This decision may be formally revised before it is published in the District of Columbia Register and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No. 1601-0071-23
EMPLOYEE[1]	
Employee	Date of Issuance: January 13, 2025
v	
DISTRICT OF COLUMBIA DEPARTMENT OF PUBLIC WORKS	LOIS HOCHHAUSER, Esq. Administrative Judge
Agency	

Jeremy Greenberg, Esq., Agency Representative
Joseph Davis., Employee Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Employee filed a petition with the Office of Employee Appeals ("OEA") on September 21, 2023, challenging the decision of the D.C. Department of Public Works ("Agency") to terminate his employment. Sheila Barfield, Esq., OEA Executive Director, notified Timothy Spriggs, Agency Director, of the appeal and of the filing deadline for Agency's answer. Agency filed its answer on October 23, 2023. On October 26, 2023, this Administrative Judge ("AJ"), assigned to hear this matter issued an Order scheduling the prehearing conference ("PHC") for December 6, 2023.

Following the PHC, the AJ issued an Order on December 25, 2023, scheduling the evidentiary hearing for April 17 and April 24, 2024, and providing discovery deadlines. On January 11, 2024, Agency filed its First Set of Discovery Requests. On January 11, 2024, Agency filed a Motion to Strike Employee's Responses to Agency's First Set of Discovery Requests. Employee filed his Opposition to Agency's Motion to Strike on January 22, 2024. On January 26, 2024, Agency filed its Reply in Support of Motion to Strike Employee's Responses to Agency's First Set of Discovery Requests. On March 29, 2024, Employee's representative advised the AJ by email that he required emergency surgery and requested a continuance of the hearing and of discovery deadlines.[2] On April 2, 2024, Agency filed its Response, stating that it did not object to the request and proposing new

[1] This Office does not identify employees by name in *Initial Decisions* published on its website.
[2] The AJ excused Employee from filing a written requests during Mr. Davis's illness. Agency did not object.

hearing dates agreeable to both parties. By Order dated April 17, 2024, the AJ granted Employee's request and scheduled the first day of the hearing for May 14, 2024.[3]

On May 3, 2024, Employee filed a Consent Motion to Convert Evidentiary Hearing to Virtual Platform, due to his representative's continuing medical issues. However, during a subsequent telephone conference, the parties agreed, that due to these health concerns, the hearing should be continued rather than held remotely. Employee withdrew the request for a remote hearing and sought a continuance which the AJ granted. On May 6, 2024, the parties filed the Joint Prehearing Statement, and Agency filed its Prehearing Statement. On May 28, 2024, the AJ issued an Order confirming that the unopposed request for continuance was granted and that the new hearing dates were July 24 and July 26, 2024. Agency filed its *Praceipe* Regarding Motion to Strike Employee's Responses to Agency's First Set of Discovery Requests on May 14, 2024.[4] On June 25, 2024, Agency filed a Consent Motion for Third Day of Evidentiary Hearing due to the unavailability of an essential witness in July. However, the AJ decided, and the parties agreed, that rather than add a third day, the second hearing date would be rescheduled for a day when all remaining witnesses were available. The Order issued on July 9, 2024, confirmed that the second hearing date was continued until August 22, 2024.

The evidentiary hearing took place on July 24 and August 22, 2024, at this Office, located at 955 L'Enfant Plaza, S.W. in the District of Columbia.[5] Both representatives and Employee were present throughout the proceedings,[6] and the parties were given full opportunity to, and did, present testimonial and documentary evidence and argument in support of their positions. Witnesses testified under oath and proceedings were transcribed. [7]

The September 9, 2024 Order confirmed the agreement of the parties to file closing briefs on October 7, 2024. The deadline was extended until October 22, 2024, at the request of the parties.[8] Following submissions of closing arguments, the record closed on October 22, 2024.

JURISDICTION

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

ISSUES

[3] The Order also revised some filing deadlines and directed the parties to jointly propose dates for the second day of proceedings.
[4] Following arguments, Agency's motions were denied. (Tr1, 12-15).
[5] The transcript of the August 22 proceeding erroneously states that it was conducted "via videoconference."
[6] In addition, Employee's spouse was present on both hearing days. Jacqueline Williams, Agency Assistant General Counsel, and Jackson Derman, Agency Intern, were present for all or part of the July 24 proceeding. Christine Davis, Esq., Agency General Counsel; and Erika Jefferson, Esq., Agency Deputy General Counsel attended all or part of the August 22 proceeding.
[7] The transcript is cited as "Tr" followed by "1" (July 24), or "2" (August 22) followed by the page number. Exhibits ("Ex") are cited as "J" for Joint, "A" for Agency and "E" for Employee, followed by the exhibit number.
[8] *See*, Consent Motion for Extension of Time to Submit Closing Briefs (September 26, 2024).

Did Agency meet its burden of proof on its decision to remove Employee? If so, is there any basis to disturb the penalty?

SUMMARY OF EVIDENCE

Agency's position is that Employee, a Motor Vehicle Operator ("MVO") did not adhere to required procedures on December 6, 2022[9] by failing to take the vehicle that he was assigned to tow ("party bus") directly to the Blue Plains impoundment facility ("Blue Plains"),[10] by making unauthorized interim stops, and by providing and submitting inaccurate information on required forms. It maintains that removal was the appropriate penalty for each charge, *i.e.,* conduct prejudicial to the District Government, failure/refusal to follow instructions, and two causes for false statements/records. (Tr1, 17-18, 25-26; Ex J-4).

Cranston Payne, Agency's first witness, has been Mobilization Vehicle and Towing Manager of Agency's Parking Enforcement Management Administration ("PEMA") since 2017. He stated that Cheri Douglas was Employee's immediate supervisor, and he was Employee's second level supervisor at the time Employee was terminated. The witness said that he was an MVO from 2002 until 2014, when he became an MVO supervisor. (Tr1, 30-35). The witness testified that during the relevant time period, MVOs were required to follow the 2016 Standard Operating Procedures for Towing ("SOP"). (Tr1, 55). Mr. Payne testified that Officer Silver, an abandoned auto investigator, issued the Notice of Infraction ("NOI") in this matter on December 5, 2022, (Tr1, 40-41; Ex J-6).

Mr. Payne stated that the MVO usually receives towing assignments from the supervisor at morning roll-call, and is given the NOI at that time. (Tr1, 37-39; Exs J-5, J-11) He testified that the MVO then goes to the vehicle location, photographs the vehicle and inputs information about the vehicle, *e.g.*, make, model, VIN, damage; into a handheld electronic device ("handheld"). The witness testified that the MVO is also required to complete a daily log report ("DL") and an electronic crane form ("CF"). He noted that the DL includes the time the MVO arrived at the vehicle, and the CF includes all vehicle information and photographs. (Tr1, 41-47; Exs J-7, J-8). The witness stated that the SOP requires the MVO to enter information accurately on the forms, explaining that the information may be used in court proceedings. He testified that the SOP requires the MVO to inform the supervisor of any safety issue he encounters at the vehicle site. Mr. Payne stated that if there are no safety concerns, the MVO is required to tow the vehicle directly to the impoundment lot. The witness testified that the MVO must provide all necessary information in the DL if an interim stop is made. (Tr1, 48-52; Ex J-11). He testified that in December 2022, Blue Plains was the only impoundment lot for MVOs to take abandoned vehicles. He related that he told supervisors to instruct MVOs to take abandoned vehicles to Blue Plains; and that the Bryant Street facility, which he thought had not yet officially opened, was limited to "booted and general violations." (Tr1, 5). He stated that on December 6, Employee failed to comply with SOP requirements multiple times, by taking the vehicle to another location to take photographs, by failing to report a safety issue to his supervisor, failing to accurately complete reports, and by failing to tow the vehicle directly to Blue Plains. (Tr1,

[9] In this *Initial Decision*, the year is often omitted, for the sake of brevity. If omitted, the year is 2022. For the same reason, time designations of "a.m." or "p.m." may be omitted. If not specified, the time is a.m.
[10] All locations cited in this document are in the District of Columbia.

72-80).

On cross examination, Mr. Payne stated that the DL has room for the MVO to provide information if an interim stop is made. (Tr1, 83, Ex J-7). He explained that MVOs are told how to record "anything odd" about the towing in the DL, and receive training to do this when hired. (Tr1, 92, 95). He testified that since the vehicle was a party bus it had to be taken to Blue Plains, whether or not the NOI was issued for abandonment or expired tags, since Bryant Street could not handle that large a vehicle. (Tr1, 88, 114). He stated that it was impossible for towing to be completed in three minutes, *i.e.*, start at 8:17 and end at Blue Plains at 8:20, as stated on the CF. (Ex J-8). Mr. Payne, returning as a rebuttal witness, testified that the 2016 SOP took effect upon its revision in 2016. (Tr2, 214; Ex J-11).

Raymond Haynesworth, Agency's next witness, is Deputy Administrator of PEMA, and is responsible for field operations and ensuring that enforcement policies and procedures are followed. He said that all managers report to him and that he reports to Johnny Gaither, PEMA Administrator. (Tr1, 119). The witness said that he knew Employee, and was in his chain-of-command, since Mr. Payne reported to him. (Tr1, 120). He testified the SOP introduced in this hearing was the version containing the MVO's duties and responsibilities at that time. (Tr1, 121; Ex J-11). He stated that MVO adherence to the SOP is important in order to have an accurate tracking record of the vehicle. He testified that MVOs are not permitted to "deviate" from the designated impound lot absent specific instructions from their supervisors. (Tr1, 127-131; Ex J-11).

Mr. Haynesworth stated that he was familiar with the charges, and determined that Employee failed to comply with the SOP by stopping at Bryant Street without any supervisory directive instead of going directly to Blue Plains, by not taking photographs near the towing site on Hamlin Street, and by failing to accurately complete his forms. He noted that the DL did not include any information about the Bryant Street stop or the stop where Employee took the photographs. He maintained that the start time of 8:17 and completion time of 8:20 were incorrect since the process could not be completed in three minutes. (Tr1, 134-139; Exs J-7, J-8). He stated that if Employee moved the vehicle to another location for safety reasons in order to take photographs, he was required by the SOP to first contact his supervisor. (Tr1, 163).

On cross examination, the witness testified that the 2016 SOP is the "most revised" version and is still in use. (Ex J-11). He stated that although the NOI does not identify the party bus as abandoned, since the tow was requested by the abandoned vehicle investigator; the MVO had to tow it to Blue Plains. (Tr1, 142-145). Mr. Haynesworth testified that he is familiar with the training process because he interacts with the training academy and reviews training materials regularly. (Tr1, 147-153, Ex J-5). He stated that Agency considered that the information that Employee gave about the photographs was "falsified" since he did not take the photographs at or near the party bus location as required, but instead took them at 17th and Benning Road, which was not in close proximity to the site, *i.e.*, within several blocks. He stated that Agency might have allowed this deviation that if Employee had provided the information with an explanation. (Tr, 163-167; Ex J-8).

Antwon Temoney, Agency's third witness, stated that he has been Program Manager of Abandoned Vehicle Operations for six years, and in that capacity oversees the operations of

abandoned vehicles. He said that in December 2022, Bryant Street had only one or two employees and was only used for booted cars, scofflaws, and camera tickets exceeding 60 days. (Tr1, 170-173). He said that before February 2023, an MVO could not tow a vehicle to Bryant Street unless specifically instructed. (Tr1, 174-175,191). On cross-examination, the witness said that MVOs know that abandoned vehicles must be towed to Blue Plains, and that buses could not go to Bryant Street "at all." (Tr1, 178, 192-194; Ex J-5).

Zachary Grayton, Agency's next witness, said that he began as a parking officer ("PO") in 1981, subsequently being appointed as Abandoned Vehicle Division lead and then supervisor. He stated that when he retired in 2016, he was a Training Instructor ("TI") when he retired in 2016, and returned as a contractor with the Training Department where he served as a TI for new hires in 2020 and 2021. The witness stated that currently he is a supervisor in the Abandoned Vehicle Division. Mr. Grayton stated that as IT, he reviewed the SOP with trainees who also receive copies of the document. He reviewed the SOP in evidence and testified that was the version in use during his tenure as TI. (Tr1, 197-205; Ex A-11).

Agency's next witness, Johnny Gaither, PEMA Administrator, proposed Employee's removal. He stated that he signed, but did not draft, the Advanced Written Notice of Proposed Removal ("Advanced Notice"), and that it "accurate[ly] reflect[ed]" his decision. He testified that he proposed removal as the penalty for each of the four charges, noting that the penalty was erroneously omitted from the document following the fourth charge. (Tr1, 242-245; Ex J-1). The witness stated that he also proposed removal for each charge on the Proposing Official's Rationale Worksheet ("Worksheet"). (Tr1, 246; Ex J-2). He testified that Employee failed to adhere to the SOP Code of Conduct by entering false information, and failing to adhere to requirements. The witness stressed that adherence to SOP requirements was important for the protection of employees and the public. He testified that he considered each of the *Douglas Factors*[11] in determining the penalty of removal.

Asked on cross-examination which allegations led him to propose removal, Mr. Gaither stated that Employee entered incorrect information and failed to tow the vehicle directly to Blue Plains. He stated that MVOs receive training on these requirements when hired. He testified that an MVO should alert a supervisor if the MVO is "doing something different" due to safety concerns. Initially, the witness stated this was not a requirement, but after reviewing the SOP, he testified that an MVO who is in an unsafe situation is required to contact a supervisor. (Tr1, 261-264). On re-cross, Mr. Gaither stated that although he did not author the Advanced Notice, he verified its accuracy. (Tr1, 265-267).

Timothy Spriggs, Agency's final witness, had served as Agency Director for about 8 months at the time of this hearing. He stated that he was the Deciding Official for this Final Decision on Proposed Removal ("Final Decision") which was issued on September 14, 2023. (Ex J-4). He described the process that he used and the documents he reviewed to reach his decision to remove Employee. He noted that he also discussed the matter with Agency General Counsel before reaching a decision, (Tr2, 12-13, 36-37). He stated that that although he also reviewed the Rationale

[11] These factors were enunciated in *Douglas v. Veterans Administration,* 5 MSPR 280 (1981); and are also stated in Section 1606.2 of the District of Columbia Personnel Manual ("DPM").

Worksheet, he also conducted an independent assessment of the *Douglas Factors*. (Tr2, 8-10). Director Spriggs testified that this matter involved "the loss of confidence and public trust." He explained that towing is a "front-facing duty" which requires "a level of trust" by the public since the MVO is moving someone's personal property from one location to another. He maintained that if the MVO did not as required, it "opens up" Agency and the District Government to a loss of confidence by the public. (Tr2, 13-14). The witness testified that the second and third charges of "false statements/records" were based on Employee's failure to identify correct locations in DL. He noted that the "alcohol theft allegation"[12] had no impact on his decision. (Tr2, 15-17). He testified that he would have removed Employee for each penalty and the result would be the same even if only one penalty remained. (Tr2, 37).

Director Spriggs testified on cross-examination that he did not conduct his own investigation. He stated that Employee falsified the individual towing report by omitting the locations where he took the vehicle before taking it to Blue Plains, and stated that there was "plenty of space" for Employee to include that information on the DL. He testified that all stops, even to use a restroom, should be documented. He stated that the MVO knows if a vehicle is considered abandoned even if, as in this case, the NOI cites it for failing to display current tags. (Tr2, 20-26; Ex J-7). Director Spriggs stated that all Agency employees are instructed to notify their supervisors if they feel they are "unsafe." (Tr2,28). Asked why that progressive discipline was not used since Employee had no prior corrective or adverse action and had received positive evaluations, the Director responded that it was due to the loss of public trust. (Tr2, 32).

Employee's position is that his removal was the result of "unsubstantiated allegations." He maintained that his actions on December 6 complied with "policies and procedures." He contended that Agency removed him "simply [to scare] the rest of the staff." As relief, he asked for the reversal of the removal, reinstatement and restoration of lost pay and benefits. (Tr1, 18-24).

Tabari Slack, Employee's first witness, is an MVO who was also supervised by Ms. Douglas at the relevant time. He stated that the policy requiring all abandoned vehicles to go to Blue Plains was not implemented until "right after" the December 6 incident. (Tr2, 41). He testified that he always telephones a supervisor when he encounters a safety risk, adding that the MVO determines if there is a safety risk. He noted that it is not "common practice" to complete a written report if a safety risk is encountered. (Tr2, 45-47).

The witness testified that Employee telephoned him on December 6, asking if he had a tool that Employee needed to open the party bus in order to get the VIN. He said that he had the item, *i.e.*, a metal rod known as a "slim jim." He testified that he met Employee at Bryant Street because Employee "wasn't too far" and he was on his way there. Mr. Slack did not recall if anything prevented

[12] At the PHC, the parties informed the AJ that this adverse action began as part of an investigation of an incident allegedly involving Employee, several co-workers, the party bus and alcohol. They agreed that the investigation did not result in any charges of misconduct related to these allegations. The incident therefore was never before this AJ, she did not know the specific allegations, and they played no role in her decision. The charging documents include references to these allegations and the fact that there was insufficient evidence to result in charges. (Exs J-1, J-4).

Employee from leaving the vehicle at Bryant Street. (Tr2, 45-50). He stated that the NOI was issued for failure to display tags, but that it was uncommon for vehicles to be cited for abandonment, since it was difficult to determine abandonment. (Tr2, 48-52). On cross-examination, Mr. Slack stated that an MVO is supposed to contact a supervisor if there is a safety concern, which he described as a feeling of danger. He did not think that trying to tow a vehicle during rush hour traffic would be a safety concern. (Tr2, 57-58).

Edward Epps, Employee's next witness, said that he is a crane operator who is supervised by Ms. Douglas. He stated that he would not make an interim stop unless he felt unsafe, and that he usually did not note the interim stop on the DL. (Tr2, 67-69). He said that he would call a supervisor if he felt unsafe, and that if a situation got "too far out of hand," *e.g*., with an angry customer whose car was being towed, he might contact the police. He added that he might also call for assistance if traffic is "too bad, *i.e*., if one vehicle was blocking another, but otherwise he would use the "blue lights." (Tr2, 72-75).

Cheri Douglas, Employee's next witness, was Employee's immediate supervisor at the time of his removal. She said that the individual MVO decides if there was a safety risk, and that the issue was discussed at monthly meetings. (Tr2, 100). She testified that she assigned Employee the Hamlin Street tow at roll call on December 6. She said that she does not tell the MVO which lot to tow a vehicle, but tells them of the number of spaces available at each lot every morning. (*Id*). Ms. Douglas said that MVOs usually takes the photographs of the vehicle at the start of the tow, but they can be taken at another time; for example, if the MVO felt unsafe or if doing so would create traffic to become congested. (Tr2, 105-107; 110; Ex J-7).

The witness testified on cross-examination that the SOP requires the MVO to notify the supervisor if there is a safety issue. She stated, however, that at the time of this incident, the 2011 SOP was in use, and not the 2016 edition. (Tr2, 119-120, Ex J-11). She stated that Employee did not contact her after she assigned him the vehicle on December 6. (Tr2, 122).

Ms. Douglas testified that starting in October or November 2022, MVOs could tow vehicles to Bryant Street, but needed permission to bring a larger vehicle there. She said that even before it officially opened, Bryant Street gave information daily regarding available spaces, but she did not recall if she gave the MVOs any information on available spaces at Bryant Street on December 6. The witness did not agree that an MVO must notify a supervisor if making an interim stop to "use the restroom[or] grab a drink." She said the MVO only needed to contact the supervisor if a stop was made for safety reasons. (Tr2, 124-131).

Employee was the final witness. He stated that Ms. Douglas was his direct supervisor with his chain-of-command continuing with Mr. Payne, Mr. Haynesworth, and then Mr. Gaither. (Tr2, 134). He testified that he experienced a number of unsafe situations while an MVO, *e.g.,* people blaring car horns and/or using profanity. (Tr2, 135). He said that he was never instructed on how to handle safety concerns, adding that Mr. Payne said at a meeting that the decision was at the "[MVO's] discretion." (Tr2, 136). Employee testified that Hamlin Street was the first of four assignments he received from Ms. Douglas on December 6. He said that the vehicle did not qualify as abandoned since it had tires and the windows were not broken. (Tr2, 137-139). Employee testified that the

Hamlin Street location is both industrial and residential., and it had no rush hour restrictions. He said that upon his arrival he walked around the vehicle, and did not find anything that "needed to be reported." (Tr2, 143). Employee testified that the first step in the towing process is to enter the VIN in the handheld. He said that he could not gain entry to the vehicle to get the VIN, so he contacted Mr. Slack for assistance. He said that Mr. Slack told him that he was "on his way" to Bryant Street, which was "not far" from his location on Hamlin, so he went to meet him there. According to Employee, vehicles could be brought to Bryant Street at that time if there was space available. (Tr2, 150). He said that while Mr. Slack was using the slim jim to gain entry to the party bus, he went to a door at the Bryant Street facility and asked if it would take the vehicle. He said that he was told that it would not, so he returned to the vehicle. By that time, according to the witness, Mr. Slack had the door opened so Employee left for Blue Plains. He testified that on his way, he realized that he had not yet taken any photographs, so he stopped on the 700 block of 17th Street and took the photographs there. (Tr2, 144, 152). Asked why he did not list these interim stops, Employee responded that "[n]obody does that," adding that the form is just for "to and from" and has no space for that information. He stated that he has made interim stops before. (Tr2, 145-146, Ex J-5).

Employee testified that he did not falsify any information on his reports. (Tr2, 146). Reviewing the DL, he testified that 7:57 was the time he arrived, that 8:00 "may be the time" that he left to go to Bryant Street, that 8:10 was the time he was at Bryant Street and that 9:05 was the time he arrived at Blue Plains. (Tr2, 147-149, Ex J-7). Employee stated that he had never before been "written up…or counseled" while working at Agency, (Tr2, 152). Reviewing the charges, Employee testified that he did not act unprofessionally or provide false written or oral statements. (Tr2, 160-161; Ex J-4).

On cross-examination, Employee confirmed that he authorized the Union's letter of August 11, 2023, which represented his position. (Tr2, 166, Ex J-3). He stated, on redirect, that he did not know what the "note section" of the DL was used for, and never made entries there. He testified that the "8:00" he wrote on the DL "probably was the time" he was trying to access the vehicle, and 8:10 was "probably" when he went to Bryant Street to meet Mr. Slack. (Tr2, 197-198; Ex J-7). He testified that 8:17 where he wrote "towing started" was "probably" when he was on 17th Street taking pictures because that's …at the end of the tow." (Tr2, 199-200; Ex J-8). Employee stated that the information in the handheld is "automatically generated," and he had "no idea" why it had "towing start at 8:17," but surmised that the time may have been generated when he used the handheld to take the photographs. Employee said that the 8:20 time for "towing completed" was when he finished taking the photographs. (Tr, 201-204; Ex J-7). Employee testified that he did not need the VIN to tow the vehicle, but needed it for Blue Plains to accept it. He said that he could not wait until he arrived at Blue Plains to get the VIN because employees there do not "go inside of vehicles." He testified that he needed a "big space" in order to take the photograph, and the 17th Street location was "the best place" for him to pull over and take the photos. (Tr2, 206-209).

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

The jurisdiction of this Office is established by the District of Columbia Comprehensive Merit Personnel Act of 1978, D.C. Code Ann. §1601.01, *et. seq*. as amended by the Omnibus Personnel Reform Amendment Act of 1998, D.C. Law 12-124. D.C. Official Code §1-606.03(a) states, in

relevant part, that an employee can appeal "an adverse action for cause that results in removal." Therefore, this Office has jurisdiction to hear this removal action.

Pursuant to OEA Rule 631, Agency has the burden of proving the charges and must meet this burden by a preponderance of evidence, which is defined as "the degree of relevant evidence which a reasonable mind, consider the record as a whole, would accepted as sufficient to find a contested fact more probably true than untrue." After carefully considering the evidence and arguments presented by the parties, the AJ concluded, for the reasons discussed below, that Agency met is burden of proof on each of the four charges.

There were a number of facts that were not in dispute. First, Agency is the District of Columbia Government entity that is responsible for parking enforcement in the District of Columbia, including ticketing and towing vehicles. (*See,* Agency website). The MVO, who is part of PEMA, is responsible for towing vehicles that has been issued an NOI to an Agency impoundment site. It is also undisputed that Employee was hired as an MVO on or about November 18, 2019, and served in that position until his removal on September 15, 2023. Employee received performance ratings of "highly effective" for FYs 20, 21 and 22. Prior to the charges that resulted in his removal, he had not been the subject of any corrective or adverse action. (Ex J-2). The parties agree that on December 6, 2022, Employee was assigned to tow a vehicle, referred to as a party bus, which was located at or near 1717 Hamlin Street, N.E.[13] The vehicle, issued by Office Silver, was for failure to "display current tags."[14] Employee arrived at the vehicle at 7:57. (Exs J-7, J-8).

In evaluating disputed facts, the AJ assessed both the quality and consistency of evidence and the credibility of witnesses. *See, e.g., Haebe v. Department of Justice*, 288 F.3d 1288 (Fed. Cir. 2002). She considered the demeanor and character of the witness, the inherent improbability of the witness's version, inconsistent statements and the witness's opportunity and capacity to observe the event at issue. *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987). In this matter, the AJ found witnesses were generally credible and knowledgeable in their areas of experience and expertise. Agency witnesses did not appear to exhibit any *animus* toward Employee and their evidence was consistent. The AJ found a number of inconsistencies in Employee's testimony and inconsistencies in the evidence offered by Employee and his witnesses. However, some inconsistencies are expected and does not invalidate all testimony offered by that witness. *DeSarno, et al., v. Department of Commerce*, 761 F.2d 657, 661 (Fed. Cir.1985). The AJ also found Employee was uncertain and inconsistent about why he entered certain times and gave different reasons on direct and cross examinations. (*Infra* at 8).

The first disputed fact examined was whether the 2016 SOP was in use during the relevant time period. Ms. Douglas testifying on behalf of Employee, stated that that the 2011 version of the SOP and not the 2016 version was in use during the relevant time period. On the other hand, Agency witnesses Mr. Payne, Mr. Haynesworth and Mr. Grayton testified on behalf of Agency that the 2016

[13] All locations cited in this document are in the District of Columbia.
[14] The parties did not agree whether the party bus was considered abandoned. Although the outcome is not relevant to the outcome of this matter, the AJ found that Agency presented sufficient evidence to support its position that Employee knew or should have known the vehicle was abandoned.

SOP version was in use during the time of these events. The AJ determined that Agency presented sufficient evidence to establish that the 2016 SOP was the version in use during the relevant time period. In reaching her decision, the AJ considered that Agency witnesses offered strong credible, cumulative and consistent evidence on this issue. Each had considerable tenure in different positions at Agency, and demonstrated familiarity with the 2016 SOP. The AJ also considered that Ms. Douglas's testimony was not supported by any other testimonial or documentary evidence. Also, since the 2011 SOP was not introduced or offered into evidence, there was no way to determine if there were relevant differences between the two versions.

The accuracy of Employee's time entries was also at issue. Agency maintained that Employee did not enter times truthfully and deliberately omitted information regarding interim stops. Employee contended that he did enter information accurately and truthfully. Employee, supported by at least some of his witnesses, testified that MVOs are not required to enter information regarding interim stops. Reviewing the evidence regarding the time entries, the AJ found Employee to be uncertain about several of the time entries that he made in the DL. For example, he testified that the "8:00" entry was "probably was the time" he was trying to access the vehicle, 8:10 was "probably" when he went to Bryant Street, and 8:17 where he wrote "towing started" was "probably" when he was on 17th Street taking pictures because that's …at the end of the tow." He asserted that the information in the handheld was "automatically generated," and had "no idea" why it had "towing start at 8:17," guessing that the time may have been generated when he used the handheld to take the photographs. He also testified, that the 8:20 time for "towing completed" was when he finished taking the photographs. Employee stated that the information in the handheld is "automatically generated," and he had "no idea" why it listed "towing start at 8:17," but guessed that the time could have been generated when he used the handheld to take the photographs and thought the 8:20 time for "towing completed" was when he finished taking the photographs. (*Infra* at 8; Ex J-7, J-8). Employee did not claim that the handheld was defective in any way. He did not dispute Agency's position that the towing could not have been completed in three minutes, but could not explain these entries other than to surmise that these were the times he began and completed taking photographs. In sum, the AJ did not find Employee completely credible on these entries and therefore determined that Agency met its burden of establishing that Employee knowingly misrepresented the times he entered. With regard to interim stops, Employee testifying that he thought some of his entries referred to interim stops, so the AJ was uncertain of his position. If in fact, he listed the times for interim stops, then his position that he was not required to include interim stops weakens. The AJ determined that Agency met its burden on proof on this issue.

Employee's reason for taking the vehicle to Bryant Street was an issue. At the proceeding, Employee testified that the reason he took the vehicle to Bryant Street because Mr. Slack was on his way there and he needed to use his slim jim. He said that while there, he went to the door and asked an employee at Bryant Street if he could leave the party bus. However, Employee's testimony different significantly from his position in his August 11, 2023 letter, in which he stated that he went to Bryant Street to leave the vehicle there. (Ex J-3).[15] Since this had been Employee's position, the AJ assessed the evidence on that issue and concluded that Agency established that the Bryant Street

[15] The Administrative Judge found this inconsistency troubling, although it did not cause her to find that Employee was not a credible witness at other times.

was not available to leave vehicles at that time, and in any event would not accept a vehicle the size of the party bus. Mr. Payne, Mr. Haynesworth, and Mr. Temoney consistently testified that Bryant Street was not available for impounded vehicles during the relevant time. Agency witnesses also testified that the party bus could not be towed to Bryant Street because that facility did not "handle" vehicles of that size. Witnesses testifying on behalf of Employee witnesses testified that the party bus could be towed to Bryant Street on December 6. Mr. Slack stated that the restrictions on towing vehicles to Bryant Street, were implemented after December 6. Mr. Epps stated that the MVOs could tow vehicles to Bryant Street in December 2022. Ms. Douglas, however testified that an MVO could tow a vehicle to Bryant Street in December 2022, only if "special permission" was first given, since it was a large vehicle. More significantly, no evidence was offered by Employee or his supervisor that he asked for or was given permission to take the party bus there on December 6. Based on this assessment, the AJ determined that Agency met its burden of establishing that Bryant Street was not available for towed vehicles on December 6, 2022.

The AJ also evaluated another fact that was not in dispute, *i.e*., Employee's contention that he had to move the vehicle from Hamlin Street because he deemed the situation unsafe or dangerous. The SOP states that the MVO should visually inspect the vehicle upon arrival, and then notify the supervisor of any public safety issues or hazardous conditions. However, Employee maintained that he had to move the party bus before completing these steps because he felt unsafe and in danger. He stated that he was concerned that drivers on Hamlin Street could get angry at him for slowing down traffic, although he stated that there were no rush hour restrictions at the location. He was also concerned that an owner could possibly appear and create a problem. It is undisputed that Employee did not notify his supervisor of concerns about any concern regarding safety or danger. All witnesses agreed that the decision that a location raises safety concerns and/or a dangerous situation is left entirely to the MVO, and Agency presented no evidence contradicting Employee's position regarding the reason he moved the vehicle. However, Employee's witnesses offered little if any support on this issue. Both Mr. Slack and Mr. Epps testified that they would call their supervisor if they felt unsafe or in danger. Mr. Epps added that he might call for assistance if traffic is "too bad," *i.e.,* if a vehicle was being blocked, but otherwise would proceed, using the "blue lights." He also stated that an incident report has to be completed by the MVO for each safety incident. Employee did not contact his supervisor or complete an incident report. In addition, there were no rush hour restrictions placed on parking during that time, and Employee did not allege being confronted by an angry owner.[16] An AJ is not required to find a fact because there is no evidence to the contrary. The determination that an MVO is made by the individual MVO. In this matter, if Employee reasonably felt he was in a dangerous situation and had to move the vehicle, the outcome would likely have been the same since he did not report it as required. However, even Employee's testimony did not support his position. Employee took the time to walk around the vehicle and look for anything that "needed to be reported," to try to open the doors of the vehicle, and to call Mr. Slack and ask if he had a slim jim and then arrange to meet him at Bryant Street. (*Infra* at 8). It is more likely and reasonable that someone who felt he was in an unsafe and dangerous situation would have left the site immediately, rather than taking the time to do these tasks.

[16] The photographs were taken at 10:36 a.m., after morning rush hour, and does not show a high degree of traffic. It also appears that the street is at least partially residential. (Ex J-6).

Agency has the primary responsibility for managing its employees, which includes determining the penalty once cause is established. The AJ's review is limited to ascertaining if "managerial discretion [was] legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). Agency established that the penalty of removal is within the permitted range for each charge. *See*, DPM, Chapter 16, §§1607.2(4), 1607.2(b)(2), 1607.2(b), and 1607.2(d). Employee contended that the parties' collective bargaining agreement required Agency to use progressive discipline, which would result in a less severe penalty. (Employee's Closing Argument, 7). However, Agency met its burden of proving that Employee's misconduct was sufficiently serious so that no lesser penalty was appropriate. It determined that Employee's actions involved "the loss of confidence and public trust." (*Infra* at 6). Agency's position is the MVO is a position of trust since that towing requires "a level of trust" by the public for the MVO who tows vehicle, a valuable possession, often with property in the vehicle that might have a personal or economic value to the owner. An MVO's failure to adhere to requirements, including accurate information, can create a loss of confidence by the public in Agency and the District Government. In addition, accurate information is required since it may be relied on in legal proceedings. Agency established that Employee's failure to provide accurate information and adhere to requirements was sufficient to support its decision to terminate his employment. Finally, the AJ concluded that Agency considered each *Douglas* factor in reaching its decision. In the Final Decision, the DO reviewed each factor, and explained the reason that even Employee's positive evaluations and lack of prior discipline did not reduce the penalty. (Infra at 6). In sum, Agency met its burden that it "reasonably considered" all relevant factors in reaching its decision to remove Employee. *Stuhlmacher v. U.S. Postal Service*, 89 M.S.P.R. 272 (2001).[17]

Based on a thorough review of the documentary and testimonial evidence and arguments, as well as the facts, analysis and conclusions discussed herein, the AJ determines that Agency met its burden of proof in this matter, and the appeal should be denied.[18]

ORDER

Agency's decision is upheld

FOR THE OFFICE: LOIS HOCHHAUSER.

[17] The fact that the AJ may have chosen a lesser penalty does not constitute a basis to disturb the penalty of removal, since the AJ has no authority to disturb the penalty absent the criteria discussed..

[18] In reaching her decision, the AJ thoroughly reviewed and considered all evidence and arguments offered by the parties, even if not discussed in this decision. *Gardner v. Department of Veterans Affairs,* 123 MSPR. 647 (2016). *See also, Antelope Coal Company/Rio Tino Energy America v. Goodin*, 743F.3d 1331 (10th Cir. 2014).