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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
DANARION BENJAMIN,)	
Employee)	OEA Matter No. 1601-0101-09
)	
v.)	Date of Issuance: December 12, 2011
)	
D.C. DEPARTMENT OF)	
MOTOR VEHICLES,)	
Agency)	ERIC T. ROBINSON, Esq.
)	Administrative Judge
_____)	
Clifford Lowery, Union Representative)	
Charles Tucker, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Danarion Benjamin (“Employee”) was a Motor Vehicle Inspector in the Department of Motor Vehicles (“DMV” or the “Agency”). Employee was removed effective on March 11, 2009, upon a charge of committing an “on duty act that interferes with the efficiency or integrity of government operations (malfeasance and neglect of duty)” ((DPM 1603.3 (f) (7) and (3)). Employee was also charged with an “on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law” (DPM 1603.3 (e)). According to the Agency, its Service Integrity Office (“SIO”) conducted an investigation during the period of April 1, 2008 through September 30, 2008. Through that investigation, the Agency alleges that Employee misused his official position as a vehicle inspector to conduct at least five (5) fraudulent vehicle inspections.

On March 17, 2009, Employee filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”). Employee denies knowingly conducting any fraudulent inspections. He also maintains that he never had the opportunity to present his case at the Agency level. Employee explained that vehicle inspection results can be impacted by a variety of factors other than fraudulent activity. Employee also maintains that the Agency should have effected corrective action or retraining to ensure that employees were following proper procedure when inspecting vehicles. He denied receiving any benefit from the alleged fraudulent

inspections and noted the absence of any customer statements from Agency's investigation results. Employee also cites his previous history at agency as grounds for a lesser penalty.

This matter was originally assigned to Administrative Judge Sheryl Sears; however, she retired from service before this matter could be adjudicated. This matter was then reassigned to the Undersigned. The Undersigned held a Status Conference in order to ascertain the pertinent issues in this matter as well as plan for an evidentiary hearing. However, due to constraints within the OEA's budget, this matter was held in abeyance until a time where the OEA could afford to hold an evidentiary hearing in this matter. Once the OEA's budget stabilized, an evidentiary hearing was held in the above-captioned matter on February 17 and 18, 2011. 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 629.1, 46 D.C. Reg. 9317 (1999) 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 629.3 *id.* states:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUES

1. Whether the Agency's adverse action was taken for cause.
2. If so, whether the penalty was appropriate under the circumstances.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

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

Summary of the Testimony

Agency's Case in Chief

Horniman Orjisson

Horniman Orjisson ("Orjisson") testified in relevant part that he is employed by the DMV as a Supervisor. He has held this position for the past four years. *See* Transcript ("Tr.") at 16 - 18. Orjisson's daily duties include supervising his subordinates located at the Southwest Vehicle Inspection Station. Employee was one of the subordinate employees that Orjisson was tasked with supervising. *Id.* As a result of an investigation carried out by the SIO, Orjisson was made aware that Employee was conducting fraudulent vehicle inspections. *Id.* Orjisson repeatedly brief Employee and his fellow vehicle inspectors about how to properly conduct vehicle inspections and customer service training issues. Moreover, Orjisson admonished his subordinate employees against conducting fraudulent inspections (e.g. using one vehicle to pass another) and reminding employees that they are responsible for signing in and out of their work station using their unique identification ("ID") numbers. *See* Tr. at 18 – 20. Agency's Exhibit No. 1 is a sampling of various work-related training courses that Employee has successfully completed. The following excerpt from the transcript is relevant to this matter:

Q: Was any information given with regards to the conducting of fraudulent inspections as it applied to OBD fingerprint on the vehicles and how they were using other vehicles to pass a vehicle? Was any information given in that regard?

A: Yes, I did brief [that information] at the employees' meeting because at one of the meetings, I will give out papers relating to incorrect VIN numbers, incorrect mileage, incorrect OBD systems, where one car was put in as a diesel to use it to bypass a Ford, a regular Crown [Victoria] and not diesel.

And that is another fraudulent - - some of them are put in as Flexfuel and based on that, those things were also briefed at the Wednesday meeting to get the employees to properly put information in. Because if you use the wrong criteria, by using flex or diesel fuel in the system, it automatically overrides the OBD and weights also is part of that.

Q: And were these meeting conducted with all the inspectors?

A: Everyone, I have a checklist...

Q: And did you conduct those meetings personally?

A: Yes.

Q: And do you recall seeing the Employee, Danarion Benjamin, present at those meetings?

A: Yes, he was in several of the meetings.

Tr. at 22 – 23.

Orjisson explained that the inspection of a for-hire vehicle (e.g. taxis, limousines, etc.) takes longer to inspect than regular vehicles because for-hire vehicles go through an expanded inspection process not required for regular vehicles. *See* Tr. at 24 – 25. In order to root out fraudulent inspections, the DMV required that for-hire vehicle inspections would only occur on Lanes 5 and 6 at the Southwest Vehicle Inspection Station. *Id.*

During cross examination, Orjisson admitted that he never received a formal complaint that Employee conducted a fraudulent inspection. *See* Tr. at 31 – 34. Orjisson never witnessed Employee take anything of value in order to allegedly perform a fraudulent vehicle inspection. *Id.* Orjisson explained the inspection process of a vehicle as follows:

Q: Is it the team leader's duty to verify the final inspection?

A: Yes.

Q: Could you explain to me very briefly how the entire process works with inspections?

A: The vehicle comes in through the gates, directed to a lane, designated lane for cabs, 5 and 6. Customers are asked to come out, information is entered into the system.

The inspector in Position 1 enters the vehicle in, which means he sees the vehicle. Inspector in Position 1 also conducts the safety inspection to make sure that those items are in the system, what they found, if there's any defect for items that should have been rejected. Those things are in the system.

The inspector in Position 1, for him to work pretty much had already put his information in. so that means his ID, his responsibility to make sure whatever in Position 1 is entered right.

Then Position 1, you move forward a little bit. You lift the vehicle up, check the suspension [of] the vehicle, make sure that the safety items on the car [are] intact.

Two, you move to Position 2. Position 2 is the emissions location where the vehicle will be tested for emissions. Another inspector takes it from there at Position 2...

I've also seen one inspector on Positions 1 and 2. Why there are two inspections, why that's happening? Well, it's questionable because it's not part of our training. Each inspector is supposed to be located on the lane that they're supposed to be in.

After that, Position 3, the car gets driven to the end. The inspector comes out, the team lead verifies. If there is any monetary information that happens, it doesn't happen at the end, it happens at Position 1.

Q: Is Mr. Benjamin a lead inspector?

A: No, he's not.

Tr. at 39 – 41.

During redirect examination, Orjisson indicated that the DMV is only concerned if a fraudulent inspection occurred, not if the offending employee received a benefit from conducting said fraudulent inspection. *See* Tr. at 47 – 50.

Gregory Simpson

Gregory Simpson (“Simpson”) testified in relevant part that he is currently employed by the DMV as an Inspection Station Manager. *See* Tr. at 52 -53. Simpson indicated that his on-the-job duties include making sure that all of his subordinate employees have a safe working environment, that these employees receive the proper career training, and to ensure that the vehicle inspections conducted at the inspection station are done accurately and efficiently. *Id.* Simpson confirmed that the DMV held weekly meetings during which it was emphasized to his subordinates that the vehicle inspections were supposed to be done in an accurate and efficient manner and that they are prohibited from conducting fraudulent vehicle inspections. *See* Tr. at 53 – 56. With respect to fraudulent vehicle inspections, DMV employees were made aware that for-hire vehicles should receive a 6 month inspection sticker not a 24 month inspection sticker (which is exclusively reserved for regular passenger vehicles). *Id.*

Simpson was made aware by the SIO that several employees under his supervision were suspected of carrying out fraudulent inspections. According to the SIO, Employee was one of the suspects. Simpson assisted the SIO in its investigation by pulling the vehicle histories for some of the questionable inspections that occurred. He did this under the guidance of Michael Montgomery, SIO Investigator, and Dr. Michael St. Denis. *See* Tr. at 56 – 64. In order to log onto the Gordon-Darby system, each DMV vehicle inspector is given a unique ID number and password. DMV employees were repeatedly cautioned about safeguarding their ID number and password. Employee's ID number was 2939. According to Simpson, there were approximately 20 – 25 vehicles that were allegedly fraudulently inspected by Employee. *Id.* A number of these suspected vehicle were for-hire. Moreover, Simpson explained that some of the discrepancies that led to an allegation of a fraudulent inspection occurring included:

- (a) The vehicles' OBD system would read "unsupported" during an emissions inspection. Typically, for the vehicles listed, that reading is virtually impossible.
- (b) For-hire vehicles were tested within moments of each other. According to Simpson, because of the additional safety checks that have to be performed on these vehicles, a proper test cannot be done in that short amount of time.
- (c) DMV inspector giving for-hire vehicles 24 month inspection stickers. This practice is against DMV policy. This type of vehicle is only supposed to be issued a 6 month inspection sticker.

During cross examination, Simpson testified that a fraudulent vehicle inspection test "is an inspection that deviates from the standard and procedures that were implemented during the training process and that would be beneficial to the individual." Tr. at 64.

During redirect examination, Simpson testified that with respect to a fraudulent vehicle inspection, the DMV is unconcerned with what motivates an employee to conduct said test; the DMV is only concerned with whether a fraudulent vehicle inspection occurred. *See* Tr. at 75 – 80.

Michael Montgomery

Michael Montgomery ("Montgomery") testified in relevant part that he is currently employed by the District of Columbia Office of the Inspector General as a Criminal Investigator. *See* Tr. at 84 – 86. Montgomery was previously employed by the DMV as an Investigator from August 2008 through October 3, 2009. *Id.* During his tenure with the DMV, Montgomery focused on investigating whether DMV vehicle inspectors were conducting fraudulent vehicle inspections. As part of this investigation, he was unconcerned with whether an offending inspector received a benefit from conducting a fraudulent inspection. His only concern was whether a fraudulent inspection occurred. *Id.* Dr. Michael St. Denis helped Montgomery in the investigation. He focused his research on the on-board diagnostic ("OBD") computer readouts that were culled from the DMV inspection database also known as Gordon-Darby. *See* Tr. at 87. Agency's Exhibit No. 2 was introduced into evidence through Montgomery's testimony. It is a report that Montgomery prepared detailing the fruits of his investigation with respect to Employee. *See* Tr. at 87 – 90. The following excerpt describes the methodology of Montgomery's investigation:

Well, I was asked by the Agency to identify, to use data in the computer to identify any vehicles or any vehicle inspections that might have been fraudulent. I consulted with Dr. St. Denis to find out what the indicators were. In this particular case, the OBD test was the indicator and we used the EGR, the specific EGR reading.

Because we suspected that cab drivers may have been attempting to pay off inspectors, we focused on cabs and the taxi inspections. And the other reason we did that or I chose to do that is because such a large percentage

of taxicabs in the city are Lincoln Town Cars, Ford Crown Victorias and Mercury Grand Marquis. They are, in essence, the same vehicle, they have the exact same OBD fingerprint and they look the same on paper, or they should. So that's why I chose to focus on those.

So I ran every test and I knew that the EGR for those particular cars is always "supported," meaning it's got to be ready or not ready. So I ran every taxi inspection for a six-month period between April the 1st and September the 30th of maybe 2008 I believe it was. And I just recorded every Town Car, Crown Victoria, Grand marquis where an EGR reading was unsupported.

That, in of itself, based on the information that I had, was prima facie evidence that a vehicle other than that was used for that particular test.

What I did thereafter for each of these vehicles that I identified, I did a vehicle history, an inspection history on those vehicles for the life of the inspection to ensure that the OBD reading had actually been correct on all the previous inspections to make sure there were no problems with the vehicles, to make sure the vehicle was exhibiting the characteristics that it was supposed to.

And with one exception, every vehicle that I identified had, in fact, tested properly in the past, had exhibited the proper characteristics in the past, and that's how I extracted the information that I did.

Tr. at 92 – 94.

Montgomery detailed several instances where, based on the data collected and using the criteria outlined in the preceding excerpt, he suspected Employee performed fraudulent inspections. *See* Tr. at 90 – 107. Agency Exhibit No. 2 is a report prepared by Montgomery where he detailed the specific instances where he believed Employee committed a fraudulent vehicle inspection. Montgomery explained that Agency Exhibit No. 2 is broken down into two attachments. Attachment 1 details the alleged fraudulent inspections where Employee is the only person logged onto the Gordon-Darby computer system at both stations 1 and 2. Attachment 2 contains suspected fraudulent inspections where Employee was working with another inspector on either station 1 or 2. *See generally* Tr. at 87 – 107.

Agency Exhibit Nos. 3, 4, 5, and 6 were admitted into evidence through Montgomery's testimony. They are all Vehicle Inspection Information Reports culled from the Gordon-Darby computer system. They each detail a distinct instance where it was alleged that Employee committed a fraudulent vehicle inspection. *See generally* Tr. at 105 – 124. Montgomery asserted that according to the aforementioned exhibits, Employee committed a fraudulent inspection in each instance. *Id.*

During cross examination, Montgomery was questioned regarding Agency's Exhibit No.

3. This exhibit indicates that with respect to the second vehicle listed (Volvo XC90), another inspector (8384) worked alongside Employee at station 2. Since Employee was supposedly charged only with instances where he was the sole inspector, why was this used to justify, in part, Employee's removal? Montgomery explained that Employee was the sole inspector for the first vehicle (Ford Crown Victoria) and he contends that the first vehicle was passed on account of the emissions test being administered on the second vehicle. *See* Tr. at 133 – 135. Regarding Agency's Exhibit No. 4, Montgomery was asked why this report was used since the subject vehicle failed. Montgomery explained that the vehicle failed due to a visual inspection (e.g. cracked windshield); however, he maintains that the OBD emissions test was conducted fraudulently. *See* Tr. at 134 – 137.

Based on the information gathered as part of his investigation, Montgomery maintains that Employee conducted fraudulent vehicle inspections. *See* Tr. at 143 – 144.

Dr. Michael St. Denis¹

Dr. Michael St. Denis ("St. Denis") testified in relevant part that he owns Revecorp, Incorporated ("Revecorp"). This company is primarily focused on reducing air pollution and conducting research into vehicle emissions. Tr. at 156 – 157. St. Denis holds a BS in Chemistry from the University of the Pacific, MS in Chemical Physics from the University of the Pacific, and a Doctorate in Environmental Science and Engineering from the University of California Los Angeles. *Id.* The following excerpt is relevant to this matter:

Q: And can you talk about your experience particularly with dealing with the auditing of inspections, auditing of fraudulent inspections?

A: Yes. Approximately two years ago, [Montgomery] from DMV was just starting to do this kind of work. I had provided some training to him and to Bob Johnson about how to look at the data to determine fraudulent inspections, giving him the EPA's guidance document that I had written, and trained them on how the on-board diagnostics ("OBD") system in cars work and then what things should and should not show up in those data...

So we developed some screening triggers, so we looked at the rates at which people had data that didn't appear to be correct. And he started at the top of that list with the case that was the worst and sort of pulling the individual records so that he could look at them one at a time and go through them to see things that looked suspicious.

¹ DMV proffered St. Denis as an expert witness in the field of vehicle emissions testing and auditing of emissions testing and with respect to the Gordon Darby vehicle emissions system used by the DMV to test vehicle emissions. *See* Tr. at 147 – 155. The Undersigned decided not to accept St. Denis as an expert witness due to the fact that St. Denis and the DMV have a business relationship wherein, he provided technical expertise to the DMV, so that it could find, procure and implement its current vehicle emissions testing system. The *appearance* of bias is too great to allow for St. Denis' testimony to be accepted as an expert. *Id.* However, St. Denis was allowed to testify otherwise in this matter and the Undersigned will weigh his testimony appropriately given the circumstances.

Q: And as far as indicators of certain things that [Montgomery] should look for and Bob Johnson, what are some of the indicators that you were giving them that they should look for?

A: All '96 and newer vehicles sold in the United States have an on-board diagnostics system and that system has 11 what are referred to as monitors, which are systems that check the emissions control system in the car. Two of them aren't used, three of them are continuously checking the system, and then six are optional.

Some cars have or don't have individual ones, depending on how the car was designed. And so those six can be used as a fingerprint of the car, it should or should not have them. There's only one known instance where one of those has changed, which is a General Motors vehicle.

And so [Montgomery] would take vehicles with a certain fingerprint that he knew it should have. I have a look-up table that has those fingerprints for most cars and sold in the United states and he compared them to those to find ones that didn't match.

Because of the volume of cars that are tested, suspicions about which vehicles may be receiving fraudulent inspections, he focused his investigation down to taxis just to bring the number - - because looking at each of these takes a half an hour or so. We had to pare it down to something that was reasonable and that was - - the easiest case to look at was taxis.

Q: When [Montgomery] started looking at the Crown Victoria's, the Lincoln Town Cars, and Mercury Marquis, is that something you told him he should kind of focus on as a control group?

A: Yes. Well I don't know if I told him or he told me, but as we looked, most of the taxis were makes or models... and they all had something in common in their fingerprint which made it easy to just look for those. And so he decided to narrow down his investigation to those to pare down the amount of data that he had to go through.

Q: And in reviewing fraudulent inspections, what are some of the factors that you told Mr. Montgomery he should look for or what you normally found nationwide in your auditing of these fraudulent inspections?

A: There are several ways for these vehicles that people do fraudulent inspections. The way the test process works is that the inspector enters the vehicle's information into the computer, the test system and then he plugs into the car and the test system requests data from the car. Basically, it says whether or not it has an emissions control problem or it's healthy.

And then the data is stored in the system and the car continues on.

So obviously, if you plugged into a different vehicle, one that you knew would pass, you could use that to pass a car...

So what we rely on is looking to see if the fingerprint is different, either between two inspections for the same vehicle, because its fingerprint should never change, except for that one exception that I mentioned, or if it's fingerprint doesn't match what we know in the look-up table...

We have a simple way in Gordon-Darby to pull a history of a vehicle so we can look at every inspection and we can look at its fingerprint over time to see if it changed. So if it changed, then you go in and pull those inspections.

If we want to figure out which vehicle it was that was used to test it because the cars are queued up in the lane, we would look at the fingerprint of the car in front of it and behind it to see if either one of those could have been used in its place.

Simply by doing two tests on the car that's in front of it and not doing a test on it, you could just plug into it and pretend like you're at the keyboard and come back. It would do the inspection on the second vehicle and then a passing inspection would print out at the end of the lane and the data would be stored.

Q: In regard to the inspection itself being fraudulent, does it matter if the car that they picked turned out to actually result in a failing test?

A: No. If the data is incorrect, you have to test the car that's in front of you, which is what the inspectors are trained to do.

Q: So when an inspector uses another car or the OBD fingerprint from another vehicle to kind of pass the other vehicle, the fact that they actually failed in their pursuit, does that even factor into whether or not that inspection is deemed a fraudulent inspection?

A: it's still incorrect, it's still fraudulent, that's not the data from that car, which is what that inspection is supposed to represent.

Tr. at 160 – 166.

St. Denis was asked to review Agency Exhibit Nos. 3, 4, 5, and 6 *en masse*. In his opinion, they each represent an instance where a fraudulent vehicle inspection occurred. *See* Tr. at 166 – 172. St. Denis also explained that the amount of fraudulent tests could not reasonably

be mitigated by Employee's inadvertent error. *See* Tr. at 180 – 183.

Robert Johnson

Robert Johnson (“Johnson”) testified in relevant part that he is an Investigator with the OSI. Johnson assisted Montgomery in his investigation. *See* Tr. at 186 – 189. Johnson was tasked with assisting Montgomery with pulling documents and records as part of this investigation. Johnson searched the Gordon-Darby system for for-hire vehicle inspections that were conducted that were notated as “unsupported” in the system. Johnson then turned over the information he collected to Montgomery. *Id.*

Kenneth King

Kenneth King (“King”) testified in relevant part that he is employed by the DMV as its Administrator for Vehicular Services. *See* Tr. at 191. Through random conversations with various persons doing business at the DMV and DMV employees, King was initially made aware that fraudulent vehicle inspections were being conducted at the Southwest Vehicle Inspection Station. *See* Tr. at 191 – 195. Through the fruits of the investigation carried out by the OSI, King learned that Employee was one of his subordinates who conducted fraudulent vehicle inspections. With the fraudulent inspections allegedly conducted by Employee, King felt that it put the Agency in jeopardy with respect to Federal monies that are granted to the Agency. Moreover, he also surmised that if the DMV did not act on this information, it could potentially lead to those monies being withheld from the DMV and the District government. *See* Tr. at 197 – 198. It did not matter if the fraudulent inspection resulted in the vehicle passing the test. King surmised that the mere fact that it occurred could jeopardize Federal grant funding associated with the vehicle emissions testing conducted by the DMV. *Id.* King prepared Employee's Advance Written Notice of Proposed Removal. *See* Agency's Exhibit No. 7 at Exhibit No. 5 within. King believes that Employee is guilty of the charges as stated within that document. *See* Tr. at 204 – 206.

During cross examination, King was questioned with regard to some perceived discrepancies within Agency Exhibit Nos. 4, 5, and 6. However, King explained that he based his proposal to remove Employee on the data given to him by the OSI.

Lucinda M. Babers

Lucinda M. Babers (“Babers”) testified in relevant part that she is the Director of the DMV. *See* Tr. at 267. She is tasked with overseeing the Agency. Babers was made aware that Employee was conducting fraudulent vehicle inspections through the investigative efforts of the OSI – in particular Montgomery, Johnson, and St. Denis. It was alleged that Employee conducted at least five fraudulent vehicle inspections. She posited that either Employee used another vehicle that was in the inspection lane in order to trick the OBD testing equipment or Employee inputted a different VIN number (possibly one that was written down) of a vehicle that was not located at the testing station when then the test was conducted. Either way, it was done in furtherance of a fraudulent inspection. *See generally* Tr. at 267 – 273.

In making the decision to remove Employee from service, Babers considered the seriousness of the allegations, the integrity of the DMV, she also consulted the DPM Table of Penalties and found that fraudulent inspection would warrant dismissal for the first offense. *Id.* Babers reiterated King's concern that Employee fraudulent acts, left unchecked, could jeopardize Federal grant monies associated with the air quality and transportation funds. Babers posited that the potential loss would be several million dollars. *Id.* Given the number of infractions and circumstances surrounding each, Babers felt that Employee's acts were intentional and egregious and in her opinion cannot be explained by unintentional error. Moreover, according to Babers, the number of alleged attempts is irrelevant. *Id.*

Babers confirmed that she relied on the OSI investigation and the expertise of the persons involved in that investigation. *See* Tr. at 273 – 280. Moreover, she also based her determination to remove Employee on the entire investigative report submitted by the OSI not just a few distinct pages contained therein. *Id.*

Employee's Case in Chief

Kelvin Fuller

Kelvin Fuller ("Fuller") testified in relevant part that he is currently employed by the DMV as a Lead Motor Vehicle Inspector. *See* Tr. at 282 - 283. He is also the Sergeant-At-Arms for the Union². During September 2008, Fuller was the Chief Shop Steward for the Union. *Id.* Fuller indicated that during his stint as Chief Shop Steward, he never received a complaint from DMV management concerning suspected fraudulent vehicle investigation. As the Lead Motor Vehicle Inspector, his 'duty is to make sure all lanes are operational, place the employees in a position where they're supposed to be at and do the opening and closing and put the stickers on and make the final decision, if I have to make one according to the inspection manual." Tr. at 283 – 284. Fuller described the hypothetical instance whereby in his role as Lead Motor Vehicle Inspector, he would have a vehicle retested if said vehicle passed and upon his determination it should not have passed. Furthermore, when a car is retested, Fuller would not automatically require that vehicle to go to the back of the line to be retested – he may just back said vehicle up in the lane so that it can be retested on the spot. *See* Tr. at 284 – 286.

Fuller testified that the OBD testing equipment occasionally malfunctions and consequently could give a false reading. *See* Tr. at 288 – 295. When this occurs, a technician is called upon to effectuate repairs. Regarding Agency's Exhibit No. 5, Fuller testified that it doesn't make sense for an inspector to conduct a fraudulent test on the OBD testing equipment then fail that same vehicle due to the brake test as was indicated in the exhibit. Regarding Agency's Exhibit No. 3, Fuller testified that the report indicates that Employee failed the for-hire vehicle that was listed in this exhibit.

During cross examination, Fuller admitted that a vehicle can fail the overall inspection process yet pass the OBD testing component of the test. *See* Tr. at 316 – 317. Fuller also

² Fuller did not disclose which employee Union he is a part of. The Undersigned assumes that he is referring to American Federation of Government Employees ("AFGE") Local 1975.

confirmed that the information on the vehicle that is being tested is recorded by the DMV testing equipment at Station 1 of the inspection lane. Station 2, where the OBD test occurs, records the information that was entered at Station 1 and saves that information. Fuller was evasive when asked whether this system will be able to distinguish if an inspector inputted a vehicles' information at Station 1 but actually used another vehicle to conduct the OBD test at Station 2. *See* Tr. at 318 – 327. Fuller also admitted that for Agency Exhibits 3, 4, 5, and 6 that the vehicles in question passed the OBD component of the DMV inspection process. *See* Tr. at 329 – 330.

Curtis Thomas

Curtis Thomas (“Thomas”) testified in relevant part that he has been employed by the DMV for approximately 40 years. *See* Tr. at 354 - 355. Thomas indicated that Employee was a former colleague. Moreover, Thomas described him as a “good” employee. *Id.* Thomas never witnessed Employee receive anything of benefit in return for conducting a fraudulent vehicle test. *Id.* Thomas confirmed that it is possible for an inspector to input a vehicles' information at Station 1 but actually use another vehicle to conduct the OBD test at Station 2. *See* Tr. at 377 – 378.

Danarion Benjamin

Danarion Benjamin (“Employee”) testified in relevant part that he previously worked for the DMV for approximately ten years as a Motor Vehicle Inspector. *See* Tr. at 380 – 381. His on-the-job duties involved performing inspections of motor vehicles. *Id.* Employee confirmed that his ID number was 2939. *See* Tr. at 382. Regarding Agency's Exhibit No. 3, Employee denied that he conducted the emissions/OBD test on the vehicles listed in that document. He notes that another employee was listed as the inspector at Station 2 where the emissions/OBD test is performed. *Id.* Employee also explained that occasionally an inspector could be working both Station 1 and 2 by themselves. Some reasons for this include bathroom breaks or being called upstairs to meet with DMV management. *See* Tr. at 385 – 386.

Regarding Agency's Exhibit No. 5, Employee noted that this document indicates he failed the subject vehicle (Ford Crown Victoria) contained therein. Regarding Agency's Exhibit No. 6, Employee admitted that the subject vehicle (Mercury Grand Marquis) passed on its first attempt prior to another vehicle (Volkswagen Jetta) being inspected. This would seemingly negate Agency's argument that he used the Jetta to pass the Grand Marquis. *See* Tr. at 387 – 389. Employee also contended that the vehicle listed in Agency's Exhibit No. 2 was failed by him, but went on to be passed in Lane 9. Employee does not work in Lane 9 and the testing equipment used there is different than the equipment that the employee used. *See* Tr. at 389 – 391. Employee defined a fraudulent inspection as taking something of profit in exchange for giving them a fraudulent inspection. *See* Tr. at 393 – 394. He further explained that it would be a complete fraudulent test – an inspector would pass this vehicle on every area that is tested, not just the OBD/emissions test. *Id.* Employee denied ever receiving anything of benefit in exchange for conducting a fraudulent test. *Id.*

Findings of Fact

The Agency presented oral testimony from several persons who, both individually and collectively, repeatedly counseled Employee (and his colleagues) about the importance of exercising integrity in their job-related duties. Orjisson, Simpson, and King confirmed that Employee and his fellow vehicle inspectors attended several DMV sponsored training classes in an effort to make sure that each attendee was well versed in the mechanics of performing their job-related duties in a workmanlike manner. These three witnesses also confirmed that Employee attended several DMV sponsored meetings over the course of several years wherein it was stressed that the fraudulent activities in question were not to be tolerated. Employee was repeatedly counseled that the actions alleged herein would not be condoned and that the offending employee would face severe sanctions.

In an attempt to make sure that the vehicle emissions inspection process was done in a manner that was compliant with EPA demands, as well as making sure that the District government did not lose out on Federal grant monies tied to emission guidelines, Babers contracted with St. Denis to find and then implement the Gordon-Darby vehicle emission testing system. When this new system was instituted, it became a more manageable process for tracking emissions as well as rooting out fraudulent vehicle inspections. Babers then tasked St. Denis, Montgomery, and Johnson with investigating whether fraudulent inspections were being conducted at the Southwest Vehicle Inspection Station. In order to accomplish this task, St. Denis advised Montgomery of some of the best practices which were widely accepted nationwide in order to effectively determine whether fraudulent vehicle inspections were occurring. This process would focus on whether certain vehicles would register within the Gordon-Darby system as “unsupported”. What was discovered is that certain makes and models of vehicles should never come back as unsupported by the Gordon-Darby system. In order to make sure that the data set was not too onerous for the OSI to investigate, the investigation only focused on vehicle inspections that occurred during the time period of April 1, 2008 through September 30, 2008. The OSI then further focused their investigation by reducing that list of inspections to certain makes and models (primarily Ford vehicles) that were registered as for-hire (taxis) vehicles. What the investigation uncovered was that DMV employee identification number 2939 (Employee herein) registered approximately 5 instances where a vehicle read as unsupported, but according to the vehicle’s make and model that is virtually an impossible occurrence.

For his part, Employee firmly denies that he actively participated in fraudulent vehicle inspections. Employee asserts that the equipment must have malfunctioned. Employee also provides that another plausible reason that the instances were not fraudulent test is that the instances cited by the Agency did not meet the criteria for a fraudulent test either because some of the vehicles actually failed the vehicle test for some other reason (e.g. brake test). Employee also noted that for some of the alleged fraud occurrences, he was working with someone else on either Station 1 or 2, so if a fraud occurred it was the other employee who committed it.

During the evidentiary hearing, I had the opportunity to observe the poise, demeanor and credibility of both the Agency’s witnesses and Employee’s witnesses in this matter. I find that the Agency’s collective testimony relative to this matter was more credible and persuasive than Employee’s rendition of events. Agency instituted its investigation in order to root out suspected

fraudulent activities occurring within its vehicle inspections. I agree with the DMV that in order to prove fraud that it need not prove that Employee herein received a benefit, only that a fraudulent inspection occurred. I further find that one instance of a fraudulent inspection is enough to warrant removal of an offending employee. As the Agency noted, the integrity of its testing process is at stake as well as millions of dollars in Federal grant monies that are predicated on the integrity of the emission testing process conducted by the DMV.

I further find the collective testimonies of all of the Agency's witnesses to be both forthright and trustworthy. The Undersigned notes that the initial bent of the DMV's investigation was not to implicate Employee personally but rather was an assessment of the data set presented on who was conducting fraudulent vehicle inspections. I also take note that the testimonies of Montgomery and St. Denis were not credibly challenged and that the minor points of contention raised by Employee with respect to some of the other Agency's witnesses could have been more readily vetted and better received by Montgomery and St. Denis, who, collectively, performed the yeomen amount of work in this investigation. I also take into account that Fuller is the current Sergeant-At-Arms and former Union Shop Steward and thus has an implied interest in seeing that this matter is resolved in Employee's favor. I find that Employee committed fraudulent vehicle inspections as indicated in Agency's Exhibit No 2. I further find that the Agency has met its burden of proof in this matter and it has adequately proved that it had proper cause to remove Employee from service.

Analysis and Conclusion

In a nutshell, I find that the Agency's adverse action was taken for cause. The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office. *See, Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), __ D.C. Reg. __ (); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), __ D.C. Reg. __ (). Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

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. *See Stokes, supra; Hutchinson, supra; Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996), __ D.C. Reg. __ (); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (Sept. 21, 1995), __ D.C. Reg. __ (). I conclude that given the totality of the circumstances as enunciated in the instant decision, the Agency's action of removing Employee from service should be upheld.

ORDER

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

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Administrative Judge