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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

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| _____ |) | |
| In the Matter of: |) | |
| |) | |
| SHAIRRMAINE CHITTAMS, |) | |
| Employee |) | OEA Matter No. 1601-0385-10 |
| |) | |
| v. |) | Date of Issuance: March 22, 2013 |
| |) | |
| DISTRICT OF COLUMBIA DEPARTMENT |) | |
| OF MOTOR VEHICLES, |) | |
| Agency |) | MONICA DOHNJI, Esq. |
| _____ |) | Administrative Judge |
| Clifford Lowery, Employee Representative | | |
| Justin Zimmerman, Esq., Agency Representative | | |

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 25, 2010, Shairrmaine Chittams (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of Motor Vehicles’ (“DMV” or “Agency”) decision to terminate her from her position as a Secretary, effective August 10, 2010. Following an administrative review, Employee was terminated for violating District Personnel Manual (“DPM”) §§1603.3(d); 1603.3(f); 1603.3(f)(7); 1603.3(h) and 1603(g). On September 24, 2010, Agency filled its Answer to Employee’s Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge (“AJ”) in July of 2012. Thereafter, on July 30, 2012, I issued an Order Scheduling a Status Conference in this matter for August 22, 2012. Both parties were in attendance. Because this matter could not be resolved based on the documents on record, the undersigned, issued an Order scheduling a Prehearing Conference for October 10, 2012. Both parties submitted their Prehearing Statement. Following the Prehearing Conference, the undersigned issued an Order scheduling an Evidentiary Hearing for December 11, 2012. Both parties were present for the Evidentiary Hearing. Following the Evidentiary Hearing, I issued an Order dated January 15, 2013, notifying the parties that the transcripts from the Evidentiary Hearing were available. The Order also provided the parties with a schedule for submitting their written closing arguments. The written closing arguments were due on or before February 19, 2013. While Agency timely submitted its closing arguments, as of the date of this decision, Employee has not submitted her closing arguments. The record is now closed.

JURISDICTION

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

ISSUES

- 1) Whether Employee's actions constituted cause for removal; and
- 2) If so, whether the penalty of removal is within the range allowed by law, rules, or regulations.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) 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 628.2 *id.* states:

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

SUMMARY OF MATERIAL TESTIMONY

Agency's Case in Chief

1. Horniman Orjisson (Transcript pgs. 12-55)

Horniman Orjisson ("Mr. Orjisson") has been an Inspection Station Supervisor at the 1001 Half Street, Southwest location for about six (6) years. He testified that Employee was a Secretary at the station. According to Mr. Orjisson, on a day-to-day basis, Employee worked downstairs in the resolution department, where she answered phone calls. He explained that he did not authorize Employee to work downstairs. (Tr. pgs. 33-36). Mr. Orjisson maintained that while management could assign an employee to work downstairs, there is a difference between answering phone calls and actually performing inspections. Mr. Orjisson also testified that Employee was trained and had expertise in renewing tags and registration, which was one of her daily functions at the inspection station. (Tr. pgs. 40 - 41). In performing the duties of an LIE, Employee had to go into the Gordon-Darby database.¹ He stated that all DMV employees are trained to go into the Gordon-Darby database to check the VIN number to make sure the vehicle has a valid inspection on it. (Tr. pg. 42).

¹ The Gordon-Darby database is a network system that records all of the vehicles that comes to the inspection station. It shows activities, the history of the vehicle, the type of inspection they had, and how many times they've been at the inspection.

He testified that Agency authorized employees to look up information related to inspection and tag renewing in the Gordon-Darby database, however, License Instrument Examiners (“LIE”) cannot change, approve or input any vehicle into the database. (Tr. pgs. 43 - 44). Mr. Orjisson explained that although all employees have access to view information in the database, only Inspector, Team Leads and Resolution Coordinators can change information in the database. (Tr. pg. 44). Additionally, Mr. Orjisson stated that the Team Lead can authorize an Inspector to make changes in the Gordon-Darby database. (Tr. pg. 45).

Mr. Orjisson provided a detailed explanation of the testing process. He testified that vehicle inspections are conducted by trained Inspectors in inspection lanes, and there are a total of eight (8) Inspection lanes. Lanes five (5), six (6) and seven (7) are designated for taxis. He stated that the inspection for a taxi is different from that of a regular car. He further noted that, more time is spent on the inspection of taxis than it is on a regular car. He further testified that, once a vehicle shows up for inspection, it is moved to position one (1) where information about the car, such as the VIN number, make, model and year is collected from the customer and from the car, and inputted into the system. He explained that, after the information is collected, the vehicle is classified as being a taxi or a regular car. Thereafter, a safety inspection is conducted if the vehicle needs a safety check. If the vehicle passes the safety inspection, it is then moved to position two (2), where the emission is tested. After the emission test is conducted, the vehicle moves to position three (3), where the vehicle’s brake function is tested. He also noted that, for a vehicle to pass the inspection, it has to at least pass the safety, brakes and emissions test.

Mr. Orjisson testified that Inspectors are certified every two (2) years to keep abreast with changes in the job. He explained that as a Secretary, Employee was not authorized to conduct inspections because she did not receive any training on motor vehicle inspections. (Tr. pgs. 17 & 24). He further explained that employees, including Employee were advised at the regular meetings that only the Team Chief and authorized inspectors can conduct an on-board diagnostic (“OBD”) retest with an OBD scanner. According to Mr. Orjisson, an OBD retests vehicles that come back to be tested after they initially failed an emissions test. These vehicles are automatically retested for emissions through the scanner. He further explained that certain vehicles are tested with a handheld scanner just to make sure that the emissions are ready before they go through the regular emissions test to be approved if they pass the inspections. Mr. Orjisson explained that vehicles coming back for an OBD retest have to go back through the lanes. (Tr. pg. 21). Inspectors used the manual OBD scanner on certain vehicles because they know the customer or the customer requested that they check their vehicles before they get in line. (Tr. pg. 23). He also explained that once a vehicle gets in line and the information is entered into the system, a customer only has two re-inspections attempts within twenty (20) days period. They are charged for the third retests conducted within the twenty (20) days period. If the vehicle is tested manually before it gets in line, it saves the customer time so they won’t have to use it or waste their time. (Tr. pgs. 22 & 24). Mr. Orjisson further noted that, because the OBD test can be complicated to conduct on certain vehicles, the Inspector has to go out, kneel down, physically find the plug, and plug the scanner into the customer computer data, recapture the data and record into the system. (Tr. pg. 25).

Mr. Orjisson testified that on October 30, 2008, he saw Employee working with a taxi. The driver of the taxicab was a Taxi Runner for the taxicab company, and came regularly to the DMV.² He explained that the taxicab driver had been attended to, and instead of returning to the line, he

² A Taxi Runner is an individual that brings taxis into the city for inspection.

approached Employee and then left. Fifteen (15) minutes later, the Taxi Runner came back and did not go back to the line or allow anyone else to help him. He again approached Employee, and handed her a paper from his jacket. Employee then went out and provided the Taxicab Runner with a “passed” sticker. Mr. Orjisson testified that he asked one of the Resolution Coordinators to write down the tag of the taxicab. Upon running the tag, he discovered that the taxicab had previously failed emissions, and Employee didn’t even go outside. (Tr. pgs. 27-29). Mr. Orjisson asked the security guard at the DMV to bring the Taxi Runner upstairs for questioning during which the Taxi Runner stated that he did not want to get involved. (Tr. pg. 38). Mr. Orjisson testified that Employee was not authorized to conduct inspections, and she did not speak to a supervisor before she provided the Taxi Runner with the inspection sticker from lane nine (9), nor did she conduct an OBD scan, brake or visual test on the vehicle. (Tr. pgs. 30-31).

2. Dr. Michael St. Denis (Tr. pgs. 56 -108)

Dr. Michael St. Denis (“Dr. St. Denis”) testified in relevant parts that he designed the current “vehicle emission and safety and for hired vehicle inspection system” utilized by the District. He is currently working as a consultant under the direction of the District, maintaining the system. He testified that D.C. regulations require inspection for commercial vehicles and taxis for safety. Taxis are required to be tested every six (6) months. A Taxicab driver has to show up to the Southwest inspection center to have their taxi inspected. Taxis are inspected in a three position lane. (Tr. pg. 67). The vehicle information, the hack inspection for taxis, and the safety and visual inspection is entered at the first position. The emission inspection is completed at the second position. The emissions inspection is performed by physically plugging a connector into the car. (Tr. pg. 70). Once connected, the on-board computer talks to the car computer to determine if everything is working correctly, and it makes the decision electronically through the hard-wire connector. (Tr. pg. 71). There is no human interaction at this point of the inspection. The brakes inspection is done at the third position. The data is electronically gathered at all three positions and sent to the Vehicle Information Management System (“VIMS”), the data system that stores all the records. A pass-fail decision is then made and the information is returned to the lane. An inspection report is printed with a pass or fail sticker. (Tr. pg. 68). If a vehicle passes, the data is sent to the DMV to a system called Destiny, which allows the vehicle registration to occur.

While there are eight (8) physical lanes at the inspection station, taxis are often inspected in lanes five (5) and six (6), because taxi inspections are more thorough than private vehicle inspection. (Tr. pgs. 68 & 69). Dr. St. Denis explained that because the DMV has dealt with fraud before, whereby, taxi drivers bribed inspectors to pass their cars, having taxis inspected in these two lanes, makes it easier for management to observe and control what activities are going on in the lanes. (Tr. pg. 69). The VIMS is designed and controlled by an outside contractor. Dr. St. Denis testified that since 2007, there have been one or two incidents in which data collection has been delayed to make it to the VIMS, however, there has never been an incident where the data completely failed to make it to the VIMS. (Tr. pg. 71). The information recorded when an inspection is conducted includes the information about the Inspector who performs and/or enters the inspection data; and information about the safety, hack, emissions, and brake inspection. The gas cap inspection is done visually. (Tr. pg. 72).

According to Dr. St. Denis, users are identified in the database by their user identification numbers (“ID”) and passwords. Every user has a user ID and password, and these numbers have not been recycled since 2005. (Tr. pg. 73). He testified that if a taxi passes an inspection, the information

is sent to the DMV, and depending on when the inspection is done, the motorist gets charged for each inspection. Once the motorist pays the inspection fee, a vehicle inspection report and a passing sticker is then printed. (Tr. pg. 74). If the vehicle fails inspection, the information is not transmitted to the DMV, but stored in the system, and sent back to the lane to print the inspection report identifying the items that fail and needs to be retested. A failing sticker is also printed and attached to the car. The motorist has twenty (20) days to have two (2) free retests before they get charged the inspection fee for another retest. (Tr. pgs. 74-75).

Dr. St. Denis stated that the inspection station has eight (8) physical lanes and an application in the office referred to as lane nine (9). (Tr. pg. 75). Vehicle information can be modified or added from scratch in lane nine (9) if need be. A modification in lane nine (9) occurs when a car goes through the physical lanes and there is a discrepancy in what the inspector decided. (Tr. pg. 75). Whereas, an add is used for special vehicles such as fleet vehicles and undercover District vehicles that never come to the inspection stations, but need to appear as if they are regular vehicles that drive around, so they have to have an inspection sticker. (Tr. pg. 76). Dr. St Denis testified that the add function is not used for taxis. (Tr. pg. 77). He identified four (4) taxis that were entered into the VIMS in lane nine (9) by user ID 133. He explained that the user ID belongs to Employee. He also noted that the initial inspections on these vehicles were done in lane nine (9) and the inspection report described the inspections as 'attempt 1,' proving that they were not retests. He explained that testing the vehicles in lane nine (9) was improper because hardware that is in the lane is required to carry out certain portions of the inspection such as the gas cap, emissions and brakes test. Additionally, while a visual safety inspection was done on these taxis, a safety and hack test was not conducted. (Tr. pgs. 77-86).

In addition, Dr. St. Denis noted that Employee's testimony in the September 10, 2009 Agency hearing regarding hand-held OBD tests is inconsistent with the inspection reports of the four (4) aforementioned taxi inspection reports in that, these four inspections are initial inspections, and not retests. He maintains that, with a re-inspection, only the components that failed inspection are redone. With an initial inspection, all the tests have to be conducted. (Tr. pgs. 87-90). Dr. St. Denis testified that Employee's inspection of these four (4) taxis is inconsistent with industry inspection standards because based on the inspection reports, the taxis do not appear to have been tested at all. (Tr. pg. 92). Dr. St Denis also stated that, because the District is audited by the EPA to ensure that emissions inspections occur properly, a failure to comply with federal regulations in efficiently testing vehicles may result in the District losing its federal highway funds. (Tr. pg. 93).

According to Dr. St. Denis, the Lane Chief assists in letting motorists know the overall result of their inspection, and if there are discrepancies in the inspection, the Lane Chief can override this in the system. (Tr. pg. 95). He testified that all employees are trained on the use of the Gordon-Darby system as part of their jobs. He also stated that inspection stickers are generated at the last position in the physical lanes (lanes 1-8). (Tr. pg. 98), and the lane nine (9) stickers are generated in the office (Tr. pg. 99). He further noted that the printing of a failing sticker is automatic and cannot be bypassed; however, it's up to the Inspector to actually apply it to the vehicle. (Tr. pg. 99). Dr. St. Denis explained that, a sticker can be regenerated in lane nine (9) without going through the physical lanes (lanes 1-8) if the sticker did not print properly in the physical lane, or if there is a problem with applying it to a vehicle. Additionally, he noted that, although there's no functionality to physically create a sticker, however; a sticker could be generated in lane nine (9) using the lane nine (9) applications, if an inspection is added in lane nine (9). (Tr. pgs. 103-105). He testified that a hand-held OBD was not used on the four (4) previously mentioned taxis. Employees working in the office

may be authorized to enter information in lane nine (9); however, he is not sure whether Employee was directed to enter information directly into the system (Tr. pg. 106).

3. Gregory Simpson (Tr. pg. 110 - 126)

Gregory Simpson (“Mr. Simpson”) is an Inspection Station Manager at the Southwest inspection station. Vehicle inspectors are trained to conduct inspections. (Tr. pg. 111). Employee was his Administrative Secretary in 2008, and her responsibilities included providing support to management staff, including Mr. Simpson, and completing the Time & Allowance (“T&A”). According to Mr. Simpson, Employee did not receive training in conducting inspections. (Tr. pgs. 110 -112). He testified that an ODB scanner is a piece of equipment used to confirm or verify the status of a vehicle that may not have gotten a good reading on the lane, and to determine if the issue was with the vehicle or the equipment. (Tr. pg. 112). Mr. Simpson testified that, because the use of the ODB scanner is very labor-intensive and has a very intricate procedure, training is required to use it, and there was no reason for Employee to use an OBD scanner. He also noted that OBD scanners are not used on taxis. (Tr. pg. 113). Mr. Simpson stated that on Resolution Coordinators, management and Lead Inspectors are authorized to pass vehicles through lane nine (9). (Tr. pg. 114). He explained that no supervisors, including himself would ever authorized Employee to pass taxis in lane nine (9) because she did not have the qualification and because the taxis need to come through the physical lanes. (Tr. pg. 115). He maintained that although Lane Chiefs have the authority to retest cars, they do not have the authority to authorize other employees to enter information in lane nine (9). (Tr. pg. 123).

Mr. Simpson stated that Employee was never assigned to lane nine (9), which was downstairs. (Tr. pg. 118). He explained that Employee took it upon herself to move downstairs to help the individuals working there while they performed their jobs. Mr. Simpson mentioned that while he was aware that Employee had moved downstairs, he didn’t see a problem with her being downstairs since she was still performing her duties. (Tr. pgs. 119-120). Mr. Simpson testified that he has never seen Employee use the OBD scanner. (Tr. pg. 120). He also stated that he had disciplined Employee for T&A in the past. (Tr. pg. 121).

4. Kenneth King (Tr. pgs. 127 – 169)

Kenneth King (“Mr. King”) is the Administrator of vehicle services for the DMV. His responsibilities include overseeing the inspection stations, tag and titling, and registration of vehicles in the District. He testified that Employee was terminated for misuse of the virtual lane nine (9) at the inspection station for hired vehicles. (Tr. pg. 129). He explained that for hired vehicles (taxis) have to be inspected every six months. (Tr. pg. 130). For taxis to pass these semi-annual tests, safety and exhaust tests have to be performed. The safety tests are performed at position (station) one, the exhaust (ODB) tests at position two, and a fail-pass sticker is given at position three. A taxi cannot be approved without passing the emission, and brakes tests, which is performed by the Inspectors. (Tr. pg. 131). Inspectors receive special training, and employees without such training are not allowed to conduct vehicle inspections. (Tr. pg. 132). Lane nine (9) can only be used for taxis if the motorist had previously failed a safety test, and they came back. Instead of going through the lines, they can go see the Lane chief or Resolution Coordinator, who can go visually see that the safety issue has been fixed and then they can go do an edit through lane nine (9). Only management, lane chiefs and resolution coordinators were authorized to pass a vehicle through lane nine (9). (Tr. pg. 132). Because of the amount of fraud at inspection stations, taxi inspections were narrowed to two (2)

lanes. (Tr. pg. 133). Inspection information can be edited in the Gordon Darby system without using a hand-held device. (Tr. pg. 166). He testified that he has never seen Employee use the ODB scanner. (Tr. pg. 169).

Mr. King testified that Agency conducted an investigation of Employee's alleged misconduct. (Tr. pg. 133). The investigative report listed a total of 106 cars that had been processed through lane nine (9) by Employee. Between June 2008 and October 2008, Employee processed forty-four (44) cars through lane nine (9). (Tr. pgs. 134-135). He testified that it is unusual for a Secretary, such as Employee, to process forty-four (44) taxis in lane nine (9) during a period of three (3) months because she was not authorized to process cars. He identified four (4) out of the forty-four (44) taxis that were processed through lane nine (9) for the first time, and explained that the only reason a vehicle is processed through lane nine (9) is if the vehicle had previously been inspected and failed, and the inspector does a visual check and can see that something was corrected. If the vehicle had never had an emissions or safety test done, it is inappropriate to pass it through lane nine (9). (Tr. pgs. 136-137). He explained that the four (4) vehicles processed in lane nine (9) by Employee were not in compliance with Agency's policy. (Tr. pgs. 137-139).

According to Mr. King, Employee's duties did not include inspecting vehicles and she did not receive any training on how to conduct vehicle inspections. Employee's primary duties included answering the phones, and any duties that could be performed in DESTINY. He testified that Employee was assisting downstairs doing DESTINY transactions. He explained that any employee can go into the DESTINY system to make corrections. (Tr. pgs. 160). Mr. King also stated that Employee knew what her daily tasks were. He noted that while Employee could perform certain secretarial tasks without being authorized, she could not work at the inspection lane without authorization or approve taxis through lane nine (9). (Tr. pgs. 155-157). Employee was authorized to perform the duties in which she received training in, such as DESTINY transactions and the surrendering of tags. (Tr. pgs. 162 -163).

Mr. King also explained that because the hand-held device used for conducting emissions inspections is very sophisticated and training is required for an individual to use it, thus, he would never authorize a Secretary to perform inspections. (Tr. pg. 141). While Employee was not the only employee in the front office that used the hand-held device, he never authorized Employee to use hand-held device. (Tr. pg. 159). Management was unaware that Employee was conducting inspections with the hand-held device. (Tr. pg. 164). Employee's conduct in this matter jeopardized the District vehicle instruction program. (Tr. p. 143). The number of vehicles Employee was initially charged with passing through lane nine (9) was reduced from forty-four (44) to four (4), because these four vehicles were never tested through the physical lanes prior to being processed through lane nine (9); the vehicles could not have passed without going through inspection. The user went into the Gordon Darby system, which is located in the office, and altered the inspection report. (Tr. pgs. 144 & 167). He testified that he recommended that Employee be removed from Agency because her conduct constituted fraudulent behavior, which jeopardized the program. (Tr. pg. 145). He explained that although the charges were reduced from forty-four (44) to four, there was no adjustment to the penalty because four (4) fraudulent tests are as bad of forty-four (44) fraudulent tests. (Tr. pg. 148).

5. Lucinda Barbers (Tr. pgs. 170-187).

Lucinda Barbers ("Ms. Barbers") has been Director of the DMV since 2007. She was the deciding officer in this matter. She testified that Employee was charged with making a material

misrepresentation on a government document because Employee fraudulently entered vehicle information in lane nine (9) without the vehicles being inspected and without authorization from management. (Tr. pgs. 173-174). She further testified that Employee was charged with engaging in conduct that Employee knew or should have known was a violation of the law because, Employee had not receive any sheet of paper with someone's initials on it, indicating that the vehicles had previously gone through inspection, in violation of the District law requiring vehicles to go through inspection every two (2) years. She stated that Employee was also charged with conduct that interfered with the efficiency and integrity of the DMV because there is a "black market" for everything that is done at the DMV, and she gets letters everyday accusing DMV of corruption and lack of integrity. (Tr. pgs. 175-176).

Ms. Barbers also testified that, after reviewing both the hearing examiner's record and recommendations, and the entire record, she recommended that Employee be terminated. In making her recommendation, she reviewed the severity of Employee's conduct, Employee's job level, duties, length of service, mitigating, and aggravating factors, along with the Douglas factors. (Tr. pgs. 177 - 179). She stated that Employee's penalty of removal was consistent with Agency's past practice. Ms. Barbers testified that Employee could not be retained because she had been employed with Agency for about twelve (12) years, and should have known better. According to Ms. Barbers, Employee did something that was egregious. (Tr. pg. 180). Ms. Barbers stated that the sole reason Employee was charged with fraud was because of the four (4) vehicles that were fraudulently entered into the system by Employee. (Tr. pgs. 182-184).

Employee's Case in Chief

1. Calvin Fuller (Tr. pgs. 187 – 213).

Calvin Fuller ("Mr. Fuller") is the Lead Inspector (Team Chief) at the Southwest Inspection station. Mr. Fuller is a former Union Shop Steward and has been the Sergeant at Arms for the Union since 2006. He testified that Employee was one of his co-workers, and that her official position was Secretary. (Tr. pg. 188). Mr. Fuller also testified that, to the best of his knowledge, Employee's duties included doing temporary tags, renewing registrations, and doing some of the inspection stuff, such as rechecking a car with the hand-held OBD scanner or safety infractions. He stated that management was aware that Employee was performing these tasks because management was sometimes down in the front office. (Tr. pg. 189).

Mr. Fuller testified that cars only go straight to lane nine (9) when they are coming back for a retest. He explained that lane nine (9) is where you go to make complaints or if you had problems with inspections outside. The person working in the front desk only comes out to lane nine (9) with an OBD scanner after an inspection had previously failed. Mr. Fuller explained that either a Supervisor or Management authorized Employee to perform inspection duties. (Tr. pg. 190). He testified that Managers and Supervisors issue override numbers which can be used to modify any inspection procedure. Mr. Fuller also testified that Employee was not the only front desk employee that used the hand-held OBD scanner. He further stated that the Lane Chiefs, Supervisors and Managers have the authority to order a retest of a vehicle if there is a problem with the safety infraction or with the OBD. (Tr. pgs. 191-192).

According to Mr. Fuller, customers are not allowed to bypass the physical lanes and go straight to lane nine (9) unless they failed the inspection. He testified that it is possible to have an

inspection report which has a “not tested” on all the required components and yet has a “passed” if that was the fourth (4th) retest. He explained that the retest count starts all over after the third (3rd) retest, if the inspection passes. (Tr. pg. 193). He also explained that if an Inspector fails a car, but they see that there is nothing wrong with the car, they will go to the front office and have them okay it, because, if he takes the vehicle back through the lanes, it will show as a whole new inspection (showing as the fourth test), and the motorist will be charged another \$35. (Tr. pg. 194). Mr. Fuller testified that when a car comes for a whole new test and it goes through lane nine (9), it does not reference the test as coming through the lanes. He explained that it is possible to input a test without going through lanes 1-9 and receive a sticker, as long as there is an override. (Tr. pg. 195). He stated that Employee had an override. (Tr. pg. 196). Mr. Fuller also testified that a vehicle that goes through lane nine (9) will appear as ‘not tested’ for the second attempt because those components have previously been tested. (Tr. pgs. 197-198). He testified that the computer will delete all the information if a vehicle is tested for the fourth (4th) time in lane nine (9). (Tr. pg. 205). He also testified that it is typical for a vehicle to pass all the other tests components, but has a safety issue that can be visually inspected to receive an overall pass in lane nine (9). (Tr. pg. 206).

He testified that he has seen a Supervisor and other employees order Employee to pass a car in lane nine (9). This is usually done by handing Employee a special sheet, noting that they don't have any issues. However, the special sheet is never given to the customer to take to the front desk. He has also seen customers directly approaching employees in the front office when they have complaints. (Tr. pgs. 199-200). According to Mr. Fuller, the statement in Agency's Exhibit 4, which states that all vehicles coming back for ODB retests have to go through the lane, is not a fair statement because that's not what is done. He further noted that he was not aware of the policy that stated that any vehicle coming back for an ODB retest can only be authorized by the Team Chief and the Inspector has to use the ODB scanner. Mr. Fuller testified that, for a vehicle to go through lane nine (9), it had to have come in for a prior test and failed. (Tr. pgs. 202-203). He explained that a violation of these policies occurs on a day-to-day basis. (Tr. pg. 209). He also stated that he has never passed a test through lane nine (9) without the vehicle passing the emissions and brakes tests. (Tr. pg. 207). He explained that vehicles specifically go to lane nine (9) so they will not be charged an extra fee, and managers are aware of this. (Tr. pg. 208).

2. Carl Evans Martin (Tr. pgs. 213 -233).

Carl Evans Martin (“Mr. Martin”) is currently the lead hack inspector for the D.C. Taxicab Commission (“DCTC”). Mr. Martin was a Resolution Coordinator at the DMV until 2007. He testified that Employee worked downstairs with him at the DMV. He explained that Employee was assigned to work downstairs with the Resolution Coordinators due to an overflow in the issuance of temporary tags, and to help with inspections by performing ODB. (Tr. pg. 214-215). He further explained that management was aware of Employee performing these duties because she was assigned to work downstairs and she performed the DESTINY tasks. (Tr. pgs. 216 -217).

Mr. Martin testified that a vehicle incurs a fee after the third (3rd) attempt. He explained that this was a glitch in the system design; however, they used an override to handle this glitch. Mr. Martin explained that an override gives them the authority to put cars in the system in the office, instead of going back through the lane. He noted that this was done through visual inspection at the office. Mr. Martin also testified that the Resolution Coordinator, the Main Lead, or the Supervisor could authorize an override. He maintained that only certain personnel are authorized to do an

override. (Tr. pgs. 217-218). He testified that Mr. Simpsons and Mr. Orjisson were aware that Employee used the hand-held scanner to conduct inspections. (Tr. pg. 232).

3. Shairrmaine Chittams (Tr. pgs. 233 – 259).

Shairrmaine Chittams (“Employee”) is a former DMV employee. She worked for Agency from 1997, through 2010 when she was terminated. Prior to working at the Southwest Inspection Station as a Secretary, Employee worked for several other inspection stations as a LIE. As a Secretary at the Southwest station, she assisted the manager with setting up appointments, time and attendance, answering phones, disciplinary actions, and inspector’s schedules. (Tr. pg. 235). She stated that she was assigned downstairs to assist the Resolution Coordinators since they were short-staffed. Downstairs, she issued tags, did OBD testing, assisted on correcting inspections, and assisted customers with complaints. (Tr. pg. 236). Employee testified that she was assigned downstairs by Mr. Simpson, and Mr. Orjisson was aware that she was working downstairs. (Tr. pg. 237). Employee explained that she started performing inspections when the front office was short-staffed and customers needed assistance. She learned how to use the hand-held device by asking the inspectors to show her how to use them. Employee stated that she used the hand-held device on a regular basis, and Mr. Orjisson and Mr. Simpson were aware that she was using the device because they were in the office, or outside several times when Employee was using the device. (Tr. pg. 238).

Employee testified that she was not aware that vehicles coming back for a retest had to go back to the lanes and that only Team Chiefs could authorize an Inspector to use an OBD scanner. (Tr. pg. 239). She also testified that half of the time; she did not participate in the meetings with inspectors. (Tr. pg. 240). She explained that she only sat in meetings with the employees in the inspection station if it pertained to her. Employee testified that user ID 133 belongs to her. She testified that she manually put in ‘passed’ in the system for the four (4) aforementioned vehicles. She explained that once in the Gordon-Darby system, after you have done testing with the OBD and/or safety test, the only input function allowed is ‘pass’; however, this doesn’t mean inspection components are not tested. She also testified that to enter a vehicle in lane nine (9), you need a sheet of paper that comes from the lanes. (Tr. pgs. 241-243). Employee testified that everyone in the office enters information in the Gordon-Darby system. (Tr. pg. 245). Additionally, Employee stated that she did not attend any courses in vehicle inspection. (Tr. pg. 249). According to Employee, to pass an inspection in the District, vehicles have to come to the physical lanes for emissions, brakes and other safety tests. And if a vehicle fails one of these tests, they receive an overall rating of fail and they have to come back for a retest once the problem is corrected. (Tr. pgs. 249-250).

FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee’s appeal process with this Office.

In 2008, Employee was a Secretary at Agency working under the supervision of Mr. Ojisson and Mr. Simpson. Following an incident that occurred on October 30, 2008, wherein Mr. Orjisson witnessed Employee issuing a passing inspection sticker to a Taxi Runner, an investigation was initiated. According to the investigative report, forty-four (44) for hired vehicles were inputted into Agency’s Gordon Darby database by Employee. These vehicles were inputted in inspection lane nine (9), which is a virtual lane in the office used to input information manually. Thereafter, an internal

investigation was conducted, during which it was discovered that Employee had made forty-four (44) questionable entries into the Gordon Darby system. On March 18, 2009, Agency issued an Advance Written Notice of Proposed Removal to Employee, noting that she allowed forty-four (44) taxicabs to obtain approval stickers even though they should have received rejection stickers.³ On March 26, 2009, Employee, through her Union representative, submitted a response to the March 18, 2009 Notice highlighting that she did not misuse her position as a Secretary by improperly accessing and inputting information into the Gordon Darby database. Employee further stated that she passed the vehicles in the Gordon Darby database after receiving paperwork with a signature or initial of the staff which indicated to her that the vehicle should be passed.⁴ This matter was assigned to a Hearing Officer, and following an administrative hearing wherein Employee submitted oral testimony, the Hearing Official submitted a Written Report and Recommendation on July 6, 2010. On August 12, 2010, Agency issued Notice of Final Decision on Proposed Removal adjusting the allegation to allege false information for four (4) for hired vehicles.⁵

1) Whether Employee's actions constituted cause for removal

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §1603.3, the definition of “cause” includes the following: (d) [a]ny knowing or negligent material misrepresentation on other document given to a government agency; (e) [a]ny on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law; (f) (7) [a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include Malfeasance; (g) [a]ny other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious; and (h) [a]ny act which constitutes a criminal offense whether or not the act results in a conviction.

Based on the charges and specifications in the instant matter, the real issues are whether Employee was justified in using lane nine (9) to pass the four (4) taxis and/or whether she acted outside of the scope of her duties as a Secretary. Agency provided oral testimony asserting, that as a Secretary, Employee was not trained and/or certified to conduct a vehicle inspection. Employee testified that she did not receive official training on conducting vehicles inspections. She explained that she learned how to use the hand-held device by asking inspectors to show her what to do. Additionally, Employee testified that she was not aware that vehicles coming back for a retest had to go back through the lanes and that only Team Chiefs could authorize an Inspector to use an OBD scanner because she did not participate in meetings with inspectors. (Tr. pgs. 239-240). Although Employee testified that Mr. Orjsson and Mr. Simpson were aware that she was conducting inspections with the hand-held device, Employee does not state that she was indeed authorized to do so.

Furthermore, Employee does not contest the allegation that she conducted vehicle inspections on the four (4) vehicles on lane nine (9); Employee simply explains that she was authorized by an inspector and/or management to pass the vehicles on lane nine (9). Employee also maintains that the vehicles had been previously tested on the physical lanes before she passed them in lane nine (9)

³ Agency's Answer (September 24, 2010) at Tab 2.

⁴ Id. at Tab 1.

⁵ Id. at Tab 3.

after receiving a sheet of paper from an inspection station staff. However, Employee did not provide this Office with any physical evidence to substantiate her claim. She did not have any paper files of the sheets submitted by the inspection station staff asking her to pass the vehicles. Moreover, according to the VIMS for these vehicles, the inspection carried out on lane nine (9) by Employee was the first inspection attempt proving that they were not retests. If these inspections were not indeed retests, the record in the VIMS would not have listed them as '1st attempt'. In an attempt to explain this discrepancy, Mr. Fuller noted that the Gordon Darby database automatically deletes all the inspection information if a vehicle is tested for the fourth (4th) time in lane nine (9). (Tr. pg. 205). He also testified that it is possible to input a test without going through lanes 1-9 and get a sticker, as long as there is an override, he noted that Employee had override authority. (Tr. pgs. 195-196). Mr. Martin also testified that there is a glitch in the system and an override key is required to resolve this glitch. Mr. Martin stated that the Resolution Coordinator, the Main Lead, or the Supervisor could authorize the override, and that the authority to do an override could only be given by management. (Tr. pgs. 217-218). Dr. St. Denis, on the other hand, explained that vehicle information can be modified or added from scratch in lane nine (9) if need be. He also noted that the add function is not used for taxis. (Tr. pg. 77). He maintained that since 2007, there have been a couple delays in data collection; however, there has never been an incident where the data failed to make it to the VIMS. (Tr. pg. 71). Although Mr. Fuller wants this Office to believe that the system deletes information, he has not provided this Office with any evidence to substantiate his assertion. I also take note that the testimony of Dr. St. Denis on the issue was not credibly challenged. I further take into account that Mr. Fuller is the current Sergeant-At-Arms and the former Union Shop Steward, and thus has an implied interest in seeing that this matter is resolved in Employee's favor. Also, while Employee testified that everyone in the office entered information in the Gordon Darby information; she failed to identify who in the management team gave and/or authorized her use of the Gordon Darby database to manually input passed vehicles.

In an attempt to make sure that the vehicle emissions inspection process was done in a manner that was compliant with EPA demands, as well as making sure that the District government did not lose out on Federal grant monies tied to emission guidelines, Agency contracted with Dr. St. Denis to find and implement the Gordon-Darby vehicle emission testing system. Dr. St. Denis testified that all employees are trained on the use of the Gordon-Darby system as part of their jobs. The VIM for the four (4) taxis in this matter show that an ODB, along with the other inspection requirements were not done, yet Employee passed the vehicles. Consequently, I find that an overall pass inspection for these taxis was not plausible, and Employee issuing a passing sticker was inaccurate and constitutes a material misrepresentation in violation of District rules and regulations.

During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of both Agency's witnesses and Employee's witnesses. I find that Agency's collective testimony relative to this matter was more credible and persuasive than Employee's rendition of events. I find that, as a Secretary, Employee did not possess the skills and training needed to conduct a vehicle inspection. While Employee testified that Agency was aware that she was conducting inspections with the hand-held device, Mr. Orjisson and Mr. Simpson confirmed that Employee was not authorized to conduct inspections. Moreover, Employee does not dispute the fact that she did not have the training or certification necessary to conduct vehicle inspection. She has not provided this Office with any evidence as to who in management authorized her to conduct inspections and/or manually pass vehicles in lane nine (9). I further find that a single instance of a fraudulent inspection is enough to warrant removal of an offending employee. As Agency noted, the integrity of its testing process is at stake, and Agency runs the chance of losing its Federal funding if it is not in compliance

with EPA demands. The four (4) taxis which Employee issued passing stickers to, without being properly inspected, undermine Agency's integrity.

In addition, Employee testified that she was aware that all District vehicles must pass all vehicle inspections in order to operate legally in the District. (Tr. pg. 249). Employee was also aware, that to pass an inspection in the District, vehicles have to come through the physical lanes for emissions, brakes and other safety tests. If a vehicle fails one of these tests, they receive an overall rating of fail and they have to come back for a retest once the problem is corrected. (Tr. pgs. 249-250). Yet, Employee manually passed four (4) vehicles without proper inspection. Accordingly, I conclude that Employee committed fraudulent vehicle inspections as indicated in Agency's Exhibit Nos. 8, 9, 10, and 11. I further conclude that Agency has met its burden of proof in this matter and it has adequately proved that there was proper cause to remove Employee from service.

2) *Whether the penalty of removal is within the range allowed by law, rules, or regulations.*

In a nutshell, I find that Agency's adverse action was taken for cause, and as such, Agency can rely on these charges in disciplining Employee. In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).⁶ According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties as prescribed in DPM 1619.1; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency.

The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.⁷ Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."⁸

When an Agency's charge is upheld, this Office has held that it will leave the Agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment.⁹ Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans*

⁶ See also *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

⁷ See *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

⁸ *Stokes v. District of Columbia*.

⁹ *Id.*; See also *Hutchinson*, *supra*; *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (Sept. 21, 1995).

Administration, 5 M.S.P.R. 313 (1981), in reaching the decision to remove Employee.¹⁰ In *Douglas*, the court held that “certain misconduct may warrant removal in the first instance.” In accordance with Chapter 16 of the DPM, I conclude that Agency had sufficient cause to remove Employee. Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable and is clearly not an error of judgment. Accordingly, I further conclude that Agency's action should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of removing Employee is **UPHELD**.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge

¹⁰ The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

- 1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- 3) the employee's past disciplinary record;
- 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
- 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- 7) consistency of the penalty with any applicable agency table of penalties;
- 8) the notoriety of the offense or its impact upon the reputation of the agency;
- 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- 10) potential for the employee's rehabilitation;
- 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.