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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
CRAIG ROYAL) OEA Matter No. 1601-0003-10
Employee)
) Date of Issuance: March 28, 2013
v.)
) Lois Hochhauser, Esq.
DISTRICT OF COLUMBIA METROPOLITAN) Administrative Judge
POLICE DEPARTMENT)
Agency)
)

Craig Royal, Employee, *Pro Se*
Ronald Harris, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

Craig Royal, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on October 1, 2009, appealing the final decision of the District of Columbia Metropolitan Police Department (MPD), Agency herein, to suspend him for ten days without pay.

The matter was assigned to this Administrative Judge on November 16, 2011. At the prehearing conference, held on December 14, 2011, the parties agreed to avail themselves of the mediation services offered by this Office. The matter was referred to mediation, and the parties were directed to file status reports. On February 13, 2012, I was advised that mediation had not been successful, and I issued an Order the following day scheduling the hearing for March 20, 2012. After several delays[1] and continuances, the hearing took place on November 7, 2012. At the proceeding, the parties had full opportunity to, and did in fact, present testimonial and documentary evidence as well as argument in this matter.[2] The record closed on February 22, 2013, following the submission of closing briefs. Employee appeared *pro se*. Agency was represented by Ronald Harris, Esq..[3]

[1] Much of the delay resulted as a result of legal issues raised after Agency reduced the suspension to five days, and then moved to dismiss based on lack of jurisdiction. That issue is discussed more fully in this Initial Decision.
[2] Testimony was presented under oath. The transcript is cited as "Tr", followed by the page number. Exhibits are cited as "A" for Agency and "E" for Employee, followed by the exhibit number
[3] Until approximately December 2011, Teresa Quon Hyden, Esq., represented Agency.

JURISDICTION

For the reasons discussed in this Initial Decision, this Office has jurisdiction of this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUES

Did Agency meet its burden of proof in this matter? If so, is there a sufficient basis to change the penalty imposed by Agency?

FINDINGS OF FACT, POSITIONS OF THE PARTIES, ANALYSIS AND CONCLUSIONS

Procedural Background and Undisputed Facts:

The alleged misconduct took place on January 20, 2009, the date of the first inauguration of President Obama. On that day, Employee was serving as platoon leader in charge of Civil Disobedience Unit (CDU) 64, which was tasked with monitoring and facilitating pedestrian traffic using the Third Street Tunnel.

The Notice of Proposed Adverse Action issued on May 21, 2009 contained one charge with three specifications and proposed a 15 day suspension. In the Final Notice of Adverse Action, dated July 31, 2009, Agency eliminated the second specification and reduced the suspension to ten days:

> Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-12, which reads: "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 violation of any law of the United States or any law, municipal ordinance, or regulation of the District of Columbia.
>
> Specification No. 1: On January 20, 2009, at approximately 1320 hours while serving as the platoon leader for CDU 64, you rode your mountain bike to the vicinity of 1201 M Street, Southeast and confronted Lieutenant Ronald Netter. In an agitated and angry manner, you demanded to know why Lieutenant Netter had repeatedly tried to reach you via the Departmental radio. You then walked towards Lieutenant Netter pointing your finger at him in a definite display of aggression. The conduct took place in full view of subordinates.
>
> Specification No. 3: On January 20, 2009, you referred to your co-worker, Lieutenant Netter, as a "faggot." Your comments were made in the presence of subordinates, as well as citizens..

Employee disputed the charges. On July 31, 2009, Agency issued its Final Notice of Adverse Action imposing a ten day suspension without pay. Employee appealed the matter to the Chief of Police; and on September 1, 2009, MPD Chief Cathy Lanier denied the appeal.

Employee filed the petition with OEA on October 1, 2009. I was appointed to hear the matter in November 2011. At the December 14, 2011 prehearing conference, the parties agreed to mediation. When mediation did not prove successful, the matter was returned to me. I issued an Order on February 14, 2012, scheduling the hearing for March 20, 2012. On or about March 14, 2012, Agency filed a motion to dismiss the matter, arguing that OEA no longer had jurisdiction of the appeal because Agency reduced the suspension to five days and paid Employee for the five days. In support, it submitted a memorandum in which it directed that Employee be paid for five days of lost salary. Employee opposed the motion, arguing that he opposed Agency's proposal to reduce the suspension to five days. The hearing was delayed while the parties presented written and oral argument on this issue. Following oral argument on July 25, 2012, I issued an Order on July 27, 2012 in which I concluded that this Office retained jurisdiction. I noted that although this issue was one of first impression for OEA, the Merit Systems Protection Board (MSPB), the federal agency that this Office often looks to for guidance, has consistently concluded that where jurisdiction is initially established based on the number of days of a suspension, the unilateral reduction of the number of days of the suspension by an agency to a number that, if initially imposed, would not meet the jurisdictional threshold, does not divest MPSB of jurisdiction. In *Himmel, v. Department of Justice,* 6 MSPR 484 (June 2, 1981), after an employee filed an appeal with MSPB regarding a suspension, the agency reduced the number of days of a suspension to a number which would have deprived MSPB of jurisdiction if it had been initially proposed, and then moved to dismiss the matter for lack of jurisdiction. The presiding official agreed with agency and dismissed the petition for lack of jurisdiction. On appeal, the MSPB concluded that it retained jurisdiction, stating:

> The unilateral modification of the action by the agency after the appeal has been filed cannot divest the Board of jurisdiction… unless the appellant consents to such divestiture or unless the agency completely rescinds the action being appealed.

MPSB has consistently maintained this position. *See, e.g., Edwards v U.S. Postal Service,* 112 MSPR 196 (August 28, 2009). Federal courts of appeal have also utilized this reasoning in cases with other fact patterns. In *Gulf Refining Company v. Price,* 232 F.2d 24, 30 (5th Cir 1956), for example, the Court held that a "defendant could not divest the court of jurisdiction after the complaint had been filed simply by transferring part of the property at issue and thereby reducing the amount in controversy between the parties to less than the statutory minimum." Similarly, in *United States v. City of Chicago,* 549 F.2d 415, 424 (7th Cir 1977), the Seventh Circuit refused to dismiss a complaint based on the "lack of jurisdictional amount if the sum claimed by the plaintiff at the time he filed the complaint was in excess of the statutory minimum and was made in good faith." Based on this analysis, I determined this Office retained jurisdiction and proceeded to a hearing.

<u>Positions of Parties and Summary of Evidence</u>:

Agency's position is that Employee engaged in inappropriate conduct by using profanity and by engaging in an aggressive confrontation with Lieutenant Ronald Netter. Agency disciplined both employees.

Captain Regis Bryant, a captain for 12 years, testified that he was assigned to investigate the incident involving Employee and Lt. Netter, both of whom worked for him. He said that he has

investigated close to 100 matters involving lieutenants during his career. Based on his investigation, he concluded that both Employee and Lt. Netter had engaged in "conduct unbecoming." With regard to Employee, Capt. Bryant stated that the officers who were present told him that Employee had said "Fuck that little faggot," referring to Lt. Netter, and that the remark "was heard also by two elderly folks." (Tr, 17, 21). He said the investigation revealed that Employee had initiated the confrontation with Lt. Netter and that Employee appeared "agitated" to the witnesses. (Tr, 21). According to the witness. the incident was considered serious because it took place "in the public forum." (Tr, 22).

Sergeant David Robinson, who was a member of CDU 64 on January 20, 2009, testified that he heard Employee yelling while on the telephone. He said he heard Employee say something like "I can't stand that fucking faggot." (Tr, 51). Sgt. Robinson testified that two civilians, who were standing in front of him when Employee made that statement, appeared surprised by the statement. The witness stated that the noise level in the Third Street tunnel was not loud. (Tr, 54). He said he told Employee to "watch what he said" because he was concerned about the civilians standing there. (Tr, 52). He testified he saw Employee ride his bicycle out of the area, without saying anything to anyone. (Tr, 53).

Efrain Soto, Jr., also assigned to CDU 64 on January 20, 2009, testified that they were supposed to be on bicycles and scooters, but "there were just too many people" so they stayed at the one location under the Third Street Tunnel the entire day. (Tr, 62). He said that he, Sgt. Robinson, Officer Perry, other officers and civilians heard Employee on the telephone "getting upset" and telling the person he was speaking with on the telephone that "he was tired of this faggot." (Tr, 62-63). He testified that he had no doubt that Employee used the word "faggot." (Tr, 65). He said there were approximately 30 people within 100 feet of where he was standing, including civilians. (Tr, 68).

> It was a lot of them. It was everybody walking through the tunnel, that was cutting through. I just remember this older couple, it was actually a lot more. But I remember the face on two elderly people…they were in shock; and when they started to walk away, the lady was saying, "Is that a Washington, D.C. police officer?" (Tr, 64).

Officer Soto said that at first the officers, except for Sgt. Robinson, laughed when they heard Employee's statement. He testified Sgt. Robinson commented that he "couldn't believe" what Employee had said. (Tr, 69). Officer Soto added that when they heard the civilian's comment, they stopped laughing:

> That's what I remember; and then I stopped laughing because us officers we took it as, I mean, internal; but when I realized that…these people were actually, were reflecting, I was like, oh, it wasn't funny anymore after that. (Tr, 64).

The witness stated that those present commented that "something's going to happen" because Employee rode away quickly and was noticeably "upset." (Tr, 64).

Sgt. Ronny Arce, who has been with MPD since 1989, was working a traffic detail on January 20, 2009. He testified he was with Inspector Cleora Sharkey when another officer told Inspector

Sharkey that she was needed because two lieutenants were "getting ready to fight." (Tr, 86). He said he accompanied her to the section of the parking lot where he observed Lt. Netter and Employee engaged in a "verbal fight." He said their "body posture was consistent with being agitated, being angry" which he described as "people squaring off at each other." (Tr, 87). The witness said the two were standing within a foot of each other. (Tr, 88). According to Sgt. Arce, Employee and Lt. Netter "were arguing about being relieved or not relieved and what was or wasn't said on the radio." (Tr, 89). The witness said he thought some officers in the area watched the two argue. He stated that after Inspector Sharkey intervened, Employee left. (Tr, 91).

Lt. Teresa Brown, employed by MPD for almost 30 years, was in charge of a traffic unit on January 20, 2009. She stated that after working for about 20 hours, she and Lt. Netter had "released" their people and were waiting for relief. She said Sgt. Arce was also present. Lt. Brown said she was sitting in her private vehicle because they "didn't really have a break" since they had to be back in about an hour. (Tr, 99). She stated that Lt. Netter was standing at the window of her vehicle when Employee "came riding on his bicycle." She noted that Employee was wearing a "winter mask" so she could not identify him at first and asked Lt. Netter who told her it was Employee. She testified that Lt. Netter was walking away from her car when Employee "jumped off his bike and got into [Lt. Netter's] face." She said she heard Employee ask Lt. Netter if he had something to say to him, and heard Lt. Netter state that Employee was supposed to relieve them. Lt. Brown testified that Employee became "very aggressive." She said she heard Employee call Lt. Netter "a faggot and then he said he should punch [Lt. Netter] in the face." The witness said Lt. Netter responded that Employee should hit him and if he did, Lt. Netter would file a grievance. (Tr, 100, 104).

> So at that time, I got out of my vehicle, and [Employee] was so close to [Lt. Netter's] face like I thought [he] was going to hit him. So, I pushed my hand on [Employee] to back him up to say, [Employee] get out of his face. (Tr, 100-101).

Lt. Brown testified that Employee's "body movement, his mannerism, everything… made me think that they were going to fight." (Tr, 102). She stated that the two weren't face-to-face because Employee is much taller than Lt. Netter, but that Employee "was so close in [Lt. Netter's] face that he could have felt [Employee's] breath." (Tr, 107). She said the verbal exchange was "very loud" and she thought it could be heard outside of the enclosure where it took place. (Tr, 105). Lt. Brown said that even after Lt. Netter backed up Employee "kept coming towards him." (Tr, 108). She testified she told Employee to "back up" and "get out of [Lt. Netter's] face." (Tr, 115). In response to Employee's question as to what she would have done if a physical fight had taken place, Lt. Brown stated she would have "locked Employee up" because she considered him the aggressor. (Tr, 109).

She responded to Employee's question about why she intervened in the matter:

> Your bodily aggression was more than enough for me to get in the middle to say, Royal, get out of his face, you know, what you're doing. Even though I put my hand to stop you, you still kept coming like you [were] trying to get to him. (Tr, 114).

The witness said Employee was still "being aggressive" when Inspector Sharkey arrived. She said Inspector Sharkey exited her vehicle and spoke first to Lt. Netter and then to Employee. She

testified Employee was "so upset" that Inspector Sharkey could not calm him down, explaining that she used the word "upset" because "his body movement, his body language was still at that stage, aggressive as he was with [Lt. Netter]." (Tr, 101). She said Employee was disrespectful to Inspector Sharkey and would not let her finish a sentence when she tried to talk with him. (T, 115). She said Employee left shortly after Inspector Sharkey's arrival.

Lt. Brown stated that she omitted that she heard Employee call Lt. Netter "a faggot" from her written statement because she thought "the main topic was how aggressive [Employee] was and how he was trying to fight [Lt. Netter]." She said she considered the word "so vulgar" that she "didn't feel comfortable putting that in the statement." (Tr, 104). She stated no one had asked her about the use of the word "faggot". (Tr, 112-113).

Inspector Michael Eldridge stated he testified that he was assigned to the Disciplinary Review Branch in March 2010 and had no involvement with this action. He said that since his appointment, he had been involved in about 125 investigations involving lieutenants and that based on his experience and his review of the matter, the decision was proper. (Tr, 125-126). The witness stated that a study he conducted two years earlier concluded that MPD issued disciplinary actions for "the whole spectrum of demeaning language," not just profanity." (Tr, 130).

Employee's position is that he did the best he could under the difficult circumstances caused by the inauguration and the crowds. He denied calling Lt. Netter a "faggot" and contends that he did not engage in conduct that merited disciplinary action. (Tr, 7-8). He testified that he was in the Third Street tunnel when he received a telephone call from Officer Marcello Muzzatti who was monitoring the radio for him because he was using a loudspeaker to give directions. (Tr, 171). He said Officer Muzzatti told him that Lt. Netter was trying to reach Employee so he could relieve him, and that he told Officer Muzzatti that he was not Lt. Netter's relief. It was during this conversation, he testified, that he called Lt. Netter a "maggot." (Tr, 172). He did not recall if other officers were in the area when he spoke with Officer Muzzatti. (Tr, 173). He said he was not sure of his tone when he was talking with Officer Muzzatti:

> You're in the Third Street tunnel. If people heard it, I was using, I'm a loud talker anyway so I can't say but I was not yelling into the phone. I'm talking loud. (Tr, 174).

Employee stated he was "agitated" but not angry when he went to see Lt. Netter because "somebody [was] calling me on the radio telling me I'm not doing what I'm supposed to do." (Tr, 185). He said he got on his bicycle and rode to Lt. Netter because of "what was going on" with Lt. Netter. He testified that he and Lt. Netter "had a history," did not like each other and had "communication issues" so he thought that if he had contacted him by telephone they "would have had a quote-unquote pissing contest on the radio," and that it would be "more effective" to explain to Lt. Netter in person that he was not his relief. (Tr, 173-174, 189). Employee stated he felt it was better to have the discussion in person because he did not want civilians to hear two lieutenants "bickering." He said that he was "trying to keep this private." (Tr, 187).

Employee stated he spoke to Lt. Netter in "a very controlled and level voice' and that it was

Lt. Netter who raised his voice. (Tr, 190-191). Employee said he remained at "arms-length" when he spoke with Lt. Netter and that the conversation was at "an irritated level" since each was irritated at the other. . (Tr, 175). He denied that Lt. Brown put her hands on him and did not hear if she spoke to him:

> So, I wasn't listening to what [Lt. Brown] was saying. I was focusing on what me and Lieutenant Netter were arguing about. (Tr, 178).

Employee maintained that he used the word "maggot" and not "faggot." (Tr, 158). He noted that the investigation contained no reference to the allegation that he called Lt. Netter "faggot." He contended it was "initially brought up in the investigation through statements by Officer Soto and Sergeant Robinson at the request of Lieutenant Netter." He said the situation would have been different if the two civilians had heard him use an "essentially sensitively charged word like faggot" but that no disciplinary action was warranted for using the word "maggot." (Tr, 182, 194).

Employee contended that Officers Soto and Robinson had "negative feelings" about him and therefore their testimony should not be credited . (Tr, 159). He doubted Officer Soto's testimony about the reactions of the two civilians in the tunnel stating he had "every reason to doubt not only his accuracy but the reasons." (Tr, 179). He accused Officer Soto of lying under oath, stating that Officer Soto had "an ax to grind" with him." (Tr, 180). He said witnesses put his statements in quotes, and their statements were not consistent. He questioned why Agency did not call Lt. Netter as a witness even though Lt. Netter would have been a "star witness." (Tr, 160-161).

Employee asserted that the incident with Lt. Netter took place in an area that was not open to the public and that he could not control Lt. Netter's reactions.(Tr, 162). He denied engaging in aggressive or threatening conduct, stating:

> I was not happy with Lieutenant Netter at this time. I made no threats to Lieutenant Netter. I made no gestures towards Lieutenant Netter as if I was going to punch him. Everybody who has those perceptions of a fight were exactly that, their perceptions.
>
> How they came to their perceptions, I don't know other than I'm in Lieutenant Netter's face. That's the only thing that everybody was consistent.
>
> Nobody said I raised a fist. Nobody said I swung…In fact, the investigation shows that Lieutenant Netter was instigating the event and even though he was instigating the event, I still did not swing, did not punch, did not do anything whatsoever. (Tr, 162-163).

Employee asserted that he did not consider his conduct an "embarrassment to the Department" because it occurred in a secured area and the only people he saw were Lt. Brown and Lt. Netter. (Tr, 165-166).

Employee clarified why he stated that the reason he was not proud of the incident, was not because on his conduct, but rather because he was the subject of an investigation. (Tr, 7, 168). He said he was not happy that people misheard him and thought he used the word faggot. (Tr, 170).

In a written statement, Officer Muzzatti stated in pertinent part:

> As I remember the details for that day, Lt. Netter was putting your name out on the radio and making you look bad by slandering you during the incident which was occurring in the 2rd Street tunnel. I remember you mentioning to me that you were assigned to the detail in the tunnel. There have been incidents in which the police radios do not always transmit in the tunnel. When Lt. Netter continuously transmitted on the police radio accusing you of not monitoring your assignment duty and questioning your integrity, I felt it necessary to contact you via cell phone. Once you answered, I informed you the unnecessary transmissions on the radio. However, you informed me about the work that you were doing in the tunnel. During our conversation you stated, "He's getting on my nerves, he's like a maggot." At no time during our conversation did you say anything derogatory. (Ex E-1).

Analysis, Findings of Disputed Facts and Conclusions of Law

This Office's jurisdiction is conferred upon it by law. Pursuant to D.C. Code §1-606.3(a), its jurisdiction is limited to appeals involving performance ratings that result in removals, final agency decisions that result in removals, reductions in grade, suspensions of ten days or more, and reductions-in-force. OEA Rule 604.1, 46 D.C.Reg. 9299 (1999). Since October 21, 1998, this Office has consistently held that appeals involving suspensions of less than ten days are not within our jurisdiction. *See, e.g., Osekre v. Department of Human Services,* OEA Matter No. J-0080-00 (February 13, 2002). Agency again raised the issue of jurisdiction in its closing argument, contending that it had paid Employee for the five days it had reduced the suspension and that Employee had not returned the funds. Therefore, it contended, OEA no longer had jurisdiction. As discussed fully above, MSPB cases have uniformly held that jurisdiction is determined by the penalty imposed by the agency at the time the appeal was filed. *Hagan v. Department of the Army,* 99 M.S.P.R. 313 (2005). In *Harris v. Department of the Air Force,* 96 MSPR 193 (2004), MSPB determined that an agency's unilateral modification of its adverse action after an appeal was filed did not divest MSPB of jurisdiction unless the employee agreed or unless the agency rescinded the action being appealed. Unless Agency rescinds the entire action and Employee is returned to the *status quo ante* the matter will proceed. *Gillespie v. Dept. of Defense.* 90 M.S.P.R. 327, (2001). Employee objected to Agency's unilateral reduction of the suspension, noting that he had rejected this offer during mediation. He maintained that it would be unfair to allow Agency to impose the rejected offer after mediation failed in order to divest OEA of jurisdiction. In reaching her decision to proceed with the matter, the undersigned, as noted above, found substantial support in decisions by both MSPB and the courts. She also considered that allowing an agency to unilaterally impose an offer rejected at mediation, thereby divesting OEA of jurisdiction, could undermine the voluntary and good-faith requirements of mediation. Agency presented a memorandum in which it directed that Employee be paid for the five days of suspension that were being restored. The record did not establish that the payment went through, or if other benefits, such as leave and seniority, were restored. The undersigned does not know if Employee accepted the payment or tried to return it. She assumes, for the purpose of this discussion, that he received it and did not return it. Although Agency may argue that by failing to return the payment, Employee consented to the dismissal of the appeal, the

Employee was clear and consistent in his objection to Agency's unilateral decision to reduce the penalty and his desire to go forward with it.

This is a novel issue for this Office and could well have taken additional months to resolve. The Administrative Judge considered the delay and use of resources required to resolve this issue which could still result in this evidentiary hearing going forward. She also considered that although MSPB cases did not discuss whether an employee who had received the reduced suspension had kept the reimbursed funds, it was reasonable to assume the employee had, or MSPB would not have considered the matter a "reduced" suspension. MSPB clearly stated that the entire action had to be rescinded, not merely reduced, for jurisdiction to be defeated. In any event, the undersigned considered that the outcome of the evidentiary hearing would resolve this issue. This matter has proceeded as a ten day suspension. If Agency's decision is upheld, Agency may decide to impose the total time since by insisting on going forward, Employee accepted this risk. On the other hand, if Agency's decision is reversed, Employee will be entitled to all remaining back pay and benefits lost as a result of the suspension.

In this matter, where so many of the pertinent facts are disputed, credibility assessments were essential. The District of Columbia Court of Appeals emphasized the importance of the person hearing the case to make credibility determinations, since that individual sees the witness "first hand." *Stevens Chevrolet Inc. v. Commission on Human Rights*, 498 A.2d at 440-450 (D.C. 1985). In resolving issues of credibility, the Administrative Judge considered the demeanor and character of the witness, the inherent improbability of the witness's version, inconsistent statements of the witness and the witness's opportunity and capacity to observe the event or act at issue. *Hillen v. Department of the Army*, 35 M.S.P.R. 453 (1987). See also, *Universal Camera Corp. v. National Labor Relations Board*, 340 U.S. 474, 496 (1951). The Administrative Judge adhered to these considerations and relied on testimonial evidence and not on written statements because the testimony was presented under oath and she was able to assess demeanor and make credibility determinations during live testimony.[4] In *Gruspe v. Merit Systems Protection Bd.*, 2009 WL 1285163 (Fed. Cir. 2009) (quoting *Haebe v. Dep't of Justice*, 288 F.3d 1288, 1301 n. 30 (Fed. Cir. 2002):

In assessing witness credibility, a Board administrative judge must first identify the factual questions in dispute; second, summarize all of the evidence on each disputed question of fact; third, state which version he or she believes; and, fourth, explain in detail why the chosen version was more credible than the other version or versions of the event.

Employee's words and demeanor during his telephone conversation, and his demeanor during his exchange with Lt. Netter were in dispute. The Administrative Judge carefully assessed the demeanor of Agency's witnesses during their testimony. She found them to be credible. She considered Employee's statements that several of the witnesses had a bias against him, and allowed Employee to question those witnesses about the bias. While one witness stated that he had been unfairly disciplined as a result of Employee's directions, even that witness appeared unbiased and straightforward in his testimony. While there may have been strained relations between Employee

[4] The exception was the written statement from Officer Muzzatti which was considered by the undersigned in reaching her decision. (Ex E-1).

and some of the witnesses, she did not find these witnesses lacked credibility. With regard to Employee's challenge that some of the statements alleged by witnesses that Employee said were not the same, the Administrative Judge found them consistent and not contradictory, albeit not identical. Indeed, the fact that the statements were not identical, perhaps supports the view that they were not rehearsed or part of a plot to get Employee in trouble.

The undersigned is aware that someone who is the subject of an adverse action may be defensive and upset with individuals testifying against him, and she factored that into her assessment. She also considered that Employee appeared pro se, and gave him leeway in presenting his case. Finally, she considered that these events took place during a time that Employee was required to work long hours in a stressful and demanding environment. However, so were all MPD officers working on that date, including Lt. Netter and all but one of the witnesses who testified at the proceeding. The Administrative Judge carefully made these credibility determinations, and found Agency witnesses more credible than Employee on the disputed issues. Employee dismissed testimony from Agency witnesses as unworthy of belief because he had negative interactions with them. His testimony was inconsistent at times. He did not accept any responsibility for his conduct. When he stated that he was not proud of the matter, the Administrative Judge thought that perhaps he regretted some aspect of his conduct. He clarified that he meant he regretted only that he was falsely accused of the misconduct. Agency presented substantial and consistent evidence that Employee engaged in a loud and heated telephone conversation that heard by subordinates as well as members of the public. A careful review of Employee's testimony reveals that he did not completely dispute many of the facts presented by Agency witnesses or alleged in the charge. He did not recall if other officers or the civilians heard the conversation, and was unsure of his tone, admitting that he was agitated and was a "loud talker."

Employee is charged with 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." The evidence supports the conclusion that Employee engaged in a conversation on the telephone in which he was loud and agitated. She did not find Employee credible on this issue and did not find Officer Muzzatti's statement to be credible. His statements offered more conclusions than facts: characterizing Lt. Netter's transmissions as "unnecessary" and slanderous as slandering Employee, and asserting that Employee did not use "derogatory" language. The Administrative Judge concludes that the evidence supports the conclusion that Employee referred to Lt. Netter as a "faggot," although in this Administrative Judge's view, the result would be no different if he had referred to him as a "maggot." Either way, Employee used derogatory and demeaning language toward another lieutenant in a loud manner in the presence of peers, subordinates and the public. The evidence supports the conclusion that Employee's actions were detrimental to "good discipline" and "could adversely affect" the ability of Employee and MPD to perform effectively. It set a poor example for subordinates and was disturbing to the public, as evidenced by the reaction of the citizens who heard the comments.

With regard to the other specification, Agency presented substantial evidence that Employee rode his bike to the vicinity where Lt. Netter was located and engaged in a verbal confrontation with him. It presented credible evidence that Employee demonstrated a "definite display of aggression" and that the conduct took place in view of officers, peers and subordinates. Employee's statement that he thought it would be more effective to talk with Lt. Netter in person since they had such a poor

relationship, did not make sense. It appears more reasonable, as Agency contends, that he was upset and wanted to express his dissatisfaction in person. Employee testified that the location was secured and out of view of the public. (Tr, 165-166). He denied threatening Lt. Netter, and points out that no one accused him of raising a fist. (Tr, 162). He stated that his tone was at an "irritated level" because both he and Lt. Netter were irritated with each other. Agency's witnesses were more credible on these issues than Employee. Lt. Brown presented compelling and detailed testimony about the event, as summarized above. She testified that Employee's "bodily aggression was more than enough" for her to intervene and to tell Employee "to get out of [Lt. Netter's] face." She noted that despite her words and the placement of her hand on him to stop him, Employee "still kept coming." (Tr, 114). She described the exchange was "very loud" and thought it could be heard outside of the enclosure. (Tr, 105). Although Employee denied that Lt. Brown put her hands on him, he did not deny that she spoke with him during that time, but rather stated that he was not listening to what she was saying because he was so focused on his argument with Lt. Netter.(Tr, 178). Employee's testimony supports the conclusion that he was not in control and was unable to even hear the words of to a peer who was trying to diffuse the situation. He blames Lt. Netter for instigating the confrontation. That allegation is not supported by the evidence, but the Administrative Judge notes that Agency imposed discipline on Lt. Netter and is not contending that he was blameless.

Agency proved its case by a preponderance of evidence in accordance with OEA Rule 629.1, 46 D.C. Reg. 9317 (1999). See also 5 C.F.R. § 1201.56(c)(2). "Preponderance" is defined as "that degree of relevant evidence which the reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue".

The OEA Board has long recognized that the appropriateness of a penalty "involves not only an ascertainment of factual circumstances surrounding the violation but also the application of administrative judgment and discernment." *Beall Construction Company v. OSHRC*, 507 F.2d 1041 (8th Cir. 1974). This Office's function is not to usurp managerial responsibility in determining a penalty, but only to ensure that the penalty reflects a responsible balancing of relevant factors. *Lovato v. Department of the Air Force*, 48 M.S.P.R. 198 (1991). A penalty will not be reversed unless the Administrative Judge concludes that an agency has not considered relevant factors or that the imposed penalty constitutes an abuse of discretion. *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985). A penalty that comes "within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment" will not be disturbed. *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C.Reg. 2915 (1985). The Administrative Judge considered Employee's argument that the penalty should be reduced because one specification was eliminated. However, it was eliminated before the final Agency notice was issued. The penalty imposed in the final Agency notice comes within the permitted range for Employee. The Administrative Judge also considered the case cited by Employee in which the use of profanity was considered by Agency to warrant "corrective" and not "adverse" action. Each case must be determined on its individual facts. Agency presented substantial evidence that in this case. Employee's conduct merited the imposition of the suspension, and not corrective action.

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion. *Butler v. Department of Motor Vehicles,* OEA

Matter No. 1601-0199-09 (February 10, 2011). The evidence does not establish that the penalty constituted an abuse of discretion. The fact that Agency reduced the suspension to five days while the matter was pending in the expectation that the matter would then be dismissed, does not, under the circumstances presented, mean that its determination to impose a ten day suspension was wrong.

In sum, the Administrative Judge concludes that Agency met its burden of proof with regard to the adverse action, that it properly exercised its managerial discretion; and that the penalty was reasonable and not an error of judgment. I conclude that Agency's action should be upheld.

ORDER

It is hereby

ORDERED: This petition for appeal is denied.

FOR THE OFFICE: ______________________________

LOIS HOCHHAUSER, ESQ.
Administrative Judge