FAIRFIELD FORD/VW/HYUNDAI/ MITSUBISHI,	:	IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA
Petitioner	:	
	:	
vs.	:	NO. 02-00,010
	:	
COMMONWEALTH OF PENNSYLVANIA: DEPARTMENT OF TRANSPORTATION, : BUREAU OF MOTOR VEHICLES,	:	
Defendant	:	SUSPENSION OF INSPECTION PRIVILEGE

Date: April 23, 2002

ADJUDICATION and ORDER

This case arises on an appeal filed by Petitioner (Fairfield) on January 4, 2002 from the Order of Suspension of an Official Inspection Station issued by the Commonwealth of Pennsylvania, Department of Transportation, (Department) on December 13, 2001. The suspension notice provides in pertinent part

> "Pursuant to Departmental regulations, your Certification of Appointment will be suspended for two (2) months for improper record keeping (18 incorrect insurance expiration dates recorded; 2 inspections no registration number or year/make/body recorded; 2 inspections recorded without VIN number; MV-431 sheets missing for 40 inspections, have work orders, but only 25 with insurance information). Further, the Department is including in this offense, the lesser included offense of careless record keeping."

An evidentiary *de novo* hearing was held before this Court on February 27, 2002. At the conclusion of the testimony and arguments of counsel it was agreed that a decision would be deferred to allow the Court time to consider testimony, exhibits and legal authority cited to it and also to allow counsel additional time to attempt a negotiated disposition. Counsel has now reported to the Court that there will not be a negotiated disposition. The following findings of fact, conclusions and order will be entered.

Findings of Fact

An audit was done, on behalf of the Department, of the Inspection Records of Fairfield at its Montoursville facility on October 2, 2001. The subject of the audit was Fairfield's motor vehicle inspections for a period of slightly in excess of one year. The audit covered 5,500 inspections. Counsel stipulated that the audit revealed four types of discrepancies for the Form MV-431, the Inspection Record required to be completed and maintained by Fairfield, which consisted of the following:

1. Eighteen inspections recorded information that the expiration date of the insurance coverage expired prior to the date of the actual inspection.

2. Two inspections did not record the "registration number" nor the "yr/make/body" of the vehicles inspected (two separate blanks on the MV-431 Form).

3. Three inspections did not record the "VID number" of the vehicle inspected.

4. One MV-431 booklet, consisting of four complete sheets, was missing representing forty inspections, ten for each page, involving Inspection Sticker Nos. 8011242 through 8011281. The inspection station did have forty work orders that identified the forty inspections. Nine of those work orders dealing with individually owned vehicles (as opposed to dealership-owned vehicles) did not have complete insurance information recorded on the work order.

The Commonwealth's testimony also accepted, as non-disputed facts, that Fairfield had not performed any faulty inspections, had not wrongly inspected any vehicle nor

had any Inspection Sticker been issued by Fairfield to any vehicle that had not passed inspection. Further, the Department made no accusation of fraudulent wrongdoing by Fairfield.

As a result of the October 2, 2001 audit, the Department notified Fairfield of being in violation of Department regulations for the infraction of improper record keeping and the lesser-included offense of careless record keeping. The Department held a hearing on, November 7, 2001 as a result of which it was determined that the audit violations constituted improper record keeping. The Department issued a notice of suspension on December 13, 2001 (quoted above) for a total of two months in accordance with their regulations. *See*, 67 Pa. Code §175.51.

Two earlier audits, in 1999 and 2000, had resulted in two prior warnings for careless record keeping being issued to Fairfield. The audit performed in 1999 determined one MV-480 sheet (an inspection sheet apparently similar to the MV-431 at issue in this case, but relating to motorcycles and trailers) was missing at the inspection station and as a result the Department issued a warning on June 28, 1999 for a violation of "careless record keeping." The 1999 audit had involved 4,847 inspections. *See* Commonwealth's Exhibit #1, pp. 5, 5A and 6. The audit conducted in the year 2000 also resulted in a warning for the offense of "careless record keeping." This warning was based upon twelve inspections having been recorded with expired insurance dates and six inspections missing required information. The 2000 audit had involved 5,073 inspections. *See*, Commonwealth's Exhibit #4, pp. 4, 4A and 6.

The auditor who performed the audits revealing the referenced discrepancies, Mr. Larry Lamana, is a quality control officer with an independent auditing service utilized by the Department. He is a former garage inspector with the State Police having been employed

by them for 9-1/2 years performing essentially the same function. He has been employed by his current employer, Protect-Ere Corporation for four years and has audited the Fairfield dealership in question since 1999. He performed the audits in 1999, 2000 and 2001. *See* Commonwealth's Exhibit #1.

The MV-431 Forms consist of pages approximately 11" x 14" with a white first page and an underlying yellow carbonless copy. Each form has ten spaces for entry of the appropriate inspection information relating to the inspection of a specific vehicle, which consists of two lines per vehicle and fifteen different blocks of information together with fifteen inspection check-off points. The fifteen boxes of information are as follows:

Line 1:

- INSP #
- Date
- Registrant's Name
- Address
- Vehicle Identification #
- Old Odometer #
- Sticker #

Line 2:

- Work Order #/Signature
- Insurance Company Name
- Exp Date
- Policy #
- Registration #
- Yr/Make/Body
- Current Odometer
- Total Cost + Tax

The check-off points are as follows:

Registration Verified	Body Doors & Latches
Tires, Wheels	Brake System
Steering Suspension	L Front
Exhaust System	L Rear
Fuel System	R Front
Glazing & Mirrors	R Rear
Lights, Wiring & Switches	Other
	Road Test

Commonwealth's Exhibit #2 is the white sheet of the inspection record, MV-431, covering the dates of July 2 through part of July 3, 2001. In the ninth inspection, #2655, a circle appears around the "Exp Date" and Mr. Lamana explained that this date, as recorded when he did the audit, read 6-01-01. This was a Fairfield-owned vehicle. Testimony by Fairfield's Service Manager, Donald Treese, established that when the auditor pointed out the omission to him, he obtained the correct insurance expiration date from the dealership records and corrected the date on the white sheet to read 6-01-02.

Commonwealth's Exhibits #3 through 7 are five of the dealership yellow copies of the MV-431 Form on which discrepancies appeared, including three more of the insurance date errors. *See* Commonwealth's Exhibit #3, Insp. #2246, Exhibit #4, Insp. #2189, Exhibit #7, Insp. #3118. From these entries it is clear that these insurance errors as well as the one noted on Exhibit #2 resulted when the person making the entry wrote down the year in which the inspection was being completed rather than the subsequent year that would correlate to the year the insurance actually expired. In other words an entry of "00" was made on the inspection date of August 7, 2000 and the insurance expiration date was also indicated as being in year "00," when in fact it should have been year "01."

Commonwealth's Exhibit #5, Insp. #2649 is an example of where the registration year, make and body was not completed, as is Insp. #2092 on Exhibit #6. Defendant's Exhibits #1-5 are the corresponding work orders for the errors as to insurance registration and yr/make/body on Commonwealth's Exhibits #3-7 and demonstrate Fairfield did have the correct information noted on the work orders. Fairfield's Exhibits #10-11 verify as to the vehicles owned by Fairfield that the correct expiration date of the insurance policy covering the vehicles was June 1, 2001 and not June 2000 as noted in the inspection records. After the auditor had pointed out the errors and on a date subsequent to the date of the audit, Service Manager Treese obtained the necessary missing or correct information from the dealership records and corrected the sheets.

Commonwealth's Exhibit #7 is also the MV-431 Form where the missing Vehicle Identification #s appeared, in three successive inspections, Insp. #3120, 3121 and 3122. Defendant's Exhibits #6, 7 and 8 establish the work orders had the correct vehicle identification number. Fairfield's Service Manager established in un-contradicted testimony that he entered the correct numbers onto the forms from those records when the audit was made.

The four missing yellow copies of MV-431 Forms (found missing in the 2000 audit) had been mailed by Fairfield to the Department together with the original white copies. Upon the audit taking place, Fairfield requested the procedure to obtain return of these copies from the Department in order to be in compliance. The auditor advised Fairfield the missing documents could not be recovered from the Department records because the Department does not keep the sheets on file that long and they no doubt had been destroyed. The

Commonwealth acknowledged to this Court that the white copy of the MV-431 Forms sent to Harrisburg, which would correlate to the sheets upon which the audit errors were discovered, were not available or obtainable from the Department records and neither were Fairfield's yellow copies obtainable. The forty work orders contained in Defendant's Exhibit #9 demonstrate the inspections recorded on the four missing MV-431 Forms were properly carried out.

Discussion

The Commonwealth maintains that the errors disclosed in the October 2, 2001 audit constitute "improper record keeping" and that this being the first offense of improper record keeping, Fairfield's inspection privileges should be suspended for two months. *See,* 67 Pa. Code §175.51(a)(2)(ii). In the alternative, the Commonwealth argues that the errors and discrepancies disclosed by the audit would constitute the lesser-included offense of "careless record keeping." However, somewhat incongruously, the Commonwealth also argues that if the transgressions of Fairfield only amount to the lesser offense of careless record keeping, since this was Fairfield's third careless record keeping violation, their inspection privileges should be suspended for a period of six months rather than two months, based upon the penalties established under the Department's regulations. *See,* 67 Pa. Code §175.51(a)(2), (vii).

Fairfield, while acknowledging the audit correctly revealed the errors noted by stipulation, maintains that such does not constitute either careless or improper record keeping. Alternatively, Fairfield asserts the audit discrepancies at most amount to careless record keeping, because the mistakes were due to the negligent conduct of its employees. Fairfield further argues that if the errors do amount to careless record keeping, this must be regarded as

the first offense since the Commonwealth did not introduce any evidence to prove the audit errors, which had occurred in 1999 and 2000. Fairfield asserts the Commonwealth was required to prove the existence of the errors in the prior two audits because the warning notices sent to Fairfield by the Department as a result of the 1999 and 2000 audits (Commonwealth's Exhibit #1, pp. 4 and 5) did not provide for any type of hearing or appeal procedure and, hence, Fairfield has never had its day in court where those charges could be contested.

The Department's inspection regulations, in the Pennsylvania Code Chapter 175, 67 Pa. Code, §175.42(b)(c) and (d) establish the rules as to the MV-431 Form inspection report sheets. The information from the garage work order should be transferred to MV-431 Form. The MV-431 Form is to be neat and legible and completed in its entirety, maintained in duplicate, with the original to be mailed to the Bureau of Motor Vehicles immediately upon completion, or at the close of the inspection period. The copy is to be retained on file for a period of two years as a "garage record." A work order is also required to be available for inspection by an authorized representative of the Department upon request. The regulations do not specify how long the work order is to be maintained.

Under the regulations at §175.29 the owner of the Inspection Station is to assume full responsibility, with or without actual knowledge for the inspections conducted by employees of the Inspection Station and also to maintain the necessary records for a period of two years. If an owner is without knowledge of a violation and should not have known of the violation, in lieu of the suspensions referenced in §175.51 of the regulations, the Department could assign points upon the owner's consent. The Department included in the December 13th suspension notice, a finding that assignment of points was not an appropriate remedy.

Although there was some testimony introduced by Fairfield at the *de novo* hearing as to the owner's lack of knowledge of the discrepancies revealed by the audits, the limited testimony on this issue did not demonstrate that the Department's determination that points were inappropriate was error. Further, Fairfield made no contention or argument otherwise.

Neither the Vehicle Code nor the regulations provide definitions as to "improper record keeping" or "careless record keeping." Accordingly, the appellate courts, particularly the Pennsylvania Commonwealth Court, have established the definitions. *See* ***Department of Transportation v. Cappo***, 527 A.2d 190 (Pa.Cmwlth. 1987); ***Dept. of Transp. v. Tutt***, 576 A.2d 1186 (Pa.Cmwlth. 1990). Applying the Statutory Construction Act to define these terms in accordance with their common and approved usage, ***Cappo*** states as follows:

> "Improper" is defined as "not accordant with fact, truth, or right procedure," *i.e.*, incorrect, inaccurate. Webster's Third New International Dictionary 1137 (1966). "Careless" is defined as "not taking ordinary or proper care," *i.e.*, neglectful, inattentive. Webster's Third New International Dictionary 339 (1966).

Cappo, *supra*, at page 193.

Tutt refines the distinction between improper and careless record keeping in the following manner:

> We defined improper as essentially inaccurate or incorrect and careless, as previously discussed, as neglectful or inattentive.
>
> [T]o prove improper record-keeping, a showing that inaccuracies exist or that incorrect information is included in the records is all that is necessary. . . .
>
> [C]areless record-keeping is a lesser-included offense of improper record-keeping. Inaccuracies and incorrect information find their way into records because of incorrect methods, procedures, and practices in their keeping. That the inaccuracies exist is sufficient proof to find liability. A showing of inadvertence, however,

> lowers the presence of the inaccuracy to careless record-keeping and requires that a standard of ordinary and proper care be applied when determining whether negligence has resulted in the inaccuracy.

Tutt, *supra*. At 1189.

Inadvertence is defined by Webster as "the fact or action of being inadvertent; a result of inattention; oversight." (Merriam Webster's Collegiate Dictionary, Tenth Edition, 1994.)

Accordingly, this Court will apply these foregoing standards to the context of our case, recognizing improper record keeping is made out by an inaccurate entry onto the MV-431 Form of something that is not factually correct or true, or, from a failure to follow the proper procedure. Obviously, careless record keeping also involves an inaccuracy or omission in the entry of information upon the MV-431 Form. A record that is regarded as being carelessly kept could also be said to be not true or factually incorrect, just as in improper record keeping. The distinction between record keeping conduct, which is improper and that which is careless, is not the nature of the error but rather the careless error is one in which the erroneous act was done without ordinary care, or by neglect, or through inattention. This standard of careless record keeping is easily recognized as being equivalent to errors occurring through negligent conduct inasmuch as "negligence (is) otherwise known as carelessness. . . ." *See*, Pa. SSJI (Civ.) §3.01. Applying the familiar and recognized concepts of negligence and ordinary care found in the Pennsylvania Suggested Standard Civil Jury Instructions at §§3.01 and 3.02, the errant record keeping will be careless if the record keeping error arises out of an act or omission committed without the ordinary care that a reasonably prudent person would exercise in the circumstances presented by the record keeping involved in this case, or a failure to correctly record the information that a reasonably careful person would correctly record, in a

manner consistent with not causing injury to those affected by the record keeping. *See*, SSJI (Civ.) §§3.01 and 3.02 and sources cited therein.

Obviously careless record keeping involves errors being made without any intent to do wrong. "Careless record keeping" is deemed to be a lesser included offense of "improper record keeping." *See*, ***Tutt,*** *supra* at 187; *see also*, Order of Suspension, Commonwealth's Exhibit #1, sub-exhibit #1. Improper record keeping, therefore, involves a deviation from reasonable conduct that is of a more wrongful or inappropriate conduct than negligence. However, improper record keeping does arise to fraudulent action, that is, acts undertaken with deceitful intent. *See*, ***Cappo***, *supra*. *See also*, ***Com., Dept. Transp. V. Midas Muffler Shop, Inc.***, 529 A.2d 91 (Pa. Cmwlth. 1987), where it is stated that fraud consists of false entries entered intentionally, and with the purpose of deceiving. Although the appellate courts have not specifically stated a level of conduct that constitutes an improper error in record keeping, since improper record keeping conduct is more than negligence but less than fraud this Court concludes an erroneous entry onto the inspection records is improper record keeping if: 1) the error involves a gross deviation from the ordinary care a record keeper would take; or 2) an error made recklessly without consideration of the consequences; or, 3) an intentional error, although one made without the intent to defraud, deceive, or cheat anyone.

There is no contention whatsoever by the Department that any fraud was perpetrated by Fairfield nor, that the information was intentionally placed into the records in error, nor any contention that the dealership did not have the correct and necessary information available when the inspection occurred. This Court does not find any evidence in the record, which would support a finding that the errors constituted a gross deviation from acceptable

conduct nor that Fairfield acted recklessly. Indeed, the Commonwealth did not contend there was any grossly wrong conduct, such as destroying records and forms. The Commonwealth never argued that Fairfield was reckless such as guessing at correct information or taking a vehicle owner's word as to an insurance expiration date. What is alleged, simply, is that the employees failed to exercise a standard of ordinary and proper care in putting the information that was available to them, fully and completely onto the MV-431 Form. It is clear from Fairfield's work orders, Defendant's Exhibits #2 through 8, that the proper information necessary to properly inspect the vehicles was obtained and documented but was not placed onto the MV-431 Forms on 23 occasions in the course of doing 5,500 inspections. Why would that happen? Although no specific testimony was presented as to "why," it is clear the Fairfield dealership would have been very busy in performing 5,500 inspections in a little over one year. Obviously a person recording information onto the MV-431 Form might be interrupted by a telephone call or by a statement or question from a co-worker or customer and as a result simply did not copy the information from the work order onto the MV-431 Form. As to the year of the insurance policy expiration being entered in error the MV-431 Form, Commonwealth's Exhibits #3 and 4, reflect the occurrence of a common mistake made in writing dates on a document. The current year, "00" is to be inserted in line one, block two, the date the entry is being made; several blocks later in line two, block three, the year of the insurance expiration is to be entered. The errors found on the exhibits by the audit reveal that the writer when inserting the insurance date again wrote the year as "00" (the current year) rather than putting down "01," (the next year) which would have been the correct entry.

Entering the necessary information for Fairfield's 5,500 inspections done during the audit period, requires 82,500 entries to be made as to the fifteen pieces of information to be transferred to the MV-431 Form. This does not include the additional fifteen inspection checkpoints that are to be noted on the Form. Such would constitute another 82,500 entries. Disregarding the inspection checkpoints and just considering the 82,500 pieces of information to be put onto the MV-431 Form, the twenty-three errors found in the audit is equivalent to a .00028% error rate. Is this proof of a deviation from the care a reasonably careful person would take in making such entries? Or, is it proof that Fairfield employees acted without the exercise of ordinary care? This Court thinks not.

By way of comparison, this Court takes some pride in the correctness with which it authors its opinions and orders. Yet, no doubt, if one were to audit 82,500 words (approximately 300-350 pages) issued by this Court in its opinions and orders, no doubt the audit could find significantly more than twenty-three errors in typing, grammar or spelling. Even so, this Court would be reluctant to concede that its opinions and orders are entered in a careless, neglectful manner or that our staff and we had not taken ordinary care to issue those opinions and orders without error. Errors do exist. Errors arise through inadvertence. Yet not every inadvertent error occurs because of lack of the exercise of ordinary care; nor does the existence of an error in and of itself establish negligence. *See*, ***Correll v. Werner***, 437 A.2d 1004 (Pa. Super. 1981); ***Enole v. Spind*** 228 A.2d 745 (Pa. 1967). Incidents of mistake can and do happen without any negligent activity. ***Collins v. Hand***, 246 A.2d 398 (Pa. 1968). Even an error by a physician may not be negligence if the physician used care such as ordinarily used in like or similar situations by physicians of reasonable and average skill. ***Smith v. Yohe,*** 194

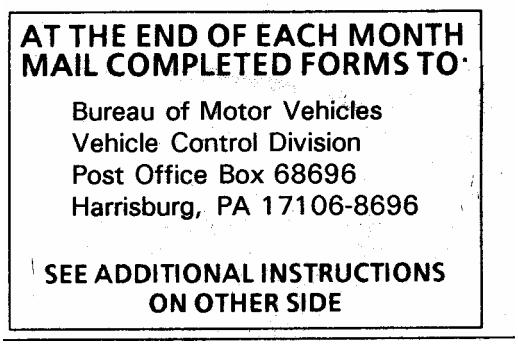
A.2d 167 (Pa. 1963). A greater standard should not be imposed upon the person making the entries for the state vehicle inspection records.

Tutt, *supra* at 1189, recognized as careless record keeping mistakes stemming from the inspection station being overextended in the running of its business. The careless record keeping in Tutt included issuance of fictitious certificates; a missing voided sticker; a pack of 150 stickers being used out of sequence; omission of relevant information, e.g. mechanics' signature, brake and tire measurements, dates; illegible and written over entries and MV-431 Forms which were not submitted to the Department. ***Id***., at 1187. The record discussed in ***Tutt*** does not discuss the number of inspections involved, but nevertheless the errors of Fairfield are clearly not of the magnitude of the errors in ***Tutt,*** especially considering that fictitious and missing stickers were found by the audit.

The Department's inspection regulations do require the MV-431 Form to be, "... completed in its entirety." 67 Pa. Code §175.42(d). It seems appropriate to note, however, that there is nothing in the regulations that requires perfection. When does the appearance of one or more errors amount to a showing that the record keeping procedures are being conducted in a careless, that is, in a neglectful or inattentive way or without the taking of ordinary or proper care? If this Court were to find that Fairfield's erroneous entries onto the MV-431 Forms is "careless" record keeping it would be as if we created a new offense under the regulations of, "Failing to perform perfect record keeping." This we are not willing to do. Just as accidents sometimes happen without anyone being negligent, so errors are bound to creep into the record keeping of the nature revealed in the audit process. With the exception of the missing forms,

this Court cannot reach a conclusion that the twenty-three errors cited out of the 82,500 entries amounts to a showing of carelessness or lack of ordinary care.

As to the four missing MV-431 Forms, a different result is compelled, although a strong argument can be made that sending the yellow copy together with the white original to the Department was a non-negligent mistake. This is because of the nature of the Form and the fact that no harm ensued. The original and copy of the form are of clearly distinct colors and the yellow is obviously a carbon-less copy. The forms themselves, however, do not make a clear statement that sending the yellow copy to the Bureau of Motor Vehicles is an error. Both of the forms are clearly marked at the top that the "completed forms" are to be forwarded to the Bureau of Motor Vehicles. It is interesting, that the yellow form contains no indication whatsoever that it is to be retained by the Inspection Station. Instead, it contains the same notice printed boldly in an outlined block in capital letters at the top, as follows:


AT THE END OF EACH MONTH
MAIL COMPLETED FORMS TO:

Bureau of Motor Vehicles
Vehicle Control Division
Post Office Box 68696
Harrisburg, PA 17106-8696

SEE ADDITIONAL INSTRUCTIONS
ON OTHER SIDE

There are no additional instructions on the other side of the yellow copy. The white form does have additional instructions on the other side. Nowhere on those instructions is there any wording that indicates that the yellow form is to be maintained at the Inspection Station and not be sent to the Department. However, a common sense reading does imply that procedure.

Instruction #11 does state:

> "ALL RECORDS MUST BE RETAINED FOR TWO (2) YEARS. THEY MUST BE AVAILABLE FOR EXAMINATION OR SURRENDER, AT ALL TIMES, UPON DEMAND OF THE INSPECTION STATION SUPERVISOR."

Also, the MAILING INSTRUCTIONS (on the reverse of the white copy) provide:

> 1. FORWARD **COMPLETED** ORIGINAL COPIES TO THE VEHICLE CONTROL DIVISION AT THE END OF EACH MONTH. 2. PLACE ALL FORMS IN A SINGLE ENVELOPE AND MAIL TO: Bureau of Motor Vehicles Vehicle Control Division Post Office Box 68696 Harrisburg, PA 17106-8696.

The mailing instructions say the completed original copies are to be forwarded at the end of each month. Although the second mailing instruction does say to place "all forms" in a single envelope and mail to the Department, the instructions clearly also provide that all records must be retained for two years. Regardless that there is no specific instruction stating the yellow copy is one of those records to be retained, the inspection regulations of which the Station owner is deemed to be aware of would provide that a duplicate copy is to be made of the MV-431 Form and is to be kept on Station for two years. *See*, 67 Pa. Code §175.42(c). It is clear that as to four of these sheets this was not done. Instead, it is unrebutted that an employee was neglectful in failing to separate the MV-431 Form yellow copy from the white copy before the white copy is mailed to the Department. There is no contention whatsoever that these white copies and accompanying yellow copies were not mailed to the Department. It is clear from the forty records, furnished through Defendant's Exhibit #9 that the forty inspections were carried out appropriately. There is no contention that any mistake was made in the inspections or in the record keeping, except that nine work orders did not have

the full insurance information. Again, however, there was no contention made that the correct and necessary insurance information was not available or that an inspection was done on vehicles where the insurance had in fact expired.

There is no evidence of any intent on the part of Fairfield to not be factual, truthful or follow the right procedure in the mailing of MV-431 Forms. In fact, they may have been over compliant. This over compliance or the failure to keep the yellow copy at Fairfield is in our view not taking ordinary or proper care, that is, it was neglectful. Who is harmed by this neglectful act? No one, except the erring inspection station who is to be penalized by having its inspection license revoked. It is disturbing to this Court that upon request by an inspection station that discovers such an error (through audit or otherwise) that the Department cannot return the copy upon a proper request? Of course, there is no basis to compel the Department to do so, but it would seem to be a matter of somewhat common and courteous business practice for the Department to adopt a policy where the mis-forwarded documents would be sent back to the inspection station. This is particularly true if the role of the Department is to assure the safety and convenience of the motoring public, including that there be an appropriate number of inspection stations able to provide inspection services readily available to the public. Obviously revoking Fairfield's inspection license upon the basis of these minuscule deviations will adversely impact the fairly large number of motorists who will need to make arrangements for their vehicles to be inspected at another station. It is a well-known fact that most reliable inspection stations are very busy and car owners, in seeking out and finding a new garage to perform that service where they are not a regular customer, often involves a significant delay, particularly when repairs are needed in order for a vehicle to pass the inspection.

It also seems somewhat strange to this Court that once the MV-431 records are sent to the Department that the Department does not also keep them for two years in order to review and investigate any discrepancies that some audit might show. If these records were so important it would seem the Department would find someway of maintaining them until the audit is completed in order that any really major issues, particularly as would relate to fraud, or faulty inspections could be investigated and the forms used for evidentiary purposes. The fact that they are not so maintained is strong evidence of the *de minimis* nature of this violation of sending the duplicate to the Department.

However, this Court must deal in this decision with the appropriateness of the action of Fairfield as would relate to the maintenance of the records. The Court finds that the failure to keep the yellow duplicate copies for the forty inspections in their office rather than forwarding them to the Department of Transportation. This is neglectful and hence careless. It is not improper. It is also *de minimis*. If this Court could find authority, therefore, to dismiss the proceedings of the Department against Fairfield, as it could if there were a criminal prosecution under the Crimes Code (18 Pa. C.S. §312), it would. Unfortunately, such authority cannot be found.

The Court is now compelled to address the issue as to the appropriate penalty, inasmuch as this Court has made facts and conclusions, which differ from those of the Department. ***Com. Dept. of Transportation v. Johnson,*** 482 A.2d 1378, 1380 (Pa. Cmwlth., 1984). If this is the first careless record keeping offense for Fairfield, then the appropriate remedy is a warning under 67 Pa. Code §175.51. Or, if it is the second careless offense then a

four-months' suspension is to be imposed. However, if it is the third or subsequent violation as argued by the Commonwealth then the appropriate remedy is a suspension of six months.

There is no question that two prior warnings were issued to Fairfield. They were issued for careless record keeping based upon the 1999 and 2000 audits. There was no remedy provided to Fairfield, which would have allowed it to have challenged those findings. There is no question that Fairfield is entitled to due process rights when faced with the loss of or suspension of its inspection license. *See*, ***Kennedy v. Com. Dept. of Transp.***, 416 A.2d 614 (Pa. Cmwlth. 1980) This means at a minimum that the Department must afford Fairfield a hearing prior to the suspension of its license in order to provide a reasonably reliable basis on which to conclude that the facts alleged by the Department are true and under the law support a suspension. ***Kennedy***, *supra* at 616 *citing* ***Mackey v. Montrym***, 443 U.S. 1, 99 S.Ct. 2612, 61 L.Ed.2d 321 (1979). In this case, unlike the scenario in ***Kennedy,*** Fairfield had no relief available after the initial two warning hearings and hence would be deprived of due process unless the relief of a right to challenge the two prior audits is afforded by this Court.

In this action, the Commonwealth, through its Exhibit #1 introduced its records establishing the discrepancies of the two prior audits. *See* Commonwealth's Exhibit #1, pp. 4, 4A, 5 and 5A. The basis of the audit discrepancies in 1999 and 2000 is made clear from these Exhibits and they also make clear that Fairfield had no rights afforded to them at that time to challenge the warning letters. Fairfield contended at this proceeding that such evidence should not be admissible. This Court finds to the contrary inasmuch as these are appropriate certified records of the Department of Transportation and appropriately admissible. 42 Pa. C.S. §6103 and Pa. Rule of Evidence §03(6). In addition to the Department's certified record of the audit

findings, the Commonwealth also had the auditor, Mr. Lamana, testify to the effect that in conducting the 1999 and 2000 audits he found the discrepancies indicated in Commonwealth's Exhibit #1. Fairfield asserted at the *de novo* hearing before this Court that the Commonwealth must prove each and every audit discrepancy from 1999 and 2000. Such proof is not required. If Fairfield wishes to challenge the accuracy of the audit report, they should have been prepared to introduce evidence contrary thereto. *See,* ***O'Hara v. Commonwealth, Department of Transportation,*** 624 A.2d 266 (1993). Fairfield did not introduce any evidence showing that the audit reports were in error. Given Fairfield's position as would relate to the 2001 audit it is more likely than not that they have no evidence that the audits were in error.

Nevertheless, upon reviewing the audit discrepancies for 1999 and 2000 and the appropriate penalty to be imposed here, this Court needs to examine whether or not in fact those audit findings are an appropriate basis for a charge of careless record keeping by applying the same standards as set forth above in the 2001 audit to the 2000 and 1999 audits. Again, the Court finds that one sheet missing for the more than 4,800 inspections in 1999, without a further showing as to reason for it being missing, hardly amounts to carelessness. It is also important to observe that the Department chose to base its careless record keeping finding in 1999 only on the missing MV-480 sheet, rather than the errors found in the logs disclosed by that audit report. As noted in Commonwealth's Exhibit #1, p. 4A, those errors included a wrong odometer reading, twelve incorrect insurance expiration dates and approximately eight other inaccurate entries in the records. The Department, properly, did not make those few errors the basis of the 1999 careless record keeping charge. *See* Commonwealth's Exhibit #1, pp. 4 and 4A.

Similarly, the eighteen errors reported in the year 2000 out of the total entries for 5,073 inspections do not amount to carelessness. Since those prior careless findings in 1999 and 2000 do not support a charge of careless record keeping, the 2001 failure to retain the four yellow copies of the MV-431 Forms is the first careless record keeping offense for Fairfield. The appropriate sanction then is to issue a warning as provided by 67 Pa. Code §175.51.

Our ruling that the audit discrepancies in 1999, 2000 and 2001 do not constitute "careless record keeping" by Fairfield should not be interpreted as being based upon the number of, or percentage of, errors appearing on the MV-431 Forms. Although the small percentage of error is a factor, and being such a small percentage a significant factor demonstrating there was no lack of ordinary care, it is only one factor. Indeed, this Court recognizes that an improper record keeping finding has been sustained by the Pennsylvania Superior Court where it appears a single entry of the incorrect registration number of a vehicle was entered in the inspection logs, however, this finding related to the inspection station certifying that vehicle as passing inspection when instead it had rust holes, a cracked windshield, four improper tires and a smashed-in rear end. ***Gula v. Commonwealth, Department of Transportation,*** 451 A.2d 807 (1982). Clearly, the court could find recording that vehicle as having passed inspection and inserting the wrong registration number onto the records was improper. Also, in ***Commonwealth, Department of Transportation v. Sorintino,*** 462 A.2d 925 (1983), the court sustained a finding of careless record keeping involving 28 inspections where there was a delay in transferring the necessary inspection information onto the inspection logs when the inspections had been completed. This finding by the lower court in ***Sorintino*** had been in contrast to a Departmental finding of faulty inspections and fraudulent record keeping where

apparently the inspections had been done in a month prior to the month in which they were being recorded. Fairfield, however, in contrast to the conduct penalized in ***Gula*** and ***Sorintino*** is not accused of any such misdeed. Nor do the ***Gula*** and ***Sorintino*** decisions reflect the extent to which the improprieties of the involved inspections stations constituted all of, or, a significant part of the inspection work of those stations. All that this Court holds is that the Department has not met its burden of proof of showing that Fairfield committed careless record keeping by showing the relatively few inconsequential errors committed by Fairfield in the 1999, 2000 and 2001 audits. This is especially true since Fairfield had properly performed the inspections, had all the proper information available and merely failed to transfer absolutely all of it to the Department's form.

Even if it must be found that the prior warnings would not be subject to question in this appeal, the most severe penalty that can now be imposed is one of four months for a second violation. That is because there was no indication to Fairfield, prior to this time, that the 2000 careless record keeping finding carried with it any further sanction than a warning. The next careless record keeping under the regulations, after a warning is to be a suspension of four months not of six months. The Department is estopped from asserting now that this is a third and subsequent violation with the greater penalty of six months when it chose in 2000 to issue a second warning rather than issue a suspension of four months. The Department must abide by its regulations and work up the scale of sanctions in order to give Fairfield due process and

notice of what is likely to come next. Fairfield had the right to expect that after the careless record keeping warning received in 2000, upon a future careless record keeping finding it would be subject to a suspension for four months, not six months. The Department cannot now impose a six months' suspension for this current audit discrepancy.

ORDER

In accordance with the foregoing Opinion, it is ORDERED and DIRECTED that:

1. The Commonwealth of Pennsylvania, Department of Transportation, Bureau of Motor Vehicles' Order of Suspension of December 13, 2001, issued to William P. Mannos, Fairfield Ford/VW/Hyundia/Mitsubishi #T-159 (the licensee), is VACATED.

2. The submission of ten copies of the MV-431 Form to the Department by the licensee is found to constitute careless record keeping.

3. The findings of the Department that the licensee committed careless record keeping as stated in its warning notices of August 25, 2000 (Commonwealth's Exhibit #1, p. 4) and June 28, 1999 (Commonwealth's Exhibit #1, p. 5) are VACATED.

4. The Department is DIRECTED to issue the licensee a warning for careless record keeping based upon the findings of this Court as a result of the discrepancies found by the audit of the licensee conducted in 2001.

5. The Department shall correct its records in accordance with this Order.

BY THE COURT:

William S. Kieser, Judge

cc: Barbara A. Darkes, Esquire
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Judges
Suzanne R. Lovecchio, Law Clerk
Gary L. Weber, Esquire (Lycoming Reporter)