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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	OEA Matter No.: 1601-0079-15
JAFARU OSUMAH,	)	
Employee	)	
	)	Date of Issuance: November 21, 2016
v.	)	
	)	
METROPOLITAN POLICE DEPARTMENT,	)	
Agency	)	
	)	
	)	
	)	Arien P. Cannon, Esq.
	)	Administrative Judge
_____	)	
Jafaru Osumah, Employee, <i>Pro se</i>		
Brenda Wilmore, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On May 22, 2015, Jafaru Osumah (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“Office” or “OEA”) challenging the Metropolitan Police Department’s (“Agency” or “MPD”) decision to suspend him from his position as an Officer for fifteen (15) days. This matter was assigned to the undersigned on September 16, 2015. A Prehearing Conference was originally scheduled for November 16, 2015, however, Employee failed to appear. A Show Cause Order was issued, and upon consideration of Employee’s response, the Prehearing Conference was ultimately rescheduled for January 8, 2016. Subsequently, a Post Prehearing Conference Order was issued which required the parties to submit written legal briefs addressing their legal arguments. Both parties submitted their briefs accordingly. I determined that an evidentiary hearing was not warranted. The record is now closed.

**JURISDICTION**

Jurisdiction of this Office is established in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

## ISSUES

1. Whether Employee's actions rise to the level of "conduct unbecoming [of] an officer."
2. Whether Agency's action to impose a fifteen (15) day suspension was appropriate under the circumstances.

## BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.<sup>1</sup> "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.

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.<sup>2</sup>

### Agency's position

On August 27, 2014, Detective Sergeant Morani Hines ("Detective Sergeant Hines") was investigating the case of a missing 17-year-old juvenile when he learned that Employee had been communicating with the missing female juvenile via cellular phone. Detective Sergeant Hines and Detective Miguel Miranda went to Employee's home to speak with Employee regarding the investigation. Employee was advised of the nature of the investigation and that he was not the target of the investigation. Employee acknowledged that he had sent numerous text messages to the missing juvenile's cellular phone, but that he had never met her in person. Employee also stated that he obtained the juvenile's phone number from "a friend."

When Detective Sergeant Hines asked for the friend's name, Employee stated that he "did not feel comfortable" divulging the friend's name because the friend was also an MPD officer. Employee wanted to call the other MPD officer to warn him that Detective Sergeant Hines would be calling him. At some point, Employee displayed his phone and attempted to contact the other officer, but was prevented from doing so. Detective Sergeant Hines did not want Employee to call the other officer, whom Employee initially did not identify, despite multiple requests from Detective Sergeant Hines. Employee was allowed to use his phone to call individuals, other than the subject MPD member. Agency asserts that Employee called his wife and children.

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<sup>1</sup> 59 DCR 2129 (March 16, 2012).

<sup>2</sup> OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

Detective Sergeant Hines asked Employee if he could look at the information on his cell phone, to which Employee acquiesced.<sup>3</sup> Detective Sergeant Hines temporarily seized Employee's cell phone, and placed it in his pocket, in order to prevent Employee from impeding the investigation by calling the other MPD officer, or erasing text messages. When Employee again refused to divulge the other MPD member's name, Detective Sergeant Hines called Commander Daniel Hickson of the Youth Investigation Division ("YID"). Commander Hickson advised Detective Sergeant Hines to contact the Internal Affairs Division ("IAD").

Prior to IAD arriving at Employee's home, Detective Sergeant Hines called the U.S. Attorney's Office and inquired about the possibility of obtaining a search warrant for Employee's cell phone. The U.S. Attorney's Office advised the Detective that he could not obtain a warrant under the circumstances. After repeated requests by Detective Sergeant Hines, Employee finally gave him the name of the other MPD officer who had given him the juvenile's phone number—Officer Richard Antoine. Detective Sergeant Hines then returned Employee's cell phone and called the other MPD officer. The other officer was fully cooperative with the investigation and was advised that he was not considered a target of the investigation. Officer Antoine told Detective Sergeant Hines that he met the missing juvenile at a gas station and she gave him her cell phone number; however, he did not contact her because he did not want problems with his long-term girlfriend. Consequently, Officer Antoine passed the number to Employee.

Two IAD Agents responded to Employee's residence on the day of the incident and revoked his police powers and placed him in a non-contact status. The investigation was assigned to Agent Taliaferro who conducted the investigation and determined that Employee refused to provide Detective Sergeant Hines with the name of the other MPD Officer until he became aware that IAD has been notified. Based on these facts, it was determined that Employee had engaged in "Conduct Unbecoming [of] an Officer."

#### Employee's position

Employee asserts that on August 27, 2014, Detective Sergeant Hines, along with Detective Miguel Miranda called his phone and asked him to come downstairs to the entrance of his building. Detective Sergeant Hines advised Employee that they were conducting the investigation of a missing 17 year-old female that may have been involved in prostitution. Detective Sergeant Hines then showed Employee a flyer of the 17 year-old juvenile and Employee denied ever having met her. Employee was then informed that prior to Detective Sergeant Hines and Detective Miranda making a visit to his home, his phone was tracked for the past few hours as having been in contact with the missing juvenile. Detective Sergeant Hines then read the missing juvenile's phone number to Employee at which time he realized that he had in fact been communicating with the missing juvenile. When Employee realized that he had been in contact with the missing juvenile, he asked the detectives to further explain the purpose of their visit regarding this missing juvenile. Employee states that he was told that he was not a target of the investigation.

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<sup>3</sup> This assertion is contradicted throughout the record. Employee and Detective Sergeant Hine's statements only assert that the phone was seized. The statements do not provide that the content of the phone were viewed.

Employee further maintains that while he had his phone in his hand, he asked Detective Sergeant Hines if he would like to speak with the person who provided him the missing child's number. At this point, Employee avers that Detective Sergeant Hines grabbed his phone out of his hand. Employee states that he knew that Detective Hines' seizure of his cell phone was illegal and based on the context of the investigation, he (Employee) was aware that he could become a target of the investigation. The exchange between Employee and Detective Sergeant Hines continued and Employee declined to speak with the detective until he received his phone back. After Detective Sergeant Hines was unable to get a search warrant from the U.S. Attorney's Office, Employee finally provided the other Officer's name.

#### FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

The facts in this case are largely undisputed. The issue hinges on whether the exchange Employee had with Detective Sergeant Hines rises to the level of conduct unbecoming of an officer as described in the Notice of Proposed Adverse Action.<sup>4</sup> There is no question that Detective Sergeant Hines, along with Detective Miranda, went to Employee's house as a result of an investigation into a missing female juvenile. The visit to Employee's home was prompted by the fact that Employee's cell phone was tracked as having communication with a missing juvenile. The disagreement as to whether Employee's actions rise to the level of misconduct stem from when Detective Sergeant Hines sought to obtain the name of the individual who provided Employee with the missing juvenile's phone number. It is settled that the person who provided Employee with the juvenile's phone number is also an MPD Officer.

Employee was cited for violation of MPD General Order 120.21, Attachment A, Part A-12, which states: "Conduct unbecoming [of] an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia."

The specifications of this charge provide that: On August 27, 2014, Employee refused to provide Sergeant Morani Hines with information regarding an investigation he was conducting into a missing juvenile. Employee only provided the requested information after the Internal Affairs Division was notified regarding Employee's initial refusal to provide the information. Agency states that Employee's conduct was "unprofessional and unbecoming of an officer."

All versions of accounts surrounding the material facts of this incident align except for when Employee actually provided Detective Sergeant Hines the name of the other officer who provided him the missing juvenile's phone number. Detective Sergeant Hines maintains that it was nearly an hour after he initially asked for the other officer's name and contact information, while Employee asserts that he immediately provided the other officer's name and information upon request.<sup>5</sup> Both parties' description of events assert that when Detective Sergeant Hines and Detective Miranda arrived at Employee's home, Employee came outside of his building and was

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<sup>4</sup> Agency Answer, Tab 2 (June 17, 2015).

<sup>5</sup> See Answer, Tab 1, Memo authored by Agent/Detective Taliaferro; See also Petition for Appeal, CD, Interview of Detective Sergeant Hines and Jafaru Osumah (Employee).

informed as to the nature of their visit—the investigation of a missing juvenile. It is uncontroverted that Employee was shown a flyer of the missing juvenile, whom he denied knowing. However, when Employee was informed that his cell phone was tracked as having communication with the missing juvenile on several occasions in the immediate preceding hours, he realized that he had in fact communicated with her. Employee stated that although he had been in communication with the juvenile, he had never met her in person. Detective Sergeant Hines also represented to Employee that he was not a target of the investigation.

Despite Employee's assertion during the course of the internal investigation that he immediately provided the other officer's name and contact information upon Detective Hine's request, the record supports otherwise. During Agent Taliaferro's investigation into Employee's actions, Detective Hines stated that Employee provided the other officer's name (Officer Richard Antoine) approximately one (1) hour after his initial request and after IAD was notified. Employee also stated during his interview with Agent Taliaferro that Detective Sergeant Hines kept his (Employee's) cell phone for approximately an hour.<sup>6</sup> Employee acknowledged that when he told Detective Sergeant Hines that he had the other officer's phone number and asked to call him, he was informed that he could not call the other number for fear of it impeding the missing person investigation. It is undisputed that Detective Hines temporarily seized Employee's phone when he pulled it out and offered to call the other officer, for fear of impeding the investigation.

The discrepancy in stories rests in the exact point in time as to when Employee provided Detective Sergeant Hines the other Officer's name and contact information. The exchange between Employee and Detective Hines appear to have been a straightforward conversation until Employee attempts to call the other officer who provided him the missing juvenile's phone number. At this point, Detective Sergeant Hines temporarily seized Employee's cell phone and Employee declined to speak further with the detectives. When asked in a recorded interview with Agent Taliaferro if he ever refused to give Detective Hines the name of the other officer, Employee provided a roundabout answer.<sup>7</sup>

When Employee realized that he had in fact been in contact with the missing juvenile via cell phone, he asked Detective Sergeant Hines if he could call his "friend" who provided him the juvenile's number, to which Detective Hines stated "no." Employee also avers in his recorded interview with Agency Taliaferro that when Detective Hines took his phone, he then provided the other officer's name and the district where the officer worked. However, in Employee's written brief, he stated that when Detective Sergeant Hines confiscated his phone, he stated that he would not talk with him until he returned his phone.<sup>8</sup> Based on the stated version of events provided by all involved parties, I find that Employee's assertion that he immediately provided Detective Sergeant Hines with the other officer's name implausible. Both parties maintain that Detective Sergeant Hines and Detective Miranda were at Employee's home for at least one hour. Given the representations from both parties of how the exchange went between Employee and Detective Sergeant Hines, it is apparent that the visit to Employee's home was prolonged by his initial refusal to provide the name of the officer who provided him the phone number of the

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<sup>6</sup> Agency Answer, Tab 1, Attachment 8 (June 17, 2015).

<sup>7</sup> Petition for Appeal, Attachment, CD (May 22, 2015).

<sup>8</sup> Employee's Brief (April 18, 2016).

missing juvenile. Had Employee immediately provided the name of the officer who provided him the juvenile's phone number, it would not have caused Detectives Sergeant Hines and Miranda to remain at Employee's house for an hour carrying out their investigation. Employee's actions unnecessarily delayed the investigation of the missing juvenile. Thus, I find that Agency had cause to take adverse action against Employee for conduct unbecoming of an Officer.

### **Appropriateness of the penalty**

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency. In the instant case, I find that Agency had cause to take adverse action against Employee for conduct unbecoming of an officer. Agency's General Order Series 120.21, Attachment A, an applicable Table of Offenses and Penalties Guide, provides that a first time offense for a "conduct unbecoming" charge may range from a three (3) day suspension to removal. Here, Agency elected to impose a fifteen (15) day suspension for Employee's conduct.

Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the Administrative Judge.<sup>9</sup> The undersigned may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.<sup>10</sup> When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.<sup>11</sup> Here, in Agency's Notice of Proposed Adverse Action, it thoroughly discusses each *Douglas* factor.<sup>12</sup> Based upon the analysis of each *Douglas* factor, I further find that Agency reasonably concluded that a fifteen (15) day suspension was an appropriate penalty under the circumstances.

### **ORDER**

Based on the foregoing, it is hereby **ORDERED** that Agency's decision to impose a fifteen (15) day suspension of Employee is **UPHELD**.

FOR THE OFFICE:

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Arien P. Cannon, Esq.  
Administrative Judge

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<sup>9</sup> See *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

<sup>10</sup> See *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Douglas v. Veteran Administration*, 5 M.S.P.B. 313 (1981); Agency's Answer, Tab 2 (June 17, 2015).