THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In The Matter Of:	)	
	)	
LYNN C. EDWARDS	)	OEA Matter No. 1601-0012-05
Employee	)	
	)	Date of Issuance: April 28, 2009
v.	)	
	)	Rohulamin Quander, Esq.
D.C. METROPOLITAN	)	Senior Administrative Judge
POLICE DEPARTMENT	)	
Agency	)	
	)	

Pamela Smith, Esq., Agency Representative
Craig Ellis, Esq., Employee Representative

INITIAL DECISION

Background and Procedural History

On June 27, 2006, an evidentiary hearing in the above matter was convened before the undersigned Senior Administrative Law Judge (the "AJ"). Due to equipment failure and related technical difficulties, the transcript from that evidentiary hearing could not be retrieved, and a hearing *de novo* was convened on July 19, 2007. All four of the witnesses who testified in the first evidentiary hearing returned, and re-testified in the second evidentiary hearing. In addition, Agency called Frank Torcisi, Jr., as an additional witness, making a total of five Agency witnesses. Lynn C. Edwards, Employee ("Employee"), did not testify.

Agency was represented by Pamela Smith, Esq., Assistant Attorney General for the District of Columbia. Employee was represented by Craig Ellis, Esq. Agency witnesses were: Lieutenant William O'Connor; Detective Michael Murphy, the assigned investigator; George G. Hester, MPD Fleet Supervisor; Donnell Curtis, a co-defendant in the criminal case and a hostile witness; and Frank Torcisi, Jr., General Manager, First Vehicle Services, MPD.

On March 14, 2004[1], a Grand Jury of the Superior Court of the District of Columbia returned an indictment charging Donnell Curtis, Antonio Rouse, and Lynn Carlos Edwards ("Employee") with one count each of First Degree Theft and Conspiracy. The indictment, based in part upon the testimony and/or statements of 15 witnesses, stated that Employee and one of his co-defendants were involved in the removal of an engine, rear axle, exhaust system, and transmission from an Agency vehicle with the intent to appropriate the property for their own use and to deprive the Agency of a right to and benefit of the property. *Agency Exhibit No. 6*. By letter dated April 6, 2004, Employee was notified by Shannon P. Crockett, Assistant Chief, Human Services, that he was being summarily removed from his position of Shop Supervisor, Fleet Management, Corporate Support, Metropolitan Police Department as of 4:30 p.m. that day. *Agency Exhib. No. 3.*

During the same time frame, Employee appeared in the Superior Court of the District of Columbia, and entered a plea of not guilty on all charges. The matter was then set for trial. Although Agency had summarily dismissed Employee, pursuant to his appeal, Agency convened an administrative hearing on June 28, 2004, before Winston Robinson, Jr., Assistant Chief of Police, and pursuant to DPM §1617.5, the designated Hearing Officer. *Agency Exhib. No. 4*. Based upon the recommendation of the Hearing Officer, Philip E. Graham, Chief, Information Technology, Metropolitan Police Department, and the Deciding Official, sustained the Employee's summary removal as an employee of the District of Columbia government, previously initiated, effective April 8, 2004.[2] *Agency Exhibit No. 5*

On October 14 and 19, 2004, Employee's co-defendants pled guilty to Attempted Theft in the Second Degree. Neither of the co-defendants implicated the Employee at sentencing. The government, having no material witness available to testify against Employee and lacking in documentary evidence as well, elected to dismiss all pending criminal charges against Employee. *Agency Exhibit No. 2.* Despite the dismissal of the criminal charges against Employee, Agency refused to reinstate Employee to his position. There was a delay in serving Employee the notice of Agency's final decision, but once served, Employee timely filed the instant appeal.

[1] The record is confused on the actual date of indictment. Some documents cite it as January 20, 2004, which is the date that the Grand Jury panel was convened. Others documents variously refer to the date of indictment as March 10, 14, and 17, 2004. I am of the opinion that the indictment was issued on March 14, 2004. This is a distinction that is without a significant difference, and has no bearing upon the outcome of this matter.

[2] Deputy Police Chief Cockett's summary dismissal letter was dated April 6, 2004, but not received by Employee until April 8, 2004, reflected in Graham's reference to April 8, 2004, as the effective date of Employee's termination from Agency.

CHARGES

A/ The following are the charges against Employee that were listed in the indictment issued by the Grand Jury:

1. Count One – Between October 1, 2003, and or about November 16, 2003, within the District of Columbia, Donnell Curtis, Antonio Rouse, and Lynn Carlos Edwards, did unlawfully, knowing and willingly, combine, *conspire (AJ's emphasis added)*, confederate, and agree together to steal property belonging to the Metropolitan Police Department, in violation of 22 D.C. Code, Section 3211, 3212(a), 2001 ed.[3]
2. Count Two – On or about November 16, 2003, within the District of Columbia, Donnell Curtis, Antonio Rouse and Lynn Carlos Edwards wrongfully obtained and used property of a value of $250 or more, belonging to the Metropolitan Police Department, consisting of an engine, transmission, rear axle, exhaust system, and related automobile parts, with the intent to appropriate the property for their own use and to deprive the Metropolitan Police Department of a right to and benefit of the property. (First Degree Theft, in violation of 22 D.C. Code, Section, 3211, 3212(a) (2001 ed.)

B/ Based upon Agency's investigation into this matter, which included adopting the Grand Jury's two-count indictment as a component of "cause," the following are the charges that resulted in Agency's decision to termination Employee's employment with Agency:

1. Violation of [DPM] Chapter 16, Section 1603.3., which states that, for the purpose of this chapter, "cause" means " . . . 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 or employment-related act or omission that interferes with the efficiency or integrity of government operations; . . . . This definition includes, without limitation, . . . misfeasance, malfeasance . . . ."[4]
2. Violation of Chapter 16, Section 1603.4, which states that, "With regard to [any] civilian employee of the D.C. Metropolitan Department . . . "cause" also means ... (a) Any act or omission which constitutes a criminal offense, whether or not such act or omission results in a conviction."[5]

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[3] The more specific conspiracy-related language of this offense appears in 22 *D.C. Official Code*, § 1805(a), 2001 ed.

[4] The enumerated specification recited that, "In that, on or about November 16, 2003, Mr. Antonio Rouse, Carlos Lynn Edwards [sic]; and Donnell Curtis knowingly and willingly conspired to commit the theft of D.C. Government Property."

[5] The enumerated specification recited that, "In that, on or about November 16, 2003, Mr. Antonio Rouse, Carlos Lynn Edwards [sic]; and Donnell Curtis knowingly and willingly conspired to commit the theft of D.C. Government Property."

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "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.

OEA Rule 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

Accordingly, Agency has the burden of proving that the act of misappropriating government property, including conspiring to do same, or removal from its proper location, including engaging in a conspiracy to do the same, was unlawful.

JURISDICTION

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

ISSUE

The issue to be decided is whether the evidence to be presented regarding Employee's termination will support a finding that Employee was removed from his position by Agency for "cause", as that term is defined by the District of Columbia Office of Personnel (DCOP) Rule 1603.4, 47 D.C. Reg. 7074, 7096 (2000).

> By its terms, the definition of "cause" set forth in Rule 1603.4 includes any civilian employee of the Metropolitan Police Department who is terminated for any act or omission which constitutes a criminal offense, whether or not such act or omission results in a conviction. Therefore, Agency must prove that Employee was removed for "cause" under DCOP Rule 1603.4.

A/ Agency's Case

Testimony of William O'Connor

Lieutenant William O'Connor ("O'Connor") has been an employee of the Metropolitan Police Department for the past 20 years. In January of 2004, he was reassigned to Acting Director of Fleet Management in charge of accruing vehicles, discarding used vehicles, and the maintenance of MPD vehicles. He was familiar with the process for bringing a vehicle to Fleet Management and signing it in for repairs. The procedure included logging the request into the computer, filling out the repair slip, and dropping the key off to the vendor, First Vehicle Service. O'Connor described the process regarding an MPD vehicle that had been involved in an accident, stating, "MPD, at that time, will make a decision whether they want to repair the vehicle, pay for the repairs for the vehicle, or survey the vehicle, dispose of it." *Tr., Pp 19-25*

While MPD is in the process of making this decision, they retain the keys to the vehicle, which were handled by Jose Rojas and Employee, who was Rojas's predecessor in that responsibility. Their position title was "Q&A Supervisor." The responsibilities included: preparing an estimate of the cost of the repairs to the vehicle and forwarding it to George Hester, the Fleet Supervisor; making certain that the required work was done to MPD specification; and maintaining control of the keys. *Tr., Pp. 25-26.* When repairs were made, the mechanic would receive a key, but also a clear envelope package that provided pertinent information on the vehicle, i.e., the mechanical slip, and estimate by the quality assurance person (Q&A Supervisor). *Tr. Pp. 31-32.* The package received by the mechanic was contained within a clear envelope that held pertinent information on the vehicle. The information was relevant to helping the director (Rouse at that time) or person in authority make a determination whether to keep (repair) or dispose of a vehicle.

Testimony of Michael Murphy

Detective Michael Murphy ("Murphy"), the designated Office of Internal Affairs investigator, testified that there had been reports of thefts from the Fleet Division in 2003, which generated an investigation. An allegation had also come forward from an MPD officer who was working on limited duty at the Northeast shop. *Tr., Pp. 36 and 37*. Installed video surveillance equipment of the Fleet Division disclosed the observation of Donnell Curtis and others removing parts from an MPD vehicle and then installing them into a privately owned vehicle. *Tr., P 47.* As a result, Rouse, Curtis, and Employee were each arrested and charged. Upon questioning, Curtis stated to Murphy that he had received the keys for the MPD vehicle from Employee. *Tr., Pp. 42 and 61.* Curtis also stated that Employee was supposed to be present on the night the video surveillance was taken, to assist in the removal of parts from the MPD vehicle and their installation into the privately owned vehicle, but did not appear after Curtis had warned Employee that the location might be under surveillance. *Tr., P. 47.* As Murphy concluded his investigation, he came to believe that Employee played some role to facilitate the removal or installation of the parts taken from the MPD vehicle. He determined that Employee conspired to commit theft by giving Curtis the keys to the stolen vehicle so

that the parts could be removed. *Tr., P. 61.* Both Rouse and Curtis subsequently pled guilty to the charge of Attempted Theft in the Second Degree, as noted in Murphy's final written report of this investigation, which was admitted into evidence as Agency's Exhibit #2.

Testimony of George G. Hester

Gregory G. Hester ("Hester"), was the Fleet Supervisor for MPD at the time of the theft in question. His duties included overseeing the performance of outside auto vehicle repair contractors, one of whom was Donnell Curtis. Hester observed a personal vehicle on MPD property without an engine and inquired of Rouse, then Fleet Manager, about the vehicle. Rouse replied that he was investigating the matter. Hester later observed an MPD vehicle with its engine, transmission, and drive train all removed. Since there had been no parts removal documentation file created, Hester wondered what was happening.

Hester had known Employee since the 1980s and believed him to be honest. He had no prior reason to question whether Employee was involved in the matter of the stolen MPD auto parts. However, he became disturbed by Employee's flippant, "you don't need to know the details . . . ," response to Hester's inquiry about the seeming irregularity of there apparently being no parts removal documentation file or survey conducted, which could lead to a conclusion by Hester and others that the vehicle should be taken out of service, and that the vehicle's usable parts could be removed. *Tr. Pp. 72-87.*

Testimony of Donnell Curtis

Donnell Curtis ("Curtis") testified that, at Rouse's request, he found a car for Rouse's son, and then assisted Rouse in the purchase of a Mercury Marquis from a private owner. Rouse wanted a lower mileage engine put into the Marquis and decided to remove the needed parts from a surplus MPD vehicle on the parking lot. *Tr., Pp. 94 -97.* Employee's only involvement with the matter was acceding to Rouse's direction to turn over the keys and survey package to Curtis.[6] Curtis had performed personal auto repair work for Rouse on one prior occasion. To Curtis's best recollection this was the first time that Rouse directed a survey package to Curtis at the same time that he was given a set of keys. *Tr. P. 114.*

On cross examination, Curtis reiterated that Employee's sole involvement was to pass the keys and accompanying survey package to the MPD vehicle, done at Rouse's express direction; that Employee was not involved in any of the communications between

[6] Curtis explained that a "survey package" is created when MPD evaluates a vehicle, and determines to get rid of it, either at auction or via re-distribution of its usable parts. The vehicle's history, including its history of damage and repairs, are contained in the survey package. Conversely, if MPD determines to repair and retain a vehicle, a "repair order" is created, indicative that the vehicle was retained. *Tr. P. 131.*

Curtis and Rouse concerning the removal of parts from the MPD vehicle; and, was likewise unaware of what was taking place with the MPD vehicle. Having worked at the site for seven years, Employee's action of passing keys and a package (generally a repair order) to a subordinate employee was a standard job-related duty, which Employee routinely discharged, under direction from Rouse. *Tr., Pp. 133 - 136.*

Testimony of Frank Torcisi, Jr.

Frank Torcisi ("Torcisi") was the general manager for First Vehicle Services ("FVS") at MPD and knew Curtis from a prior employment at the Water and Sewer Authority, and subsequently from having worked together at FVS in 2003, where Curtis was a lead technician. Regarding the present matter, Curtis called Torcisi one day, informing him that he (Curtis) expected to be arrested when he arrived at work. Sometime after the arrest, Curtis related to the Torcisi that he purchased a car for Rouse and then put a transmission in it. When queried by Torcisi where the transmission came from, Curtis stated that he has discussed the matter with Rouse and the Employee, and that the Employee gave him the key to a car. *Tr., Pp. 138-141.*

On cross examination, Torcisi acknowledged that he neither had independent knowledge of the facts of this case, nor information or reason to believe that Curtis's testimony that Employee was not involved in the theft was true or not. However, he still questions whether Curtis ever told him the entire truth about what actually happened. He had three or four separate discussions with Curtis on different occasions, and in different places. While the conversations always involved the incident of the theft, they contained inconsistencies from what had been said before. In at least one of those conversations with Curtis, he told Torcisi that on an occasion when Rouse, Curtis, and Employee were present, Employee allegedly said, "the car was junk, just take the transmission out of this car." *Tr., Pp.157-158, 164-166, 144, 147-148.*

Further, Torcisi testified that, according to Curtis, on one occasion during a discussion in which Rouse, Employee, and Curtis were present, "Rouse put his hands up and said, 'I don't want to know anything about it,' and walked away."[7] *Tr., Pp 141, 158-159.* He concluded his testimony by stating that at one time he considered Curtis to be a trustworthy and truthful person, but not any longer. *Tr., Pp. 167, 171.* Torcisi admitted on cross examination that he based some component of his assessment of Curtis's decreased reputation for truthfulness upon what the police officers had told him with regard to the matter. *Tr., P. 17.*

Recall Testimony of Donnell Curtis

Donnell Curtis ("Curtis") was recalled by the Agency. He testified that he did not remember meeting with Torcisi at a restaurant, or at any time after he had been arrested. Curtis also denied having any conversation with Torcisi or anyone else concerning this

[7] It is unclear whether this latter conversation occurred at the same or a different time as the prior conversation referred to.

criminal matter. As well, he denied ever receiving any update from Torcisi about what the MPD investigators were saying as they developed their case. *Tr., Pp. 176-180.*

B/ Employee's case

At the conclusion of the government's case, Employee, through counsel, requested a Motion to Dismiss Agency's case. The essence of counsel's legal argument was that:[8]

1. Agency had failed to state a claim upon which relief could be granted;
2. Agency had failed to prove its case by preponderance of the evidence, as there was no showing that Employee had engaged in any improper conduct;
3. Regardless of bare allegations and assertions in the Agency's exhibits and other documents related to this matter, the testimony of the witnesses utterly failed to tie Employee to the illegal conduct committed by others;
4. Employee's insignificant act of passing the keys and survey packet from Rouse to Curtis was merely an incidental facilitation of the established job duties, and was not tied to the commission of a crime; and
5. Agency's case is built solely on speculation and innuendo, and no action of Employee throughout the entire life of this case ties him into the plan, theft, removal of auto parts, or installation of said parts into another vehicle.

As the presiding AJ, I declined to issue a bench ruling on Employee's motion, and took the matter under advisement. Employee, operating with the advice of counsel, then advised that he elected to waive his right to present an opening statement and evidence in support of his denial of the allegations. Employee then rested. The record was closed at that point. *Tr., Pp. 180-181.* Employee, through counsel, renewed his Motion to Dismiss in writing, incorporated as a component of Employee's Proposed Final Decision document.

FINDINGS OF FACT, LEGAL ANALYSIS, AND CONCLUSIONS OF LAW

Employee, as of his termination in April 2004, was an 11-year employee of the Fleet Division of MPD and was the Shop Supervisor. According to Agency, he was terminated for cause. In seeking a Motion to Dismiss Agency's action, thus to reinstate Employee, his counsel has questioned whether Agency carried its burden of proof by the preponderance of the evidence. "Preponderance of the evidence" is defined as "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." *OEA Rule 629.1, 46 D.C. Reg. 9297, 9317 (1999).* Thus, Agency must present substantial evidence to meet it preponderance standard in support of Agency's action of termination.

[8] This expanded enumeration of the basis for Employee's Motion to Dismiss, as noted at items #1 to #5, was gleaned from Employee's two proposed final orders, the first submitted as the closing argument after the first evidentiary hearing, held on June 27, 2006, that was reheard on July 19, 2007, due to the lost transcript..

The "substantial evidence" test mandates that there must be in the record under consideration, "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[9] Further, if administrative findings are supported by substantial evidence, the AJ must accept the existence of substantial evidence, even if there is substantial evidence in the record to support contrary findings.

Obviously in cases with a diametrically opposite factual dispute, there is likely to be some substantial evidence on each side, to support each party's respective position and legal argument. The OEA Board held in *Howard v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0127-05 (Apr. 2009), "The issue, however, is not whether there is competing evidence that would have supported a finding favorable to Employee. Rather, the issue is whether there is substantial evidence in the record to support the Administrative Judge's finding." The Board then went further, upholding the AJ's ruling, noting that there was substantial evidence in the record to support the AJ's ultimate determination and the Initial Decision.

In the matter under consideration, Agency initially stated two bases for Employee's dismissal. Citing the grand jury indictment of March 14, 2004, Agency noted that Employee, along with Curtis and Rouse, was indicted on two felony counts, Conspiracy, in violation of Title 22 of the *D.C. Official Code* (the "Code") §1805(a) (2001 Ed.), and First Degree Theft, in violation of Title 22, §§ 3211, and 3212(a) (2001 Ed.).[10]

The indictment stated that between October 1, and November 9, 2003, Employee and others, in furtherance of the conspiracy, illegally removed an engine, transmission, rear axle, exhaust system and related automobile parts from an MPD vehicle. Additionally, the indictment stated that on November 16, 2003, Employee and others, "wrongfully obtained and used property of a value of $250 (sic) or more, belonging to the Metropolitan Police Department, …, with the intent to appropriate the property for their own use… ."

By letter dated April 6, 2004, Employee was notified of his summary dismissal from the Agency effective at 4:30 P.M. on April 8, 2004. The stated basis for his removal was his indictment for Conspiracy and First Degree Theft activities that were consummated between October 1, and November 16, 2003. Employee contested his dismissal, and on June 28, 2004, he was accorded an administrative review hearing before Assistant Chief Winston Robinson, Regional Operations Command-East, MPD. On September 21, 2004, Robinson's findings and recommendation for Employee's

[9] See *David-Dodson v. D.C. Dep't. of Employment Services*, 697 A.2d 1214, 1218 (D.C. 1997), quoting *Ferreira v. D.C. Dep't. of Employment Services*, 667 A.2d. 310, 312 (D.C. 1995).

[10] Although the record herein sometimes refers to the indictment date as January 20, 2004, this AJ takes evidentiary notice that this was the date the grand jury was paneled. It subsequently indicted the defendants on March 14, 2004.

termination were forwarded to Philip Graham, Chief, Information Technology, Metropolitan Police Department, the designated Deciding Official.[11]

In a letter to Employee, also dated September 21, 2004, the Hearing Officer stated that, "[i]n reviewing this case, I place additional evidentiary weight upon the facts in support of the Grand Jury indictment dated, (sic) January 20, 2004, [12] alleging you violated 22 D.C. Code Sections 3211, 3212(a), 2001 ed. (Sic). Based upon the informal hearing before me and my review of the record, I have decided that the removal is appropriate." *Agency's Exhibit No. 4*. Based upon these charges, Graham, by letter to Employee, dated October 13, 2004, adopted Robinson's recommendations and formally accepted the previously instituted summary dismissal from the Agency, effective April 8, 2004. *Agency Exhibit No. 5*.

Graham's letter further stated that he determined, " . . . that there is a preponderance of evidence that [Employee] engaged in an act which constituted a criminal offense, and that [Employee's] removal is fully warranted under the 'cause' provisions as outlined in *District Personnel Manuel*, Chapter 16, §1603.4."[13] *Agency's Exhibit No. 5.* From that decision Employee filed the instant appeal with the Office of Employee Appeals

A few days later, Employee and his two co-defendants appeared in the Superior Court and were given plea offers to their criminal charges. On October 19, 2004, Employee's co-defendants accepted their plea offers, and pled to Theft in the Second Degree, a lesser misdemeanor offense. With no witnesses now available to testify against Employee on either the charge of theft or conspiracy, both formal charges against Employee were dismissed. At their sentencing hearing, both co-defendants Curtis and Rouse are alleged to have stated on the record that Employee was not involved in their crimes. Despite the dismissal of criminal charges against Employee, Agency declined to reinstate Employee, electing instead, to abide by its earlier decision to dismiss him for cause, as reflected in provisions stated in DPM §§ 1603.3 and 1603.4.

Pursuant to the provision of DPM § 1603.3, the definition of "cause" includes any act or omission which constitutes a criminal offense, whether or not such act or omission results in a conviction. Further, DPM § 1603.4 provides that the aforementioned definition of cause also applies to civilians employed by MPD.

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[11] Pursuant to a letter of August 6, 2004 (not a part of the record herein), Graham replaced Nola Joyce, Senior Executive Director, Organizational Development, Metropolitan Police Department, who was initially identified as the Deciding Official.

[12] Although the jury was paneled on January 20, 2004, it apparently did not indict Employee and the other two co-defendants until March 14, 2004.

[13] Graham's letter also recited that his decision was based in significant part upon the investigative report (prepared by Agency witness, Michael Murphy, on behalf of MPD's Office of Professional Responsibility) and the indictment by the Grand Jury for First Degree Theft and Conspiracy.

It is against the backdrop of these criminal charges that it must be determined whether the Employee was dismissed from his position as Shop Supervisor with MPD for cause. The record, as established by Agency, is that Employee was a suspect for both a conspiracy and theft of MPD property. Each charge is criminal in nature, a separate offense, and the basis upon which Agency determined that "cause" for dismissal existed. While none of Agency's five witnesses who testified before me specifically linked Employee to the theft of MPD property, my analysis of the testimony of four of Agency's witnesses (Murphy, Hester, Curtis, and Torcisi) leads me to find that there is substantial evidence that at least a conspiracy to commit a crime was present.

Curtis was the only witness with direct knowledge of the facts concerning the removal of the parts from the government vehicle and what role, if any, Employee played in this scenario that led to installing these items into a privately owned vehicle. Therefore, the sworn testimony of all of Agency's other witnesses carried the label of "Hearsay." However, Curtis's testimony before me during this evidentiary hearing, that Employee was not involved in this crime, was not consistent with what he told Murphy, Hester, and Torcisi on prior occasions, even to the point of telling Torcisi different versions of what happened during their several meetings to discuss the matter. Although Curtis did not focus upon his personal conviction for the commission of a criminal act, the record herein reflects that on October 14, 2004, he plead guilty to Attempted Theft in the Second Degree, a negotiated misdemeanor plea, in violation of *D.C. Official Code*, Title 22, §§ 3211 and 3212(a), 2001 ed.[14]

Regarding the admissibility of hearsay in an administrative proceeding, the District of Columbia Court of Appeals held in *Compton v. D.C. Board of Psychology*, 858 A.2d 470, 476 (D.C. 2004) "that duly admitted and reliable hearsay may constitute substantial evidence. See, e.g., *Coalition for the Homeless v. District of Columbia Dep't of Employment Services.*, 653 A.2d 374, 377-78 (D.C. 1995) ("Hearsay found to be reliable and credible may constitute substantial evidence . . . ."); *Wisconsin Avenue Nursing Home v. District of Columbia Commission on Human Rights*, 527 A.2d 282, 288 (D.C. 1987) (explaining that reliable hearsay standing alone may constitute substantial evidence). Thus, nothing in the hearsay nature of evidence inherently excludes it from the concept of "substantial" proof in administrative proceedings."

The Court of Appeals went on to explain that "just because hearsay may constitute substantial evidence does not be mean that it will do so in every case. The circumstances under which hearsay rises to the level of substantiality are not ascertained by any definitive rule of law, but rather by a set of considerations applied to the particular facts of each case. See *Robinson v. Smith*, 683 A.2d 481, 488-89 (D.C. 1996) (citing *Washington Times v. District of Columbia Dep't of Employment Servs.*, 530 A.2d 1186, 1190 (D.C. 1997) (stating that even hearsay "that lacks indicia of reliability may be entitled to some weight")). The weight to be given to any piece of hearsay evidence is a

[14] The initial charge was Attempted Theft in the First Degree, a felony charge for theft of MPD property valued at $250.00 or more. Curtis negotiated a misdemeanor plea, Attempted Theft in the Second Degree, which reduced the level of conviction, but not the level of the initial charge against him.

function of its truthfulness, reasonableness, and credibility. *See Wisconsin Ave. Nursing Home*, 527 A.2d at 288 (quoting *Johnson v. United States*, 202 U.S. App. D.C. 187, 190-91, 628 F.2d 187, 190-91 (1980)). We have said that:

> [A]mong the factors to consider in evaluating the reliability of hearsay evidence are whether the declarant is biased, whether the testimony is corroborated, whether the hearsay statement is contradicted by direct testimony, *whether the declarant is available to testify and be cross-examined, and whether the hearsay statements were signed or sworn. Id.*; *see also Gropp*, 606 A.2d at 1014 n.10." *Emphasis added.*

Compton v. D.C. Bd. of Psychology, 858 A.2d 470, 476-477 (D.C. 2004).

I find that the sworn testimony given before me and credibility of Curtis were each seriously compromised and undermined by the testimony of three far more credible witnesses, Murphy, Hester, and Torcisi. Each of them added something significant to the case. Further, none of them had any particular motivation or future career interest or employment opportunities to protect while testifying. The cumulative effect of their respective testimonies supports both my finding and conclusion that at least a conspiracy to commit a criminal act existed.

I find also that there is at least evidence of a creditable and substantial nature to prove Agency's case and underlying legal theory that Employee conspired with Curtis and Rouse to commit a theft of MPD property. The substantial evidence test requires: (1) that Agency make findings of basic facts on all material contested issues; (2) that these findings, taken together, must rationally lead to conclusions of law which are legally sufficient to support the decision; and (3) that each basic finding is supported by substantial evidence. *DuPont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n*, 426 A.2d 327 (App. D.C. 1981). Based on the preceding relevant testimony, I find that there exists Substantial Evidence to support both a finding and conclusion with regard to Employee's involvement in the instant matter. Therefore, I will not disturb Agency's action of terminating Employee under rubric of Substantial Evidence.

The passing over of a key and the attached supplemental packet from Rouse to Curtis during duty hours may have appeared to be an innocent act, but when viewed within the context of this entire scenario, takes on a broader character and points in a direction that sustains a finding that Employee was involved.

Employee, who was represented by counsel, elected not to testify in either the first or second evidentiary hearing. Therefore, the AJ had no opportunity to observe Employee's personal demeanor and mannerisms, or to assess his credibility under oath and during both direct and cross examination.

I find that Employee, either by rendering some level of active cooperation, or by failing to act to intercede to prevent the commission of a crime of which he was aware was in process, facilitated the removal of automobile parts from an MPD vehicle, by

according Curtis, through Rouse, access to the vehicle keys and supplemental package. It is also undisputed that Employee maintained control over the keys to MPD vehicles and was responsible for determining the condition of the vehicles. This known responsibility diminishes the argument that Employee was simply a pass through and not actively involved with at least the planning to commit the theft. I find that MPD has sustained its burden of proof that it had cause to remove Employee, Lynn Carlos Edwards, based upon his action or omissions, either of which constituted a criminal offense(s).

MPD had procedures in place that direct that a vehicle may not be disposed of without the approval of three staff members, who between October 1, and November 16, 2003, were Rouse, Employee, and Hester. I find it particularly troubling that when Hester questioned Employee concerning what was occurring with regard to the MPD vehicle, Employee's response to him was that he did not need to know the details on the vehicle. Given their long-term working relationship, that spanned the course of more than one work site, I find Employee's response to be both troubling and suspect, lending credence to Curtis's earlier statements that Employee, Rouse, and he had discussed the removal and re-utilization of the MPD vehicle's parts in a private vehicle.

I find that a participant need not be involved in every component or aspect of the offense, to be deemed a conspirator. Rather, a conspirator can be someone who makes an illegal action possible or easier to occur, by facilitating the path to the completion of the illegal act. I conclude that, although Employee's role was on the periphery, it was sufficient enough to constitute a conspiracy with Curtis and Rouse to take the parts from the MPD vehicle without authority.

Employee had the responsibility and authority to correctly identify the condition and legal state of a vehicle prior to providing the keys and the package to each mechanic. Hester's signature was a standard component prior to allowing parts to be removed from an MPD vehicle. The fact that Hester did not provide approval for the removal of parts from the MPD vehicle, and was even discouraged by Employee from making any further inquiries about the vehicle, supports my finding of Employee's involvement with the theft. I find that the substantial weight of the evidence supports a conclusion that Employee at least facilitated, by his engaging in a conspiracy, or was involved with the theft of automobile parts from the Agency, either by his own acts, his omission, or his engaging in a conspiracy, the nature of which supports Agency's action of removing him from his position for cause.

ORDER

This matter having been considered, it is hereby,

ORDERED, that Employee's Motion to Dismiss, the effect of which would renew Agency's termination of Employee for cause, is DENIED; and it is

FURTHER ORDERED, that Employee's Motion for Summary Disposition is DENIED; and it is

FURTHER ORDERED, that Agency's decision to remove Employee from his position as a Shop Supervisor, Fleet Management, Corporate Support, Metropolitan Police Department, for cause is UPHELD.

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ROHULAMIN QUANDER, Esq.
Senior Administrative Law Judge