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

_____	)	
In the Matter of:	)	
	)	
PAULETTE PAYLOR,	)	
Employee	)	OEA Matter No. 1601-0014-14
	)	
v.	)	Date of Issuance: April 29, 2016
	)	
D.C. DEPARTMENT OF	)	
TRANSPORTATION,	)	
Agency	)	Eric T. Robinson, Esq.
	)	Senior Administrative Judge
_____	)	
Gina Walton, Union Representative	)	
Michael O’Connell, Esq., Agency Representative	)	

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

On November 5, 2013, Paulette Paylor (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or the “Office”) contesting the District Department of Transportation’s (“DDOT” or the “Agency”) action of removing her from service. Employee’s last position of record with DDOT was Traffic Control Officer (“TCO”). According to the Agency, Employee was removed from service based on the following charges:

Cause 1. Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Neglect of duty, pursuant to 16 District Personnel Manual (“DPM”) § 1603.3(f)(3) and § 1619.1(6)(c);

Cause 1.1: Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Misfeasance, pursuant to 16 DPM § 1603.3(f)(6) and § 1619.1(6)(f);

Cause 2: Any knowing or negligent material misrepresentation on other

document given to a government agency, pursuant to 16 DPM § 1603.3(d) and 16 DPM § 1619.1(4); and

Cause 3: Any on-duty or employment related act or omission that an employee knew or reasonably should have known is a violation of law: Perjury, as specified in D.C. Official Code § 22-2402 (2010), pursuant to 16 DPM § 1603.3(e) and 1619.1(5).

The crux of DDOT's allegation relevant to this matter surrounds an investigation conducted by DDOT wherein it was alleged that Employee issued 111 fraudulent tickets. This number was reduced when the designated Hearing Officer, who conducted a pre-termination investigation, found that only 94 of those tickets were fraudulent. This matter was assigned to the Undersigned on or about June 2014. The parties appeared, pursuant to Order, for a Prehearing Conference on October 2, 2014. During this conference, Employee challenged the validity and veracity of DDOT's removal action and the evidence used to support it. I determined that an Evidentiary Hearing would be held on February 12, 2015. The Hearing was held as scheduled. Thereafter, the parties submitted their written closing arguments. After review of the record, I have determined that no further proceedings are required. The record is now closed.

#### JURISDICTION

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

#### 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 RELEVANT TESTIMONY<sup>1</sup>

Lorenzo Pugh ("Pugh") Transcript p. 13 - 57

Pugh testified in relevant part that: he works for DDOT as a Management Analyst. In this role, he is tasked with analyzing data for DDOT's traffic control branch: including revenue derived from citations and he helped develop SharePoint, a program used by DDOT. Prior to his current position, Pugh first served as a Traffic Control Officer ("TCO") and was promoted to Customer Service Communication Specialist; from there he was promoted to his current position. When he worked as a TCO, Pugh testified that he was trained on how to properly issue citations, whether using a handheld device or by writing a paper ticket. He explained that his training dictated that before issuing a citation, he is required, as a TCO, to make sure that all of the information in the citation was accurate. This requirement that the information entered is accurate is reiterated to the TCO on every citation under penalty of perjury.

With respect to the instant matter, Pugh testified that he was tasked by his supervisor, Lashawn Hamilton, to review a tranche of citations issued by Employee with an eye to ensuring that they were accurate. Agency's Exhibit No. 1 is one of the documents that he reviewed. It is a citation issued by Employee. It is noted that the vehicle listed belonged to FedEx; however, after reviewing the vehicle information through the Electronic Ticket Information Management System better known as "ETIMS", it was discovered that this vehicle was registered to the Washington Metropolitan Area Transit Authority ("WMATA"). Pugh testified that this was the first example of alleged numerous errors that he discovered when he reviewed the aforementioned tranche of citations issued by Employee. Agency's Exhibit No. 2 is a spreadsheet that Pugh created to delineate the numerous errors that he discovered when he reviewed Employee's citations. Of note, Pugh found that approximately 58 citations, which were originally noted by Employee as belonging to either FedEx or UPS, were not registered to anyone.

During cross examination, Pugh was presented with Employee's Exhibit No. 2 which was an excerpt from FedEx's website that indicates that FedEx has a recognized program whereby they would use independent contractors to assist it with the pick-up and delivery of items. In essence, it was alleged that the FedEx discrepancies were actually independent contractors who were working for FedEx at the moment the citations were issued. Pugh did not contact any of the registered owners of any of the vehicles listed because he was not authorized to do so as part of his review. Employee's Exhibit No. 3 is very similar to No. 2, except that it indicates that UPS has a similar program for utilizing independent contractors for pick-up and delivery. When asked about his impressions of being a TCO, Pugh testified that he was required to write the information as he saw it displayed on the vehicle license plate. He was unaware of the usage of the different vehicle license plate numbering designations used by other neighboring jurisdictions. He explained that when he reviewed the "phantom" registrations that did not show an owner in ETIMS, it was his belief that no one was the registered owner. Pugh also revealed that he reviewed 11 other TCO's as part of his investigation.

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<sup>1</sup> Employee did not present an evidence or testimony as part of her case in chief.

Alice Kelly ("Kelly") Transcript p. 57 - 73

Kelly testified in relevant part: that she has worked for DDOT for 12 years. She currently works as a Manager in DDOT's Policy Planning and Sustainability Administration. Kelly's normal job duties consist of drafting policies and regulations and responding to constituent or DC Council requests. On occasion, Kelly has been required to act as a Hearing Officer ("HO") for internal personnel disciplinary matters. Kelly served as the HO that reviewed DDOT's removal action against Employee herein. Kelly created Agency's Exhibit No. 3, which is the HO report she created in the instant matter. In her report, Kelly reviewed the allegations levied against Employee and determined that Employee's termination from service was appropriate given the circumstances. When she reviewed the information submitted by DDOT to substantiate its removal, that Employee inputted incorrect information onto the citations resulting in these citations being issued to either the wrong vehicle owner or that the information inputted by Employee did not show any owner at all for the subject vehicles in the ETIMS database.

Steve Messam ("Messam") Transcript p. 72 – 89

Messam testified in relevant part that: he has worked as an Operations Manager within DDOT's Administrative Services Administration for approximately four years. His job duties include recruitment, human resource management, and advising DDOT on the processes and administration of employee discipline. He testified that TCO's are tasked with enforcing parking and non-moving vehicle infractions. With respect to Employee's termination, he noted that the tranche of citations reviewed by Pugh found numerous errors that were determined to be erroneous or "fraudulent".<sup>2</sup> Messam explained that the investigation into Employee's citations was instigated due to two or three citizens complaining about the accuracy and validity of citations issued to them by Employee. Messam explained that TCO's are required to accurately record the information that underlies a citation. Continuous failure to do so "puts the Agency in a bad position..."<sup>3</sup> and undermines DDOT's credibility in the community.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

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

The following facts are not subject to a genuine dispute:

1. Employee's last position of record for DDOT was TCO.
2. A TCO's main job duty is to enforce parking and non-moving violations within the District of Columbia.

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<sup>2</sup> Transcript at 75 – 77.

<sup>3</sup> Transcript at 78.

3. TCO's are required to accurately record all of the information that supports an citation, including but not limited too; vehicle make, vehicle model, license plate information (number and state of issue), and the vehicle identification number ("VIN").
4. When filling out a citation, a TCO is required to attest to the accuracy of all of the information inputted under penalty of perjury. This attestation is reiterated on every citation regardless of whether it was a paper ticket or if it was generated from an Agency issued handheld device.
5. The requirement that all of the information inputted into a ticket is accurate under penalty of perjury is an integral part of a TCO's on-the-job training. This training was provided to Employee.

Agency argues that I should draw a negative inference because Employee's "chose not to testify; called no witnesses; presented no case in chief; and refused to submit herself to cross-examination."<sup>4</sup> In support thereof, Agency cites to the case of *Simmons v. United States*,<sup>5</sup> However, *Simmons* also notes that the fact finder may exercise discretion as to whether a negative inference shall be made.<sup>6</sup> Given the instant circumstances, I opt to not make a negative inference with respect to Employee's hearing strategy of not calling witnesses or taking the stand on her own behalf. To do otherwise, would undermine an agency's responsibility to meet its burden of proof in each and every matter that comes before the OEA. I find that an agency cannot rely on Employee's presentation of his/her case-in-chief in order to meet its burden of proof in a matter before the OEA.

Agency also argues that Employee failed to present credible evidence that would controvert Agency's assertion that she issued "incorrect and faulty information as to vehicles' makes and models that did not match the vehicles' registration."<sup>7</sup> Employee contends that the handheld device and other work related implements provided by DDOT did not accurately denote the information that was inputted. During the Evidentiary Hearing, Employee presented evidence that both UPS and FedEx have a program whereby they would hire independent contractors to deliver and pickup mail parcels on their behalf.<sup>8</sup> In doing so, she attempted to make the inference that DDOT's system for tracking vehicle registrations was faulty and that the evidence that they presented in support of her removal should be discounted as unreliable. However, I note that DDOT sustained 94 instances where Employee entered faulty information. I find that Employee failed to make a credible connection to each and every allegation with respect to the aforementioned program. Some of the instances that were cited by the Agency in her removal involved FedEx and UPS registered vehicle but quite a few of the instances included vehicles registered to other business entities as well as to private owners. With respect to the contested UPS registration violations, Agency listed the following as indicative of Employee's

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<sup>4</sup> Agency Closing Argument at 4 (May 18, 2015).

<sup>5</sup> 444 A.2d 962 (1982).

<sup>6</sup> *Id.*

<sup>7</sup> Agency Closing Argument at 6 (May 18, 2015).

<sup>8</sup> See Employee Exhibit Nos. 2 & 3.

failure to adequately perform her primary job duty:

Examples of tickets issued by Employee listing the vehicles as UPS when the registrations showed the vehicles were not registered to UPS include:

- 1) Ticket issued to license plate MD 21S295 while vehicle registered to MAF of MD, Inc.;
- 2) Ticket issued to license plate MD 49V429 while vehicle registered to Lease Plan USA Inc. as Agent c/o Sherwin-Williams Co.;
- 3) Ticket issued to license plate MD 49V493 while vehicle registered to Miller Long & Arnold Co., Inc.;
- 4) Ticket issued to license plate MD 49V499 while vehicle registered to Barlett Roofing & Sheet Metal Inc.;
- 5) Ticket issued to license plate MD 64S565 while vehicle registered to Canada Dry Potomac Corp.;
- 6) Ticket issued to license plate MD 810M974 while vehicle registered to Prince George's County Government;
- 7) 7) Ticket issued to license plate MD 94J895 while vehicle registered to Netcom Technologies...

These tickets do not include the twelve (12) tickets issued by Employee listing the vehicle make as UPS when the vehicle registrations showed that the vehicles were not registered to UPS but were registered to individuals. Nor does this list include the twenty-six (26) tickets issued by Employee listing the vehicle make as UPS, while the license plates noted on the tickets were not actually registered to any vehicles whatsoever; that is, Employee issued tickets for vehicle registrations which do not exist.<sup>9</sup> (*sic*)

In its closing argument, with respect to the contested FedEx registration violations, Agency listed the following as indicative of Employee's failure to adequately perform her primary job duty:

Examples of tickets issued by Employee listing the vehicles as FedEx when the registrations showed the vehicles were not registered to FedEx include:

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<sup>9</sup> See Agency Closing Argument at 9 – 10 (May 18, 2015); See also Agency Exhibit No.2.

- 1) Ticket issued to license plate MD 8MD7363 while vehicle registered to VT Results LLC;
- 2) Ticket issued to license plate DC C50452 while vehicle registered to DL Peterson Trust;
- 3) Ticket issued to license plate DC C60541 while vehicle registered to James R. Bowen T/A JJ Towing;
- 4) Ticket issued to license plate DC C62988 while vehicle registered to Herson Auto Parts & Glass;
- 5) Ticket issued to license plate DC C64498 while vehicle registered to Express Cable;
- 6) Ticket issued to license plate DC C64501 while vehicle registered to Techrite Services Inc.;
- 7) Ticket issued to license plate DC C69898 while vehicle registered to ABA Towing Inc.;
- 8) Ticket issued to license plate DC C71233 while vehicle registered to Capital Entertainment Service Inc.;
- 9) Ticket issued to license plate DC C71249 while vehicle registered to W.A. Chester LLC;
- 10) Ticket issued to license plate DC C71950 while vehicle registered to Americare Medical Transport;
- 11) Ticket issued to license plate MD 41W585 while vehicle registered to TBCC Funding Trust I Lessor;
- 12) Ticket issued to license plate MD 86S655 while vehicle registered to Continental First Federal Inc. c/o Rahman S. Hilton;
- 13) Ticket issued to license plate DC C70533 while vehicle registered to Washington Metropolitan Area Transit Authority;
- 14) Ticket issued to license plate DC C70562 while vehicle registered to Washington Metropolitan Area Transit Authority;
- 15) Ticket issued to license plate DC C74394 while vehicle registered to Specialty Construction Management;

16) Ticket issued to license plate DC C75679 while vehicle registered to Planned Power Systems Inc.

These tickets do not include the eleven (11) tickets issued by Employee listing the vehicle make as FedEx when the vehicle registrations showed that the vehicles were not registered to FedEx but were registered to individuals. Nor does this list include the thirty-three (33) tickets issued by Employee listing the vehicle make as FedEx, while the license plates noted on the tickets were not actually registered to any vehicles whatsoever; that is, Employee issued tickets for vehicle registrations which do not exist.<sup>10</sup> (*sic*)

Employee also contends that her hand held device would, on occasion, scramble the address and/or city quadrant on the parking violation issued. In response, Agency notes that it did not predicate its removal action due to faulty address and or city quadrant. DDOT notes that it has never received a complaint (prior to the Evidentiary Hearing) about the hand held devices being defective from Employee or from any other DDOT employee. This assertion was credibly corroborated by Pugh during the Evidentiary Hearing.

As stated previously, Employee was charged with Neglect of Duty, pursuant to 16 DPM §1603.3(f)(3) and §1619.1(6)(c), which is defined in the DPM's Table of Appropriate Penalties as failure to follow instructions; and careless or negligent work habits. 16 DPM §1619.1(6)(c). After considering the voluminous instances of incorrect or fraudulent violations issued by Employee<sup>11</sup> I find that Employee failed to execute her primary job duty as a TCO in an accurate and workmanlike manner. I further find that DDOT has met its burden of proof with respect to this charge.

With respect to the charge of Misfeasance pursuant to 16 DPM §1603.3(f)(6) and §1619.1(6)(f). It is defined in the Table of Appropriate Penalties as careless work performance; providing misleading or inaccurate information to superiors; dishonesty; and unauthorized use of government resources. 16 DPM §1619.1(6)(f). Based on the discussion above, I find that Employee failed to execute her primary job duty as a TCO in an accurate and workmanlike manner.<sup>12</sup> Accordingly, I further find that DDOT has met its burden of proof with respect to this charge.

With respect to the charge of any knowing or negligent material misrepresentation on other document given to a government agency pursuant to 16 DPM §1603.3(d) and 1619.1(4), the Table of Appropriate Penalties defines this cause as both a non-intentional false statement as a result of negligence, and an intentional false statement or omission with respect to government documents or making a false entry on government records which call into question the credibility of the document. 16 DPM §1619.1(4). Employee has 94 instances where she negligently (at the least) issued parking violations to persons that did not warrant a violation or to whom she incorrectly denoted all of the pertinent information on these violations. This amount of error is

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<sup>10</sup> *Id.* at 10 – 12.

<sup>11</sup> *See* Agency Exhibit No. 2.

<sup>12</sup> *Id.*



too egregious for the Undersigned to ignore. Based on the discussion above, I find that Employee failed to execute her primary job duty as a TCO in an accurate and workmanlike manner.<sup>13</sup> Accordingly, I further find that DDOT has met its burden of proof with respect to this charge.

Agency correctly notes that the OEA does not have authority over criminal matters, but the Office is allowed to recognize activity that would otherwise be deemed a criminal violation when asked to interpret 16 DPM §1603.3€ and §1619.1(5) “Any on-duty or employment-related act or omission that an employee knew or reasonably should have known is a violation of law. In this matter, DDOT is alleging that Employee committed Perjury, as specified in D.C. Official Code §22-2402<sup>14</sup> when she negligently or fraudulently issued the aforementioned parking violations in either a careless or negligent manner. Pugh credibly testified that a TCO is trained to accurately record all of the information that is used to substantiate a violation. He also testified that a TCO certifies that the information submitted for issuing a ticket is true and correct under penalty of perjury every time a violation is issued. Based on the preceding, I find that Employee issued 94 citations, as noted in Agency’s Exhibit No.2, in either a careless or negligent manner. I further find that DDOT has met its burden of proof with respect to this charge.

Accordingly, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."<sup>15</sup> When an Agency's charge is upheld, this Office has held that it will leave the Agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment.<sup>16</sup> I conclude that Employee has failed to proffer any credible evidence that would indicate that her removal was improperly conducted and implemented. For the voluminous charges levied against Employee herein, the appropriate penalty ranges from reprimand to removal. Given the breadth of all of the charges that have been sustained in this matter, I find that Agency has proven that the penalty of removal was proper; therefore, the removal is upheld. I further find that Employee’s other ancillary

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<sup>13</sup> *Id.*

<sup>14</sup> a) A person commits the offense of perjury if:

(1) Having taken an oath or affirmation before a competent tribunal, officer, or person, in a case in which the law authorized such oath or affirmation to be administered, that he or she will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by that person subscribed is true, wilfully and contrary to an oath or affirmation states or subscribes any material matter which he or she does not believe to be true and which in fact is not true;

(2) As a notary public or other officer authorized to take proof of certification, wilfully certifies falsely that an instrument was acknowledged by any party thereto or wilfully certifies falsely as to another material matter in an acknowledgement; or

(3) In any declaration, certificate, verification, or statement made under penalty of perjury in the form specified in § 16-5306 or 28 U.S.C. § 1746(2), the person willfully states or subscribes as true any material matter that the person does not believe to be true and that in fact is not true.

<sup>15</sup> *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

<sup>16</sup> *See Stokes, supra.*

arguments are best characterized as a grievance and outside of the OEA's jurisdiction to adjudicate.<sup>17</sup>

ORDER

It is hereby ORDERED that Agency's action of removing Employee from service is UPHELD.

FOR THE OFFICE:

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ERIC T. ROBINSON, ESQ.  
SENIOR ADMINISTRATIVE JUDGE

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<sup>17</sup> Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.