

Notice: 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.: 1601-0057-20
EMPLOYEE, ¹)	
Employee)	
)	Date of Issuance: March 22, 2022
v.)	
)	
DISTRICT OF COLUMBIA DEPARTMENT)	
OF PUBLIC WORKS,)	
Agency.)	MICHELLE R. HARRIS, ESQ.
)	Administrative Judge
)	
)	

Charles Walton, Esq., Employee Representative
Bradford Seamon, Jr., Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On September 23, 2020, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Department of Public Works’ (“DPW” or “Agency”) decision to suspend him from service for fifteen (15) days effective August 7, 2020, through August 22, 2020 for Conduct Prejudicial to the District Government.² OEA issued a letter dated September 23, 2020, requesting an Agency Answer by October 23, 2020. On October 20, 2020, Agency filed a Motion for an Extension of Time to File its Answer. Employee noted his opposition to an extension of time.³ Agency filed its Answer to Employee’s Petition for Appeal on November 24, 2020.

Following a failed attempt at mediation, I was assigned this matter on February 26, 2021. On March 3, 2021, I issued an Order Scheduling a Prehearing Conference for March 24, 2021. During the Prehearing Conference, I determined that an Evidentiary Hearing was warranted. As a result, I issued an Order on March 25, 2021, Convening an Evidentiary Hearing for May 19, 2021. On April 21, 2021, Employee by and through his counsel, filed a Motion for Subpoenas. Upon review of this request, the undersigned issued an Order on April 26, 2021, scheduling a Status Conference for May 3, 2021. During the Status Conference, the parties revealed that discovery had not been completed in this matter. As a

¹ Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

² Two causes of action: 6B DCMR § 1607.2(a)(5) and §1607.2 (a)(12).

³ See. Email correspondence between Employee, DPW General Counsel, Camille Glover; OEA Executive Director, Sheila Barfield; and Administrative Judge, Wanda Jackson dated October 21, 2020. It should be noted that during the October 2020 timeframe, District Government operations were under the Covid-19 State of Emergency.

result, I issued an Order on May 3, 2021, requiring that discovery be completed by May 19, 2021.⁴ The May 19, 2021 Evidentiary Hearing was vacated pending the abbreviated discovery extension and the possibility of mediation of this matter. Following email correspondences between the undersigned and the parties, an extension of time was granted for the parties to attempt to settle this matter through mediation. Because Mediation was unsuccessful, I held a Status Conference on June 25, 2021 to resume the adjudicatory process. An Order was issued that same day extending the discovery deadline to July 16, 2021, with an Evidentiary Hearing scheduled for August 11, 2021. On July 14, 2021, Agency filed a Consent Motion to Extend Discovery citing that more time was needed. On July 15, 2021, I issued an Order granting the Motion and extending discovery to July 30, 2021. Prehearing Statements were due by August 13, 2021, and a Status Conference was scheduled for August 19, 2021. The August 11, 2021 Evidentiary Hearing was vacated.

Following the Prehearing Conference on August 19, 2021, I issued an Order Convening an Evidentiary Hearing in this matter for November 10, 2021. Witnesses were discussed and approved, and parties were advised of the limited nature of this hearing. On November 9, 2021, Agency's representative sent email correspondence indicating that Agency had reduced the suspension to nine (9) days and believed that OEA was divested from jurisdiction. As such, Agency advised the witnesses that they were not to appear for the Evidentiary Hearing on November 10, 2021. The undersigned advised the parties that this was an inappropriate action on Agency's part and that this matter should have been brought to the AJ's attention prior to any dismissal of witnesses. Agency filed a Consent Motion to Continue the Evidentiary Hearing on November 9, 2021. Consequently, the undersigned vacated the November 10, 2021 Evidentiary Hearing, and held a Status Conference. During the conference, the undersigned advised the parties of OEA's jurisdiction and issued an Order the same day requiring the parties to submit briefs regarding OEA's jurisdiction to address the issues raised by Agency.⁵ Further, the Order rescheduled the Evidentiary Hearing to December 14, 2021. Neither party submitted briefs regarding the jurisdiction matter.

The Evidentiary Hearing proceeded on December 14, 2021. During the Evidentiary Hearing, both parties presented testimonial and documentary evidence. Following the Evidentiary Hearing, I issued an Order on January 5, 2022, requiring both parties to submit their written closing arguments on or before February 7, 2022. On January 27, 2022, Agency filed a Consent Motion to Extend the Deadline to submit Closing Arguments. On February 1, 2022, I issued an Order granting the Motion. Closing arguments were due on February 14, 2022. Both parties submitted their written closing arguments by the prescribed deadline. 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 Agency had cause to take adverse action against Employee; and
2. If so, whether the fifteen (15) suspension was the appropriate penalty under the circumstances.

⁴ The parties revealed that discovery had not been previously undertaken in this matter.

⁵ Agency asserted that it believed OEA was divested of its jurisdiction in this matter, because it recently reduced Employee's penalty from fifteen (15) days to nine (9) days. Agency avers that pursuant to the D.C. Code that OEA does not have jurisdiction over suspensions of less than ten (10) days. Operating under this belief, and before notifying the Administrative Judge, Agency notified its witnesses that the Evidentiary Hearing would not proceed on November 10, 2021. Agency also notified Employee's counsel of this action and Employee's counsel consented to the Motion to Continue. Counsel for Employee noted during the Status Conference that it did not agree/consent with any penalty regarding this matter.

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 TESTIMONY

On December 14, 2021, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as “Tr.”) which was generated following the conclusion of the proceeding. Both Employee and Agency presented testimonial and documentary evidence during the Evidentiary Hearing to support their positions.

Agency’s Case-In-Chief

Brian Lawrence “Lawrence” Tr. Pages 16 – 86

Lawrence retired from Agency in November 2021. Before retirement, Lawrence was employed at DPW in Fleet Administration as an administrator for two (2) years and had that position in May of 2020. His responsibilities included oversight of fleet management. Prior to this, Lawrence had experience with the D.C. Department of Transportation and City of Alexandria, VA and other municipalities. Lawrence noted that he was hired to address issues with the Agency and its supervisory process, which he described as “loosely ran” and “lax.” Lawrence testified that there were customer service issues and personnel matters that were problematic and inadequate. Lawrence said that his supervisors were Mike Carter and Chris Geldart and that he was essentially “third in charge” in this division. Lawrence testified that Employee was one of his supervisors at Fleet Management. However, Employee reported directly to John Hall. Lawrence cited that Daniel Harrison (“Harrison”), a Deputy Administrator for Fleet Operations worked directly for him. Lawrence explained that Employee was a supervisor in the operation and that his duties included responsibilities for the welding shop and for repairing vacuum systems that were used to retrieve leaves. Lawrence explained that Harrison was responsible for operation of people fixing and repairing equipment. Harrison was Lawrence’s direct report.

Lawrence testified that he was aware of the vacuums located on the DPW campus. Lawrence was able to identify the area as presented in Agency’s Exhibit 8. Lawrence also noted the location of Employee’s work area in this same exhibit. Lawrence explained that there is a car wash and three (3) vacuums and that it’s a 24-hour operation that services all city agencies for fuel. Lawrence testified that the authorized use for the vacuums in those area is for “city equipment only.” He noted that to get fuel, there’s a special reader in the vehicle and that access to the car wash is not available without city

credentials. Lawrence noted that personal use would violate the district regulations regarding the vacuums. Lawrence testified that he never issued any warnings to employees regarding the personal use of vacuums. Lawrence said that Employee's regular duties did not require him to use the vacuums.

Lawrence testified that Harrison notified him that he had observed Employee at the fuel line. Specifically, Lawrence said that Harrison told him that when he was leaving, he saw Employee's vehicle parked in front of the vacuum cleaners. He said Harrison told him that he approached Employee and inquired what was happening and that Employee told him that he was getting ready to vacuum his vehicle out. Tr. 36. Lawrence said Harrison told Employee it was city equipment and that Employee responded that everyone does it and didn't see anything wrong. Lawrence advised Harrison to do an investigation and proceed with whatever action he thought appropriate. Lawrence said his role was in making a final disciplinary decision in this matter. He said Employee came to his office and indicated that Harrison was harassing him and "made up kind of a lie about what happened and fabricated the story that didn't line up with what Mr. Harrison said." Tr. 38. Lawrence said the next day Employee called him and said that he had lied, and that Harrison's reflection of the account was accurate. Lawrence said all of this went into his consideration of discipline in this matter. Lawrence also testified that he reviewed Employee's written response identified in Agency's Exhibit 6. Lawrence said he did not agree with Employee's statements about standing practices for use of government property. Lawrence testified that he did not know of other employees who had used the vacuum.

Lawrence explained that he considered past disciplinary history when considering this matter. He explained that the "District of Columbia allows you to go back and look up to three years of records, disciplinary records, so that you can make discipline decisions based on the employees' actions and severity of their actions." Tr. 50. Lawrence testified that this was the window of time he considered for Employee and that there were prior infractions in 2019 and earlier in 2020. Lawrence said that while the proposed suspension was for 30 days, that he reduced it to a 15-day suspension. He said his philosophy and feelings were that "if you have to suspend an employee for 30 days, why would you do that?...[N]ow you're hurting your operation and if the employee did something that severe, then they should be terminated." Tr. 52. Lawrence explained that he reduced it to "within a fair window so that the action would be considered corrective and not punitive." He said that he did not choose less days for the suspension because this was Employee's third infraction.

On cross examination, Lawrence explained that he was hired in October 2019. He stated that in May of 2020, John Hall ("Hall") was Employee's direct supervisor. Lawrence did not talk to Mr. Hall about this incident, citing it was not his responsibility, but that speaking to Harrison was his responsibility since he was his direct report. Lawrence did not know whether Harrison had spoken to Hall. Lawrence explained that his manager was Mike Carter and reiterated that when he was hired there were many issues, personnel and otherwise at Agency for which he was meant to address. Lawrence indicated there was stealing, employees parking their cars wherever they wanted and instances of loose supervision and management. Lawrence reiterated his earlier statement in that he was unaware of any warning or notice given to employees about using vacuums. Lawrence testified that Harrison told him that "Employee was getting ready to use the vacuum." Tr. 69. Lawrence did not recall seeing a picture of Employee using the vacuum in the picture and noted it was grainy. No one else told Lawrence that they had seen Employee use the vacuums.

On redirect, Lawrence said that Harrison told him he saw Employee with his floor mats out of his vehicle and he was standing near the machine in preparation. He did not recall that he said he "actually physically saw Employee using the machine, but was in the area of the facility that he shouldn't have had his personal vehicle, and he certainly shouldn't have had his floor mats out, the doors open, like you would if you were going to vacuum your car out." Tr. 72. Lawrence said he considered the "preparation" to be a violation because employees weren't supposed to be there. Whether he had the vacuum in his hand

or not, he did not know, but he considered that he shouldn't have been over there. Lawrence noted that Employee in a statement suggested he had the vacuum hose in his hand, but that Harrison stopped him. Tr. 77.

John Hall "Hall" – Tr. Pages 87 -119

Hall has worked at DPW for 31 years and is currently a Direct Repair Manager. He is responsible for oversight of the operation and the supervisors under him. He's been in a supervisory role for approximately 15 years. Employee is one of his supervisees and has been for approximately two (2) years. He was his Manager in May 2020. Hall noted that Employee's job was a Heavy Equipment Supervisor and confirmed the job description as listed in Agency's Exhibit 1. Hall explained that Employee's daily duties included making sure his workers had work every day, issue all work, ensure completion, check work orders and checking status. Hall testified that Daniel Harrison was "over him" in the chain of command, as a deputy administrator. Hall explained that he learned about the vacuum incident from Harrison. Hall said Harrison brought it to his attention because he's Employee's direct manager. Hall testified that Harrison told him he saw Employee at the fuel site around 3:00pm with his personal vehicle. Hall noted that everyone was off at 2:30pm. Hall said Harrison told him that he saw Employee at the vacuum station with a hose in his hand, and that he stopped and spoke to him. Hall did not know what Harrison and Employee spoke about.

Hall explained that either he or Harrison were responsible for scheduling Employee's work shifts. Employee's hours on Saturday were from 6:00am to 2:30pm and probably the same during the week but could've also been 7:00am to 3:30pm. There is a day and night shift. Hall said Employee was on the same shift he was that day (6:00am-2:30pm) and that he would not have had any work-related reason to be at the fuel site after the shift or at any time with his personal vehicle. Hall explained that Employee's daily tasks would not require him to be at that site unless he was driving a government vehicle and vacuuming that or getting something out of the truck or other government equipment.

When asked whether employees had been put on notice about the prohibited use of the vacuums, Hall said no. But that there was a government letter regarding misuse of government equipment that had been presented to all employees. Tr. 96. He said Employee would have received that letter years ago or it is sent when you onboard. Hall believed a recent one was sent out; but he would have to look and see. Hall said he would expect that Employee would know that using those vacuums was prohibited because he held a supervisory role and knows DPW rules and regulations. Hall did not know of any other employees who had used the vacuum for personal use in his time with Agency. Hall said it was not a standing practice to allow employees personal use of the vacuum.

Hall testified that he never witnessed Harrison harassing Employee. Hall attested that the affidavit noted as Agency's Exhibit 7 was his and included his signature. [Employee objected and cited the affidavit had not be notarized.] Hall also identified Agency's Exhibit 3 as an affidavit of Daniel Harrison and noted that he was familiar with Harrison's signature. [Employee objected and cited that the affidavit was not notarized, and that Harrison was not present to identify or confirm, and that it was not a dying declaration.] Hall testified that he spoke with Employee about the incident and stated that Employee told him he wasn't doing anything or using anything. Hall said that he knew Employee shouldn't be down there, so he can't say he believe Employee.

On cross examination, Hall explained that he supervises three (3) people, including Employee. Hall does not have responsibility for the vacuums at Agency and neither does Employee. Hall said that no personal cars parked on the side of that location. Hall said that he's heard from Employee that personal cars come and use the vacuum, but he had not heard it from anyone else. Hall testified that there was a letter about use of government equipment and that there was not one for vacuum per say, but it's a misuse

of government property. Hall said he did not know whether there was any signage posted about use of vacuum at the vacuum location because he does not go down there. He stated he only goes down there to fuel a government vehicle he's driving but does not go close to the vacuum. Hall did not have a role in disciplining Employee for the use of the vacuum. He did not discuss this the matter with Mike Carter or Mr. Lawrence. Hall did not see Employee use the vacuum and stated he was not at work. Hall testified that Harrison told him he saw Employee at the vacuum station with the hose in his hand. Hall explained that Harrison did not say Employee used it, he said he was there. On redirect, Hall said Employee indicated other employees' use of the vacuum while conversing with Lawrence while Employee was "getting his papers."

Ryan Frasier "Frasier" – Tr. Pages 120-138

Frasier is currently employed at SIA Solutions, LLC. In May of 2020, he was employed at Agency as the associate administrator for Fleet Management. He was with DPW for approximately ten (10) years. He was responsible for the management of business operations, which included the fuel site where the vacuums were located on DPW's campus. In his time of managing the fuel site, he said there was no standing practice to allow employees to use the vacuum for personal use. Frasier never witnessed anyone using it but testified that he instructed his employees that if they saw anyone use it, to tell them that they could not use it for personal use. Frasier did not recall any incidents where this had to be addressed. Government vehicles were the only authorized use for the vacuums at the fuel site. When asked if there would be a reason for an employee to have their personal vehicle in this area, Frasier noted that if they are driving through or working at the fuel site, they would park their personal vehicles down there, but could not use the vacuums. Frasier was not aware of any reason for Employee to have his personal vehicle at the fuel site. Frasier recalled that he heard in a meeting that Employee was seen by a supervisor using the vacuum for personal use.

On cross examination, Frasier indicated that he was not aware of any signs specifying use of the vacuum or who would be responsible for such notice. Frasier said if an employee asked about the use of the vacuum, that he would tell them no. He never saw Employee using the vacuum. He heard at a meeting about Employee, and no other details and explained that the supervisor was Daniel Harrison. On redirect, Frasier said he believed that Employee would've known about the vacuum use.

Employee's Case-In-Chief

Employee - Tr. Pages 139 – 153

Employee has been with District Government since June 1986. On May 30, 2020, he testified that on that morning he had worked overtime and was off duty at 2:30pm. He encountered Daniel Harrison after he drove his car to the car wash area vacuums. He testified that he had started to take his floor mats out of his car when he saw Harrison approaching him. Harrison told him "this is not a government vehicle." Employee explained that he did not respond, but placed his floor mats back in his car, closed the doors and drove off. Employee testified that about three (3) weeks later, Harrison sent him an email asking him to write a statement on why he was at the vacuums that day. Employee said he had spoken with Lawrence and had asked whether he had to write a statement and that Lawrence told him to do it. Employee said that Lawrence noted "if you didn't use it, you didn't use it" so he wrote a statement to Harrison about what he did. Employee said he was concerned about Harrison harassing him and didn't know if he was legally bound to give a statement. Employee testified that he told Lawrence that he had pulled out his mats and Harrison drove up to him. He told Lawrence that Harrison said it wasn't a government vehicle and that he left without saying anything due to the atmosphere. Employee explained that Harrison would correct him on things he wasn't wrong on and had written him up for a five (5) day suspension.

Employee testified that he received two suspensions from Harrison, one for five days and another for 30 days. Employee said that the final notice of the 30-day suspension came later and that Brian Lawrence had set it at 15 days. Employee maintained that he did not use the vacuum and that Harrison alluded to it, but he did not. He did not tell Lawrence that he used the vacuum, nor did Lawrence indicate to Employee that he believed he had used it. Employee did not speak to his supervisor John Hall about this matter. The only interaction with Hall was on the day they served him the proposed notice of suspension. Employee testified that when he onboarded 30 years ago, he got a letter about use of government property, but that rules and regulations changed per administration. Employee testified that he never inquired about personal use of vacuums. He explained that at the time the site was built, it was understood by senior management or the administrator at that time that no one could take their personal car through the car wash, but there was no problem with using the vacuum. Employee maintained that Harrison did not tell him not to use the vacuum, but that he stated that it was not a government vehicle. Employee reiterated that following that statement from Harrison, that he returned to his car and left.

On cross-examination, when asked if he touched the vacuum on May 30, 2020, Employee testified that when Harrison approached that the hose was laying on the ground. When Harrison told him it was not a government vehicle, Employee put his mats in the car and hung the hose back on its foundation. Employee iterated that other than hanging the hose, he was not otherwise holding the vacuum. When asked whether his statement to Lawrence aligned with his testimony, Employee stated that it would not indicate that he picked up the vacuum. [This answer was in response to review of Agency's Exhibit 6- "...it appears Mr. Harrison has deemed himself the vacuum monitor and has decided that merely picking up the vacuum is worthy of suspending a government employee."]

When asked whether his statement in an email to Harrison, wherein he stated "I had attempted to begin to vacuum my vehicle when I was approached by Mr. Harrison saying that this is not a government vehicle. At that time, I said nothing, rehung the hose and proceeded on my way," indicated that he had picked up the hose to attempt to begin to clean his vehicle, Employee responded that it did not. When asked about a statement made in August 2020, Employee testified that when he pulled up to the vacuum the hose was on the ground and that he moved it so he could get his floor mats. He again iterated that when Harrison came, he picked up the hose, hung it and left. Employee maintained that he moved the hose once and picked it up once. Employee did not deny that he had intended to use the vacuum that day and went to the site but maintained that he had not used the vacuum at the time Harrison approached him.

Employee testified that previous administrations permitted personal use of the vacuums. He believed it was sanctioned by Ron Flowers, but it was at the time the site was built. Employee asserted that it was his belief that in May of 2020 that personal use of vacuums was permitted. He had never previously used the vacuum for his personal vehicle and that it just so happened on that day that he had attempted to use it. He did not respond to Harrison due to tension between them. Employee testified that he did tell Lawrence that he believed they were allowed to use the vacuum. Employee also cited that other employees used the vacuum. Employee iterated that he did not admit to using anything to Lawrence, because he didn't. Employee testified that he was at the vacuum approximately two to five minutes before Harrison approached and in that that time, he was removing floor mats.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW**ANALYSIS*****Jurisdiction***

As was noted in the procedural history, on November 9, 2021, Agency's counsel sent correspondence indicating that it had taken internal actions and had reduced Employee's suspension from fifteen (15) days to nine (9) days. Thus, Agency believed that this divested OEA of its jurisdiction and dismissed its witnesses assuming the Evidentiary Hearing would not proceed on November 10, 2021. On November 10, 2021, the undersigned held a Status Conference wherein Agency discussed its assertions and Employee, by and through his counsel, noted that it had not agreed to Agency's actions regarding the reduction of the penalty. The undersigned advised both parties during the status conference that pursuant to the holding in *Davis v. DMV*,⁶ OEA's jurisdiction rests with the penalty that was issued and for which the Petition for Appeal was filed at this Office. Absent a settlement agreement/rescission or withdrawal, OEA's jurisdiction would not be divested from Agency's unilateral actions to reduce a penalty after the filing of the appeal at OEA. The parties were provided the opportunity to submit briefs in this matter. Neither party submitted a brief to address this issue further. As a result, OEA's jurisdiction to adjudicate this matter regarding the fifteen (15) day suspension penalty assessed, remains intact.

Brief Summary of Agency's Position

Agency asserts that it had cause to suspend Employee from service for fifteen (15) days and that it was an appropriate penalty under the circumstances. Agency avers that on May 30, 2020, Daniel Harrison witnessed Employee using the car vacuum for his personal vehicle, which was not an authorized use. Agency maintains that those vacuums were for use of government vehicles only and that all employees were aware of this. Further, Agency asserts that all its witnesses testified that it was well known that the use of the vacuums in personal vehicles was prohibited. Further, Agency argues that Employee's statements regarding the matter have been inconsistent and lack credibility. Agency asserts that Employee's argument that he didn't actually "use" the vacuum is not in the "spirit of the law" pursuant to the DCMR. Specifically, Agency notes that "assuming *arguendo* that Employee never activated the vacuum and was unable to begin vacuuming before he was caught, Agency contends that in the spirit of the law, Employee's actions still constituted "use" of government property for non-official purposes 6B DCMR §1607.2 (a)(12)."⁷

Agency avers that the facts of the case exhibit that Employee had "engaged in the preparatory acts such as opening his doors and removing floor mats while parked directly adjacent to the vacuum."⁸ Agency notes that although Employee disputes it, that his initial statements evince that he had already picked up the vacuum and was holding it in his hand when he was approached by Mr. Harrison.⁹ Agency cites that it would have been different if Employee had taken those same actions (removing floor mats, parking near vacuum etc.) but had then "reconsidered, rehung the vacuum and left on his own volition."

⁶ *Tina Davis v. DMV*, OEA Matter No. 1601-0124-15 (January 31, 2017). The AJ noted that "D.C. Code § 1-606.03(a) provides that this Office generally has jurisdiction over suspensions of ten days or more. Agency's original penalty was a fifteen-day suspension, which was unilaterally amended after Employee filed her Petition for Appeal with this Office, to a two-day suspension. As set forth in the undersigned's December 2, 2016 Order, **once jurisdiction of this Office has attached, it cannot be divested by an agency's decision to unilaterally amend an imposed penalty, unless the employee consents to such divestiture or unless the agency completely rescinds the action being appeal.** *Himmel v. Department of Justice*, 6 M.S.P.R. 484 (June 2, 1981)." (Emphasis Added),

⁷ Agency's Closing Argument at Page 14. (February 14, 2022).

⁸ *Id.*

⁹ *Id.*

However, Agency asserts that he was only precluded from use due to the intervention of a supervisor “mid-act.” Agency argues that this is analogous to a shoplifter. Specifically, Agency cites that “a shoplifter who is apprehended by Loss Prevention Officers before being able to completely vacate the premises is still guilty of theft.”¹⁰ Here, Agency avers that under Employee’s definition of “use” then Mr. Harrison would have had to have “idly [sat] by and watched Employee waste government resources in order to hold him accountable.”¹¹ Agency asserts that would have constituted neglect of duty by Mr. Harrison.

Accordingly, Agency maintains it has shown it had cause to discipline Employee and that its penalty of a suspension of fifteen (15) days was appropriate. Agency notes that it utilized progressive discipline given that this was Employee’s third disciplinary action in two (2) years. Agency asserts that the Deciding Official, Mr. Lawrence made all appropriate considerations in assessing this penalty and that it should be upheld.

Brief Summary of Employee’s Position

Employee asserts the charges against him for allegedly using the vacuum cleaner are unfounded and malicious. Employee argues that “all of the Agency’s witnesses testified under oath that they did not see [Employee] using the vacuum cleaner.”¹² Further, Employee avers that Agency witnesses also failed to show that there was a clear policy regarding the use of the vacuum. Additionally, Employee argues that the affidavit of Daniel Harrison should not be admissible because it was not notarized and is a due process issue since Harrison was not available to be cross-examined and that Agency had sufficient time to have the affidavit notarized. As such, Employee argues that Harrison’s affidavit is inadmissible hearsay. Further, Employee asserts that all the Agency witnesses relied upon the statements made by Harrison, as none of them witnessed the incident or were on the scene. Specifically, Employee assert that Brian Lawrence, the Deciding Official, testified that he did not see Employee use the vacuum and that he did not recall seeing Employee using the vacuum in the pictures supplied by Harrison. Employee also asserts that John Hall also testified that he did not see Employee use the vacuum and stated that Harrison did not tell him that he had used it, but that he said he was there.¹³

Employee maintains that his presence and/or his picking up the vacuum hose does not constitute the conduct prejudicial to government for which he was charged. Employee avers that “holding a piece of government property does not constitute any violation...[e]ven intending to use the government property in the future does not constitute conduct.”¹⁴ Further, Employee avers that there was no Agency written policy regarding the use of the vacuum. Employee asserts that all Agency witnesses admitted that there was no clear written policy barring vacuum use. Additionally, Employee asserts that neither Lawrence or Hall issued a written policy regarding the use of the vacuum and there were no signs prohibiting personal use of the vacuum at the cleaning site. Employee maintains that he did not use the vacuum that day and that he was unfairly charged and penalized. Accordingly, Employee asserts that Agency has not met its burden in this matter and that the penalty of the fifteen (15) day suspension should be reversed.

¹⁰ *Id.* at Page 15.

¹¹ *Id.*

¹² Employee’s Closing Argument at Page 1. (February 15, 2022).

¹³ *Id.* at Page 3.

¹⁴ *Id.*

Whether Agency had Cause for Adverse Action

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

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

Additionally, DPM § 1601.7 provides that “[e]ach agency head and personnel authority has the obligation to and shall ensure that corrective and adverse actions are only taken when an employee does not meet or violates established performance or conduct standards, consistent with this chapter.” Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Employee was suspended from service for fifteen (15)¹⁵ days pursuant to two (2) charges: **(1) DPM § 1607.2(a)(5) – “Conduct prejudicial to the District Government: Off-duty conduct that adversely affects the employee’s performance or trustworthiness or adversely affects his or her agency’s mission or has an otherwise identifiable nexus to the employee’s position; (2) DPM § 1607.2(a)(12) – “Conduct prejudicial to the District Government: Use of (authorizing the use of) District owned or leased property, services or funds for inappropriate or non-official purposes.**

In the instant matter, Employee was charged pursuant to DPM §§ 1607.2(a)(5) and (a)(12) for allegedly using car vacuum cleaners for his personal vehicle, where these vacuums were to be used for government vehicles only. Employee was accused of this action by Daniel Harrison (“Harrison”), who passed away in January 2021. Harrison was the only witness to Employee’s action. Employee has maintained that he did not use the vacuum and that the penalty is unwarranted and unjust. It is uncontroverted that on May 30, 2020, Employee was at the car vacuum station with his personal vehicle. Employee testified that he had removed his car mats with the intention to vacuum his car, but never used the vacuum. In an affidavit submitted by Harrison, whose assertions were chiefly relied upon in levying the instant adverse action, Harrison asserted he watched Employee at the vacuums. Harrison also noted that he took pictures. However, it should be noted that some of the photographic evidence was blurry and hard to ascertain. There were no videos taken of this incident.

Affidavit of Daniel Harrison

Employee raised an issue regarding the lack of notarization of Agency’s affidavits in this matter. Employee asserts that it should not be considered given its lack of notarization. Agency filed an affidavit of Daniel Harrison (who died in January 2021) with its Answer and relied upon that affidavit as an Exhibit for the Evidentiary Hearing.¹⁶ Another unnotarized affidavit for John Hall was also submitted;

¹⁵ The Advanced Written Notice Dated July 14, 2020 proposed a thirty (30) day suspension. The Deciding Official, Brian Lawrence, reduced it to fifteen (15) days.

¹⁶ Tr. at Agency Exhibit 3. (December 14, 2020). The affidavit was also included in Agency’s Answer filed on November 24, 2020.

however, since Mr. Hall testified at the hearing, the undersigned will not address Mr. Hall's affidavit.¹⁷ Employee avers that Agency had time to have the affidavit notarized and that the Agency's reliance on challenges during Covid-19 State of Emergency do not explain the lack of notarization. Agency asserts that OEA was notified by and through an email exchange March 20, 2020¹⁸ regarding the challenges of notarization due to the Covid-19 State of Emergency. Further, Agency avers that OEA "sanctioned" the lack of notarization and relies on this for the submission of these affidavits in November 2020. Agency maintains in its closing argument that in November 2020 that "Agency's Answer was filed November 24, 2020, which was well before Covid-19 related concerns began to dissipate and District government operations began to return to some form of "normalcy." Unfortunately, Mr. Harrison passed away January 2021 prior to having the opportunity to subsequently notarize his statement."¹⁹ In its Answer, Agency asserted that it did not have access to commissioned notaries and that its on-site notary services were unable to "renew their commission due to the ongoing public health emergency and the District Government's modified operating status."

Regarding Harrison's affidavit, the undersigned notes Employee's objections and has considered that Harrison was not present to be cross-examined. This is of note given that Harrison's assertions were the impetus for the adverse action taken against Employee. Harrison's affidavit was not notarized, albeit due to Agency's claim that it was unable to obtain the notarization in November 2020 due to the Covid-19 pandemic.²⁰ It is well established that OEA is guided by the Federal Rules of Evidence, but is not bound by them. Accordingly, evidence that would otherwise be inadmissible in other forums, hearsay or otherwise, may be admissible in matters pending before this Office. That said, the undersigned finds that based on the totality of the circumstances, Harrison's affidavit should be afforded the consideration as would be given to any other documentary evidence in the record, but because the notarization is missing,

¹⁷ Tr. at Agency Exhibit 7. (December 14, 2020). The affidavit was also included in Agency's Answer filed on November 24, 2020.

¹⁸ See. Agency's Closing Argument at Attachment 1. In this email exchange, DPW General Counsel, Camille Glover, proposed the following:

"Good afternoon Ms. Clarke and Ms. Brown: I am following up again. Our agency has an additional question about getting documents, such as affidavits notarized. The notary for our agency is unavailable (out). Additionally, notaries at our sister agencies in the District are currently unavailable to us, because as non-essential employees they have been placed on telework status. We also located various notary services outside of District government employees. However, these services are not willing to come to us and notarize our documents, because of their own COVID-19 concerns. DPW proposes submitting affidavits with an Agency Response that are not notarized, and then having them notarized later, once operations are fully up and running, as well as submitting documentation that explains why the affidavit(s) is not notarized. If there is another procedure you would like us to use, please let me know. Finally, when time permits, I would like to speak to one or both of you briefly via teleconference to ensure we have all necessary information during this COVID-19 emergency." --OEA General Counsel, Lasheka Bassey, responded to Ms. Glover with the following: "Camille, your suggestion regarding notarized documents is very reasonable under the circumstances. If you have any additional questions or concerns, please feel free to email us."

¹⁹ See. Agency's Closing Argument at Page 3-4 (February 14, 2022);

²⁰ Following the receipt of the closing arguments in this matter, the undersigned contacted the Office of Notary Commissions and Authentications/Office of the Secretary of the District of Columbia on February 18, 2022, to inquire about the status of notary services during November 2020. That Office cited the following regarding the status of Notary Commissions in November 2020:

"We don't keep a listing of government notaries. There is a list of notaries available on our Search for a Notary Public map, but these are not government notaries, although they are allowed to notarize government documents. During the COVID-19 health pandemic it is unclear how many of them might be willing to notarize. We have been suggesting that many UPS stores and branch banks have notaries. No, all notary Commissions did not expire in 2020. Notary Commission are for a five-year term and except for January 2nd, they begin on the first and fifteenth of each month and end on the 14th and last day of each month. For example a Commission would be from August 1, 2020 through July 31, 2025. One can renew a Commission."

the undersigned has taken notice that these statements were not made under oath. Wherefore, in the consideration of this matter, the undersigned will treat Harrison's affidavit as such, and it will not be afforded any more weight or be considered as if it were taken under oath. This is not to suggest that the affidavit is viewed as lacking credibility, but it is to note that the undersigned has recognized it was not taken under oath and of the unavailability of the witness to be cross-examined regarding the statements included in the submission.

Conduct Prejudicial to the District Government – DPM §§ 1607.2 ((a)(12) and 1607.2 (a)(5)

As previously mentioned, in the instant matter, Employee was charged pursuant to DPM §§ 1607.2(a)(12) and (a)(5) for allegedly using car vacuum cleaners for his personal vehicle, which was prohibited. Agency avers that on the date of the incident, Harrison witnessed Employee using the vacuums. Employee maintains that while he was at the vacuum station, that he never actually used the vacuum and left after the encounter with Harrison. During the Evidentiary Hearing, I had the opportunity to consider witness testimony and examine documentary evidence regarding the incident. None of the Agency witnesses saw or otherwise witnessed Employee's alleged use of the vacuum. Lawrence who was the deciding official relied on the statements provided by Daniel Harrison. John Hall, Employee's direct supervisor noted that he had no knowledge of the incident outside of what was stated by Harrison and was not involved in the disciplinary action against Employee. Agency maintains that Employee did use the vacuum, and even if he did not actually use it, his actions of being by the vacuum, removing floor mats and otherwise constitute the misconduct for which he was charged. Employee avers that no witness can attest to his use and maintains that he did not use the vacuum. Employee testified that he was there, had removed his floor mats, but never used the vacuum because Harrison approached him. Further, Employee asserts that he only had the vacuum hose in his hands to pick it up and hang it, and maintains he never used it. In Harrison's affidavit, it is noted that he witnessed Employee vacuuming his vehicle for several minutes and took pictures.

Harrison's affidavit also notes that when he approached Employee and told him that was not a government vehicle, that Employee did not respond, rehung the hose and left the site. The undersigned finds that this corroborates Employee's version of the events, in that he did not use the vacuum before Harrison approached, that he did not respond to Harrison, but hung the hose and left the site.²¹ Upon review of the pictures included with the Proposed Notice, the undersigned notes that the picture does not show Employee with a hose in his hand, or exhibit actions consistent with vacuuming his car.²² Harrison noted that he observed Employee using the vacuum for several minutes, however none of the photographs show this behavior.²³ As a result, I find that Agency has not been able to prove that Employee used the vacuum that day. While Harrison's statement indicates he saw Employee using the vacuum, I find that there is not any supporting evidence to show this. Harrison did not indicate that he saw or heard the vacuum on, or if he checked to see if it had been recently used/turned on, and none of the photographs show Employee with the vacuum hose in his hand and using it to clean the car as indicated in the statement. Additionally, in the time observed, Harrison did not take any videos of the actions. Further, there are no videos provided from the site itself or otherwise.

As a result, I find that Agency has failed to prove that Employee actually used the vacuum that day. Agency suggests that even if actual "use" is not found, that Employee's actions of being present in

²¹ Tr. at Agency's Exhibit 4 – Email exchange between Employee and Harrison. *See also* Agency Exhibit 6 – Employees July 28, 2020 Response to Proposed Notice. (December 14, 2020).

²² Agency Answer at Tab 17 – Advanced Written Notice of Thirty (30) Day Suspension – Pictures taken by Daniel Harrison. (November 24, 2020).

²³ The pictures included in Agency's Exhibit 2 – Proposed Notice – were not clear. Those included with the Answer showed Employee standing by a van and included a picture of the license plate.

the prohibited area and his intentions to use the vacuum constitute the misconduct for which he was charged. Agency suggests that Employee's statements have been inconsistent and therefore lack credibility. However, the undersigned finds that Employee's statements have maintained that: (1) he was at the vacuum site; (2) he intended to use the vacuum, but did not; and (3) that he did not respond to Harrison, rehung the hose and left the site. Further, Agency maintained that "assuming *arguendo* that Employee never activated the vacuum and was unable to begin vacuuming before he was caught, Agency contends that in the "spirit of the law," Employee's actions still constituted "use" of government property for non-official purposes 6B DCMR §1607.2 (a)(12)."²⁴

Agency avers that the facts of the case exhibit that Employee had "engaged in the preparatory acts such as opening his doors and removing floor mats while parked directly adjacent to the vacuum."²⁵ Agency notes that although Employee disputes it, that his initial statements evince that he had already picked up the vacuum and was holding it in his hand when he was approached by Mr. Harrison.²⁶ Agency likens Employee's actions to that of a shoplifter. Agency averred that "a shoplifter who is apprehended by Loss Prevention Officers before being able to completely vacate the premises is still guilty of theft."²⁷ The undersigned finds that Agency assertion essentially asks this Office to examine intent regarding the misconduct. The language of both DPM sections explicitly notes "use" and/or "conduct" and do not otherwise suggest intent. The undersigned finds that a finding or interpretation of "intention" versus "use" or "conduct" as prescribed in the DPM provision to be a slippery slope that potentially misaligns with the provisions in the DPM. Based on Agency's assertions, it suggests that intention of actions that are never undertaken, could/should be penalized.

The undersigned finds that this is not the intent of the personnel law. Further, the undersigned notes that Agency has not provided any written policy regarding the use of the vacuum. Agency witnesses and Employee all testified that there is a document about use of government property that is included with the onboarding process, but neither of the Agency witnesses, could attest to any specific written policy regarding vacuum use. The undersigned also notes that Ryan Frasier, the former Associate Administrator for Fleet Management, who held the role of supervision/maintenance of the fuel site where the vacuums were located, testified that while he had not seen anyone use the vacuum for personal use, that if he or his employees saw someone using vacuum, they would be told they could not use it, but that there was no written policy regarding those vacuums.²⁸ Thus, while it may have been a perceived practice prohibiting vacuum use, I find that Agency has not shown the written policy for which employees had notice of the prohibition. Accordingly, I find that Agency has not met its burden of proof to show cause for the adverse action against Employee.

As it relates to the charge under DPM § 1607.2 (a)(5) – *Off-duty conduct that adversely affects the employee's performance or trustworthiness or adversely affects his or her agency's mission or has an otherwise identifiable nexus to the employee's position*; the undersigned finds that for the aforementioned reasons, Agency has not met its burden of proof. While it is uncontroverted that Employee was at the vacuum site, it has not been proven that he actually used the vacuum in his personal vehicle. Thus, the undersigned finds that Agency has not shown that Employee committed off duty conduct pursuant to this provision.

²⁴ Agency's Closing Argument at Page 14. (February 14, 2022).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.* at Page 15.

²⁸ Tr. Pages 121 -122. (December 14, 2021).

Whether the Penalty was Appropriate

Based on the aforementioned findings, I find that Agency did not have cause for adverse action against Employee. As a result, I also find that the penalty of suspension for fifteen (15) days was inappropriate under the circumstances.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of suspending Employee from service for fifteen (15) days is **REVERSED**.
2. Agency shall reimburse Employee all back pay, and benefits lost as a result of his termination.
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

/s/ Michelle R. Harris
MICHELLE R. HARRIS, Esq.
Administrative Judge