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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
DANIEL LEWIS	)	OEA Matter No. 1601-0215-09
Employee	)	
	)	Date of Issuance: July 15, 2011
v.	)	
	)	Lois Hochhauser, Esq.
D.C. DEPARTMENT OF MOTOR VEHICLES	)	Administrative Judge
Agency	)	
_____	)	

Shermineh Jones, Esq., Agency Representative  
Clifford Lowery, Employee Representative

**INITIAL DECISION**

INTRODUCTION AND STATEMENT OF FACTS

Daniel Lewis, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on August 20, 2009, appealing the final decision of the D.C. Department of Motor Vehicles, Agency herein, dated July 27, 2009, suspending him for ten days without pay, from his position as Inspector, effective July 28, 2009. (Ex A-7). At the time of the adverse action, Employee was in permanent career status.

This matter was assigned to me on September 2, 2010.<sup>1</sup> A prehearing conference took place on March 9, 2011. The hearing took place on April 12, 2011. At the proceeding, the parties had full opportunity to, and did in fact, present testimonial and documentary evidence as well as argument to support their positions in this matter.<sup>2</sup> Shermineh Jones, Esq., represented Agency and was assisted

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<sup>1</sup> The parties participated in this Office's mediation program, so the matter was not returned to the undersigned until February 2011.

<sup>2</sup> Testimony was presented under oath. The transcript is cited as "Tr." followed by the page number. Only Agency introduced documents. They are cited as "A" followed by the exhibit number. Employee objected to the admission of Agency exhibits 9, 10 and 11, and at the proceeding the Administrative Judge took the matter under advisement. (Tr. 138-139). Employee argued that the letters of warning (Exs A-9 and A-10) should not be admitted because they were not signed by the supervisor issuing the letter. However, Employee stated he received the documents. (Tr. 146). He wrote "under protest" and the date on each. The documents were also signed by a witness, which is required when an employee refuses to sign for the document. The signature on each appears to be that of the Union representative Mr. Kenneth Fuller. These documents are accepted into

by Shamioka Donawa, Agency paralegal specialist. Clifford Lowery, American Federation of Government Employees (AFGE), Local 1975, represented Employee, who was present throughout the proceedings. Written closing arguments were due on July 6, 2011 and the record closed on that date.

### 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? Should the penalty be changed?

### FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Agency is responsible for inspecting motor vehicles that are registered in the District of Columbia. Employee is a Motor Vehicle Inspector for Agency assigned to the Southwest (S.W.) Inspection Station where he inspects motor vehicles registered in the District of Columbia. He is in permanent and career status.

The procedure for the inspection of vehicles at the S.W. Inspection Station is that vehicles entering the facility for inspection or re-inspection are directed to one of eight lanes. At Station 1 of each lane, which is at the rear of the building, the inspector will direct the customer to drive the vehicle into the building. The inspector then takes control of the vehicle, and directs the customer to exit the vehicle and go to a waiting room. At Station 2 of each lane, located in the middle of the building, the inspector will perform safety and emission inspections. (Tr. 15-16). Station 3, located in the front of the building is called the “sticker” or “exit” station. If the vehicle has passed inspection, the new sticker is placed on the vehicle at that site. The inspector assigned to Station 3 then notifies the “front office” where an employee will direct the customer who is in the waiting room to return to the vehicle.

If the vehicle did not pass inspection, it is returned to the customer with a list of the items that failed inspection. The vehicle is given a temporary sticker and the customer must return within 20 days for re-inspection. When a vehicle is returned for re-inspection, the customer will provide the inspector with the items that require re-inspection and the procedure for inspection of those items proceeds, as described in the preceding paragraph except that the inspector will inspect only those items that caused the vehicle to fail inspection. (Tr. 45)<sup>3</sup>

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evidence not to prove that Employee engaged in the previous charged misconduct or that they were properly issues, but rather to establish that Employee received copies of the letters and was aware of Agency’s concerns. Employee’s argument that these letters of warning, issued in February and April 2008, should have been removed from Employee’s file by the time of the proceeding must fail since these documents were issued within nine months of the misconduct at issue. (Tr. 135-139). However, it should be noted that these documents did not carry much evidentiary value for the Administrative Judge in reaching her decision.

<sup>3</sup> If the sticker has expired, the inspector can inspect the vehicle again.

On October 24, 2008, the vehicle owned by Sheila Royster failed inspection. According to the Inspection Report, it failed due to safety violations (non operational backup lights, non operational indicator lights and non operation window controls) and brake failures. (Ex A-3). Ms. Royster returned to the S.W. Inspection Station for the re-inspection in a timely manner on November 3, 2008. Employee was the inspector at Station 1 of Lane 8 who was responsible for the re-inspection of her vehicle. Since the re-inspection only involved safety issues, the re-inspection would have been completed at Station 1. (Tr. 44). Dean Alvin Gibson was assigned to Station 3 of Lane 8.

Agency issued a 15-day “Advance Written Notice of Propos[al] to Suspension of 10 Days or More” on May 26, 2009, based on conduct it alleges Employee engaged in during the process of the re-inspection of Ms. Royster’s vehicle. In the letter, it alleges that Employee had engaged in conduct that he “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, unreasonable failure to give assistance to the public; and any other on-duty or employment related reason for corrective or adverse action that is not arbitrary and capricious”. Specifically, Agency charged Employee with the following:

Charges: Any on duty or employment-related act or omission that employee knew or should have reasonably known is a violation of law DPM 1603.3(e) ; any on duty act that interferes with the efficiency or integrity of government operations, unreasonable failure to give assistance to the public DPM1602.2(f)(9); and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious, DPM 1603.3(g).

Specification: On November 3, 2008, Sheila Royster visited the S.W. Inspection Station to have her vehicle re-inspected after it failed its initial test for non-operational backup lights, indicator lights and window controls. Upon arriving at the inspection station, Ms. Royster was greeted by you. Ms. Royster told you that the last time she was at the Inspection Station she did not receive quality service. You replied by implying Ms. Royster shouldn’t worry about anything that you will pass her if she lets you come to her house to be with her. You further stated that you would leave your telephone number under the sun-visor. After you released the vehicle, you repeated to Ms. Royster that your telephone number was under the sun-visor. You did in fact leave your name and telephone number for Ms. Royster. In addition, you stated that the only reason her car passed inspection was because you inspected it. Ms. Royster asked why, because she had paid for the work on her vehicle. You responded by stating that the front tire had cracks and the vehicle would not have passed inspection if he had not inspected it. You are well aware the agency’s written policy provides that if a vehicle is being re-inspected within twenty days after it had failed inspection, the re-inspection is to only check failed items. Ms.

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Royster's initial inspection occurred on October 24, 2008, and her re-inspection occurred on November 3, 2008, which was within the twenty (20) day period.

Your comments were offensive, highly inappropriate and adversely affect the confidence of the public in the integrity of the government. (Ex A-6).

#### Positions of the Parties and Summary of Evidence

Agency's position is that Employee engaged in the charged conduct described by Agency as "offensive" and contrary to the requirement that District of Columbia Government employees "maintain a high level of ethical conduct in connection with the performance of official duties" whether or not specifically prohibited by D.C. Code Section 1-614.01(a). (Tr. 9-10). It contends that Employee's conduct resulted in, or created the appearance of: using public office for private gain, giving preferential treatment, impeding government efficiency, making a decision outside official channels and adversely affecting the confidence of the public in Agency's integrity. It maintains that Employee's conduct was "particularly egregious because of the sexual nature of the statements that he made" to Ms. Royster. (Tr. 10).

Dean Alvin Gibson has been employed by Agency for about 24 years and for the last five years has been the motor vehicle team leader at the S.W inspection site. In November 2008, he was Employee's supervisor. On November 3, 2008, he was assigned to the exit end of Lane 8. He testified that Employee, who was the only inspector responsible for the re-inspection of Ms. Royster's car, drove the vehicle to the exit lane and then left. Mr. Gibson then placed the sticker on the vehicle. He said that he did not call into the waiting area, because Ms. Royster was already at the vehicle. He said he knew it was her vehicle because she came over to him when he asked whose vehicle it was. (Tr. 29). He said he was about to tell her that the vehicle had passed inspection but when he approached her, "she wouldn't answer" him and was looking down the lane where Employee was returning to his station. (Tr. 28). He said, "She was upset and wasn't speaking" and that she looked as though "she was about ready to cry". (Tr. 28). Mr. Gibson said he tried to get her attention, but she would not answer. He asked her again, and she said she was upset. Mr. Gibson said he asked Ms. Royster to calm down and to park her vehicle. (Tr. 18, 25). He then asked her to tell him the reason she was upset, and she responded that Employee had upset her. She contended Employee told her "he would pass her vehicle if she wanted to go home with him".(Tr. 20). She said he told her that one of the tires on her vehicle was bad and that "he could fail her for that". (*Id*). Mr. Gibson said that the statement was untrue since her vehicle had not failed inspection due to the tire, and that the only items that should be re-inspected were those that initially had failed inspection. He noted that when Employee brought him the car, he had not mentioned the tires. (Tr. 23). He noted that Employee did not violate any rule in passing her vehicle. (*Id*). The witness testified that there is no reason for an inspector to leave his or her personal telephone number with a customer or for the inspector to contact the customer after leaving the station. (Tr. 24). The witness stated that Ms. Royster wanted to make a written complaint about Employee so he took her to see Gregory Simpson, the manager, and Horniman Orjisson, the supervisor. (Tr. 22).

Horniman Orjisson has been the supervisor at the S.W. Inspection Station for four years and was in that position in November 2008. Prior to that time, he was employed with Agency first as an inspector and then as a resolution coordinator. He said that when Mr. Gibson brought the matter to his attention on November 3, 2008, he immediately met with and interviewed Ms. Royster in Mr. Simpson's office. In addition to Mr. Simpson, Ms. Washington, another employee, was asked to be present because he felt that due to the nature of the complaint, he "didn't want [Ms. Royster] to feel that we were bringing her into another environment where she was going to deal with all men." He described Ms. Royster's emotional state as "very, very upset." (Tr. 32). Mr. Orjisson stated that before the interview began, he asked Ms. Royster to make a written statement. (Tr. 54).

Ms. Royster wrote the following in his presence before the interview began:

I, Sheila Royster, was in the inspection line waiting for service and I told inspector Lewis that the last time I was here I did not get quality service and Mr. Danny Lewis implied to me that don't worry about anything that he will pass me if I let him come over to my house to be with me and I told him to do what you need to do at this point I was very upset. He said that he will leave his phone number under my sun visor and when he brought my truck out after being inspected I was complaining to another co-worker Dean Gibson about his behavior and he asked me if I wanted to report him. I said yes, when Mr. Danny Lewis released my car he said his phone number is under my sun visor.

P.S. Mr. Danny Lewis stated that the only reason my car passed was because he passed it. I asked why was that because I paid for the work on my vehicle and he said that my front driver tire had cracks would not pass if he didn't pass it. (Ex A-2).<sup>4</sup>

According to the witness, Ms. Royster was "complaining about how she felt very disrespected by Mr. Lewis." during the interview. (Tr. 35). He said she reported:

She said she had spent money to fix the vehicle. She was supposed to come back for only the rejected item that was supposed to be checked. She said Mr. Lewis told her that I'm going to take care of you during the process. (*Id.*)

He said that she stated that before she exited the vehicle, Employee told her "if you let me come to your place and take care of you, then I will pass your car." (Tr. 35) Mr. Orjisson stated that Ms. Royster was still "very upset" after the interview, and wanted to be sure that Employee did not have her telephone number. (Tr. 37-38). He explained that customers who make complaints are concerned with retaliation from the employee against whom the complaint is made. He said he escorted Ms. Royster to her car. He said that the sun visor in Ms. Royster's vehicle is "weak" and that although she had "brought it up", it was still "sagging down". He said that the "telephone

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<sup>4</sup> The spelling errors and many of the grammatical errors have been corrected, but the statement is otherwise unchanged as written by Ms. Royster.

number was right up there in the front” of the sun visor. (Tr. 39-40). Mr. Orjisson described how he took the photograph of the piece of paper with the telephone number on the sun visor. (Tr. 40). The paper contained the following writing: “ Inspector, Danny Lewis, (2) 486-5790.” (Ex A-4). The witness stated that he recognized Employee’s handwriting and telephone number. (Tr. 39).

Mr. Orjisson said that after Ms. Royster left, he interviewed Employee in the presence of the Union representative, Mr. Simpson and Ms. Washington. He said Employee initially denied leaving the telephone number in Ms. Royster’s car, but after he read Ms. Royster’s statement to him, Employee told him that Ms. Royster “was flirting with him” and that he had also flirted with her and left his telephone number. (Tr. 42).

Mr. Orjisson testified that employees are trained to only inspect items that failed inspection when the vehicle returns for re-inspection. (Tr. 46). He stated that in the past he has witnessed Employee “walking down the hallway where he shouldn’t be doing that and walk customer to the building to open the door.” He said inspectors are trained to only inspect vehicles, “not do extra service.” (Tr. 49). He added:

I’ve had encounters with Mr. Lewis and I had several complaints that he goes extra beyond but this issue now becomes that he keeps writing his phone number down on customer’s paper (sic).

This is the only customer that felt obligated and she was really upset based on how he presented himself to this customer, telling her ‘I’m going to come to your place and take care of you if you let me pass your car’. (Tr. 49).

He testified that he had been told by his lead, as well as the shop steward, that Employee was “physically going and writing his phone number down” but that no one, until Ms. Royster, “wanted to write a complaint” about the matter. (Tr. 56). He said that he brought the matter to the manager’s attention, but since the shop steward did not provide a written report, “[n]othing came of it”. (Tr. 56). He said he had discussed the allegation that Employee was providing customers with his telephone number several times, and that he did not deny the charge but that he did get “upset”, explaining that “he just told them just in case they need to use the number”. (Tr. 58). He said the Employee also felt the shop steward “was telling on him that he keeps giving customers phone numbers, that he needs to mind his business.” (Tr. 58).

The witness said during 2008 there was weekly training with staff where issues such as customer service are discussed. He said it is never appropriate for an inspector to leave a personal telephone for a customer. (Tr. 53).

Gregory Simpson has been station manager for more than eight years. He testified he spoke with Ms. Royster in the presence of Mr. Orjisson and Ms. Washington on November 3, 2008. He said that Ms. Royster was “humiliated [and] felt...disrespected and...insulted” because Employee told her that “he could pass her if she let him come to her home” and he would leave his phone number under her visor.” (Tr. 61). Mr. Simpson said that he spoke with Employee later in the day in

the presence of Mr. Fuller, Mr. Orjisson and Ms. Washington and that Employee admitted leaving his telephone number for Ms. Royster, explaining that it was left in case she needed to contact him (Tr. 63-64).

Mr. Simpson testified that he issued the advanced notice of proposed suspension. (Tr. 64, Ex A-6). He said customer service is “paramount” and that providing quality service is emphasized at every meeting with employees. He said it is never appropriate for an inspector to leave a personal telephone number for a customer (Tr. 66). Mr. Simpson stated that he considered both Employee’s statement and Ms. Royster’s statement in reaching his decision. He explained that the presence of the telephone number was “concrete evidence” and his “main focus”. (Tr. 76-78).

Robert Johnson testified that he was the investigator with Agency’s office of service integrity who investigated Ms. Royster’s complaint and completed a report on the matter. (Ex A-5). He said that he interviewed Ms. Royster by telephone. She told him that when Employee initially told her he would make sure her vehicle passed inspection if she allowed him to come over to her house, she “thought he was joking”. However, when she went up front, she said Employee “told her about the tires and passing [the vehicle] because of him.” Ms. Royster then said to him that the vehicle had “passed because she paid to have all the work done on the vehicle to make sure that it passed” and after that she became upset, at which time Mr. Gibson approached her and asked if something was wrong. (Tr. 85-86). Mr. Johnson said that Ms. Royster spoke calmly at the beginning of the interview but “where she was discussing the vehicle needing to pass, she sound like she was getting a bit choked up; and by the end of the conversation, she was just angry.” She told him “she felt very disrespected and she was angry and...that she should have been put through that”. (Tr. 86).

Mr. Johnson stated that he found Ms. Royster’s verbal description of the incident to be consistent with the earlier statements she had provided. He testified that his investigation also included a review of the written statements provided by Mr. Simpson, Mr. Orjisson , and Mr. Gibson as well as responses provided by Mr. Lewis. The witness stated that his conclusion would not have changed if he had interviewed Employee and Employee had denied Mr. Royster’s allegations. (Tr. 95).<sup>5</sup> Based on his investigation, he concluded:

Ms. Royster was telling the truth and the events that took place that day, that Mr. Lewis had engaged her in conversation and made the suggestion that if he passed her car, that she should allow him to come over to her house or he would pass the car if she allowed him to come over. (Tr. 88-89).

Kenneth King has been Administrator for Vehicle Services, at the S.W. Service Center since October 2008 and has been employed by the District of Columbia Government for about 15 years. He stated that he was responsible for the Notice of Final Decision. (Tr. 101, Ex A-7). In making the decision, he said he reviewed Mr. Johnson’s report, spoke with the station manager and

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<sup>5</sup> The witness stated he was told “it would be best not to interview any employee because of...union issues” and was unclear what was meant by that. He noted that Employee had declined to submit a written statement, but agreed that Employee had responded to questions he was asked when interviewed in the presence of his Union representative. (Tr. 95-99).

consulted with Agency's legal staff. He determined that Employee's conduct was "egregious enough to warrant a 15-day suspension" and that it had placed "in jeopardy the integrity of the station as well as the inspection process for the station." He felt that Employee had "used his position...for personal gain" which he described as "sexual favors." (Tr. 103-104). He also expressed concern that the matter involved safety issues explaining that:

Citizens must be able to trust that we do a safety inspection without the expectation of having inspectors to get into a negotiation about whether or not the car is going to pass or fail based on personal gain. (Tr. 106).

Mr. King testified that in addition to "call[ing] into question the integrity of the Agency, Employee's conduct had also interfered with the efficiency of Agency operations because "socializing with customers" slows down the speed with which inspectors can complete their work and causes delays in completing inspections. (Tr. 106-108). He stated that in reaching his final decision he also considered Employee's past disciplinary record and his work history. (Tr. 109). He noted that the station manager and the supervisor had advised him that all employees had been warned in customer service training that "this type of conduct was against DMV policy". (Tr. 110). The witness stated that he was aware that Employee denied "many of the allegations" in the proposed notice, because Employee had stopped him several times and told him that leaving the telephone number "was part of his customer services, he left a message, his number in the visor letting...Ms. Royster know that if she needed additional help, he can come by her house and help her with the car." (Tr. 117). Mr. King testified he considered the "*Douglas*" factors when reaching his decision that the 15-day suspension was reasonable under the circumstances, and noted that it would have been a reasonable penalty even if Employee had not made the comments to Ms. Royster about passing her vehicle and asking to visit her but had only left his telephone number in her vehicle. (Tr. 111-112).

Employee's position is that he did not engage in the charged misconduct. He stated that on the day at issue, Ms. Royster handed him the inspection report, and told him that she had gotten the items repaired and that the vehicle "should go right through", and that upon inspecting her car, he concluded that she had gotten those items repaired. He denied telling her that he would pass her vehicle if he allowed him to go to her house or that the only reason her vehicle passed inspection was because of him. On direct examination, he recalled their conversation as follows:

To the best of my recollection, we had a conversation that, as an inspector, I told her that one of her windshield wiper blades needs to be repaired and the tires. She again said that the only reason why I came back is what's on the paper. I said it's not a problem. It is going to be passed no matter what I say. I cannot insert any more failure items into the system for a vehicle. That is the brunt of it. (Tr. 121)

With regard to why he left his telephone number in her vehicle, he explained:

We were having a conversation and she asked me what kind of, on a [flirtatious] note that, well, after I told her that her vehicle will be passed and that the items will be



passed, I was just kind of reiterating, and if you have any problems, Inspector Danny Lewis, my telephone number. You may call me. (Tr. 121-122).

Employee later provided this explanation of why he left Ms. Royster his telephone number:

As an inspector, I found those items on her vehicle and I suggested to her that they needed to be repaired and she asked me can you help me, to expedite time, Inspector Danny Lewis, my phone number, it will be on the sun visor or wherever I can place it. And that's the end of it. (Tr. 142).

Employee testified that he did not believe it was inappropriate to give a "customer who is doing business with the District of Columbia" his personal telephone number because:

Well, as an inspector to expedite items, whether it be a parent, a grandmother, or any person, Inspector Danny Lewis, here is my phone number. If you prefer to contact, you may. I will allow it. (Tr. 123).

Employee stated that he had engaged in the same conduct, i.e., leaving his telephone number in customers' cars on other occasions. (Tr. 143). He testified that in the nine years he worked at the S.W. Inspection Station, he had never been disciplined or "written up" for inappropriate behavior. (Tr. 119). He agreed that he had received a letter of warning on February 21, 2008, asserting that he had engaged in "unprofessional" conduct which "interfered with the agency's ability to provide...quality customer service and affects adversely the confidence of the public in the integrity of the government", but noted that he had refused to sign the document because he disagreed with the allegations. (Tr. 125-126, Ex A-9). He also acknowledged received a letter of warning dated April 28, 2008, for accepting food from a cabdriver who stated that "he comes regularly to the inspection station for service and that Mr. Lewis, always serves him and he brings food for the inspectors". The letter categorized Employee's conduct as a "flagrant" violation. (Ex A-10). Employee recalled receiving the letter, but denied ever accepting food from any customer. (Tr. 129). Employee also conceded that his evaluation for the rating period between April 2, 2007, and December 31, 2007, included a statement that he had been cited for having customers bring him food on the lane while performing his inspection duties and that such behavior violated "lane guidelines". He agreed the statement in the evaluation referred to an incident that preceded the one referred to in the April 28, 2008, letter of warning. (Tr. 134-135, Ex A-11). The "policy", according to Employee, is that it is permissible to accept gifts that are less than ten dollars but that it would be a conflict of interest to accept a favor or gift from a customer whose car he is inspecting. (Tr. 131). Employee agreed that he had attended weekly staff meetings at which training regarding customer service was a priority. (Tr. 140, Ex A-8).

#### Analysis, Findings of Fact, and Conclusions

It is undisputed that on November 3, 2008, Sheila Royster brought her vehicle to the S.W. Inspection Station to be re-inspected. It had previously failed inspection due to non-operational backup lights, indicator lights and window controls. It is similarly undisputed that Employee was the

Inspector assigned to Ms. Royster's vehicle and that Employee left his personal telephone number in Ms. Royster's vehicle. Finally, it is undisputed that Ms. Royster died on November 4, 2010, more than five months before this proceeding took place. (Ex A-1).

The adverse action in this matter stems from written and verbal statements made by Ms. Royster, who, due to her death, could not testify at the proceeding. Therefore, Ms. Royster's oral and written statements, which were not taken under oath, are considered to be hearsay. The first matter that must be addressed is whether her statements should be admitted, and if so, what weight they should be afforded.

This Administrative Judge has always required that every effort be made by an agency to produce the individual who made the charges that resulted in the adverse action. Employees should have the opportunity to cross-examine their accusers and otherwise challenge their accusations. However, despite its best efforts, an agency may simply not be able to produce the accuser or even a sworn statement. In this matter, it was impossible for Agency to produce the accusing witness or provide a sworn statement from her. There is no set formula on how a decision will be made to admit evidence from an unavailable witness. The decision must be made on a case by case basis.

Hearsay evidence is defined by the Federal Rules of Evidence, in pertinent part, as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed.R.Evid. 801(c). However, this Office is not prohibited in accepting hearsay evidence. As the Court noted in *Hutchinson v. D.C. Office of Employee Appeals*, 710 A.2d 227 (D.C. 1998); *Hutchinson v. D.C. Office of Employee Appeals*, 710 A.2d 227 (D.C. 1998):

It is settled that hearsay evidence may be admitted in administrative hearings... In fact, hearsay evidence can serve under some circumstances as 'substantial evidence' on which to base a finding of fact".

Similarly in *Jadallah v. D.C. Department of Employment Services*, 476 A.2d 671 (D.C. 1984), the Court stated that:

The decision to permit administrative agencies to admit hearsay evidence reflects a recognition that the reliability and probative value of evidence does not always turn simply on whether or not it falls within the legal definition of hearsay evidence, and that unlike juries [Administrative Judges] are...capable of properly assessing the reliability and weight of evidence that is hearsay in nature.

Hearsay evidence must be "examined in light of the particular record [which includes]...an examination of the quality and quantity of the evidence on each side." McCormick on Evidence, Paragraph 351(d) (2<sup>nd</sup> ed. 1972) (footnote omitted). The weight to be accorded such evidence is determined by its "truthfulness, reasonability, and credibility." *Wisconsin Avenue Nursing Home v. D.C. Commission on Human Rights*, 527 A.2d 282, 288 (D.C. 1987), the Court, citing *Johnson v. United States*, 628 F.2d 187 (D.C. 1980). Since hearsay evidence is provided by witnesses other

than the declarant, its value relies in large part on the veracity and competency of someone other than the declarant. Administrative judges and other factfinders are considered to have the experience and expertise to evaluate evidence, including hearsay evidence and accord it the proper weight. Just as it may be unfair to have an entire case rest on hearsay evidence, it is equally unfair to dismiss a case because the majority of the evidence is hearsay. The administrative judge must carefully weigh the evidence considering the inherent weaknesses of hearsay evidence, particularly in the context of a disciplinary case in which an agency bears the burden of proof.

It should be noted that neither the Board Rules nor the District of Columbia Municipal Regulations<sup>6</sup> exclude hearsay evidence. This Office does not require adherence to the Federal Rules of Evidence. However, even the Federal Rules of Evidence contain exceptions to the exclusion of hearsay evidence, two of which are germane to the present case.

#### Rule 803. Hearsay Exceptions; Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

- (1) Present sense impression. -- A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.
- (2) Excited utterance. -- A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.”

#### Rule 804. Hearsay Exceptions: Declarant Unavailable

(a) Definition of unavailability. -- ‘Unavailability as a witness’ includes situations in which the declarant

- (4) is unable to be present or to testify at the hearing because of death

Hearsay exceptions. -- The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

Other exceptions. -- A statement not specifically covered by any of the foregoing exceptions but having equivalent circumstantial guarantees of trustworthiness, if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts; and (C) the

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<sup>6</sup> D.C. Municipal Regulations (DCMR), Title 4, § 424 (1)(a) provides in pertinent parts that when a witness is unavailable, a hearing examiner may admit the content of the proffered testimony in an alternative form, which is defined in the regulations.

general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

Although the evidence of statements attributed to deceased persons may be admitted, they should be subjected to the closest scrutiny. The evidence will be accepted as true where it is positive, unequivocal, and substantially corroborated by other witnesses. *Reynolds Wire Company*, 26 NLRB 622, enf'd., 121 F.2d 627 (CA 7). The Administrative Judge found Ms. Royster's verbal and written statements, made almost simultaneously with the events she alleged took place with Employee, were taken in the presence of several individuals who observed her demeanor as well, and did testify at the proceeding. Her statements, written and oral, were consistent and did not deviate over time and were supported by other witnesses. The exceptions to the exclusion of hearsay evidence noted above are applicable to this matter. Ms. Royster, the declarant, was unavailable to testify due to her death; her evidence was "offered as evidence of material fact," and her statements were "more probative on the point than any other evidence which the proponent can procure through reasonable efforts." The statements she made to Mr. Simpson and Mr. Orjisson qualify as both "excited utterances" and "present sense impressions." The Administrative Judge concludes that the interests of justice would best be served by admission of the statements into evidence. The alternative would be to dismiss the matter, which the Administrative Judge concludes would not serve the interests of justice.

In addition to determining the admissibility of the hearsay evidence, the Administrative Judge must also make credibility determinations. In trying to resolve issues of credibility, the Administrative Judge considered the demeanor and character of the witness, the inherent improbability of the witness's version, inconsistent statements of the witness and the witness's opportunity and capacity to observe the event or act at issue. *Hillen v. Department of the Army*, 35 MSPR 453 (1987). Because of the conflicting testimony, 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 440-450 (D.C. 1985). The Administrative Judge was also mindful that even if some parts of a witness's testimony are discredited; other parts can be accepted as true. *DeSarno, et al., v. Department of Commerce*, 761 F.2d 657, 661 (Fed. Cir.1985). The Administrative Judge concluded that Agency witnesses were credible. Each testified in a forthright and factual manner. The testimony of each was consistent with the testimony of the other witnesses as well as the statements provided by Ms. Royster. Agency also presented consistent and credible evidence that it had warned Employee of inappropriate behavior a number of times in the year immediately preceding the charged misconduct that is the subject of this hearing. It also provided consistent and credible evidence that it places priority on customer relations, and that the weekly training for inspectors, which Employee attends, includes appropriate interaction with customers.

Employee did not dispute that he placed his personal telephone number in Ms. Royster's vehicle. He offered a variety of reasons for doing so: ranging from generally serving the public to helping her obtain assistance. He stated that he discussed her windshield wipers and tires with her, although he agreed these were not items that required re-inspection. He stated he did not think leaving his personal telephone number with a customer was against policy, although he did not offer any explanation as to how he determines which customers should be given his home telephone number and why he does not refer individuals with complaints about the inspection process to the appropriate Agency employees assigned to handle these problems. In one explanation, he characterized the deceased's attitude toward him as "flirtatious", which in the context of his other reasons, seemed not only self-serving, but irrelevant to the reasons he offered as bases for giving customers his telephone number. Employee's credibility was also called into question because he denied ever receiving letters of warning of other inappropriate conduct. Once shown the documents, he stated he had not given them any weight because he disputed them. However, that response would go to the veracity of the charges, not the receipt of the documents. In sum, based on Employee's demeanor, the inherent improbability of his version, and his inconsistent statements, the Administrative Judge determined his testimony was not credible. *Hillen v. Department of the Army*, 35 MSPR 453 (1987).

Agency is required to prove its case by a preponderance of evidence. Preponderance 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). Agency has the burden of presenting enough evidence to convince the factfinder that a disputed fact was more likely to be true than untrue. . In order for an adverse action for Agency to meet its burden of proof, it must establish that Employee engaged in the charged misconduct, there is a sufficient nexus between the misconduct and the efficiency of the service; and that the penalty is appropriate. *Parsons v. U.S. Dept of Air Force*, 707 F.2d 1406 (1983). The Administrative Judge concludes that the charges, if proven, would constitute cause for disciplinary action to be taken. She further concludes, based on the analysis herein, that Agency met its burden of proof in this matter.

Agency has primary responsibility for managing its employees. Part of that responsibility is 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. \_\_\_\_ ( ). This Office has long held that it will not substitute its judgment for that of an agency when determining if a penalty should be sustained. OEA's review is limited to deciding whether "managerial discretion has been legitimately invoked and properly exercised". *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

D.C. 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). Agencies have considerable discretion in determining penalties, provided they consider the relevant factors and do not act arbitrarily. This Office cannot usurp managerial responsibility in determining a penalty, but only to ensure that the penalty reflects a responsible balancing of relevant factors. *Lovato v. Department of the Air Force*, 48 M.S.P.R. 198 (1991). A penalty will not be reversed unless the Administrative Judge concludes that an agency has not considered 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). A penalty that comes “within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment” will not be disturbed. *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C.Reg. 2915 (1985). The deciding official in this matter offered credible evidence that he considered all relevant factors in reaching his decision to impose a fifteen day suspension. The Administrative Judge concludes that Agency’s decision was not an abuse of discretion or arbitrary.

ORDER

It is hereby:

**ORDERED:** Agency’s action is UPHELD.

FOR THE OFFICE:

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LOIS HOCHHAUSER, Esq.  
Administrative Judge