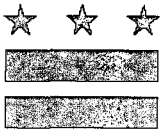
GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY



Office of Government Ethics

IN RE: Steven Allen,

Respondent

[redacted]

CASE No. AI-007-12

FINAL DECISION

I. Introduction

The Office of Government Ethics ("OGE") served Steven Allen ("Respondent") with a Notice of Violation ("NOV"), charging him with two violations of the Code of Conduct. Count 1 is based on 6B DCMR § 1803.1(a)(6)[1] and alleges that "Respondent misused a disability placard to park his vehicle on a public street, for free and all day long, even though the person to whom the disability placard had been issued was not with him." Count 2 is based on 6B DCMR § 1806.1[2] and alleges that the disability placard was issued by the State of Maryland and that Respondent's use of it "in the manner described constitute[d] misuse of government property."

Respondent filed a response to the NOV. He denied the charges and also moved to "dismiss counts 1 and 2 for lack of jurisdiction in the subject matter, and failure to state a claim for violating Sections 1803.1(a)(6) and 1806.1 of the District of Columbia regulations."

Pursuant to notice, an evidentiary hearing was held on September 19, 2013, beginning at 10:08 a.m. Through their respective representatives, both OGE and Respondent presented testimony, introduced exhibits, and offered argument.[3]

[1] Section 1803.1(a)(6) provides that a District government employee "shall avoid action, whether or not specifically prohibited by [Chapter 18 of Title 6B, DCMR] which might result in or create the appearance of...[a]ffecting adversely the confidence of the public in the integrity of government."

[2] Section 1806.1 provides, in pertinent part, that "[a] District employee shall not use or permit the use of government property, equipment, or material of any kind, including that acquired through lease, for other than officially approved purposes."

[3] With the Board's consent, both parties also presented post-hearing memoranda addressed to Respondent's motions to dismiss.

The Board has had the opportunity to review the record in its entirety and, after careful consideration of the parties' arguments, denies Respondent's motions to dismiss. The Board also finds, based on substantial evidence in the record, that Respondent violated the Code of Conduct as alleged in Counts 1 and 2 of the NOV and, accordingly, assesses a civil penalty of $1,900.

As required by 3 DCMR § 5521.2, the Board's findings of fact, conclusions of law, and analysis are set forth below.

II. Findings of Fact

The facts in this case were uncontested at the hearing and can be summarized as follows:

Respondent has worked for the District of Columbia government for thirty-four years, and he is currently employed as an investigator by the Department of Consumer and Regulatory Affairs ("DCRA"). Tr. 26, 84-85; OGE Ex. 1, 7, 10.

DCRA is headquartered in the 1100 block of 4th Street, S.W., Washington, D.C., which is also Respondent's work location. Tr. 26, 65.

On twenty-two occasions, dating from July 14, 2011, to July 2, 2012, Respondent parked either of two motor vehicles registered to him in metered parking spaces on Makemie Place, S.W., Washington, D.C. Tr. 30, 89; OGE Ex. 1, 2, 3, 4, 8.

The metered parking spaces were approximately a block away from Respondent's DCRA work location. Tr. 26-27; OGE Ex. 10. There was a two- or four-hour maximum time limit for parking in the spaces, and the parking rate was $2.50 per hour. Tr. 60, 69.

On all of the twenty-two occasions when Respondent parked in the spaces he used a Maryland disability placard issued to a person other than himself. Tr. 34, 40, 64; OGE Ex. 1, 5, 7, 10. However, on none of those occasions was the other person with Respondent, Tr. 40, and he did not pay to park in the spaces. Tr. 39-40, 64.

Even proper use of a disability placard does not entitle a person to park for free; the person can park for free only for twice the time allotted for the metered space and then has to pay the $2.50 hourly rate. Tr. 68-69.

Seven of the twenty-two occasions followed Respondent's April 5, 2012 interview by agents of the District's Office of the Inspector General ("OIG") about his parking behavior. Tr. 65; OGE Ex. 3. During the interview, Respondent acknowledged that he misused the disability placard. Tr. 40; OGE Ex. 7.

On all the occasions, Respondent used the disability placard and did not pay for parking so that he could park for free and not have to move his vehicle during his work day. Tr. 39-40, 57, 93; OGE Ex. 7, 10; Respondent's Ex. 1.

III. Conclusions of Law and Analysis

Respondent's Motions to Dismiss

A. Lack of Subject Matter Jurisdiction

In the concluding section of his response to the NOV, Respondent moved "[to] dismiss counts 1 and 2 [of the NOV] for lack of jurisdiction in the subject matter."[4] Respondent filed the response *pro se* and offered no support for the motion. OGE nevertheless filed an opposition, and the Board took the motion under advisement.

At the hearing, Respondent, through his representative,[5] explained that the motion was based on two grounds: that the collective bargaining agreement between his union[6] and the District government governs what discipline can be taken against Respondent for his parking behavior and that, in light of disciplinary action that DCRA has already taken, any further sanction against Respondent would amount to double jeopardy. These grounds will be discussed in turn.

Respondent introduced the Master Agreement Between the American Federation of State, County and Municipal Employees, District Council 20, AFL-CIO and the Government of the District of Columbia ("CBA") as his Exhibit 2 and argued that it "should be allowed to do what it was put in place to do[,] which is to address situations like this without any other party imposing additional penalties on [Respondent]." Tr. 113.[7] In support of this argument, Respondent pointed to section 3 of Article 7 of the CBA,[8] which provides as follows:

> Discipline will be appropriate to the circumstances, and shall be primarily corrective, rather than punitive in nature. After discovery of the incident, the investigations shall be conducted in a timely manner and discipline shall be imposed upon the conclusion of any investigation or the gathering of any required documents, consistent with the principle of progressive discipline and D.C. Office of Personnel regulations.

The Board is not persuaded for two reasons. First, section 3 is addressed to the nature of discipline and the procedure for imposing it, and not to the issue of whether a District government employee who belongs to the union can be the subject of discipline or some other

[4] *See* 3 DCMR § 5509.7(a) (authorizing a respondent to raise the defense of lack of jurisdiction over the subject matter at the time response is filed).

[5] Between the filing of the response to the NOV and the hearing, a staff representative of Respondent's union entered his appearance on Respondent's behalf.

[6] According to his representative, Respondent is "a member of AFSCME Local 2742." Tr. 113.

[7] *See also* Respondent's post-hearing submission at 3-4 ("The [District Personnel Manual] does not invalidate an employee's rights under the Collective Bargaining Agreement nor does [the Board] have the right to trample on them as it sees fit...The Union did not bargain away its right to fair treatment nor did they agree ever to have their members being disciplined by multiple bodies.").

[8] Tr. 119.

form of sanction authorized by a source outside the CBA itself. Indeed, Respondent admitted that the CBA does not contain a provision regarding the exclusivity of disciplinary action. Tr. 131.

Second, and more importantly, the Board has no authority to take any disciplinary action against Respondent at all. DCRA, as Respondent's employing agency, possesses that authority pursuant to the District of Columbia Government Comprehensive Merit Personnel Act of 1978 ("Merit Personnel Act"), effective March 3, 1979, D.C. Law 2-139, D.C. Official Code § 1-601.01 *et seq.* (2006 Repl. & 2013 Supp.). The Board, rather, is charged with enforcing the Code of Conduct by being able to take several forms of independent action.[9] A brief discussion will serve to make this division of authority clear.

The Board was established to, among other things, "[a]dminister and enforce the Code of Conduct." Section 202(a)(1) of the Government Accountability Establishment and Comprehensive Ethics Reform Amendment Act of 2011 ("Ethics Act"), effective April 27, 2012, D.C. Law 19-124, D.C. Official Code § 1-1162.02(a)(1) (2013 Supp.). The Code of Conduct is defined by section 101(7)(E) of the Ethics Act (D.C. Official Code § 1-1161.01(7)(E)) to include "Chapter 18 of Title 6B of the District of Columbia Municipal Regulations," which regulations contain the two forming the respective bases of Counts 1 and 2 of the NOV.

Section 221(a)(1) of the Ethics Act (D.C. Official Code § 1-1162.21(a)(1)) authorizes the Board to "assess a civil penalty for a violation of the Code of Conduct of not more than $5,000 per violation, or 3 times the amount of an unlawful contribution, expenditure, gift, honorarium, or receipt of outside income for each violation." Significantly, section 221(a)(4) of the Ethics Act (D.C. Official Code § 1-1162.21(a)(4))[10] provides that "*[i]n addition to any civil penalty* imposed under this title, a violation of the Code of Conduct may result in the following: ... (A) [r]emedial action *in accordance with the Merit Personnel Act*[.]" (Emphasis added.) There is nothing in the Ethics Act, however, that empowers the Board to take any remedial action against (or exercise any personnel authority over) an employee in another District government agency.[11] Instead, it is the Merit Personnel Act that establishes the District government's system for hiring, compensating, and disciplining employees. *See* section 301(14) of the Merit Personnel Act (D.C. Official Code § 1-603.01(14) (2013 Supp.) (defining "personnel authority" in terms of "the authority to administer all or part of a *personnel management program*") (emphasis added)).

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[9] *See* discussion in footnote 10.

[10] As amended by section 2(b) of the Board of Ethics and Government Accountability Temporary Amendment Act of 2013, effective May 18, 2013, D.C. Law 20-3, 60 DCR 4622. Section 221(a)(4) of the Ethics Act, as amended, authorizes the Board or the Director of Government Ethics to utilize a variety of sanctions for violations of the Code of Conduct, in addition to assessing civil penalties. The options include public censure, nonpublic informal admonition, and negotiated dispositions.

[11] Section 206(a) of the Ethics Act (D.C. Official Code § 1-1162.06(a)) does authorize the Board to "select, employ, and fix the compensation for a Director of Government Ethics and such staff as the Ethics Board considers necessary[.]"

In sum, the CBA neither divests the Board of the authority to enforce the Ethics Act in this case, nor does it limit the Board in that regard. Further, to the extent that the Board has decided to exercise its authority by assessing a civil penalty against Respondent, that action is in addition to the action taken by DCRA against him under the Merit Personnel Act.

With respect to his double jeopardy argument, Respondent contended that, inasmuch as he has already been disciplined by DCRA,[12] "impos[ing] additional penalties on him would be unfair and would also be – put him in double jeopardy." Tr. 112. When pressed, Respondent admitted that this ground of his motion to dismiss was not based on the constitutional prohibition against successive criminal prosecutions, but on "the unfairness part." Tr. 127-128.

A constitutional claim would be unavailing, in any event, even if this case or DCRA's disciplinary action were a criminal proceeding. *See Purcell v. United States*, 594 A.2d 527, 529 (D.C. 1991) (Double Jeopardy Clause "does not bar a criminal prosecution after a proceeding that results in a civil sanction, or vice versa") (citations omitted); *see also Ubogy v. Dep't of the Army*, 53 M.S.P.R. 342, 347 (1992) ("The concept of double jeopardy does not apply to administrative actions.") (citation omitted).

Unfortunately for Respondent, his unfairness theory must also fail.[13] First, Respondent has yet to serve his DCRA suspension. He testified that he appealed the agency's decision, Tr. 92, and his representative confirmed that the matter is pending before the Office of Employee Appeals. Tr. 118. Second, even if Respondent had served the suspension or any part of it as a consequence of DCRA's disciplinary action, the Board is not precluded from imposing its own sanction for the violations of the Code of Conduct. As explained above, the Ethics Act expressly authorizes the Board to take action (here, by assessing a civil penalty) in addition to any disciplinary action that an employing agency may take under the Merit Personnel Act.

B. Failure to State a Claim

In his response to the NOV, Respondent also moved to dismiss on the ground that OGE "fail[ed] to state a claim for violating Sections 1803.1(a)(6) and 1806.1 of the District of Columbia regulations." While Respondent pleaded to the merits of the NOV as part of the response and, therefore, can arguably be deemed to have waived any argument as to the legal sufficiency of the NOV, he did address this ground of the motion in his post-hearing submission as follows:

[12] Respondent testified that DCRA had suspended him for "malfeasance, or something like that," Tr. 86, and that the suspension was related to his using the disability placard. Tr. 91. Of note, the District Personnel Manual defines "cause," for purposes of taking disciplinary action against employees covered by Chapter 16 (General Discipline and Grievances), to include malfeasance. *See* 6B DCMR § 1603.3(f)(7). Further, the Board has no authority, under either the Ethics Act or the Merit Personnel Act, to enforce Chapter 16. That authority rests with the employing agencies. *See* 6B DCMR § 1603.1 ("There must be full accountability for managers and supervisors for all disciplinary actions taken under sections 1601 through 1619 of this chapter. Therefore, no corrective or adverse action may be initiated under those sections unless the action is first authorized by a manager or supervisor[.]").

[13] The Board will assume that Respondent's unfairness theory is based on the administrative law principle that prohibits an employing agency from taking any adverse personnel action against an employee who has already been disciplined for the same incident. *See, e.g., Adamek v. United States Postal Service*, 13 M.S.P.R. 224, 226 (1982).

> Regarding the original notice [which the Board will assume refers to the NOV] you failed to state a cause of action; you refer only to DPM 1803.19(a)(6) [sic] confidence of the public and misuse of government property. However, you repeatedly refer to a display of a Maryland Disability placard which is a parking violation, but nowhere did you cite any statue [sic] or regulation regarding these violations.

In the interests of fairness, the Board will not consider the argument to have been waived, but nevertheless rejects it on its merits. The applicable regulation, 3 DCMR § 5509.1, provides that an NOV must contain the following:

> (a) A short and plain statement of the grounds upon which the Board's jurisdiction depends;
>
> (b) The full names, residence addresses, position, title, agency, and telephone numbers of the respondent;
>
> (c) A clear and concise statement of facts which are alleged to constitute a violation of the law;
>
> (d) A description of the respondent's right to a hearing and all procedural rights available to the respondent at the hearing;
>
> (e) A description of the applicable law and regulations that govern the disposition of the notice of violation should the respondent choose not to file a response or fail to appear at a scheduled hearing; and
>
> (f) The deadline for filing a response.

The NOV here fully comports with the regulation. In short, the pleading contains sufficient allegations of fact on its face to state plausible claims of the two Code of Conduct violations and, further, sufficiently advises Respondent of his procedural rights and responsibilities.

B. Count 1 (Affecting Adversely the Confidence of the Public in the Integrity of Government)

The facts underlying this Count – indeed, all the facts in this case – were uncontested at the hearing. The question for the Board, nonetheless, is whether OGE has met its burden of proving Respondent's violation of 3 DCMR § 1803.1(a)(6) by substantial evidence.[14] The Board finds that burden to have been satisfied.

[14] *See* 3 DCMR § 5518.1 ("In all cases involving a notice of violation, the Director [of Government Ethics] has the burden of persuading the Board that a violation has occurred by substantial evidence."); *see also* 3 DCMR § 5521.4 ("A decision [by the Board] shall be supported by substantial evidence on the record. Pursuant to the substantial evidence rule, courts shall uphold an administrative determination of fact if on the entire record the determination is rationally supportable and could have been arrived at reasonably.").

On twenty-two occasions spanning almost a year, Respondent, a District government employee, parked his vehicle in metered spaces without paying by using the disability placard. The last seven of those occasions even followed his interview by OIG agents. Far from avoiding unacceptable behavior, then, as section 1803.1(a)(6) directs, Respondent intentionally took action to suit his own purposes. Aside from the resulting loss of revenue to the District, the parking spaces themselves were lost to members of the public, presumably including individuals with disabilities and DCRA customers, who could have benefited from the availability of on-street parking. Clearly, Respondent's parking behavior created at least the appearance of affecting adversely the confidence of the public in the integrity of government.

C. Count 2 (Misuse of Government Property)

The Board also finds that OGE has met its burden of proving a violation of 3 DCMR § 1806.1.

While the disability placard itself was not District government property, Respondent was not the person to whom it was issued, nor was that person with Respondent on any of the twenty-two occasions in question. Even if Respondent had been eligible for his own disability placard under either Maryland or District law – something he did not seek to prove – the fact remains that he used the placard during his work day to park in metered spaces without paying. That use violated 18 DCMR § 2704.3, which provides that a vehicle displaying a disability placard, "whether issued by the District or any other jurisdiction, shall be subject to any time limitation or meter payment requirement established for any space in which the vehicle is parked, as indicated on the sign or meter denoting the space." In other words, Respondent's use of the placard as he did was "for other than officially approved purposes" and, as such, constituted misuse of the District government's metered parking spaces.

D. Disposition

For the foregoing reasons, the Board denies Respondent's motion to dismiss for lack of subject matter jurisdiction and his motion to dismiss for failure to state a claim.

The Board also finds, as alleged in Counts 1 and 2 of the NOV, that Respondent violated the Code of Conduct and, accordingly, assesses a civil penalty against him totaling $1,900. The penalty is based on the twelve instances of parking behavior that occurred after January 29, 2012, the effective date of the emergency legislation first establishing the Board, and is calculated as follows: $100 per violation for the five incidents occurring between February 14, 2012, and February 23, 2012; and $200 per violation for the seven incidents occurring after Respondent's interview with the OIG agents on April 5, 2012. The enhanced penalty rate for the last seven incidents reflects what the Board considers to be Respondent's willfulness in continuing to use the placard when parking even after the interview and his lack of any regret for doing so, despite his assertions to the contrary at the hearing.[15]

[15] Respondent's expressions of regret are belied by other statements in his testimony. For example, after it was established that the benefit of District government-sponsored parking was lost after DCRA's move to the 4th Street, S.W., location, the Board Chair said to Respondent that his parking behavior "sound[ed] like it was both saving

An appropriate Order accompanies this Final Decision. Pursuant to 3 DCMR § 5404, Respondent may appeal the Order to the Superior Court of the District of Columbia within twenty (20) days of the date the Order is served upon him.

Robert J. Spagnoletti
Chair, Board of Ethics and Government Accountability

11/7/13
Date

Deborah A. Lathen
Member, Board of Ethics and Government Accountability

11/8/2013
Date

Laura M. Richards
Member, Board of Ethics and Government Accountability

Date

money and [a] convenience for [him]." Tr. 93. Respondent replied, "Well, because the government [had] provided parking for us at that time, too, so I guess you could say that." *Id.*

GOVERNMENT OF THE DISTRICT OF COLUMBIA
BOARD OF ETHICS AND GOVERNMENT ACCOUNTABILITY

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Office of Government Ethics

IN RE: Steven Allen,

Respondent

[redacted]

CASE No.: AI-007-12

ORDER

Based upon the findings of fact and conclusions of law contained in the accompanying Final Decision and upon the entire record in this case, it is, this 7th day of November, 2013:

ORDERED that Respondent's motion to dismiss for lack of subject matter jurisdiction and his motion to dismiss for failure to state a claim be, and hereby are, DENIED; and

IT APPEARING that Respondent violated Count 1 (Affecting Adversely the Confidence of the Public in the Integrity of Government) and Count 2 (Misuse of Government Property) of the Notice of Violation; it is further

ORDERED that Respondent pay a civil penalty in the amount of ONE THOUSAND NINE HUNDRED DOLLARS ($1,900.00); and it is further

ORDERED that this case be CLOSED.

Robert J. Spagnoletti
Chair, Board of Ethics and Government Accountability

Deborah A. Lathen
Member, Board of Ethics and Government Accountability

Laura M. Richards
Member, Board of Ethics and Government Accountability