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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	OEA Matter No.: 1601-0036-17
MICHAEL LAWRENCE,	)	
Employee	)	
	)	Date of Issuance: June 11, 2018
v.	)	
	)	
D.C. METROPOLITAN POLICE DEPARTMENT,	)	Michelle R. Harris, Esq.
Agency	)	Administrative Judge
	)	
	)	
	)	
_____	)	
Michael Lawrence, Employee <i>Pro Se</i>		
Teresa Quon Hyden, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

On April 5, 2017, Michael Lawrence (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Metropolitan Police Department’s (“Agency” or “MPD”) decision to suspend him from service for fourteen (14) days.<sup>1</sup> The effective date of the suspension was March 23, 2017. On May 8, 2017, Agency filed its Answer to Employee’s Petition for Appeal. This matter was assigned to the undersigned Administrative Judge (“AJ”) on June 5, 2017. On June 20, 2017, I issued an Order Scheduling a Prehearing Conference for August 22, 2017. Prior to the Prehearing Conference, Agency filed a Motion to Dismiss for Lack of Jurisdiction on August 17, 2017.

On August 22, 2017, both parties were present for the Prehearing Conference. Agency asserted during the Prehearing Conference that OEA lacks jurisdiction over this matter because Employee’s suspension was not ten (10) days or more, since nine (9) of the 14-day were from a previous disciplinary action. Accordingly, Agency maintained that Employee was only subject to serve a five (5) day suspension with regard to the instant appeal, and as a result OEA does not have jurisdiction. Thereafter, I issued a Post Prehearing Conference Order requiring the parties to address whether OEA has jurisdiction over the instant appeal. Employee’s brief was due on or before September 12, 2017, and Agency’s was due on or before October 3, 2017. Both parties submitted

<sup>1</sup> The 14 day suspension was comprised of five (5) days for Conduct Unbecoming an Officer and included nine (9) days that were held in abeyance from a previous disciplinary action for Neglect of Duty.

their briefs in accordance with the prescribed deadlines. On January 31, 2018, I issued an Order Regarding Jurisdiction finding that Employee was subject to a suspension of 10 days or more and held that OEA had jurisdiction over this matter. In that Order, I scheduled a Prehearing Conference for February 20, 2018. Both parties appeared for the conference on February 20, 2018. During that conference, I issued an Order requiring both parties to submit their legal briefs with regard to the merits of this matter. Agency's brief was due on or before March 16, 2018, Employee's brief was due on or before April 13, 2018 and Agency had the option to submit a Sur-Repy brief on or before April 25, 2018. Agency submitted its brief on March 15, 2018, and renewed its Motion to Dismiss for jurisdiction. Employee submitted his brief on April 12, 2018. Agency did not submit a sur-reply brief. I have determined that an Evidentiary Hearing is not warranted in this matter. The record is now closed.

### ISSUE

1. Whether Agency had cause to take adverse action against Employee for Conduct Unbecoming an Officer; and
2. If so, whether the fourteen (14) day suspension was an appropriate penalty under the circumstances.

### JURISDICTION

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

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

D.C. Code § 1-606.03(a) sets forth the jurisdictional limits of OEA. It provides that:

“An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or *suspension for 10 days or more* (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.” (Emphasis Added)

OEA Rule 604, 59 DCR 2129 (March 16, 2012) further sets forth the jurisdictional limits of this Office. It provides that this Office has jurisdiction in matters involving District government employees appealing a final agency decision affecting:

- (a) A performance rating which results in removal of the employee;
- (b) An adverse action for cause which results in removal;
- (c) A reduction in grade;
- (d) A *suspension for ten (10) days or more*; (emphasis added)
- (e) A reduction-in-force; or
- (f) A placement on enforced leave for ten (10) days or more.

OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), states that “[t]he employee shall have the burden of proof as to issues of jurisdiction.” Further, pursuant to OEA Rule 628.1, 59 DCR 2129 (March 16, 2012), the burden of proof is by a preponderance of the evidence which is defined as “[t]hat 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.”

Employee is employed by Agency as Sergeant and has been a part of Agency for over twelve years.<sup>2</sup> In a Final Notice dated March 20, 2017, Employee received final notice of Agency’s decision to suspend him without pay for fourteen (14) days for Conduct Unbecoming an Officer pursuant to the following charges:

**Charge No. 1:** Violation of General Order 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 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.

**Specification 1:** In that on or about August 2, 2016, you were on duty and inside of the Second District Sergeant’s office when you referred to a superior officer, Captain Pamela Burkett-Jones as a “fat bitch” while in the presence of several supervisory officials.

**Specification 2:** In that on or about August 2, 2016, by your own admission, referred to Captain Burkett-Jones as a “fat pig” in the presence of several supervisory officials, while inside the Second District Sergeant’s office.

**Specification 3:** In that on or about August 2, 2016, you sent an unsolicited text photo of a “pig with lipstick” to several sergeants who were on duty. You sent this photo during the same time in which you referred to Captain Burkett-Jones as a fat pig in the presence of other supervisory officials. As such, your actions led the other supervisory officials to interpret this text phot as a depiction of Captain Burkett-Jones. Your actions and comments were derogatory, disrespectful and unbecoming of a supervisory official.

### Employee’s Position

Employee argues the penalty of suspension for his actions was “overly harsh.”<sup>3</sup> Employee also argues that he was not afforded the option to participate in Education Based Development in lieu of suspension, and as a result, the Agency violated the Collective Bargaining Agreement (“CBA”).<sup>4</sup> Employee admitted to the misconduct for which he was charged, but maintains that his penalty was unfair given the circumstances.

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<sup>2</sup> Employee Petition for Appeal (April 5, 2017).

<sup>3</sup> Employee’s Petition for Appeal (April 5, 2017).

<sup>4</sup> *Id.*

### Agency's Position

In the instant matter, Agency asserts that the adverse action against Employee should be upheld because he admitted to the misconduct. Agency cites that Employee acknowledged that he called "Captain Pamela Burkett-Jones a "fat pig" in the presence of several other sergeants and sent a photograph depicting a pick with lipstick from his private cell phone to several sergeants' private cell phones."<sup>5</sup> Agency cites that OEA has previously held that an "employee's admission is sufficient to meet Agency's burden of proof."<sup>6</sup> Agency also argues that because Employee has admitted to the wrongdoing, he is only challenging the appropriateness of the penalty, and as a result OEA cannot substitute its judgment for that of the Agency.<sup>7</sup>

### ANALYSIS

#### **Agency's Renewed Motion to Dismiss**

In its March 15, 2018 Brief, Agency renewed its Motion to Dismiss for lack of jurisdiction. Agency cited recent OEA decisions in support of its Motion that OEA lacks the jurisdiction over the instant matter. However, the undersigned finds that the matters cited by Agency in its brief are distinct from the instant matter.<sup>8</sup> Here, Employee was subject to a disciplinary action for Conduct Unbecoming an Officer that initially resulted in a ten-day suspension, with nine (9) days added from a previous suspension held in abeyance; but after an internal appeal, five (5) days were held in abeyance and Employee was assessed a five (5) day suspension for the charge of Conduct unbecoming an Officer. As a consequence of the assessment of an additional disciplinary action within the same year (12 months) of having had previous disciplinary action for Neglect of Duty, Employee was also required to serve nine (9) days which were held in abeyance, for a total of 14 days suspension.<sup>9</sup>

Agency argued that the instant matter involves two separate adverse actions that arose out of two different events, and as a result, Employee's suspensions (five-day and nine-day) are separate, and Employee cannot combine the two in order to meet the jurisdictional requirement to appeal this matter at OEA. The undersigned disagreed. I find that Agency, in its Final Agency Notice,<sup>10</sup> assessed a total of 14-days suspension, and as a result, OEA has jurisdiction over this matter. Specifically, the Final Agency Notice dated March 20, 2017, provides in relevant part, "*in recognition of your long service to the Department, five days of the ten day suspension in the current matter will be held in abeyance. However you must serve the nine days held in abeyance from your previous case for a total of 14 suspension days to be served.*"<sup>11</sup> (Emphasis added). Further, it should be noted that in its Answer, Agency indicated that Employee was appealing "his fourteen (14) day suspension."<sup>12</sup> Agency assessed this suspension in its final agency notice, and Employee served all fourteen (14) days that were administered in this final action. As a result, and for the reasons cited in

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<sup>5</sup> Agency's Brief at Page 6 (March 15, 2018).

<sup>6</sup> *Id.* Citing *Employee v Agency*, OEA Matter No. 1601-0047084, 34 D.C. Reg. 804, 806 (1987).

<sup>7</sup> *Id.* at Page 7 (March 15, 2018).

<sup>8</sup> Agency cited to *Stephen Sharp v MPD*, OEA Matter No. 1601-0047-17 (November 29, 2017) and *Kristopher Smith v MPD* OEA Matter No. 1601-0051-17 (February 13, 2018). These matters involved issues of suspension days held in abeyance, but both Employees also had other related pending appeals before OEA.

<sup>9</sup> Agency's Brief on Jurisdiction (October 3, 2017).

<sup>10</sup> *Id.* See. Final Agency Notice dated March 20, 2017.

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

<sup>12</sup> Agency Answer at Page 1 (May 8, 2017).

the January 31, 2018 Order Regarding Jurisdiction,<sup>13</sup> the undersigned finds that OEA has jurisdiction over the instant matter. Wherefore, Agency's Motion to Dismiss is hereby **DENIED**.

### ***Whether Agency had cause for Adverse Action***

In the instant matter, Employee admits to his wrongdoing with regard to the charge of Conduct Unbecoming an Officer, but argues that the penalty was "overly harsh due to the fact that others have received substantially lesser penalties for similar conduct."<sup>14</sup> Agency argues that the penalty was warranted given Employee's conduct and that its adverse action should be upheld. In a response letter dated December 14, 2016, to appeal the Notice of Proposed Action in the instant matter, Employee noted that he should've dealt with his "frustration with the Captain" without the verbal outburst and also should not have sent the text that his "fellow sergeants understandably related to my reference to the captain as a "fat pig".<sup>15</sup> Further, Employee stated that "I admit to using the above expression 'fat pig' and sending the text picture, but I respectfully ask you to reduce the penalty to a PD 750..."<sup>16</sup> Additionally, following Agency's notice of Final Adverse Action dated February 14, 2017, Employee submitted another appeal letter on February 28, 2017, indicating that he should have been mindful that his "exclamation that the captain is a fat pig followed a short time later by the photograph could be considered derogatory, disrespectful and unbecoming of a supervisory official."<sup>17</sup> In this same letter, Employee went further to cite that "I admit to Charge No.1 Specification 3 and ask only that the penalty is mitigated to an appropriate degree because the link to the captain was inadvertent even though stupid and thoughtless."<sup>18</sup>

During the course of the Agency's investigation of this matter, several witnesses indicated that they had either heard the remark or had received the text from Employee during this August 2016 incident.<sup>19</sup> In a second appeal in February 2017, Employee argued that Agency did not meet its burden. However, upon review of the record and of Employee's previous admissions of misconduct, the undersigned finds this claim to be unsupported by the record. This Office has consistently held that an employee's admission of misconduct is sufficient for Agency to meet its burden of proof.<sup>20</sup> Following the appeals with the Chief of Police, in a Final Notice dated March 20, 2017, Agency assessed Employee with a fourteen (14) day suspension. As a result, the undersigned finds that Agency met its burden and had cause to charge Employee with Conduct Unbecoming an Officer.

### **Whether the Penalty was Appropriate**

Based on the aforementioned findings, I find that Agency's action was taken for cause, and as such Agency can rely on those charges in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency's penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d. 1006 (D.C. 1985).<sup>21</sup> According to the Court in *Stokes*, OEA must determine

<sup>13</sup> See Order Regarding Jurisdiction dated January 31, 2018.

<sup>14</sup> Employee's Petition for Appeal (April 5, 2017).

<sup>15</sup> Employee's Petition for Appeal at Appeal Letter dated December 14, 2016 (April 5, 2017).

<sup>16</sup> *Id.*

<sup>17</sup> Employee's Petition for Appeal at Appeal Letter dated February 28, 2017 (April 5, 2017).

<sup>18</sup> *Id.*

<sup>19</sup> Agency's Answer at Tab 1 (May 8, 2017).

<sup>20</sup> *Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987).

<sup>21</sup> *Shairrmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). See also *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-

whether the penalty was in the range allowed by law, regulation and any applicable Table of Penalties as prescribed in the DPM; whether the penalty is based on a consideration of relevant factors and whether there is a clear error of judgment by agency. Further, “the primary responsibility for managing and disciplining Agency’s work force is a matter entrusted to the Agency, not this Office.”<sup>22</sup> Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that “managerial discretion has been legitimately invoked and properly exercise.”<sup>23</sup> Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to suspend Employee from service.<sup>24</sup> Further, MPD General Order 120.21, Attachment A -Table of Offenses and Penalties, cites the penalty for a first offense for Conduct Unbecoming ranges from Suspension for three (3) days to Removal.<sup>25</sup> As a result, I find that Employee’s suspension of fourteen (14) days is within the range pursuant to the MPD General Order.

Accordingly, I find that Agency properly exercised its discretion, and its chosen penalty of fourteen (14) day suspension is reasonable under the circumstances, and not a clear error of judgment. Moreover, I find that Agency had appropriate and sufficient cause to suspend Employee from service. As a result, I conclude that Agency’s action should be upheld.

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02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

<sup>22</sup> See *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

<sup>23</sup> *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

<sup>24</sup> *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

- 1) the nature and seriousness of the offense, and its relation to the employee’s duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- 2) the employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- 3) the employee’s past disciplinary record;
- 4) the employee’s past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- 5) the effect of the offense upon the employee’s ability to perform at a satisfactory level and its effect upon supervisors’ confidence in employee’s ability to perform assigned duties;
- 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- 7) consistency of the penalty with any applicable agency table of penalties;
- 8) the notoriety of the offense or its impact upon the reputation of the agency;
- 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- 10) potential for the employee’s rehabilitation;
- 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

<sup>25</sup> MPD General Order 120.21, Table of Offenses and Penalties Attachment A.

**ORDER**

Based on the foregoing, it is **ORDERED** that the Agency's action of suspending Employee from service for fourteen (14) days is here by **UPHELD**.

FOR THE OFFICE:

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Michelle R. Harris, Esq.  
Administrative Judge