THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,	)	OEA Matter No. 1601-0072-22-R23
Employee	)	
	)	
v.	)	Date of Issuance: May 13, 2025
	)	
METROPOLITAN POLICE DEPARTMENT,	)	
Agency	)	ERIC T. ROBINSON, ESQ.
	)	SENIOR ADMINISTRATIVE JUDGE
	)	

Employee *Pro-Se*
Lauren B. Schwartz, Esq., Agency Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL HISTORY

Employee appealed a suspension from the Metropolitan Police Department ("MPD") imposed for the following: (1) engaging in Reckless Driving by operating his motor vehicle at 106 mph in a 70-mph zone on July 13, 2015, in the Commonwealth of Virginia; (2) failing to appear at the Smyth County General District Court for the Reckless Driving charge on September 2, 2015 and a capias warrant was issued; (3) being arrested by the Metropolitan Washington Airports Authority Police Department for the capias warrant on November 11, 2015, at Dulles International Airport; and (4) being found guilty of Reckless Driving in the Commonwealth of Virginia on January 27, 2016. MPD charged Employee with engaging in conduct prejudicial to the District of Columbia Government as defined by the District Personnel Manual ("DPM") § 1605.4(a)(3) as "conduct that an employee should reasonably know is a violation of law or regulation," as well as engaging in "off-duty conduct that adversely affects the employee's job performance or trustworthiness, or adversely affects the employing agency's mission or has an otherwise identifiable nexus to the employee's position" according to DPM § 1605.7(2)(a)(5).[1] Employee's position of record is CCTV Evidence Specialist, Grade 11, Step 7. Initially, Employee was

[1] Notice of Final Decision DRD# 340-22; IS# 22-000264 (July 29, 2022).

sanctioned with a 15-day suspension with seven (7) days held in abeyance. Employee served the remaining eight (8) days of suspension from September 6 – 15, 2022.

Employee filed his Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") on August 3, 2022. On that same date, the OEA's Executive Director sent a notice to Robert J. Contee, III, MPD Chief of Police, requiring Agency to Answer Employee's Petition for Appeal by September 2, 2022. MPD timely filed its Answer in this matter. This matter underwent mandatory mediation under the auspice of the OEA's Mediation Department. Regrettably, mediation failed, and this matter was assigned to the Undersigned on October 4, 2022. By Order dated October 11, 2022, a Prehearing/Status Conference ("PHC") was scheduled for November 16, 2022. The PHC was held as scheduled. During this conference, the parties presented their version of the salient facts and circumstances surrounding this matter. On November 17, 2022, after considering the opposing points of view, the undersigned issued an Order setting a briefing schedule. Surprisingly, thereafter, on December 2, 2022, Agency submitted a Motion to Dismiss wherein it noted that it had unilaterally rescinded seven days of Employee's suspension. Employee will only have served eight days of suspension. MPD contended that given the circumstances, an eight-day suspension was below the jurisdictional threshold of the OEA and argued that this matter should be dismissed for lack of jurisdiction.

In an Initial Decision issued on January 26, 2023, the Undersigned agreed with MPD's rationale and dismissed this matter for lack of jurisdiction. On February 24, 2023, Employee filed a Petition for Review, wherein he appealed the dismissal of this matter. In an Opinion and Order on Petition for Review ("O&O") issued on June 1, 2023, the Board of the OEA found that when Employee first submitted his petition for appeal that it met the threshold for OEA to exercise jurisdiction. The OEA Board further noted that MPD's unilateral post-filing action of rescinding some of the days of suspension cannot divest OEA of its jurisdiction. Accordingly, the Board of the OEA remanded this matter to the Undersigned so that a decision on the merits can be rendered.

On July 10, 2023, the Undersigned issued an Order Convening a Status Conference which was set for August 22, 2023. At the parties' request, the Status Conference was rescheduled for September 21, 2023. On that same date, the parties were provided with a briefing schedule wherein they were instructed to address the merits of this matter in writing. The parties submitted their respective briefs in due course. After reviewing the documents of record, the Undersigned has determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether the Agency's adverse action was taken for cause.

2. If so, whether the penalty was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

> The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 631.2 id. States:

> For appeals filed under §604.1, 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.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

The following findings of fact, analysis, and conclusions of law are based on the documentary evidence presented by the parties during the course of Employee's appeal process with OEA. When Employee filed his appeal with this tribunal, he was appealing a 15-day suspension with seven (7) days held in abeyance. However, on November 22, 2022, MPD unilaterally rescinded the seven (7) days held in abeyance and updated the record to reflect that Employee's final imposed discipline was only an eight (8)-day suspension. Given the O&O, the merit of MPD's adverse action will be addressed. It bears reiterating that Employee appeals a suspension from the Metropolitan Police Department ("MPD") imposed for the following: (1) engaging in Reckless Driving by operating his motor vehicle at 106 mph in a 70-mph zone on July 13, 2015, in the Commonwealth of Virginia; (2) failing to appear at the Smyth County General District Court for the Reckless Driving charge on September 2, 2015 and a capias warrant was issued; (3) being arrested by the Metropolitan Washington Airports Authority Police Department for the capias warrant on November 11, 2015, at Dulles International Airport; and (4) being found guilty of Reckless Driving in the Commonwealth of Virginia on January 27, 2016. MPD charged Employee with engaging in conduct prejudicial to the District of Columbia Government as defined by the District Personnel Manual ("DPM") § 1605.4(a)(3) as "conduct that an employee should reasonably know is a violation of law or regulation," as well as engaging in "off-duty conduct that adversely affects the employee's job performance or trustworthiness, or adversely affects the employing agency's mission or has an otherwise identifiable nexus to the employee's position" according to DPM § 1605.7(2)(a)(5).[2]

Employee contends that he was not aware that he had to follow the MPD policies cited in his Notice of Suspension. Inexplicably, he further asserts that MPD should have discovered these transgressions on their own and not relied on him to self-report. Agency counters by noting that "Employee works for MPD, a law enforcement agency whose mission, among other things, is to reduce crime and the fear of crime in the community. Employee was charged with Reckless

[2] *See*, footnote 1.

Driving in Virginia, failed to appear for the court hearing, was arrested at Dulles airport on the warrant, and found guilty on the charge of Reckless Driving. Employee's criminal conduct directly affects MPD's mission to reduce crime as he committed a crime himself."[3] Also, Agency disputes a potential red herring in that Employee argues that he was disciplined for failing to report this incident. MPD addresses this by noting that Employee was not cited for failing to report but rather he was disciplined for the underlying conduct that led to his arrest in the state of Virginia. Agency further asserts that Employee's misconduct was a willful violation of Virginia law requiring sanctions given his civilian employment with MPD, a paramilitary agency whose General Orders require greater discipline for its members (civilian or sworn) than other District government employees working for non-paramilitary agencies.[4]

Employee also asserts that double jeopardy precludes MPD's adverse action.[5] Double Jeopardy is derived from the 5th amendment of the U.S. Constitution prohibiting repeated litigation of criminal matters involving the same or similar offense. MPD's adverse action is a civil matter therefore this concept does not apply to the matter at hand. To ensure that Employee's attempt at prosecuting his appeal is thoroughly vetted, I make the determination that he may have conflated Double Jeopardy with the concept of *res judicata*. Under the related affirmative defense *res judicata*, or claim preclusion, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been raised* in that action." *McIntyre v. Fulwood*, 892 F.Supp.2d 209, 214 (D.D.C. 2012) (emphasis in original). Courts apply a three-part test to determine whether *res judicata* applies: (1) whether the claim was adjudicated finally in the first action; (2) whether the present claim is the same as the claim which was raised or which might have been raised in the prior proceeding; and (3) whether the party against whom the plea is asserted was a party or in privity with a party in the prior case." *Id.* In the instant matter, it is clear that Employee's *res judicata* claim must fail. Clearly, prong 3 fails given that the state of Virginia was the opposing party in the prior matter, not MPD. Further, the claims in Virginia were criminal whereas the adverse action at hand is a purely civil matter.

Employee's statute of limitation argument is also disingenuous. As part of his argument, Employee contends that MPD waited too long (approximately seven years) to pursue his suspension. Agency readily notes that it only found out about this misconduct after an investigation was conducted by MPD's Internal Affairs Department. But for this revelation by happenstance,[6] MPD would not have discovered Employee's misconduct in Virginia. Upon notice of this misconduct, MPD instituted its own investigation that ultimately led to Employee's suspension. Employee asserts that he was ignorant of Agency's General Orders. However, MPD correctly notes that its General Orders include guidelines for all civilian members. Most notable is the requirement that all members familiarize themselves with all MPD regulations.[7]

What is particularly illuminating in this matter is that Employee admitted to all of the specifications in this matter. I find that Employee admitted to the salient facts that are the subject

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[3] MPD Sur-Reply Brief p. 2 (December 12, 2023).
[4] *Id*. pp. 2- 6.
[5] Employee Response to MPD Statement pp. 3 – 5 (September 19, 2023).
[6] On January 14, 2023, MPD's IAD conducted a routine integrity check of its membership wherein it first discovered the misconduct that brought about his suspension.
[7] MPD General Order 101.00, Part VI, A.

of the instant adverse action. The Board of the OEA has previously held that an employee's admission is sufficient to meet Agency's burden of proof.[8] Employee's admission of misconduct constituted cause without an evidentiary hearing.[9] Notwithstanding his disingenuous assertion that he was unaware of the reporting requirements of his position, I find that Employee did not credibly argue that Agency's action was not done in accordance with applicable laws or regulations. I conclude that the MPD has met its burden of proof for all of the charges levied against Employee in this matter.

When an Agency's charge is upheld, this Office has held that it will leave the Agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. *See Stokes*, *supra*; *Hutchinson*, *supra*; *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995). I conclude that given the totality of the circumstances as enunciated in the instant decision, Agency's action of suspending Employee for eight (8) days should be Upheld. [10]

ORDER

Based on the foregoing, it is ORDERED that Agency's action of suspending Employee for eight (8) days is hereby UPHELD.

FOR THE OFFICE:

/s/ Eric T. Robinson

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

[8] *Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987).
[9] *Employee v. MPD*, OEA Matter No. 1601-0036-17 (June 11, 2018).
[10] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin,* 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater,* 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence"). This finding notes, *inter alia*, that Employee made a haphazard attempt at an age discrimination claim. At the time that his misconduct was discovered by MPD's IAD, he was approximately 40 years old. Successful age discrimination claims typically involve persons at or near senior citizen status.