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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0096-17
YVES ATSOU,)	
Employee)	
)	Date of Issuance: October 15, 2018
v.)	
)	Arien P. Cannon, Esq.
METROPOLITAN POLICE DEPARTMENT,)	Administrative Judge
Agency)	
_____)	
Kwaku D. Ofori, Esq., Employee Representative)	
Nada Paisant, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Yves Atsou (“Employee”) filed a Petition for Review with the Office of Employee Appeals (“OEA”) on September 25, 2017, challenging the Metropolitan Police Department’s (“Agency” or “MPD”) decision to remove him from his position as a Police Officer. Employee’s removal was based on five separate charges. Agency filed its Answer on October 18, 2017. I was assigned this matter on December 11, 2017.

A Prehearing Conference was held in this matter on March 14, 2018, where both parties were present. A Post Prehearing Conference Order was issued the same day which required the parties to submit briefs addressing the issues under a *Pinkard* analysis.¹ Both parties submitted their briefs accordingly. The record is now closed.

JURISDICTION

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

¹ *Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002). Based on the collective bargaining agreement between the two parties, Employee’s appeal to this Office is limited to the issues listed below in the “Issues” section.

ISSUES

1. Whether Agency's Adverse Action Panel's decision was supported by substantial evidence;
2. Whether there was harmful procedural error; or
3. Whether Agency's action was done in accordance with applicable laws or regulations.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

Employee was charged with the following:

Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-6, which states, "Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Officer to, or in the presence of, any superior officer, or making an untruthful statement before any court or any hearing."

Specification No. 1: In that, on August 24, 2016, during your interview with Agent Todd Mercier of the Internal Affairs Division, regarding allegations that your made inappropriate comments and sexual advances to [redacted]² [complaining citizen] during a traffic stop, you provided a false statement when you stated to Agent Mercier that you did not pull [citizen] over twice, nor did you kiss her two times. You made this statement knowing it to be untrue.

Charge No. 2: Violation of General Order 120.21, Attachment A, Part A-12, which states: "Conduct unbecoming 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."

This misconduct is further defined in General Order Series 201.26, B-23, which states, "Members shall not conduct themselves in an immoral, indecent, lewd, or disorderly manner or in a manner that might be construed by an observer as immoral, indecent, lewd, or disorderly. They shall be guilty of misconduct, neglect of duty, or conduct unbecoming to an officer and a professional even though such conduct is not specifically set forth in this order."

Specification No. 1: In that, on July 25, 2014, while on duty, and after conducting a traffic stop on [citizen] at or near 18th & Columbia Road, Northwest, Washington, D.C., where you asked [citizen] to give you her phone number, you followed [citizen] again and initiated another traffic stop where you kissed

² To preserve the identity of the complaining citizen, she will be referred to throughout this Decision as "citizen."

[citizen]. Additionally, you did not have legal justification to conduct either traffic stop.

Charge No. 3: Violation of General Order 120.21, Attachment A, Part A-20, which states, “Misuse of official position...for personal gain or benefit.”

Specification No. 1: In that, on July 25, 2014, while on duty an in a marked MPD cruiser, you misused your position as a MPD police officer when you conducted an unlawful traffic stop on [citizen] at or near 18th & Columbia Road, NW, Washington, D.C. for your own personal reasons..

Charge No. 4: Violation of General Order 120.21, Attachment A, Part A-16, which states, “Failure to obey orders and directives issued by the Chief of Police.”

This misconduct is further defined in General Order 304.10, Part III-A-1, which states, “Contacts may be initiated by an officer when he/she reasonable believes that some investigatory inquiry into a situation is warranted.

Specification No. 1: In that, on July 25, 2014, while at or near 18th & Columbia Road, NW, Washington, D.C., you did not have legal justification for conducting a traffic stop on [citizen]. Additionally, you were on duty, in a marked cruiser, when you activated your emergency equipment to initiate the traffic stop on [citizen].

Charge No. 5.: Violation of General Order 120.21, Attachment A, Part A-25, which states, “Any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force.”

Specification No. 1: In that, on July 25, 2014, while on duty, you used your authority as a police officer to acquire [citizen’s] telephone number after pulling her over during a traffic stop, to which you had no legal justification. Specifically, you stated to [citizen] that you were pulling her over because you wanted her phone number.

At the Adverse Action Panel Hearing conducted by the MPD on June 7, 2017, Employee pleaded “Not Guilty” to all five charges.³

³ See Agency’s Answer, Tab 3, (October 18, 2017).

Summary of Transcript

On June 7, 2017, Agency held an Adverse Action Panel Hearing. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as “Tr.”) which was generated following the conclusion of Employee’s proceeding. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their position.

Agent/Sergeant Todd Mercier (Agent Mercier)

Agent Mercier was assigned to investigate Employee’s case in July 2014. Agent Mercier learned that the nature of the investigation was regarding a complaint made by a citizen that Employee pulled her over, asked for her phone number, and did not issue a citation to the complaining citizen. Mercier learned that Employee pulled over the citizen again shortly after the first stop, this time asking her for a kiss, and proceeded to kiss the citizen on the lips.

Agent Mercier testified that the complaining citizen gave a recorded statement and interview to Agent Wandella Fields and Agent Kenneth Carter prior to him being assigned to the investigation. During the investigation, Lietenant Lucas and Agent Eames met with the complaining citizen and conducted one-party consent recorded phone calls between the citizen and Employee. These one-party recorded consent phone calls took place on at least three (3) occasions. Lietenant Lucas and Agent Eames were present with the citizen when she made the recorded phone calls to Employee.

During his testimony Agent Mercier summarized the recorded phone calls between Employee and the complaining citizen. On the first phone call, the complaining citizen asked Employee why he pulled her over and why did he kiss her, to which Employee responded by saying the citizen was pretty and that he wanted to get her phone number. Employee indicated that he pulled the citizen over the second time because he wanted a kiss. During the second and third recorded phone conversations, Employee and the citizen discussed where the complaining citizen lived and whether she would like to go out after work one day.

Agent Mercier sent an email to the United States Attorney’s Office in August of 2014, advising them of the incident with Employee. He met with AUSA Agachi in September of 2014, during which time a criminal investigation into Employee’s actions was initiated by the U.S. Attorney’s Office. The U.S. Attorney’s Office declined prosecution on May 9, 2016.

After receiving the declination letter, Agency Mercier interviewed Employee on two different occasions, once on August 24, 2016, and once on September 2, 2016. During the initial interview, Employee denied knowing the complaining citizen and denied ever pulling her over. Agent Mercier played the recording of the phone conversation between Employee and the citizen and Employee initially denied that was his voice on the recording. About halfway through the interview, Employee acknowledged that it was his voice on the recording. Agent Mercier confirmed Employee’s phone number and it was the same number that was depicted on a screen shots taken from the complaining citizen’s phone. The screen shots were of a phone number that called the citizen’s phone shortly after the traffic stop.

During the supplemental interview with Employee, Agent Mercier asked Employee about a photo of himself that was received on the citizen's phone. Employee confirmed the photo was of himself but did not remember sending it to anyone with the complaining citizen's name.

Lieutenant Felicia Lucas ("Lt. Lucas")

Lt. Lucas was over the Integrity Unit in 2014, when she became involved in the investigation surrounding Employee. Lt. Lucas and some of her agents responded to the complaining citizen's residence and spoke with her regarding her allegations. The citizen informed Lt. Lucas that she agreed to contact Employee under their supervision. Approval for "one-party" consent was given through the Investigation Services Bureau.

The first one-party consent call was made on July 30, 2014, the day after the citizen made the allegation. The one-party consent calls were used to gather more information about what occurred during the alleged traffic stop. This first phone call occurred in Lt. Lucas' vehicle outside of the complaining citizen's residence. Lt. Lucas, the citizen, and Detective Eames were present for the phone call to Employee.

Lt. Lucas explained what she learned from the recorded phone conversations. She testified that she heard Employee confirm that he pulled the citizen over because she was a pretty lady. Lt. Lucas testified that based on the recorded phone conversations, the traffic stop initiated by Employee against the citizen resulted from Employee's attraction to the complaining citizen and Employee also confirmed kissing the citizen.

Complaining Citizen ("Citizen")

The citizen explained that on July 25, 2014, at approximately 2:30 am she was leaving a bar in Adams Morgan after celebrating her birthday with friends. The citizen testified that after getting in her vehicle, she made a U-turn, drove about a block and made a right turn when she was pulled over by Employee who activated his lights and sirens. The citizen provided Employee with her license and registration and told Employee that she knew she was being pulled over because her brake light was out. However, Employee responded that he pulled her over to get her phone number. The citizen was shocked by Employee's statement and was afraid he was going to arrest her. Citizen worked for a federal contractor and was scheduled to work early in the morning following the incident. The citizen testified that Employee was in full uniform, however, he did not issue her a ticket.

After Employee allowed the citizen to drive off, she testified that he pulled her over a second time. When Employee approached her vehicle, he stated that he forgot to ask for a kiss. Again, the citizen was in shock and testified that she just wanted to get home, so she turned her face for Employee to kiss her on the cheek. However, Employee turned her face and kissed her on the lips. The citizen did not want Employee to kiss her but she was fearful of being arrested.

The following morning, Employee went to work and told a co-worker what happened, who encouraged her to report the incident. Because the citizen did not know Employee's name,

she did not report the incident right away. The next day Employee called her, at which time the citizen obtained Employee's name, and reported the incident to Internal Affairs the same day.

The citizen gave consent to investigators to record phone calls between herself and Employee, which were all made in the investigators' vehicles on three separate occasions. The citizen stated that she had a hard time understanding Employee at times because of his thick accent. She further stated that Employee admitted to pulling her over the first time to get her phone number and the second time to get a kiss. She also confirmed that Employee sent her a picture of himself, and confirmed Employee's phone number, and the date, July 26, 2014, as the first phone call. Approximately one week later, Employee called her and asked if she reported him to Internal Affairs. The citizen was again fearful for her safety.

The complaining citizen has a top security clearance and expressed concerns about having her clearance revoked for drunk driving. The citizen further explained that she did not immediately call 911 because she did not have Employee's name or vehicle number until a few days after the incident.

Officer Yves Atsou ("Employee")

Employee came to the United States sometime in the early 2000s. Employee explained that when he first arrived in the U.S., he did not speak English, only French. He taught himself English by listening to audio CDs from the library.

Employee graduated from the police academy in 2012. Employee confirmed that he was working on July 25, 2014, on the midnight shift, during the same time frame of the alleged incident. During this shift, Employee issued twelve tickets and arrested one person. However, Employee asserted that none of his traffic stops were conducted on the complaining citizen and that he had never seen the citizen until the Adverse Action Panel Hearing. Employee explained that the citizen may have gotten his phone number because he gives his number out to a lot of people on his business card. He further explained that his phone number was on the citizen's phone because he likely called the number back since the name did not appear on his phone when he had a missed call.

Employee acknowledged that it was his voice on the recorded phone calls with the citizen and explained that he did not know who the citizen was but that his statements were made up in order to practice his English. Employee stated that he asked the citizen for a picture because he wanted to know who he was speaking with and sent a picture of himself because he was expecting a picture in return.

ANALYSIS AND CONCLUSIONS OF LAW

Pursuant to the D.C. Court of Appeals' decision in *Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002), an Administrative Judge of this Office may not conduct a *de novo* hearing in an appeal before him/her, but rather must base his/her decision solely on the record below at the Adverse Action Panel Hearing, when all of the following conditions are met:

1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
2. The employee has been subjected to an adverse action;
3. The employee is a member of a bargaining unit covered by a Collective Bargaining Agreement;
4. The Collective Bargaining Agreement contains language essentially the same as that found in *Pinkard*, i.e.: “[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [i.e., Trial Board Hearing] has been held, any further appeal shall be based solely on the record established in the Departmental hearing”; and
5. At the agency level, Employee appeared before an Adverse Action Panel that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.⁴

Based on the documents of record and the representation of the parties as stated during the Prehearing Conference, and in the briefs submitted, I find that all of the aforementioned criteria have been met. Therefore, my review is limited to the issues as set forth above in the “Issues” section of this Initial Decision.

Whether the Adverse Action Panel’s decision was supported by substantial evidence.

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.⁵ If the [Adverse Action Panel’s] findings are supported by substantial evidence, I must accept them even if there is substantial evidence in the record to support contrary findings.⁶

All five (5) charges levied against Employee stem from the set of allegations surrounding Employee’s interaction with a citizen.

Charge 1

Here, Agency relied on the testimony of the complaining citizen, the Internal Affairs Division (IAD) investigators, Employee, and three (3) recorded telephone conversations between Employee and the complaining citizen. The record supports that the complaining citizen recounted the events in the early morning hours of July 25, 2014, to investigators and to the Adverse Action Panel. Employee acknowledged it was his voice on the recorded phone

⁴ *Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002).

⁵ *Black’s Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

⁶ *See Metropolitan Police Department v. Baker*, 564 A.2d 1155 (D.C. 1989).

conversations with the complaining citizens, during which he corroborated the events described by the complaining citizen. The citizen identified Employee as the officer that pulled her over to ask for her phone number and then pulled her over again a short time afterwards to ask her for a kiss. Although Employee states that he made up the statements made during the recorded phone conversations, the Panel found that Employee made statements with information that he would not have known unless he had in fact encountered the complaining citizen.

Furthermore, the Panel credited the testimony and statements made by the complaining citizen during the investigation. The citizen described the recorded phone calls with Employee, at which time Employee admitted to pulling the citizen over. Despite Employee's contention that he was just making up statements and practicing on his English during these phone conversations, the Panel found otherwise. The evidence of record is overwhelmingly in support of Agency's position. I have had the opportunity to review the investigative reports and recorded phone conversations between Employee and the citizen.⁷ It is clear that there is substantial evidence in the record that a reasonable mind could accept as adequate to support the conclusion that Employee did in fact pull the complaining citizen over twice—once to get her phone number and then again to ask for a kiss.

Charge 2

Charge two charges Employee with conduct unbecoming based on the allegations that Employee pulled over the complaining citizen—twice, without legal justification. As explained under Charge One, there is overwhelming evidence that Employee in fact pulled over the citizen to ask for her phone number and to ask for a kiss. The recorded phone conversations show Employee corroborating the citizen's version of events. The unjustified seizure of the citizen for the purpose of obtaining her phone number, and then asking for a kiss is supported by substantial evidence in the record.

Charges 3, 4, and 5

As explained above, there is substantial evidence in the record to support Agency's position that Employee unjustifiably pulled the complaining citizen over. The initiation of this traffic stop was clearly for personal gain or benefit—to receive the phone number and a kiss from a woman to whom Employee was attracted. Employee's contact with the complaining citizen was not reasonable and served no investigatory purpose. Thus, I further find that there is substantial evidence in the record to support a find that Agency had cause to take adverse action for charges three, four, and five.

Whether there was harmful procedural error.

Employee asserts that there was harmful procedural error because Agency did not comply with the applicable 90-Day Rule, pursuant to D.C. Code § 5-1031. The applicable 90-day Rule

⁷ See Agency's Brief, Exhibit 2, Bates Stamp 84 (April 27, 2018).

applicable in the instant case (D.C. Code § 5-1031 (September 30, 2004))⁸ provides, in pertinent part:

- (a-1)(1)...[N]o corrective or adverse action against any sworn member or civilian employee of the...Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the...Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.
- (b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

Thus, because the employee's misconduct was also the subject of a criminal investigation by the Metropolitan Police Department and the United States Attorney's Office for the District of Columbia, the 90-day time period was tolled. Here, the 90-day clock was tolled on July 29, 2014, once MPD learned of Employee's alleged misconduct, and as it began a criminal investigation of Employee. On July 31, 2014, Agency Eames prepared a Preliminary Report which was sent to the U.S. Attorney's Office ("USAO").⁹ Subsequent to MPD's criminal investigation, the matter was referred to the U.S. Attorney for the District of Columbia's Office for further criminal review on August 1, 2014.¹⁰ On January 16, 2015, the USAO interviewed the complaining witness. The tolling of the 90-day period did not end until the USAO issued a declination letter on May 9, 2016.¹¹

Counting from May 9, 2016, to the date the Notice of Proposed Adverse Action was issued on September 12, 2016, a total of 87 days passed. For argument sake, there were two days from the time MPD was first made aware of the allegation until they referred the matter to the USAO for criminal prosecution. Thus, no more than 89 business days had elapsed. In Employee's brief, he asserts that more than 120 days had elapsed after the USAO issued its declination letter to the time Agency issued its Proposed Adverse Action Notice. It is apparent that Employee included all calendar days (Saturdays, Sundays, and legal holidays) in his calculations rather than only working business days as prescribed in D.C. Code § 5-1031 (2004).

⁸ D.C. Code § 5-1031 was amended as of March 7, 2015. The amended section broadens the scope for when the 90 day time frame is tolled. Here, because the events in the instant matter occurred in July 2014, the older, 2004 version is the applicable 90-Day Rule, not the amended 2015 version.

⁹ Agency's Brief, *See* Exhibit 1, p. 68-69, Transcript (April 27, 2018).

¹⁰ *Id.*, *See* Exhibit 4 (April 27, 2018).

¹¹ *Id.*, Exhibit 2, at Bates Stamp 83.

Accordingly, I find that Agency did not commit harmful procedural error and did not violate the 90-Day Rule.

Additionally, Employee contends that a procedure error was committed by purposefully withholding GPS evidence. Employee contends that the GPS evidence was relevant to his defense and would have exonerated him if the GPS tracking information was produced. He contends that Agency failed to provide a reason why the GPS evidence was unavailable at his request.

Notably, Employee did not request GPS evidence until after the Adverse Action Panel Hearing. The Adverse Action Panel Hearing was held on June 7, 2017, and a formal request for GPS evidence was not made until July 28, 2017.¹² Employee was represented by counsel at the hearing and had the opportunity to present documentary and testimonial evidence; however, at no time during or prior to the hearing did Employee make a request for production of GPS tracking information. Shortly after Employee's request for GPS information, Agency responded that the Office of Unified Communications no longer had GPS data prior to 2015. Because the request for GPS tracking information was not made until *after* the Adverse Action Panel, I do not find that Agency's inability to provide the GPS information amounted to harmful procedural error nor did it violate his due process rights.

Whether Agency's action was done in accordance with applicable laws or regulations.

Based on the findings of the Adverse Action Panel, Agency imposed termination against Employee. The undersigned may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.¹³ 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.¹⁴

At the conclusion of the Adverse Action Panel/Departmental Hearing, a lengthy and thorough analysis was issued, which also included an analysis of the *Douglas* factors.¹⁵ The *Douglas* factor analysis demonstrates that Agency considered all factors and appropriately exercised its discretion in imposing the penalty in this matter. Furthermore, under Agency's General Order 120.21, Attachment A, a Table of Penalties is provided. It provides that termination is within the range of appropriate penalties for all five (5) charges against Employee: untruthful statements, conduct unbecoming, misuse of official position, failure to obey orders and directives, and prejudicial conduct. Therefore, I find that Agency's action of termination Employee was done in accordance with all applicable laws and regulations.

¹² See Agency's Answer, Tab 5 (October 18, 2017).

¹³ See *Id.*

¹⁴ *Id.*

¹⁵ See Agency Answer, Tab 3, p. 23-26 (October 18, 2017).

ORDER

Accordingly, based on the aforementioned, it is hereby **ORDERED** that Agency's removal of Employee from his position as a Police Officer is **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge