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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ARNDREA BUTLER)	OEA Matter No. 1601-0199-09
Employee)	
)	Date of Issuance: February 10, 2011
v.)	
)	
)	Lois Hochhauser, Esq.
D.C. DEPARTMENT OF MOTOR VEHICLES)	Administrative Judge
Agency)	
_____)	
Gina Walton, Employee Representative)	
Justin Zimmerman, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION

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

The matter was assigned to this Administrative Judge on June 2, 2010. The prehearing conference took place on June 25, 2010. The hearing took place on August 17, 2010. Employee was present at the hearing and was represented by Gina Walton, AFGE Local 1975 Representative.¹ Agency was represented by Justin Zimmerman, Esq.. At the proceeding, the parties were given full opportunity to, and did in fact, present documentary and testimonial evidence.² Following the submission of written closing arguments, the record closed on October 13, 2010.

¹ Clifford Lowery, President Local 1975, was present as an observer on behalf of Employee. Andrea Comentale, Esq., was present as an observer for Agency for part of the proceeding.

² Testimony was presented under oath. The transcript is cited as "Tr", followed by the page number. Only Agency introduced documentary evidence. Exhibits ("Ex") are cited as "A" followed by the

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUES

Did Agency meet its burden of proof in this matter? If so, is there a basis for disturbing the penalty imposed by Agency?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

On February 24, 2009, Agency issued its advanced notice of proposed removal, which stated in pertinent part:

The proposed action is based on two causes that include any knowing or negligent material misrepresentation on [any] other document given to government agency; any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law; any on-duty act that interferes with the efficiency or integrity of government operations.

Misfeasance; any on-duty act that interferes with the efficiency or integrity of government operations. Malfeasance: any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious; and any act which constitutes a criminal offense whether or not the act results in a conviction...Also you used your position for private gain and your actions affected adversely the confidence of the public in the integrity of government...

Specification: As a Legal Instrument Examiner your duties include scheduling hearings, through the ticket processing system eTIMS when requested by customers who appear in person, at our service center or who have written in. Your eTIMS use profile allows you to "suspend" tickets when performing a scheduling transaction. Suspending a ticket effectively places the ticket on hold to allow the agency time to conduct a hearing and render a decision on the ticket.

During the suspend period (6 months) the ticket fine does not increase, collection notices are not mailed, the vehicle associated with the ticket cannot be booted or towed and the ticket is not referred to collections for failure to pay.

While adjudicating a personal parking ticket, you are required to submit a written statement in defense of the ticket to a supervisor for processing. The supervisor suspends the ticket and submits your written statement to the Chief Hearing Examiner for review and a decision. On January 30, 2007, you submitted a mail adjudication form to Lead Legal Instrument Examiner, Kimberly Campbell for 4 parking tickets issued to your personal vehicle, a 2006 Mercury Grand Marquis, registered to you by the Maryland Motor Vehicle

Administration with Maryland tag 3CPE02. The parking ticket numbers were 358699025, 496185115, 3590771790 and 360012133. At that time, agency rules allowed a supervisor to delegate authority to a lead Legal Instrument Examiner for purposes of accepting employee mail adjudication and suspending tickets. In accordance with agency procedure, Ms. Campbell entered a 6-month mail adjudication suspend on the 4 tickets; the suspend would expire on July 31, 2007. Your mail adjudication statement read, "According to the 1st ticket, I never received ticket on vehicle or notice. No sign. Second, no notice on vehicle. Never received any notices."

On February 26, 2007, at 1:54 pm, you suspended 12 parking tickets issued to your personal vehicle, the Mercury Grand Marquis. The 12 tickets you suspended included the 4 tickets previously suspended by Ms. Campbell on January 30, 2007. By suspending the tickets again on February 26th, you changed the suspend expiration date on the 4 tickets listed above from July 31, 2007 to August 25, 2007. The 8 additional tickets you suspended (361957761, 361313116, 361568200, 571421454, 360092772, 360070701, 359074505 and 360575762) would also expire on August 25, 2007. On June 27, two months before the suspends were set to expire, you entered another suspend on each of the 12 tickets extending the suspend period for an additional 6 months to December 24, 2007.

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

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

You used your position for private gain. By suspending your personal tickets late penalties were never assessed, collection notices were never mailed to your home and your unpaid tickets were never referred to collections. Your 12 tickets have been outstanding since 2007 and total \$1,015.

Specification: On September 4, 2007, you issued a ROSA exemption to your 2006 Mercury Grand Marquis. As set forth above, you violated Department policy by performing a transaction pertaining to your personal vehicle. There is nothing in the record to reflect you are entitled to a ROSA exemption. By issuing the ROSA exemption, you prevented your vehicle, which was registered in Maryland, from being issued parking citations for failing to secure DC tags. Title 18 DCMR Section 429.2 provides that motor vehicle owners and operators who are not legal residents of the

District but who are housing a motor vehicle within the District shall comply with the vehicle registration requirements...Section 429.5 provides, in pertinent part, that observation of a non-complying motor vehicle shall result in a notice of infraction for violation of the motor vehicle registration laws and regulations. The ROSA exemption file is loaded to DPW ticket writers' ticket issuance devices. If a ticket writer had observed your Maryland tagged vehicle parking overnight in a residential area, they would not have issued your vehicle a citation as your vehicle tag was included on the exemption list. At this time it cannot be determined how many tickets you may have avoided by issuing your vehicle the ROSA exemption. The ticket fine for failure to secure DC tags is \$100. (Ex A-16).

On August 7, 2009, Agency issued its notice of final decision. The effective date of removal was August 10, 2009. (Ex A-17).

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

A. Background and Undisputed Facts³: Agency's Office of Adjudication Services is responsible, among other things, for the adjudication of parking tickets. A citizen can contest a parking ticket either in person on a "walk-in" basis or in writing, using the mail adjudication procedure. The citizen has 30 days from the date of issuance of the ticket to answer, and if there is no response, the ticket will double on the 31st day. The citizen has an additional 30 days, for a total of 60 days, to request a hearing. If the citizen does not respond in 60 days, on the 61st day, the violation is deemed admitted and the citizen is no longer eligible to have a hearing. In addition, the citizen is given another 60 days, for a total of 120 days from the date of issuance of the ticket, to file a motion to vacate, providing good cause why the matter should be heard and not deemed admitted. (Tr, 14).

If a citizen responds by contesting the ticket, a "suspend" is placed on the ticket and action on the ticket is held in abeyance to allow Agency to decide the matter. No type of enforcement or collection activities can take place while a ticket is suspended. (Tr, 16). In 2007, clerks could place "suspends" on tickets.

The electronic ticket management system (ETIMS) is the ticket database that Agency uses to track all ticket information, ranging, for example, from the badge number of the officer issuing the ticket to whether the ticket was paid on-line. It also includes information regarding the "ticket history" including actions of Agency staff, such as scheduling a hearing or suspending a ticket for mail adjudication. It will provide information if a ticket is suspended, as to who suspended it, the employee's user ID. (Tr, 15). At the time the alleged conduct took place, when citizens contested tickets, clerks would scan the document into the system or place it on a log. The clerk would then "suspend" the ticket so that it did not double and no action would be taken by the Agency until the matter was adjudicated. An Agency employee who received a citation could not process the ticket,

³ Most of these facts were stipulated by the parties. (Tr, 7).

but was required to submit a written request to a supervisor or a Lead LIE who would then place it in the log for the chief hearing examiner to review. (Tr, 19).

Agency also manages the exemptions for vehicles registered out-of-state, i.e., ROSA exemptions. The law in the District of Columbia requires an owner to register a vehicle that has been “housed” in the District for more than 30 consecutive days. (Tr, 37). Either clerks or hearing examiners are authorized to grant exemptions. (Tr, 70). To obtain an exemption, the vehicle owner establishes that he or she resides out-of-state by providing the registration, as well as a lease, mortgage or a utility bill. The owner is required to provide the documentation within 90 days of receiving a warning ticket. An owner can apply for a ROSA exemption at any of Agency’s locations. (Tr, 50). Once the owner receives the ROSA exemption, the owner will not be subject to tickets. (Tr, 48).

B. Agency’s Case: Agency contends that Employee violated Agency procedures by “personally suspended” at least seven of the twelve tickets she received between January 2007 and April 2007 by going into Agency’s ETIMS database system. In addition, Agency charges Employee with issuing herself out-of-state residency exemption (ROSA), in violation of Agency procedures, thereby preventing enforcement of residency regulations. (Tr, 7). Agency contends that Employee’s conduct “constitutes misrepresentation of material facts in the agency computer system, criminal theft and fraud, misfeasance, malfeasance, and the use of a government position for personal gain”. (Tr, 7).

Wanda Butler⁴ has served as Agency’s Adjudication Services Administrator for approximately 12 years. In that capacity, one of her duties is to manage Agency’s adjudication services administration which is responsible for providing administrative hearings for parking tickets and other minor infractions. It also handles the registration of out-of-state vehicles and the ROSA exemptions. The Administrator testified to maintain the integrity of the Agency, its employees are prohibited from processing their own tickets. She said employees are aware of this policy and that one of the reasons she knew they were aware was that the chief hearing examiner would mention hearings she had held with employees or reviewing their written submissions to her. (Tr, 20). In addition, she knew that supervisors discussed these procedures with employees because although she did not attend staff meetings, she required supervisors to submit written agenda and talking point sheets. (Tr, 61). She said that although she could not be certain which meetings Employee attended, during the six years that Employee worked there, the matter would have been raised on multiple occasions. (Tr, 62).

The Administrator stated that the investigation was initiated after complaints were made by employees with parking permits that other cars were parked in their designated spaces. An investigation by her then administrative assistant was initiated. During the course of the investigation, the Chief Hearing Examiner told the witness that one of the cars without a permit belonged to Employee. (Tr, 40). When she checked the records to confirm that she did not have a permit, she saw that Employee “had lots of tickets...and that the tickets had been suspended by her”. This action

⁴ Since both this witness and Employee have the same surname, to avoid any confusion, Wanda Butler will be referred to as “Administrator”.

triggered an investigation of other employees with the result that two employees, including Employee, had engaged in this type of misconduct. (Tr, 41). The Administrator testified that in 2007, Employee's profile was changed so that she could access ETIMS and place suspends on tickets. (Tr, 56-57). Employee's user ID number changed from W56TP375 to W56L6 when Agency moved to ETIMS. (Tr, 63).

The witness referred to a mail adjudication form signed by Employee and dated January 30, 2007, in which Employee requested adjudication on four tickets. (Ex A-1). She said that completion of the form was in accordance with the proper procedures. (Tr, 21). She then referred to the ETIMS ticket printout of Employee's request for adjudication, noting that it included ticket number 358699025, issued on January 10, 2007, which has the same number that appeared on the adjudication form. (Ex A-2, Tr 22). The witness stated that the printout included information that a suspend was placed on the ticket on February 26, 2008 by an employee with user ID code W56TP375. She testified that W56TP375 was Employee's user ID. (Tr, 24). The Administrator said the printout also included information that on August 20, 2008, Cassandra Claytor, chief hearing examiner, reviewed and sustained the ticket. (Tr, 24-25).

Referring to ticket number 496185115, issued on January 14, 2007, which was also part of the initial adjudication request, (Exs A-3, A-1), the Administrator noted that the printout indicated that on February 1, the lead clerk, Kim Campbell, suspended the ticket. On February 26, 2007. Mail adjudication suspends were entered on the ticket on February 26, 2007 and June 27, 2007 by Employee. The Administrator referred to two other tickets that were part of the mail adjudication request, stating they had similar chronologies in that they were suspended by Employee on February 26, 2007 and again on June 27, 2007. They were upheld by the chief hearing examiner on August 20, 2008. (Tr, 26, Exs A-4, A-5).

The Administrator referred to ticket number 360575762 issued on February 7, 2007, and stated it was suspended by Employee on February 26, 2007 and June 27, 2007. (Ex A-6). The Administrator stated that to her knowledge, Employee did not submit a written request to have the ticket adjudicated. (Tr, 27). She testified that the printouts for tickets numbers 359074505, 571421484, 360070701, and 36-0092773, do not contain requests for adjudication but do reflect suspends entered by Employee on February 26, 2007 and June 27, 2007, (Exs A-7 – A-10, Tr, 28-29). the witness stated that Employee did not follow the proper procedure, first because there is no record of a request for mail adjudication and second, because Employee should not have entered suspends on her own tickets. (Tr, 30). She testified that Employee was aware of the proper procedures because these procedures were conveyed to employee at staff meetings and in memoranda. (Tr, 30).

With regard to ticket number 361528200, issued to Employee on March 15, 2007, the Administrator noted that there was no response to the ticket and after the 61st day, a notice was sent notifying Employee that based on the lack of response, the ticket would double. The witness stated that the document reflects that after the notice was sent, a mail adjudication suspend was entered on the ticket on June 27 by Employee's user ID. (Tr, 32, Ex A-11). The Administrator testified that the printout reflects that ticket number 361313116 contained a similar history. It was issued to

Employee on March 17, 2007 and when there was no response, a second notice was generated on June 8, stating that the owner was presumed to have admitted the violation and was no longer entitled to a hearing. As with the previous ticket, a suspend was placed on that ticket on June 27, 2007 with someone using Employee's use ID code. (Tr, 33, A-12). The Administrator testified that ticket number 361957761 had the same history of Employee entering suspends after failing to respond in a timely manner. There was no entry in any of these tickets that Employee had filed a motion to vacate. If she had, the matter would have been reviewed by a supervisor for submission to the chief hearing examiner who would have ruled on the motion. She testified that it was inappropriate for Employee to place suspends on these tickets. (Tr, 35). The Administrator reviewed a detail ticket summary sheet of 12 tickets issued to Maryland tag number 3CPE02 which is registered to Employee and stated that the exhibit summarized her testimony regarding the 12 tickets. (Ex-14, Tr 36). The Administrator stated that where Employee did not log the ticket into the system, there could never be a mail adjudication by Agency. (Tr, 75). The witness said she looked for documentation in the system that would indicate that an adjudication was requested, but she did not find any supporting documents. (Tr, 81).

The Administrator reviewed the report from ETIMS data based entitled "ROSA exemption plate report." (Ex A-15; Tr, 37). She stated that the report noted that Maryland tag 3CPE02 had a ROSA exemption issued to it on September 4, 2007. She stated that Employee was the registered owner of the vehicle and the user code of the employee issuing the exemption was W56L6, Employee's ID code. (Tr, 37). The Administrator testified that she personally checked and found there were not documents in the system to support the issuance of a ROSA exemption. (Tr, 38).

The witness testified that she considered "a number of factors," including the seriousness of the offense, the impact on Agency's reputation, prior disciplinary action, past performance, and relationships with peers and supervisors before reaching the decision to terminate Employee's employment with Agency. She then issued the notice of proposed removal. She said that she had no confidence in Employee. (Tr, 42, 47, Ex A-16). The final decision was issued by Agency Director. (Ex A-17).

Cassandra Claytor, supervisory hearing examiner, testified as a rebuttal witness. She testified that when staff is trained, the vendor enters specific tickets into the data base, that it is not a live data base, that employees do not enter personal information during training and that nothing they enter during training, goes into ETIMS. (Tr, 125). She said this was true during the training on ROSA in 2007, and that even though she, as a hearing examiner had different training than Employee, the "final step" was the same, i.e., "you push that button and it shows you the exemption period". (Tr, 131). She said it was unlikely that an employee's information would appear during the training, but that in any event, in order to be in the system during the relevant time period,, the vehicle had to have been ticketed or the owner warned for the tags to be in the data base. (Tr, 132).

Ms. Claytor testified that she did not authorize Employee to enter suspends on any of her tickets. She said she never instructed any employee to use their own code to enter a suspend on their own tickets, and that would be "unfair because customers off the street can't do that". (Tr, 128). She said

the proper procedure for an employee to use would be to make the request of a superior. (Tr, 126-127). She said that the procedure did not change in 2007. Ms. Claytor stated that she does not suspend tickets and that when she is asked to do so she tells the individual to take the document to a supervisor. (Tr, 128).

C. Employee's Case: Employee said that during the seven years she worked at Agency , she never received written memoranda or attended meetings where she was instructed on how to handle tickets on her own vehicle. (Tr, 101-102). She said she was told by some individuals that the tickets should be handled the same way tickets received by non-employees were handled, and was told by others that the tickets should be sent to Ms. Claytor for adjudication. She said "at the time it was up in the air" and that "we didn't quite know what direction to go". She said she "did the mail adjudication...and waited on the decision". (Tr, 102). Employee testified she received no training on how to process a ROSA exemption and she received the information "by word of mouth". She said she "was just confused so [she] just didn't do it at all". (Tr, 104). She said that in 2006 until the beginning of 2007, she was appeals coordinator, "doing suspends on tickets and mail adjudications through the appeals coordinators". She was responsible for duplicating information. In 2007 through 2008 she was in the correspondence unit which deals with suspends on tickets, mail adjudication, pay plans and the "queue matic system". (Tr, 101).

Employee testified that she had never applied for or received a ROSA exemption. (Tr, 119-120). She stated that she never entered anything into the system giving herself a ROSA exemption in 2007, because at the time, she "didn't know what ROSA was". (Tr, 120). She said she learned what a ROSA exemption was in 2008, but never applied for an exemption. (Tr, 120). reviewed the ROSA Exemption Plate Report dated September 4, 2007 and identified the information and registration number as belonging to her. (Ex A-15). She testified:

This report looks like when we were in one of our beginning trainings like they were supposed to have done ROSA or however. It looks like I was in the process of being trained but we never finished off on the ROSA because they declined the whole situation about doing ROSA for us or being eligible to do ROSA. So that was cleared out. That was just a practice test that we were doing in our other training. (Tr, 105).

Employee did not know when the training took place, estimating that it was between the end of 2006 and 2007. She said it was not really ROSA training, and that trainees were told to use their own tag numbers and codes. (Tr, 113). In response to her representative's question as to whether she ever processed a ROSA exemption other than the one done as a "test", she responded:

Not that I can recall because I didn't know how to do it at all so I just didn't do it. If anything, I asked the supervisor are we supposed to do ROSA? They said, yeah, and then no. So I was clueless. I just didn't do it. (Tr, 116).

When asked by counsel for the reasons she entered suspends on her own tickets Employee stated, with regard to several tickets, that she "believe[d] [she] enter[ed] [her] code...according to Ms.

Claytor's approval". She stated that she walked to Ms. Claytor's office "to ask her to adjudicate [her] tickets" and Ms. Claytor told her "you have a code of your own put it in the system yourself." (Tr, 107, Exs A-6, A-11). She said that Ms. Claytor was supposed to complete the adjudication at a later date, but did not do so although Employee said she brought it to Ms. Claytor's attention "several times after that". (Tr, 108). She said it normally took "a good three weeks" for Ms. Claytor to render a decision. (Tr, 109). She said she suspended six tickets on February 26, 2007 that she looked up and saw were in the system, after talking with Ms. Claytor. (Tr, 117, Exs A-6 – Ex A-10). She said she was "pretty sure" she brought the matter to Ms. Claytor's attention (Tr, 118). She testified that she was told by Ms. Claytor to suspend the seven tickets on June 27, 2007. (Tr, 118).

Employee agreed that initially she had submitted several tickets to Kimberly Campbell, a Lead, for processing. She said two coworkers then told her to start sending the paperwork to Ms. Claytor. She testified that Ms. Campbell, who was her Lead, told her "they were supposed to be starting sending the paperwork to Ms. Claytor". (Tr, 114). Initially, she thought that citations received by employees were handled the same way as citations entered by members of the public. (Tr, 114). Employee stated that although she initially went to Ms. Campbell to get suspends, she later started going to Ms. Claytor because she was "unclear" about the proper procedure. She testified that Ms. Campbell had told her that the Leads had a meetings and that from then on Leads were not supposed to enter suspends, that she should go to Ms. Claytor. The information, the witness stated, was "by word-of-mouth". (Tr, 122).

Kimberly Campbell has been employed by Agency for 20 years and has been a Lead LIE for ten years. She testified the proper procedure during the relevant time period was for employees to bring their requests for adjudications with the tickets to a Lead LIE or supervisor, who would then enter them in the logs and put suspends on the tickets. At the end of the day, the items were forwarded to Ms. Claytor for review. (Tr, 85). She testified that in 2007, employees were assigned to enter suspends on tickets, and if an employee ticket was placed with regular tickets by mistake, an employee could enter a suspend on it. (Tr, 86). She indicated that this was more the exception than the rule. (Tr, 92). She also noted that the employee entering the data would know if it was that employee's ticket because the ticket would include the receiver's name. (Tr, 93). She said Employee "at some point" rotated to perform that duty. (Tr, 90). Ms. Campbell stated that if no action was taken on the suspended ticket during the six month period, a new suspend could be entered.

The witness stated that she became aware of the rules and procedures for processing employee tickets was by "word-of-mouth". When she first started with Agency, she testified, she was told she should take any ticket she received to a supervisor. She said most of the employees she knows are familiar with this process, but she never received any memoranda or had staff meetings about the matter. (Tr, 88-89). Ms. Campbell stated that employees for whom she served as Lead knew that they were not supposed to enter suspends on their own tickets because it was something that they discussed. She further testified that Employee should have known this because she was Employee's Lead. (Tr, 95).

Ms. Campbell testified that in 2007, an employee would have access to enter a ROSA exemption for his or her own vehicle. She stated that an employee would go to a Lead or supervisor for a ROSA exemption, but that the issue was not discussed the same way that placing suspends on tickets was discussed. (Tr, 97). But even though the matter was not discussed among employees the same way that the prohibition about suspending one's own tickets was discussed, she still thought an employee would take the documents to a Lead or supervisor and not enter the information in directly. (Tr, 97). The witness said that in 2007, the documents that supported the granting of a ROSA exemption, were not scanned but were kept in folders. She said Employee never asked her for a ROSA exemption and never gave her material to request the exemption. (Tr, 98). She said she never authorized Employee to enter a ROSA exemption on her own. (Tr, 99). Ms. Campbell stated that Employee would have no reason to go to another location or log on to a computer in another office. She said Employee would have to go through her chain-of-command, in any event, because in 2007, other locations could not process requests for ROSA exemptions. (Tr, 99).

Ms. Campbell testified that it might not be unusual for an employee to have two tickets or even five tickets in a three month period, but that it would be unusual for an Agency employee to receive 11 tickets during that time period because Agency employees are familiar with the regulations and know what should be done to avoid getting a ticket. (Tr, 92).

2. Discussion, Findings of Fact and Conclusions of Law

Agency's position is that Employee violated Agency procedures by placing suspends on her own tickets and by granting herself a ROSA exemption. It contends that removal is the appropriate penalty for these actions. Employee does not dispute that she placed suspends on her own tickets, but maintains that she was directed to do so by Ms. Claytor. She also contends that she starting going directly to Ms. Claytor, after being told by Ms. Campbell, her Lead, that the procedure had changed and employees were to go directly to Ms. Claytor.

D.C. Official Code §1-616.51 (2001) requires that the Mayor "issue rules and regulations to establish a disciplinary system [for agencies over which he has personnel authority] that includes...1) A provision that disciplinary actions may only be taken for cause [and] 2) A definition of the causes for which disciplinary action may be taken." The Mayor has personnel authority of Agency. The D.C. Office of Personnel, the Mayor's designee for personnel matters, published regulations entitled "General Discipline and Grievances" that meet the mandate of §1-616.51 and apply to all employees in permanent status. *See* 47 D.C. Reg. 7094 *et seq.* (2000). The definition of "cause": includes "any on-duty or employment -related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious". 47 D.C. Reg. 7096. Employee's conduct falls within this definition of "cause" since she was charged with employment-related actions that interfered with the efficiency and integrity of government operations. Agency met its burden of proof that Employee's conduct interfered with the integrity of government operations.

Credibility was a major issue since there was a great deal of conflicting testimony. In trying to resolve issues of credibility, the Administrative Judge must consider the witness's demeanor and character as well as the inherent improbability of the witness's version and the consistency of the witness's statements. *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987). Because this case presented so much contradictory evidence, the Administrative Judge adhered to these considerations carefully, particularly reflecting on the demeanor of the witness during the testimony since the substance of the testimony could be reviewed when the transcript was reviewed but the demeanor could not be captured in a transcript. *See, e.g., Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 496 (1951). The District of Columbia Court of Appeals emphasized the importance of credibility evaluations by the individual who sees the witness "first hand". *Stevens Chevrolet Inc. v. Commission on Human Rights*, 498 A.2d at 440 (D.C. 1985).

Where there is a conflict in testimony, the finder of fact "has the authority to find one witness is more credible than another". *Toy v. United States*, 263 F.2d 1,8 (DDC 2002). In this matter, after carefully reviewing the testimonial evidence and the demeanor of the witnesses, the Administrative Judge concludes that Employee was not a credible witness. Her testimony regarding essential facts of the case, e.g., whether she was aware of the proper procedures for getting tickets suspended and whether she was ever told by Ms. Campbell that the procedures had changed and she needed to go to Ms. Claytor to get suspensions entered into the system, conflicted not only with Agency witnesses, but also with Ms. Campbell's witnesses. Her testimony regarding why her vehicle appeared on the ROSA exemption report, was contradictory and illogical and also conflicted with Ms. Claytor's testimony about the training. Her testimony, in sum, was inconsistent, tentative and, at least to this Administrative Judge, essentially self-serving and not based on facts. The other witnesses, Administrator Butler, Ms. Campbell and Ms. Claytor were credible, and their testimony was in large part consistent, particularly on the relevant facts of this case.

Agency has the burden of proof in this matter. It must prove its case by a preponderance of evidence, which is defined as "that degree of relevant evidence which the reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." OEA Rule 629.1, 46 D.C. Reg. 9317 (1999). *See also* 5 C.F.R. § 1201.56(c)(2).

It is Agency's responsibility to manage its employees, including determining the appropriate discipline to impose. *See, e.g., Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), D.C.Reg. ____ (). Agencies have considerable discretion in determining penalties. The OEA Board has long held that it will limit its review of discipline imposed by an agency to a determination as to whether "managerial discretion has been legitimately invoked and properly exercised." If an agency meets that standard, the OEA Board will not substitute its judgment but rather, will sustain the penalty imposed by the agency. *Stokes v. District of Columbia*, 502 A.2d

1006, 1009 (D.C. 1985). An Agency's decision will not be reversed unless the Administrative Judge concludes that Agency failed to consider relevant factors or that the imposed penalty constitutes an abuse of discretion. *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985). The Administrative Judge has concluded that Agency met its burden of proof in this matter. She further concludes that the evidence did not establish that the penalty constituted an abuse of discretion. Agency presented evidence that it considered relevant factors in reaching the decision to remove Employee. There was no evidence presented that Agency was prohibited by law, regulation or guidelines from imposing the penalty of removal. The OEA Board recognizes that the appropriateness of a penalty "involves not only an ascertainment of factual circumstances surrounding the violation but also the application of administrative judgment and discernment". *Beall Construction Company v. OSHRC*, 507 F.2d 1041 (8th Cir. 1974). The Administrative Judge concludes that Agency did not abuse its discretion or act in an arbitrary or capricious manner. She therefore concludes that there is no basis to disturb the penalty.

ORDER

It is hereby

ORDERED: This petition for appeal is DISMISSED.

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge