspend his or her own ticket. (Tr, 69). She surmised that the two times that Ms. Allen, a Lead, entered a suspension immediately after Employee had entered it, Ms. Allen probably had assigned Employee a batch of tickets to suspend and then realizing it was "an employee matter and so for the purposes of tracking it…she said…'let me put this in to show that I reviewed it'". She said that Leads had the same authority as supervisors to suspend employee tickets. (Tr, 70, Exs A-13,A-14).

The witness testified that Employee's conduct violated Agency policy because employees are not permitted to "handle their own tickets." She said that even though non-supervisory LIEs should not have entered suspends of Employee's tickets, and the processing should have been performed by supervisors or designees, the emphasis of the procedures and training was that the LIE was prohibited from processing his or her own ticket. She testified that no supervisor authorized Employee to suspend his own tickets. (Tr, 38). She said that she became aware of Employee's actions when she was investigating charges involving Arndrea Butler, Employee's cousin, and daughter of the witness's former staff assistant. She said the investigation widened to include all employees. The investigation revealed that only two employees, Employee and Arndrea Butler, had engaged in misconduct. The witness issued the advanced written notice of proposed removal on February 27, 2009. She said after discussion with Agency Director about the misconduct, they agreed that it warranted a removal because Employee's actions caused the public to believe that Agency employees receive favorable treatment which injures the Agency's reputation. (Tr, 43). She said that Employee's conduct had a "huge" impact on her confidence in his ability to work as an LIE. She said she was "very surprised and very disappointed" by Employee's misconduct. (Tr, 42-44, Ex A-18).

Kimberly Campbell has been employed by Agency for 20 years and has been a Lead LIE for ten years. She testified that LIEs are not permitted to place suspends on the tickets they are contesting. She said that the procedure is for the LIE to put the explanation in writing and bring the ticket to a Lead LIE or supervisor who places a suspend on it and sends to the contractor who

scans it into the system and gives it to the chief hearing examiner who then decides the matter when it came up in her queue. (Tr, 74). Prior to 2007 or 2008, the same procedure was followed, according to the witness, but the suspend code was placed in a log rather than scanned. code. Ms. Campbell said that policies and procedures were communicated "[b]y word of mouth", and generally when an employee did not know what to do, he or she would ask and be advised of how to proceed. She said during her tenure with Agency, there were not regular staff meetings. The witness said that during the relevant period, LIEs had the ability although not the authority to enter a suspend code on an LIE's ticket. (Tr, 77). She said she did not know of anything in writing or any meetings on this issue, but that LIEs knew they were not permitted to enter suspends on a ticket issued to an employee. (Tr, 80).

Cassandra Claytor, supervisory hearing examiner, testified as a rebuttal witness. She testified that to the best of her knowledge, LIEs are not permitted to suspend their own tickets during the relevant period, and had to go to a supervisor or a Lead LIE to enter the suspend into the system. (Tr, 109-110). She said that if she did not respond to an employee ticket with a suspend on it in six months, the suspend would drop off and the employee would be notified. She said typically, an employee who received a notice or was tracking his or her own ticket, would tell her that she had not yet acted on the ticket and she "would apologize and do their ticket if that was the case." (Tr, 121). She said if she did not have time to do it and the suspend was getting ready to expire, she would have a supervisor extend the suspend. (Tr, 122). She said LIEs were not supposed to place suspends on an LIE's tickets and that whenever she was approached by an LIE about the suspending or re-suspending an employee ticket, she would always direct them to go to a supervisor or Lead. (Tr, 111, 114, 124). The witness stated that Joan Bailey, the current Administrator's predecessor, had issued a written policy regarding the processing of employee tickets. She said employees were also informed of the policies verbally at staff meetings. (Tr, 116).

Ms. Claytor did not recall Employee ever approaching her about any of his tickets and did not recall ever instructing him to suspend his own tickets. (Tr, 110). She explained that she was being asked about something that happened four years ago, "but I would say… I never said that to him." (Tr, 123). She said if he had ever asked her about his tickets, she would not have told him that he could suspend his own ticket since there "are other people that could do that and should do that". (Tr, 123).

C. Employee's Case: Employee does not dispute that the tickets at issue were issued to vehicles registered to him, and he does not dispute that he entered the "suspends". He argues however, that he was directed to do, that Agency did not have a "clear" policy on how employees' tickets should be processed, and that he did not knowingly engage in any misconduct.

Charlotte Stringer, employed at Agency for 33 years and a Lead LIE for 20 years, testified that in approximately 2006, she was told by LIEs that they had placed suspends on other LIEs' tickets, and that she aware of an LIE placed a suspend on her own ticket. She said it was "[n]o big deal". (Tr, 84-85). She said that after the units merged somewhere between 2005 and 2007, she

did not receive any communication regarding the procedures for processing tickets received by employees, and that employees remained with their prior supervisors. (Tr, 92).

Employee testified that while employed at Agency, he worked at a service window and that his duties included scheduling hearings, providing information on the amounts owed on tickets and providing information if a vehicle had been booted or towed. When he was not at the service desk, he generated the examiners' decisions and entered information in the logs where suspends were placed for mail adjudications. Employee testified that he placed suspends on employee tickets that were in the Ms. Claytor's log for her to adjudicate. (Tr, 94).

Employee reviewed the tickets at issue. He said the one issued on December 20, 2006 was first entered into the log by another employee. He testified he entered the second suspend after talking with Ms. Claytor and informing her that the suspend was due to expire and she had not taken any action. He said she told him to enter the suspend. He said he entered the third suspend for the same reason, i.e., no decision had yet been made by Ms. Claytor. (Tr, 96, Ex A-13). Employee said that employees assigned to work on the log would write Ms. Claytor's name on employees' tickets that were being contested and then place suspends on the tickets without going through a supervisor. (Tr, 97-98). Employee testified that he did not know the procedures regarding the processing of employee tickets until the offices merged, because prior to that time he was not involved in that process. At that time he was not instructed of the proper procedure by a supervisor or manager, but learned, by "word-of-mouth" that employees should not process their own tickets but should give them to someone else. (Tr, 99).

Employee agreed that between December 2006 and March 2007, he received eight citations for violations near his office. (Tr, 101, Ex A-2). He testified that if a citizen initially had a suspend on a ticket and the six month period expired without it being adjudicated, nothing would happen to reactivate the ticket, but that he followed his own tickets on the ETIMS system by entering his driver's license or tag numbers into the system. He said when he was employed, there "were thousands of letters in the queue…[s]o it could be a few months before a decision was made. Or if it carried on, it would be addressed…timely so no penalty would be made." He said in most instances when a citizen came in because a ticket had not been adjudicated in the six month period, the ticket was dismissed because of the inconvenience to the citizen. (Tr, 106). He said he was not surprised that his tickets were not adjudicated for such long periods of time because when it came to employees, Ms. Claytor's attitude was "I'll get to it when I get to it." (Tr, 107).

2. Discussion, Findings of Fact and Conclusions of Law

Agency argues that Employee violated Agency protocol by placing suspends on tickets he received between 2006 and 2008. It contends that removal is the appropriate penalty for these actions. Employee does not dispute that he placed suspends on his own tickets, but maintains he was authorized to do so and that he did not knowingly violate any Agency procedure or policy.

Agency is required to prove its case by a preponderance of evidence. "Preponderance" is defined as "that degree of relevant evidence which the reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." OEA Rule 629.1, 46 D.C. Reg. 9317 (1999). *See also* 5 C.F.R. § 1201.56(c)(2). This is the lowest quantum of proof, and is often preceded by the word "mere" or "only." *See, e.g.*, Elkouri & Elkouri, *How Arbitration Works* (6th Ed), p. 949, ft. 124. The standard to meet the burden is that the evidence must be "sufficient." In reviewing the testimonial evidence, the Administrative Judge found most of the witnesses to be credible even though there were some inconsistencies in the testimony of witnesses on both sides, However, even if some parts of a witness's testimony are discredited, other parts can be accepted as true. *DeSarno, et al., v. Department of Commerce*, 761 F.2d 657, 661 (Fed. Cir.1985).

After carefully reviewing the testimonial and documentary evidence using the standard of proof applicable in this matter, the Administrative Judge concludes that Agency met its burden. She reaches this conclusion for several reasons. First, when Administrator Butler conducted a thorough investigation of all employees to ascertain how many were suspending their own tickets, the investigation found only two employees had entered suspends on their own tickets - and Employee was one of the two. Also, it seems very unlikely to this Administrative Judge, and it was not argued by Employee, that the chief hearing examiner was only late adjudicating his tickets and the tickets of the one other employee who was found to have engaged in misconduct and/or only directed him and the one other employee to enter suspends or on their tickets, particularly in light of Employee's testimony that Ms. Claytor's attitude regarding employees' tickets was that she would get to them when she got to them. It is also unlikely, and it was not argued, that only Employee and the one other individual received parking violations during this entire period. Yet only Employee and one other employee entered suspends on their own tickets. Employee alleged he did so at Ms. Claytor's direction. In addition, the fact that only two employees entered their own suspends, supports Agency's contention that employees knew that such conduct was prohibited, regardless of whether the directives were communicated at meetings, in writing or verbally. Even Employee admitted at some point after the merger, he learned it was not permitted, although he did so, he states, because he was directed to do so by Ms. Claytor. Next, Employee contended that he entered the suspends on his tickets at the direction of Ms. Claytor. Scanning was initiated in 2007 and included requests for adjudication. However, not all of the printouts of Employee's tickets after that time included requests for adjudication. Therefore, Employee would have no reason to discuss the matter with Ms. Claytor. Finally, Employee's case was undermined by the fact that he had, in the past, followed the proper procedures and by his testimony that he became aware of the proper procedures when the offices merged in 2005. (Tr, 47). Employee was therefore aware of the proper procedures with regard to tickets issued in 2006 and thereafter.

D.C. Official Code §1-616.51 (2001) requires that the Mayor "issue rules and regulations to establish a disciplinary system [for agencies over which he has personnel authority] that includes…1) A provision that disciplinary actions may only be taken for cause [and] 2) A definition of the causes for which disciplinary action may be taken." The Mayor has personnel

authority of Agency. The D.C. Office of Personnel, the Mayor's designee for personnel matters, published regulations entitled "General Discipline and Grievances" that meet the mandate of §1-616.51 and apply to all employees in permanent status. *See* 47 D.C. Reg. 7094 *et seq*. (2000). The definition of "cause": includes "any on-duty or employment –related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious". 47 D.C. Reg. 7096. Employee's conduct falls within this definition of "cause." It was an employment-related action that interfered with the efficiency and integrity of government operations. Agency met its burden of proof that Employee's conduct interfered with the integrity of government operations.

Agency has primary responsibility for managing its employees. That responsibility includes 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), _____ D.C.Reg. ____ ( ). The OEA Board has long held that it will not substitute its judgment for that of an agency when determining if a penalty should be sustained, but rather will limit its review to determining that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia,* 502 A.2d 1006, 1009 (D.C. 1985). Agencies have considerable discretion in determining penalties. An Agency's decision will not be reversed unless the Administrative Judge concludes that Agency failed to consider relevant factors or that the imposed penalty constitutes an abuse of discretion. *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985). Having concluded that Agency met its burden of proof, the Administrative Judge further concludes that the evidence did not establish that the penalty constituted an abuse of discretion. Agency's position that Employee's actions undermined the public's trust in Agency and also deprived Agency of income it was due, are valid reasons for its decision to terminate Employee. Agency is not prohibited by law, regulation or guidelines from imposing the penalty of removal. The OEA Board has long recognized that the appropriateness of a penalty "involves not only an ascertainment of factual circumstances surrounding the violation but also the application of administrative judgment and discernment". *Beall Construction Company v. OSHRC*, 507 F.2d 1041 (8th Cir. 1974). The Administrative Judge concludes that Agency did not abuse its discretion or act in an arbitrary or capricious manner. The Administrative Judge therefore concludes that there is no basis to disturb the penalty.

ORDER

It is hereby

ORDERED: This petition for appeal is DISMISSED.

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge