THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
STANLEY JOHNSON,	)	
Employee	)	OEA Matter No. 1601-0025-05
	)	
v.	)	Date of Issuance: February 15, 2007
	)	
D.C. DEPARTMENT OF CONSUMER AND REGULATORY AFFAIRS,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge

L. Saundra White, Esq., Employee Representative
Matthew Green, Jr., Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On March 4, 2005, Stanley Johnson (hereinafter "the Employee") filed a Petition for Appeal with the Office of Employee Appeals (hereinafter "the Office" or "OEA") contesting the District of Columbia Department of Consumer and Regulatory Affairs' (hereinafter "the Agency") adverse action of removing him from his position as a Housing Inspector, DS-1802-9. A prehearing conference as well as various status conferences were held for this matter. During the course of these proceedings, I decided that an Evidentiary Hearing was required. Consequently, a Hearing was held on March 2 and 8, 2006. The record is now closed.

ISSUE

Whether Agency's adverse action of separating the Employee from service for cause was done in accordance with applicable law, rule, or regulation.

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.

JURISDICTION

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

STATEMENT OF THE CHARGES

The Employee's Notice of Final Decision: Proposed Removal dated January 31, 2005 states in relevant part that:

> This is a notice of final decision regarding the proposal to remove you from your position as a Housing Inspector, DS-1802-9, [with the Agency]. This action is based on a charge of Conduct Unbecoming a District Government Employee...
>
> The report and recommendation of the hearing officer were considered in this final decision. Your response to the advanced written notice has been reviewed carefully. It is not clear that you operated a vehicle on an expired permit or that you failed to report to your supervisor that your license was suspended. However, you were not able to refute the fact that you altered the expiration date on your driver's license. On several occasions you provided false information to obtain temporary driver's licenses and you provided false information on [your] D.C. Employment application and on your D.C. driver's license. Based on the preponderance of the evidence, the proposed action shall be **sustained**...

SUMMARY OF THE TESTIMONY

1. Karen Meunier (Tr.1[1] at 15 – 128).

[1] Tr.1 refers to the transcript generated for the first day of the Evidentiary Hearing in this matter held on

Karen Meunier(hereinafter "Meunier") testified in relevant part that: at all times relative to this matter she has been employed by the District of Columbia Office of the Inspector General (hereinafter "OIG"). As of the date of the Evidentiary Hearing in this matter, she was recently promoted to the position of Director of Investigations. During her investigation of the Employee, Meunier held the position of Criminal Investigator. It was in this capacity that she came to know the Employee.

As Meunier relates her understanding of this matter, she reacted to initial information received from the District of Columbia Metropolitan Police Department (hereinafter "MPD") whereby an investigation was commenced (by both OIG and the MPD concurrently) because someone named Stanley Johnson attempted to register a "fraudulent" title with the District of Columbia Department of Motor Vehicles (hereinafter "DMV"). As part of the OIG investigation into the matter it was initially theorized that the Stanley Johnson who attempted to register the fraudulent title was possibly the Employee. OIG became involved with the investigation since this matter potentially implicated a District of Columbia government employee. As part of her preliminary investigation into the Employee's background, it was discovered by Meunier that the Employee worked for the Agency as a Housing Inspector.

At some point Meunier conducted an initial interview with the Employee. Going into the interview it was discovered that the Employee had previously had his driver's license suspended. However, by the date of this interview, the Employee had obtained a valid driver's license. Meunier questioned the Employee as to whether he had driven a motor vehicle during the time his driving privileges were suspended. She testified that he had responded by stating "...that only on emergencies did he drive a vehicle and once in a while he would have to drive the district vehicle if there was nobody else to drive. Most of the time he would he would try to get other people to drive." *Tr.1* at 20 – 21.

After she completed her initial interview with the Employee, Meunier interviewed a Bernard Ferguson (hereinafter "Ferguson"), who at the time of the interview was the Employee's supervisor. According to Meunier, Ferguson indicated that the Employee was assigned a government vehicle in order to perform his assigned duties and that to his knowledge the Employee was operating a government vehicle during the time in which his driver's license was expired. According to Meunier, the Employee's driving privileges were suspended from June 27, 2000 through October 31, 2001.

Meunier further testified that as a continuing part of her investigation she investigated the Employee's driver's license record. She accomplished this by going to the DMV and retrieving the Employee's driving record as maintained by the DMV. She discovered that "[the Employee] received several licenses... some of the licenses showed a different date of birth. Some of the licenses showed an address that he no longer lived at." *Tr.1* at 36. Also, according to the DMV records the Employee's birth date "appeared two different ways, September 11, 1955 and September 11, 1957." *Tr.1* at 36.

After uncovering this additional information, Meunier conducted another interview with the Employee. As part of his participation in this second interview Meunier asked the Employee to provide a copy of his birth certificate, which showed the Employee's birth date was September 11, 1957.[2] During this second interview she asked the Employee about his allegedly using multiple birth dates. According to Meunier the Employee gave two explanations: first, when he was younger, the Employee's mother was ill and he needed to obtain a driver's license before he would otherwise be legally allowed to do so in order that he could drive her around; the Employee's second explanation was that he had incurred "some fines and that he was trying to buy time so he was switching things over so he didn't have to pay the fines." *Tr.1* at 37.

During her investigation into the Employee, Meunier discovered that he had previously been convicted of a felony for which he was placed on either probation or parole. Meunier then noted that the Employee failed to disclose his felony conviction on his District of Columbia employment application.

While some of the acts the Employee allegedly committed could have been pursued criminally, according to Muenier, the United States Attorney General's Office for the District of Columbia declined to prosecute this matter. The investigation continues solely on its current administrative track.

Agency's Exhibit A was admitted into evidence and referenced throughout the testimony of Meunier. As was stated in Note 2 *supra*, Agency's Exhibit A, which is dated October 14, 2004, contained Meunier's research, findings, and recommendations regarding her investigation into the Employee's alleged improprieties. According to Agency's Exhibit A, Meunier investigated two issues:

> Whether [the Employee] violated D.C. Code § 50-1403.01 and District ethics standards by operating a government vehicle while his driving privileges were suspended and misleading DCRA management as to his driver's license status. And;
>
> Whether [the Employee] forged his D.C. driver's license and falsified information on official government documents in violation of D.C. Code §§ 22-3241 and 2405 and DPM § 1803.1(f).
>
> Agency's Exhibit A at 2.

Contained within Agency's Exhibit A are several exhibits that were used to justify Meunier's findings and recommendations therein. The aforementioned exhibits include:

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[2] A copy of the Employee's birth certificate along with a multitude of other documents relating to Ms. Meunier's investigation into said matter were included in Agency's Exhibit A which was authored by Ms. Meunier and titled "Report of Investigation Into the Misconduct on the Part of a District of Columbia Housing Inspector Employed with the [Agency] OIG No. 2001-0039(S)." Exhibit A contains, *inter alia*, Ms. Meunier's ultimate findings in her investigation of the Employee. Exhibit A shall be discussed in more detail *infra*.

a partial copy of the Employee's driving record with the DMV evidencing that his driver's license was suspended from 6/27/00 through 10/31/01; an alleged copy of the Employee's altered driver's license (one of the copies has comments from a DMV official that buttress Agency's contention that the license, as presented, was altered); a copy of the Employee's driver's license as it appears within the DMV database; a copy of the Employee's birth certificate (which indicates that the Employee's birth date is September 11, 1957); driver's license applications for the Employee (from calendar years 1997, 1998, 2000, 2001, and 2002); and a copy of the Employee's employment application. Utilizing the information gathered through Muenier's investigation, the OIG (by and through Muenier) found that both issues as listed in Agency's Exhibit A were Substantiated and referred these findings and recommendations to the Agency. Based on Agency's Exhibit A, the Agency elected to pursue the instant adverse action against the Employee.

2. Alfreda Barron (Tr.1 at 128 – 144).

Alfreda Barron (hereinafter "Barron") testified in relevant part that: she filled out and typed the Employee's District of Columbia Employment Application. In doing so, she utilized information provided by the Employee, which he gave to her for the purpose of filling out the employment application with the information it requested. Barron was unaware of the Employee's criminal history at the time she filled out his employment application. This is why she marked certain items on the Employee's employment application as if he did not have a criminal conviction to report. The Employee's employment application appears in the record as both Employees' Exhibit No. 6 and as part of Agency's Exhibit A. After having filled out the employment application for the Employee, she presented it to him. She believes that he went directly to a job fair so that he could immediately submit it for a new job. Barron assumed that his efforts were successful because some time later, the Employee informed her that he was hired by the Agency. While Barron readily admitted that she filled out said employment application for the Employee, she did not sign it.

3. Carlton Washington (Tr.1 at 144 – 168).

Carlton Washington (hereinafter "Washington") testified in relevant part that: he and the Employee have worked together at the Agency for approximately 15-20 years. During a comparatively brief portion of their time working together, Washington was Employee's Acting Supervisor. In 2001 while serving in the capacity of Acting Supervisor, the Employee informed Washington that his driver's license was suspended and that he needed Washington to write a letter to the DMV so that he could obtain a restricted driver's license[3]. Mr. Washington complied by submitting said letter to the DMV via facsimile. A copy of the letter was forwarded to Henry House (hereinafter "House") (Washington's supervisor). According to Washington, House dealt with all follow-up in regards to the DMV approval of a restricted license for the Employee. Washington has no knowledge of the results of his action of sending the aforementioned letter to the DMV, nor of what mode(s) of transportation the Employee utilized for

[3] For the sole purpose of performing his work related duties.

getting to and from his work assignments. Also, he has no knowledge of whether the Employee drove a District government vehicle while his driving privileges were suspended.

4. Frank Brown (Tr.1 at 171 – 178).

Frank Brown (hereinafter "Brown") testified in relevant part that: he is employed by the Agency as a Neighborhood Stabilization Officer/Housing Inspector and that he has worked alongside the Employee since 1993. At one point, the Employee told Brown that his driver's license was revoked. During this period of time, Brown would drive both himself and the Employee to their respective work assignments. At one point, the Agency provided bus passes and car allowances in order to meet the work-related transportation needs of its Housing Inspectors. However, starting in 1999 (approximately) the Agency started providing District government vehicles to its Housing Inspector's. According to Brown, the policy of providing a car allowance was discontinued when the Agency started providing vehicles for work-related duties.

5. Michael Byrd (Tr.1 at 178 – 229).

Michael Byrd (hereinafter "Byrd") testified in relevant part that: he is employed with the Agency as a Housing Inspector and has held this position for approximately 19 ½ years. He has served as the Union's Shop Steward for approximately three and half years. He was the Union appointed representative for the Employee when the issues that provided the basis for the instant matter were tried as part of an Agency level grievance proceeding. As far as he is aware, the action that instigated the OAG and MPD investigation of the Employee was the attempt by someone (using the name Stanley Johnson) to register a stolen automobile with the DMV. According to his investigation into the matter, Byrd understood that the Employee was being investigated both criminally and administratively. While Byrd does not recall the Agency instigating an adverse action against another employee because of a background check done years later, he however does concede that the Agency has the authority to do so if it so chose. Also, according to Byrd, when asked to juxtapose the Employee's employment application with the NCIC report that was relied upon by the OIG, the Employee seemingly answered falsely on his employment application when he answered "No" to box Number 42 on his application.

6. Jewell Little (Tr.1 at 229 – 260).

Jewell Little (hereinafter "Little") testified in relevant part that: she currently works for the District of Columbia Office of Human Rights (hereinafter "OHR") under the auspices of the Attorney General's Office of the District of Columbia. Little's current position with the OHR is Assistant Attorney General. At the time that she performed the duties of hearing officer, Little was employed as an Investigator working at DS grade level 12 step 8.

Little was assigned by the General Counsel of the OHR, Alexis Taylor (hereinafter "Taylor"), to perform the administrative review of the Agency's proposed adverse action against the Employee. Little has no knowledge of how the matter came to be assigned to Taylor. Aside from the Employee, Lela Franklin (hereinafter "Franklin") was the only person from the Agency that Little interacted with as part of the administrative review. Although Little was unaware of Franklin's exact job title with the Agency, she did not believe that Franklin was the Agency's Director. Little reported her recommendations in this matter to Franklin.

7. Robert Garrett (Tr.2[4] at 5 – 179).

Robert Garrett (hereinafter "Garrett") testified in relevant part that: he currently is employed by the Agency as the Branch Chief of the Neighborhood Stabilization Program in the Western sector. Garrett came to know the Employee through his previous position with the Agency as Acting Program Manager of the Neighborhood Stabilization Program.

On being a Housing Inspector, Garrett stated that all of the Housing Inspector's are issued a District vehicle to drive so that they can perform their work-related duties. During his tenure with the Agency, Garrett stated that:

> [Housing Inspectors] use government vehicles to conduct their inspections. And further, since I've been in the program we haven't had any – we haven't any initiatives where individuals use their own cars and be reimbursed. Since I've been there we haven't given any reimbursements, to my knowledge, to any employee that uses their own vehicle. In fact, we discourage employees from using their own vehicle... for...insurance purposes..." Tr.2 at 14.

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Garrett went on to describe the Agency's policy regarding the ethical standard that an employee must operate by:

> [W]e've had what we call all staff meetings...it's a time where the entire staff for [the Agency] gets together and we go over different initiatives... [I]n other words, its training. And we've had all staff meeting where we've issued the little ethics booklets. We've done skits on ethics. And we've gotten into ethics.
>
> As a housing inspector, part of their job and their duty is to go out and conduct inspection of the interior property and of the

[4] Tr.2 refers to the transcript generated for the second day of the Evidentiary Hearing in this matter held on March 8, 2006.

> exterior property to determine if there are violations of the DCMR 14, which, in other words, is the Bible that the inspectors use to make sure that the tenants of the District of Columbia are not living in housing that we will consider substandard. They have to be living in safe and decent housing.
>
> So part of their job is to inspect that. And when you talk about the ethics, ethics play a large part in what they do because they issue violation notices to the owners, the property owners of the residences that they inspect. And with these notices comes a price tag...
>
> And we are depending on the inspectors, when they conduct these inspections, to be ethical in their approach to dealing with the landlord because, as a branch chief and also when I was a program manager, there have been times when inspectors have come to me and they've stated that they've been offered jobs, they've been offered money... for them to maybe alter their report.
>
> That's where the ethics come into play. And we talk with the inspectors about being ethical in the performance [of] their duties, because you could be unethical and tenants and the citizens will be harmed by your behavior.
>
> Tr.2 at 16 - 18.

According to Garrett, the Agency relied exclusively on the OIG's findings as provided in Agency's Exhibit A in order to justify the Employee's removal. The Agency did not conduct an independent investigation in order to corroborate the OIG findings in this matter. As was stated previously, according to the OIG report, the Employee falsified certain answers in his employment application regarding his criminal record; the Employee was also cited for altering the expiration dates of his driver's license; as well as providing false information in order to obtain a driver's license.

Of note, Garrett indicated during his testimony that the Employee was not singled out for removal. If it were found that *any* Agency employee had answered falsely, in the manner of the Employee, on his/her employment application, the Agency would effectuate a similar removal action against that person as well. *See generally*, Tr.2 at 26.

Garrett went on to describe the process the Agency undertook in deciding to initiate the instant adverse action against the Employee:

> What we did is we reviewed the investigative report that was submitted to us. We discussed the training that not only [the Employee] but all members of [the Agency] undergo in terms of

> ethics, in terms of the trustworthiness, that they have stated that they will uphold these different – their performance of their duties.
>
> Because in the performance of their duties they could be susceptible to bribes... Those were the things that we took into consideration when we decided to take the action that we took. It was not anything that we took lightly or that was capricious in nature.
>
> We weighed the evidence that was before us. We talked with the supervisor. We talked with the branch chief, which was Mr. Washington and myself and we conferred. And based upon what was in front of us, that is the action that we deemed necessary.
>
> Tr.2 at 111 – 113.

Garrett went on to testify that the Agency had no proof that the Employee falsified Agency documents or accepted a bribe while performing his work-related duties.

According to Garrett, Franklin was the Deputy Director of Compliance and Enforcement for the Agency. The Agency Director delegated to Franklin the authority to initiate an administrative review of the Employee's actions. Pursuant to that authority, Franklin designated Little as the hearing officer in order that she may conduct the administrative review of the instant matter.

8. The Employee (Tr.2 at 181 – 340).

The Employee testified in relevant part that: prior to his removal he was employed by the Agency as a Housing Inspector and had held that position from 1992 until 2005. At some point in 2001, the MPD conducted an investigation into whether he attempted to have a stolen automobile registered with the DMV. The MPD ceased its investigation relative to the Employee when he provided handwriting samples that did not conform to the fraudulent signature used to attempt to register the aforementioned stolen automobile.

Some time later, Meunier conducted an interview with the Employee and his then legal counsel Reginald May. During this interview the Employee stated that he did not admit to fraudulently altering his driver's license. He categorically denies ever altering his driver's license or admitting to same as part of an interview conducted by the OIG.

The Employee enlisted the aid of Barron so that she could type his employment application which is reproduced in the record as part of Agency's Exhibit A. He admits to providing his resume so that Barron could fill out his employment application with the information the application requested. He admits to not reading over the employment application thoroughly before signing it. If he had, he would have marked the sections

inquiring about his criminal past differently. He further explains that his failure to mark the boxes appropriately was an unintentional oversight that happened because he was in a rush to turn in his employment application for a pending job fair.

FINDING OF FACTS, ANALYSIS AND CONCLUSION

One of the Employee's argument as to why the adverse action instituted by the Agency should be invalidated concerns the appointment of Little as the hearing officer. The Employee contends that the Little did not fulfill all of the requirements of a Hearing Officer as mandated by Chapter 16 of the District of Columbia Personnel Manual (hereinafter "DPM"), which provides in pertinent part as follows:

> **1612 Administrative Review of Removal Actions: General Discipline**
>
> 1612.1 The personnel authority shall provide for an administrative review of a proposed removal action against an employee.
>
> 1612.2 The administrative review shall be conducted by a hearing officer, who shall meet the following criteria:
>
> (a) Be appointed by the agency head;
>
> (b) Be at grade levels DS-13 and above or equivalent;
>
> (c) Not be in the supervisory chain of command between the proposing official and the deciding official, nor subordinate to the proposing official;
>
> (d) Have no direct and personal knowledge (other than hearsay that does not affect impartiality) of the matters contained in the proposed removal action; and
>
> (e) Be an attorney, if practicable, or if required pursuant to § 1612.7.
>
> 1612.10 After conducting the administrative review, the hearing officer shall make a written report and recommendation to the deciding official, and shall provide a copy to the employee.
>
> 1612.11 For the purposes of §§ 1612.2 and 1612.7 of this section only, an "attorney" is an individual authorized to practice law in any jurisdiction of the United States.

The Employee contends that Little was not appointed by the Agency Director as mandated by DPM § 1612.2 (a). Little testified that she was assigned this matter by

Taylor, General Counsel of the OHR. Little also testified that she was in contact with and reported her findings to Franklin. Garrett testified that at the time this matter was being reviewed, Franklin was the Agency's Deputy Director of Compliance and Enforcement. Garrett further testified that the Agency Director delegated his authority to appoint a hearing officer to Franklin. During the course of these proceedings, I had the opportunity to hear and evaluate the testimony of both Garrett and Little and I have no plausible reason to disbelieve their testimony in this regard. Therefore, I find that relative to DPM § 1612.2 (a), Little was appointed, via Deputy Directory Franklin who had a delegation of authority from the Agency Director, to perform the task of hearing officer in this matter.

The Employee also contends that Little was unqualified to be the hearing officer in this matter because at no time during the pendency of her administrative review was she working at a grade level DS 13 or above or equivalent as mandated by DPM § 1612.2 (b). The Employee is technically correct. Little testified that at the time she conducted the administrative review, she was working as an Investigator with the OHR at DS grade level 12 step 8. The DPM does not provide direction as to what the consequence shall be if the hearing officer that is appointed to perform an administrative review does not meet all of the mandates outlined in DPM § 1612.2. I have already found that the Agency complied with DPM § 1612.2 (a). Coupled with the fact that it is undisputed that Little was otherwise qualified to perform the duties as assigned in this matter, I find that, while it was an error for the Agency to utilize someone to be a hearing officer who was not at a grade level DS 13 or above or equivalent as mandated by DPM § 1612.2 (b), under the instant circumstances, this error was *de minimis*. Considering this finding, I cannot overturn Agency's action because of a *de minimis* procedural error on its part.

The Agency asserts that the Employee committed several acts that support its charge of Conduct Unbecoming a District Government Employee. Allegedly, the Employee provided false information in order to obtain multiple temporary driver's licenses and he altered the expiration date on his driver's license. The Employee denies these allegations in their entirety. The Agency also contends that the Employee failed to properly note his criminal history on his employment application. The Employee explains that this was an unintentional mistake and that his work history since then should justify his continued employment. To support its multiple contentions the Agency relies almost exclusively on the investigative efforts of Meunier and the OIG as enunciated in Agency's Exhibit A. Each of these arguments shall be addressed *infra*.

Agency's Exhibit A, chronicles the relevant information gathered by the OIG as part of its investigation into the Employee. In it, Meunier reveals that when she interviewed the Employee regarding the status of his driving privileges, he allegedly gave altering accounts. There are two noticeable problems with the account of the Employee's interview as provided by the Agency's Exhibit A. First, the Employee's testimony as provided in this Exhibit was not sworn testimony. As such, its indicia of reliability is insufficient for me to render a finding favorable to the Agency under these circumstances.

The second problem with this account is that when the Employee was asked to verify his recollection, while under oath, he denied ever making the alleged admissions to

Meunier. The Employee admits that his driving privileges were suspended for a time. However, the Employee explains that he utilized various means to compensate for the temporary loss of his driving privileges, including, sharing rides with fellow employees (this account was supported by Brown who testified he and the Employee would ride together, with Brown driving, to their respective work assignments); and taking public transportation to his various work assignments. Furthermore, Washington buttressed Employee's account by testifying that the Employee came to him and reported that his driver's license was suspended and asked that he send a letter to the DMV so that he could be granted a driver's license for work related duties only. Washington complied and consequently sent a letter to the DMV on Employee's behalf. Under oath, the Employee denied ever driving a District government vehicle while his driving privileges were suspended. This is in stark contrast to the testimony given by Meunier who testified that the account as provided in Agency Exhibit A was accurate. I had the opportunity to observe the testimony of Meunier, Washington, Brown and the Employee. I observed their demeanor and poise while answering the questions posed to them relative to the instant matter. Considering this, I find that the Employee's account is more believable given that certain salient portions of the Employee's account of events were corroborated by Washington and Brown. Namely, that the Employee reported the loss of his driving privileges to his supervisor, attempted to get a driver's license for work related purposes only, and that when all else failed, he either rode with his co-workers to his work assignments or used public transportation.

The Agency alleges that the Employee altered the expiration date on his driver's license. The Agency relied on the OIG's investigative efforts into the matter. The crux of the Agency's evidence on this point is contained within attachment C[5] of Agency's Exhibit A. Attachment C of Agency's Exhibit A contains a photocopy of the Employee's driver's license. The photocopy of the driver's license has an expiration date of 10/31/2001. According to the Agency's Exhibit A, Meunier confirmed that the expiration date on the Employee's license was altered by checking with Joan Saleh, an employee of the DMV. *See* Attachment C in Agency's Exhibit A. Meunier also provided a copy of the Employee's driving information as it is contained within the DMV database. The Employee contends that he did not alter the expiration date on his driver's license. The Employee has no knowledge of what happened with attachment C. The foremost problem with attachment C is that this document, among others in Agency's Exhibit A, are hearsay.

Regarding the admissibility of hearsay in an administrative proceeding, the District of Columbia Court of Appeals held in *Compton v. D.C. Board of Psychology*, 858 A.2d 470, 476 (D.C. 2004) "that duly admitted and reliable hearsay may constitute substantial evidence. See, e.g., *Coalition for the Homeless v. District of Columbia Dep't of Employment Services.*, 653 A.2d 374, 377-78 (D.C. 1995) ("Hearsay found to be reliable and credible may constitute substantial evidence . . . ."); *Wisconsin Avenue Nursing Home v. District of Columbia Commission on Human Rights*, 527 A.2d 282, 288 (D.C. 1987) (explaining that reliable hearsay standing alone may constitute substantial

[5] Agency's Exhibit A contains several exhibits which are termed, "exhibits". In order to avoid confusion, I am using the term "attachment" as opposed to "exhibit".

evidence); *Simmons v. Police & Firefighters' Ret. & Relief Bd.*, 478 A.2d 1093, 1095 (D.C. 1984); *Jadallah v. District of Columbia Dep't of Employment Servs.*, 476 A.2d 671, 676 (D.C. 1984); see also *Richardson, 402 U.S. at 402; Hoska v. United States Dep't of the Army*, 219 U.S. App. D.C. 280, 287, 677 F.2d 131, 138 (1982). Thus, nothing in the hearsay nature of evidence inherently excludes it from the concept of "substantial" proof in administrative proceedings."

The Court of Appeals went on to explain that "just because hearsay may constitute substantial evidence does not be mean that it will do so in every case. The circumstances under which hearsay rises to the level of substantiality are not ascertained by any definitive rule of law, but rather by a set of considerations applied to the particular facts of each case. See *Robinson v. Smith*, 683 A.2d 481, 488-89 (D.C. 1996) (citing *Washington Times v. District of Columbia Dep't of Employment Servs*., 530 A.2d 1186, 1190 (D.C. 1997) (stating that even hearsay "that lacks indicia of reliability may be entitled to some weight")). The weight to be given to any piece of hearsay evidence is a function of its truthfulness, reasonableness, and credibility. *See Wisconsin Ave. Nursing Home*, 527 A.2d at 288 (quoting *Johnson v. United States*, 202 U.S. App. D.C. 187, 190-91, 628 F.2d 187, 190-91 (1980)). We have said that:

> [A]mong the factors to consider in evaluating the reliability of hearsay evidence are whether the declarant is biased, whether the testimony is corroborated, whether the hearsay statement is contradicted by direct testimony, **whether the declarant is available to testify and be cross-examined, and whether the hearsay statements were signed or sworn.** *Id.*; *see also Gropp*, 606 A.2d at 1014 n.10." *Emphasis added.*

Compton v. D.C. Bd. of Psychology, 858 A.2d 470, 476-477 (D.C. 2004).

While attachment C would tend to be probative of the issue at hand, I find that it lacks the indicia of reliability necessary to adequately support the Agency's argument. Joan Saleh, allegedly made a statement (in her professional capacity as a representative of the DMV) concerning the authenticity of the information contained within attachments C, D, and E of Agency's Exhibit A. However, the Agency failed to produce her for sworn testimony in this matter, or to at least get an affidavit from Joan Saleh, which would ostensibly buttress the statement made by her in attachment C. As was stated previously by the Court of Appeals, one of the considerations I must make regarding the reliability of hearsay is whether the declarant (Joan Saleh) is available to testify. She was not. Further is the consideration of whether the statement was signed or sworn. While attachment C was signed it was not attested to. Considering the fact and circumstances as a whole, I find this to be inadequate for the purposes of making a finding of fact favorable to the Agency.

Consequently, as it relates to whether the Employee altered his driver's license, I find that the Agency did not meet its burden of proof relative to this issue. Therefore, I find that the Employee did not alter his driver's license.

The Agency had also charged the Employee with operating a District government vehicle while his driving privileges were suspended and that he had failed to report same to the Agency. However, according to the recommendation of the hearing officer, these charges were not proven beyond a preponderance of the evidence standard. During the Evidentiary Hearing that I conducted, the Agency surreptitiously attempted to prove that the Employee did in fact commit these actions, among others. I find that the Agency did not meet its burden of proof relative to this issue. I also find that the Employee did not operate a District government vehicle while his driving privileges were suspended.

Lastly, the Agency argues that the Employee failed to disclose his criminal history on his employment application. To support this claim, the Agency makes specific reference to Agency's Exhibit A, which includes a copy of the Employee's employment application. Specifically, Agency Exhibit A at 6, states as follows:

> On the SF-171 form under "Background Information," [the Employee] was asked, "During the **last 10 years** have you forfeited collateral, been convicted, been imprisoned, been on probation, or been on parole?" [The Employee] marked "No" for this question.
>
> During the course of the investigation, [the Employee's] criminal record was checked through the National Crime Information Center (NCIC), and verified through the courts in the proper jurisdiction. [The Employee's] criminal record revealed that he was placed on probation for 1 year after being convicted of a crime in 1988, within the 10-year time frame outlined in the SF-171 application. *Emphasis in original*.

The Employee admits that the information contained in his employment application was not completely accurate. He explains that he procured the services of Barron to type out his employment application, however, the Employee failed to inform Barron about his criminal past. The Employee further explains that he was in a rush to get to a job fair and that he did not read over his employment application with care before signing it. He counters with the assertion that the mistake was not intentional, and that he was otherwise qualified for the position and with his many years of diligent work for the Agency, this aberration should be overlooked. I disagree. The Employee's employment application at § 42 states in relevant part that:

> **SIGNATURE, CERTIFICATION, AND RELEASE OF INFORMATION**
> **YOU MUST SIGN THIS APPLICATION.**
> **Read the following carefully before you sign.**
> - A false statement on any part of your application may be grounds for not hiring you, or for firing you after you begin work. Also, you may be punished by fine or

imprisonment...

- **I understand** that any information I give may be investigated as allowed by law or Presidential order.
- **I consent** to the release of information about my ability and fitness for Federal employment by employers, schools, law enforcement agencies and other individuals and organizations...
- **I certify** that to the best of my knowledge and belief, **all** of my statements are true correct, complete, and made in good faith.

Emphasis in Original.

In § 48 of the employment application, the Employee signs his employment application. Also in § 49 of same, he writes that the date he signed said application was 5/20/92. It is clear from the wording of the application that a false answer on the employment application by the Employee in the manner described *supra* would carry dire consequences. According to Agency's Exhibit A, the Employee had been on probation approximately four years before he signed the employment application. This is well within the ten years as referenced in § 42 of the employment application. The Employee claims that he failed to read over the application thoroughly before signing. Also, the application forewarned of the possible consequence of the Employee being removed from service, after being hired, if it was later found that the responses supplied therein were inaccurate.

The DPM § 1603.3 defines "cause" in relevant part as "any knowing or negligent[6] material misrepresentation on an employment application or other document given to a government agency." The Agency has failed to establish by the preponderance of the evidence standard that the Employee *knowingly* misrepresented his criminal history on his employment application. However, the Employee failed to exercise the care of a reasonably prudent person when he failed to carefully review his employment applications for errors or omissions before signing and submitting it to the Agency for consideration. Consequently, I find that the Employee *negligently* misrepresented his criminal history on his employment application. Furthermore, I conclude that the Agency had adequate cause to substantiate its adverse action of removal.

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

[6] Black's Law Dictionary (8th Edition, 2004) defines negligent in salient part as "a person's failure to exercise the degree of care that someone of ordinary prudence would have exercised in the same circumstance."

"managerial discretion has been legitimately invoked and properly exercised." *See 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 find that based on the preceding findings of facts and resulting conclusion thereof that the penalty of removal was within managerial discretion and otherwise within the range allowed by law.

ORDER

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

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Administrative Judge