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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
MICHAEL ROBERTS,	)	
Employee	)	OEA Matter No. 1601-0093-12
	)	
v.	)	Date of Issuance: April 18, 2014
	)	
DISTRICT OF COLUMBIA	)	MONICA DOHNJI, Esq.
METROPOLITAN POLICE DEPARTMENT,	)	Administrative Judge
Agency	)	
_____	)	
Michael Roberts, Employee <i>Pro Se</i>	)	
Brenda Wilmore, Esq., Agency Representative	)	

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

On May 1, 2012, Michael Roberts (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Metropolitan Police Department’s (“MPD” or “Agency”) decision to suspend him for ten (10) days, with five (5) days held in abeyance. Employee was suspended for violating General Order (“GO”) 120.21, Attachment A, Part A-5: Willfully disobeying orders, or insubordination; and GO Series 120.21, Attachment A, Part A-12: 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 of any law, municipal ordinance, or regulation of the District of Columbia. On June 11, 2012, Agency filed its Answer to Employee’s Petition for Appeal.

Following a failed mediation attempt, this matter was assigned to the undersigned Administrative Judge (“AJ”) in September of 2013. Thereafter, on September 30, 2013, I issued an Order Convening a Status Conference for October 15, 2013. Both parties were in attendance. Subsequently, on October 15, 2013, the undersigned issued an Order scheduling an Evidentiary Hearing for January 15, 2014. Both parties were present for the Evidentiary Hearing. On January 22, 2014, Agency submitted a Motion for Summary Disposition, noting that OEA does not have jurisdiction in this matter. Employee filed a reply to Agency’s Motion for Summary Disposition on January 30, 2014. Thereafter, I issued an Order dated February 25, 2014, notifying the parties that the transcript from the Evidentiary Hearing was available for pickup. The Order also provided the parties with a schedule for submitting their written closing arguments. Both parties have submitted their written closing arguments. 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 Employee's actions constituted cause for adverse action; and
- 2) If so, whether the penalty of suspension is within the range allowed by law, rules, or regulations.

### BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to 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 628.2 *id.* states:

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 FACTS, ANALYSIS AND CONCLUSION

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issue of whether Agency's action of suspending Employee was in accordance with applicable law, rules, or regulations. During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses, as well as Employee. The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's appeal process with this Office.

#### *Jurisdiction*

In its Motion for Summary Disposition, Agency asserts that Employee cannot meet his jurisdictional burden because he only received a five (5) days suspension and therefore, OEA does not have jurisdiction over this matter. Employee, on the other hand, noted in his response that he also served the five (5) days held in abeyance, for a total of ten (10) days for this cause of action. I disagree with Agency's assertion, and I find that this Office has jurisdiction over this matter. Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

- (a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . . , an adverse action for cause that results in removal, reduction in grade, placement on

enforced leave, *or suspension for 10 days or more . . .*, or a reduction in force [RIF]. . . . (Emphasis added).

Here, the April 2, 2012, letter from Agency stated that Employee was suspended for ten (10) days with five (5) days held in abeyance.<sup>1</sup> Although Employee may have initially served only a five (5) day suspension, I conclude that as long as there is a possibility, however slight that Employee may at some point serve the remaining five (5) days held in abeyance, for a total of ten (10) days for this same cause of action, this Office has jurisdiction over this matter. Accordingly, I find that OEA has jurisdiction over this matter and Agency's Motion for Summary Disposition is **DENIED**.

### SUMMARY OF MATERIAL TESTIMONY

#### *Employee's Case in Chief*

##### **1. Michael Roberts (Transcript pgs. 15-53).**

Michael Roberts ("Employee") is an Officer with Agency. Employee was suspended for ten (10) days, with five (5) days held in abeyance following an August 15, 2011, incident. With regards to charge 1, Employee submitted a recording to the night in question. Employee testified that, Agency purposely omitted the recording from the investigation by Lieutenant Pearce. Employee explained that, track 2, at 17 minutes 23-40 seconds; Sergeant Maradiaga came on the air and made a second order for all available units to respond for traffic control. (Tr. pg. 15). At this point, Employee and his partner, Officer Randy Rogers ("Ofc. Rogers") redirected from the command post and responded to 16<sup>th</sup> and Ogden Street to stop all traffic coming off 16<sup>th</sup> Street and attempting to travel southbound in the 1500 block and Ogden Street. Employee attested that the second part of Sergeant Maradiaga's directive was to respond for a traffic post, and that Sergeant Maradiaga never requested that they receive a specific traffic post. Employee further explained that the intersection of 16<sup>th</sup> and Ogden Street needed traffic control, as vehicles were coming off 16<sup>th</sup> Street and making right and left turns into Ogden Street, so they blocked the intersection and redirected all the traffic out of the block. Employee and Ofc. Rogers held that position until the barricade ended. Employee maintains that this recording was left out of the investigation that he submitted to the department's disciplinary review board. Employee testified that they were not at 16<sup>th</sup> and Oak Street.

Employee also submitted Track 2 at 18 minutes, 45 seconds, to 19 minutes, 16 seconds. Employee stated that he advised the dispatcher and all officials of his exact location for the traffic control. (Tr. pgs. 17-18). Employee testified that there was no other transmission that came across when Employee came on air. His transmission was clear and concise as to where he was, and the dispatcher repeated it for the record. (Tr. pg. 18). Employee maintains that all officials that were monitoring the radio would have heard him notify the dispatcher of his location. He further maintains that, once he came on air and noted his location, if any official had any questions as to where Employee was located, they could have notified the dispatcher who keeps an electronic query of where all officers are located. (Tr. pg. 18). Employee explained that Sergeant Maradiaga never made a request for Employee to meet him at 1515 Ogden Street to receive a traffic post. He noted that he responded to Sergeant Maradiaga's directive when he came across the radio and notified dispatch and officials of his location. There was no post assignment given, and he took the assignment that Sergeant Maradiaga voiced across the radio for traffic control. When he responded to the scene, the traffic post was not covered and he covered the traffic post. According to Employee, he did not report to Sergeant

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<sup>1</sup> Agency's Answer at TAB 6 (June 11, 2012).

<sup>2</sup> Although Agency had the burden of proof in this matter, Agency's witnesses were unavailable at the start of the Evidentiary Hearing and as such, the parties agreed to have Employee present his case first, while waiting on Agency's witnesses.

Maradiaga specifically because there was no need for him to do so. Instead, they communicated via police channels and this provided Sergeant Maradiaga with notification, as he was monitoring the 3D air at the time. (Tr. pgs. 42-43).

Employee also provided the map and pictures depicting the exact location where his scout car was located, relative to the barricade. Employee noted that, Lieutenant Pearce, who was the officer in charge, stated that it was a necessary traffic post. Employee however testified that, Lieutenant Pearce fabricated facts when she stated that Employee was several blocks north and one block west. (Tr. pg. 19). Employee testified that, 1500 block of Ogden is about half ( $\frac{1}{2}$ ) a block from where the barricade was and that he was on a necessary traffic post to keep all traffic coming off 16<sup>th</sup> Street from turning onto Ogden Street. (Tr. pg. 20). Employee testified that his scout car was blocking and facing northbound on 16<sup>th</sup> Street in the crosswalk, blocking all traffic from coming up and turning onto Ogden Street. Employee explained that he was only seven (7) yards from 16<sup>th</sup> Street to where Ogden Street begins. Employee maintains that Lieutenant Pearce's statement that Employee was one block west was incorrect because seven (7) yards is not a city block. Employee noted that the pictures offered into evidence showing blocks are to contradict what Lieutenant Pearce had in her investigation. Employee explained that, the pictures depict that the 1500 block starts near 16<sup>th</sup> Street and goes up to where the barricade was, so the blocks would be 1500 block, and 1600 block. He was not several blocks north, nor was he one full block west and his traffic post was not irrelevant. (Tr. pg. 28).

According to Employee, Charge 2 in this matter does not support the facts alleged by Agency. Employee explained that he did not adversely affect Agency's ability to perform effectively or violate any law. Employee stated that Track 1 at 25 minutes, 3-20 seconds is a transmission of Captain Mongal ordering all units on the barricade to switch their radio to MPD-C1, so he switched his car radio over to MPD-C1 as per Captain Mongal's directives. Employee stated that they were well passed their tour of duty and both their handheld radio batteries were no longer functional at this point. (Tr. pgs. 30-31). They had been held over as their regular tour of duty was evening shift, and by now, they were already into night tour and the handheld radios were no longer working. Employee noted that the handheld radio batteries are usually good for eight (8) hours of use. (Tr. pg. 31). Although the handheld radios were not functional, the car radio was working fine, and he communicated via MPD-C1 during the time he was held over. (Tr. pg. 50). According to Employee, despite Captain Mongal's directive that all units on the barricade switch to MPD-C1, neither the dispatcher nor Sergeant Maradiaga radioed relief for all operating units on that channel. (Tr. pgs. 31-32). Employee noted that he was monitoring his radio and relief was never called across the MPD-C1 as ordered by Captain Mongal to go to as the alternative channel (Tr. pg. 32). He stayed over until the incident was relieved, then he responded to the officer in charge, Sergeant Chumbley, who advised him that the barricade was over for him and asked that they respond to Cruiser 300 (Sergeant Maradiaga was Cruiser 300).

Employee also testified that, Officer Matory stated during traffic detail that his handheld radio was no longer functional and he was unable to hear any transmission and that if Employee stated their duty assignments, he would not hear their transmission. Employee averred that, based on Officer Matory's own admission, about his handheld radio not functioning, if Employee is charged with not monitoring his radio, Officer Matory would have to be charged too. (Tr. pgs. 32-33). Employee further noted that, Sergeant Maradiaga would have also been in violation of failure to monitor his radio, as Employee clearly stated his location which the dispatcher repeated. (Tr. pg. 34).

Employee stated that he stayed over his tour of duty for seven (7) hours because they were ordered to be held over by Cruiser 300 as a result of the barricade, and no evening units were relieved. (Tr. pg. 44). Employee and his partner were not relieved after an order was given due to Sergeant Maradiaga's failure to

know where his officers were before he went home that night. (Tr. pg. 45). Additionally, Sergeant Maradiaga never called to relieve them on MPD-C1, so there was no way for Employee to know that they had been relieved. (Tr. pg. 46). Employee testified that although he was close to the incident at 1515 Ogden Street, he did not notice that other units had gone from the scene because the vehicles had not left and the barricade situation went on until 4:00 am in the morning. (Tr. pgs. 46-47). He stayed on post until he was properly relieved or directed to respond off post by an official. He left his post when the barricade was broken down, other officers were leaving the scene, and they were taking crime scene tapes down. He then reported to the building where he met and asked Sergeant Chumbley if he and his partner could work double shift after the barricade ended at 4:00 am since there was just two (2) hours left of the midnight tour. So instead of submitting paperwork for additional compensation, they could just make it his regular tour of duty and he was told by Sergeant Chumbley to talk to Cruiser 300. (Tr. pgs. 48, & 51).

Employee attested that he did not receive a text message about officers being relieved and the charge related to the text was dismissed by the police chief as they were found to be inaccurate. (Tr. pgs. 49, & 91-91). He did not call to see whether he could have been relieved because it was not proper protocol. Employee stated that during barricades, it is radio silence for officer safety and you don't get to ask questions about whether you can go home. (Tr. pg. 50). Employee noted that he was never compensated for being left on the crime scene for several hours past his tour of duty. He relayed that he basically volunteered his services and received discipline on top of that. He explained that he submitted paperwork to receive additional compensation to Sergeant Maradiaga, who gave the paperwork to Lieutenant Pearce, who did not submit the paperwork, but instead, included it in the investigation. (Tr. pg. 35).

## **2. Randy Rogers (Transcript pgs. 53 -63).**

Randy Rogers ("Ofc. Rogers") is an officer with Agency, and was Employee's partner on August 15, 2011, when the instant incident occurred and he is aware of the charges brought against Employee with regards to this incident. (Tr. pg. 56). Ofc. Rogers testified that the vehicle they drove was positioned at 16<sup>th</sup> and Ogden to block vehicular and pedestrian traffic from getting off of 16<sup>th</sup> Street, onto Ogden Street, going towards the direction of the barricade. They were at this location per Sergeant Maradiaga's directives for traffic control, and they needed to keep the location clear for emergency response and other departmental personnel. (Tr. pg. 54). Ofc. Rogers explained that the sign on the street stated 1500 Ogden Street, and they were not several blocks north from 1515 Ogden Street or where they one block west of 1515 Ogden Street as stated in the investigation. Ofc. Rogers noted that Sergeant Maradiaga's first transmission stated that they were to report to receive a traffic post and because of all the traffic that kept flowing through there, Sergeant Maradiaga came across the air a second time and asked for available units for traffic control. That's when Ofc. Rogers and Employee got diverted and blocked 16<sup>th</sup> and Ogden Street because they would have had to go up the 1500 block of Ogden Street, the same area that Sergeant Maradiaga needed blocked off, and then come right back to where they eventually ended up blocking traffic to keep cars and pedestrian traffic from coming into that block. (Tr. pg. 57).

Ofc. Rogers stated that although they never responded to Sergeant Maradiaga directly, Employee stated their location and if there was any problem with their location, or if Sergeant Maradiaga was monitoring, he would have probably come over the air and told them or redirect them. (Tr. pgs. 58-59). They were never at 16<sup>th</sup> and Oak Street, N.W., and there was never a direct traffic post assignment given by Sergeant Maradiaga. Ofc. Rogers testified that they ended at 16<sup>th</sup> and Ogden Street because it was the route to, and around the corner of 1515 Ogden Street. (Tr. pg. 57). Ofc. Rogers explained that if Sergeant Maradiaga had assigned another officer to that post, Employee and Ofc. Rogers would have had to move because Sergeant Maradiaga would have already directed somebody there. (Tr. pg. 58).

With reference to the second charge, Ofc. Rogers testified that, the other units were directly on the barricade scene while Employee and Ofc. Rogers were in the perimeter area, blocking traffic and Captain Mongal had advised all the units to switch to MPD-C1, which they did until their handheld radios ran out and they were past their tour of duty. According to Ofc. Rogers, although he was aware that other officers at the barricade were relieved and only the two (2) of them were still left, he stated that, that doesn't mean that they were relieved since not everyone is relieved at the same time. They were relieved at different times. Ofc. Rogers stated that he gets relieved when someone would come and state that they are relieved or Sergeant Maradiaga would have come over the air and told him that he was being relieved, until then, he monitored the channel and was not allowed to go anywhere. (Tr. pgs. 60-61). Ofc. Rogers testified that, since him and Employee were about an hour away from a whole other tour of duty, they requested from Sergeant Chumbley to work a double shift because when the barricade was over, Sergeant Chumbley was one of the first officials they saw. (Tr. pg. 61).

### **Agency's Case in Chief**

#### **1. Deborah Pearce (Transcript pgs. 65-77).**

Deborah Pearce ("Lieutenant Pearce") is a lieutenant at the third (3<sup>rd</sup>) district of Agency, and is currently assigned to Patrol PSA 304. She worked at the same place on August 15, 2011. Lieutenant Pearce testified that she was originally assigned to investigate Sergeant Maradiaga, and through the course of the investigation, Employee and Ofc. Rogers ended up being the target of her investigation. (Tr. pg. 66). As a result of her investigation, she recommended adverse action for Employee, Ofc. Rogers and Sergeant Maradiaga. She investigated the circumstances surrounding the charges and specifications against Employee. Lieutenant Pearce explained that when the barricade incident occurred, Sergeant Maradiaga came across the air stating that a barricade had been established, and noted in his voice recording that he needed two (2) or three (3) units to meet him at 1515 Ogden Street, N.W. Some officers responded to this directive, but Employee was not one of them according to Sergeant Maradiaga's statement. Employee did not respond to Sergeant Maradiaga's radio or to 1515 Ogden Street. Employee instead responded to a self-assigned traffic post at 16<sup>th</sup> and Ogden Street, which was not the assignment per Sergeant Maradiaga. (Tr. pgs. 67-68).

Lieutenant Pearce testified that she did not recommend the charge of conduct unbecoming an officer against Employee. (Tr. pg. 70). However, she recalls that, during the investigation, Employee failed to realize that other units had been relieved. Lieutenant Pearce also testified that during the investigation, both Employee and Ofc. Rogers stated that during the barricade, they switched over to the SOD MPD Attack channel that the ERT units were working off of. She stated that it came across the main channel that all units assigned to the barricade should switch over to MPD-C1 and she believes it occurred during the August 15, 2011, incident. (Tr. pgs. 70-71). According to Lieutenant Pearce, Employee and Ofc. Rogers stated on their statement that they never heard anything with regards to relief because they were monitoring MPD-C1 channel and not the third (3<sup>rd</sup>) district radio channel. Lieutenant Pearce noted that this was problematic in her investigation because, Employee and Ofc. Rogers had three (3) radios in their patrol car-both their personal radios and the car radio. (Tr. pgs. 71-72). She explained that normal practice for officers is to pay attention to everything that's going on in and around the District also. So usually, the common practice is that one of the radios is still monitoring the third (3<sup>rd</sup>) district radio zone, and they had plenty of opportunities to monitor the third (3<sup>rd</sup>) district zone or the third (3<sup>rd</sup>) district channel on their personal radios after they switched the car radio to monitor MPD-C1. (Tr. pgs. 71-72). Had they been monitoring the radios, they would have been aware that other units had been relieved with respect to the barricade.

Lieutenant Pearce further testified that she uncovered evidence from another one of Employee's co-worker who had texted-paged Employee and Ofc. Rogers, so they were in communication with another co-worker – Ofc. Wong. They had back and forth text-page conversations with other officers who knew that some of their evening counterparts had been relieved. Although unsure of the time frame of the text-page, Employee and Ofc. Rogers had knowledge and that's what she based her investigation on. (Tr. pgs. 72-73). Lieutenant Pearce stated that it does not appear that Employee gave a reason as to why he did not know that others had been relieved. However, she later testified that Employee and Ofc. Rogers stated that they didn't know that others had been relieved because they were monitoring MPD-C1 and they had no knowledge that others had been relieved. Lieutenant Pearce stated that she proved this to be false from the text-page from Ofc. Wong that Employee and Ofc. Rogers knew that their evening co-workers were relieved by 00:30 hours (Tr. pg. 74).

Lieutenant Pearce also attested that the area of 16<sup>th</sup> Street has multiple signage and it is a very long block from 1515 Ogden Street. Lieutenant Pearce noted that she is unsure as to what point 1515 Ogden Street turns into 16<sup>th</sup> and Ogden Street. (Tr. pg. 76). Lieutenant Pearce stated that Ogden Street starts at 1500 block. She admitted that her statement that it is not a correct statement that it is several blocks north. From looking at the map, it is just a very elongated block. Accordingly, she further stated that she is not quite sure why she put that in her investigation. She explained that it was a mistake that she made. (Tr. pg. 76).

## **2. George Maradiaga (Transcript pgs. 78-82).**

George Maradiaga ("Sergeant Maradiaga") works for Agency. He recalls the August 15, 2011 incident involving Employee. He however testified that he does not recall his call assignment, but he was a Sergeant in that substation and he received a call for that assignment. He stated that he requested for all available units to respond to his location to be given assignments for traffic, and units responded to his directives. (Tr. pg. 79). Sergeant Maradiaga stated that he does not recall if Employee reported on his directive. At the time of the incident, he did not know where Employee went, but he later found out where Employee was located. (Tr. pg. 80). Sergeant Maradiaga noted that he does not recall giving Employee orders to be at his location at that time. He further stated that he participated in alerting officers in the evening that they were no longer needed and that they could be relieved from their assignments. Sergeant Maradiaga does not recall at what time the officers were relieved. (Tr. pg. 80). He testified that, when he voiced his directive over the air that officers could be relieved, he did it twice, and there was no response. (Tr. pg. 81). He voiced his relief over the main channel, and he does not remember if units were ordered to go to MPD-C1 following the barricade.

## **3. Michael Eldridge (Transcript pgs. 82-89).**

Michael Eldridge ("Inspector Eldridge") is an Inspector with Agency. His duty assignment is the disciplinary review branch. He was involved in the investigation and proposed charges in this matter. He proposed two (2) charges in reference to the investigation. (Tr. pg. 83). He based the charges on the evidence in the investigative report. Employee received a ten (10) days suspension with five (5) days held in abeyance for both charges. (Tr. pg. 85). The penalty is within the Table of Penalties and it is consistent with the charges imposed against other members for similar or like incidents of misconduct. Inspector Eldridge attested that, the expectation is that, if a member is found to do something wrong, they are disciplined for it. (Tr. pg. 87). All cases and investigation are based upon a preponderance of evidence. If there is sufficient evidence to pursue a cause, all members will be held responsible. Inspector Eldridge stated that, if during a misconduct investigation and through that investigation it is determined that other members were involved in

misconduct; the department's policy is that, it will be addressed within the investigation or separated out, depending upon the nature and investigated within a separate investigation.

### Analysis

On August 15, 2012, there was a barricade incident at 1515 Ogden Street, Northwest and Sergeant Maradiaga was the check-off official for the Third District, assigned to this incident. Sergeant Maradiaga made two (2) transmissions over the air requesting for more units to help with the incident. Employee and his partner in response to Sergeant Maradiaga's request, setup a traffic post at 16<sup>th</sup> and Ogden Street. Employee then notified the dispatcher of his location and the dispatcher repeated the transmission on air. Five (5) other officers reported to Sergeant Maradiaga's location in response to his request for more units, and these officers were all assigned specific traffic posts by Sergeant Maradiaga. The officers were notified by Sergeant Maradiaga over the air that all upper end units were being held over because of the barricade incident at 1515 Ogden Street. All units were advised by the Watch Commander, Captain Mongal to switch and monitor MPD-C1 for the incident at 1515 Ogden Street. Around 0030 hour, Sergeant Maradiaga voiced relief for all upper end units not on assignment over the third (3<sup>rd</sup>) district main channel. However, because Employee's radio was switched to MPD-C1, he did not get the transmission. Employee and his partner remained at 16<sup>th</sup> and Ogden Street until around 0400 hours, when they saw officers in the distance taking down crime scene tapes. All the other officers stated that they did not see Employee and his partner at the barricade incident. Following an investigation into the August 15, 2011, incident at 1515 Ogden Street, Agency issued a Notice of Proposed Adverse Action to Employee on December 12, 2011. Employee was charged with the following causes of actions:<sup>3</sup>

**Charge No. 1:** Violation of General Order 120.21, Attachment A, Part A-5 which states, "Willfully disobeying orders, or insubordination."

**Specification No. 1:** In that, on August 15, 2011, you failed to obey Sergeant Maradiaga's directive to meet him at 1515 Ogden Street, Northwest, to receive a traffic post assignment. Rather, you self-assigned yourself to an irrelevant post without notifying any official.

**Charge No. 2:** Violation of General Order Series 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 violation of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia."

**Specification No. 1:** In that, on August 15, 2011, after self-assigning yourself at a traffic post in reference to an incident at 1515 Ogden Street, Northwest, you failed to monitor the situation and police activity at the location, as well as your police radio. Therefore, you failed to realize that all evening units had been relieved from the incident by 0030 hours on August 16, 2011. This caused you to be held over several hours.

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<sup>3</sup> Agency's Answer, *supra*, at Tab 2.

Employee appealed the Notice of Proposed Adverse action on January 4, 2012, to Agency's Human Resource Management Division.<sup>4</sup> On March 1, 2012, Agency issued a Final Notice of Adverse Action, suspending Employee for twenty (20) days, with five (5) days held in abeyance for twelve (12) months.<sup>5</sup> Thereafter, on March 12, 2012, Employee appealed the Final Notice of Adverse Action to the Chief of Police.<sup>6</sup> On April 2, 2012, the Chief of Police responded to Employee's appeal, reducing his suspension to ten (10) days suspension, with five (5) days held in abeyance.<sup>7</sup>

*1) Whether Employee's action constituted cause for suspension*

According to the record, Agency's decision to suspend Employee was based upon these enumerated causes: 1) General Order ("GO") 120.21, Attachment A, Part A-5 which states willfully disobeying orders, or insubordination; and 2) GO Series 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 violation of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia.

**A. Charge No. 1: Violation of General Order 120.21, Attachment A, Part A-5, which reads: Willfully disobeying orders or insubordination.**

For Specification No. 1, under this charge, Agency asserts that Employee failed to obey Sergeant Maradiaga's directive to meet him at 1515 Ogden Street, Northwest, to receive a traffic post assignment. Rather, he self-assigned himself to an irrelevant post without notifying any official. Employee on the other hand argues that, based on Sergeant Maradiaga's second transmission asking all available units to respond for a traffic control, Employee and his partner redirected their position to 16<sup>th</sup> and Ogden Street, and they notified the dispatcher of their location. Employee explained that their post was relevant to the incident, and Sergeant Maradiaga never requested that they receive a specific traffic post.

Employee and his partner both admitted that they also heard the first transmission from Sergeant Maradiaga requesting all available units to respond to his location (1515 Ogden Street) to receive a traffic assignment. Moreover, all the other five (5) officers who responded to Sergeant Maradiaga's requests, physically responded to his location at 1515 Ogden Street (the staging area), and Sergeant Maradiaga gave them their traffic post. None of these officers were assigned to 16<sup>th</sup> and Ogden Street, and all of the officers stated during the investigation that they did not see Employee and his partner during the barricade incident at 1515 Ogden Street. Ofc. Rogers explained that if Sergeant Maradiaga had assigned another officer to that post- 16<sup>th</sup> and Ogden Street, Employee and Ofc. Rogers would have had to move because Sergeant Maradiaga would have already directed somebody there. (Tr. pg. 58). Consequently, I find that, in order to minimize the confusion in an already chaotic situation, like the other officers, Employee and his partner should have responded to 1515 Ogden Street to be assigned a traffic post instead of taking it upon themselves to set up a traffic post at 16<sup>th</sup> and Ogden Street.

Additionally, although where Employee and his partner were stationed at may not have been several blocks north and one (1) block west from the barricade, it appears that it was an irrelevant traffic post with reference to the barricade incident on 1515 Ogden Street. Although Sergeant Maradiaga was unaware that Employee and his partner were stationed at this post, he did not assign any other officer to man this traffic

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<sup>4</sup> Agency's Answer at Tab 3.

<sup>5</sup> Agency's Answer at Tab 4.

<sup>6</sup> Agency's Answer at Tab 5.

<sup>7</sup> Agency's Answer at Tab 6.

post during the incident. In addition, because Sergeant Maradiaga was unaware that Employee and his partner were at the barricade incident, Employee and his partner were the only officers who were not officially relieved.

Furthermore, Employee explained that he informed the dispatcher of their location and that if Sergeant Maradiaga or any of the officials had an issue as to where Employee was stationed, they should have come on the air and said something. I disagree with this argument. I find that based on the record, and from Employee's own testimony, the entire department communicates over the air, and Employee and his partner when transmitting their location, did not specify that it was in response to Sergeant Maradiaga's request for additional units for the 1515 Ogden Street barricade. Thus, their location could have been in response to any other incident in the District on that day. Accordingly, I agree with Agency's contention that simply notifying the dispatcher of his location was not enough in this situation especially given the fact that Sergeant Maradiaga's initial transmission was for all available units to report to his location for traffic assignment. Moreover, Sergeant Maradiaga's second transmission stated that he needed "all units you can *send down here* for traffic control..." and the dispatcher's retransmission of the requested was for "all units *to respond to the location of 1515 Ogden* to assist with traffic control..." (emphasis added). Accordingly, I find that the second transmission did not rescind the first transmission, but instead, was an extension of the first transmission to specifically respond to 1515 Ogden Street. Consequently, I conclude that Agency's submitted documents corroborate the above-referenced specification, and as such, I further find that Agency has met its burden of proof for this specification.

**B. Charge No. 2: 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 of any law, municipal ordinance, or regulation of the District of Columbia**

For Specification No. 1, under Charge No. 2, Agency contends that, after self-assigning himself at a traffic post in reference to an incident at 1515 Ogden Street, Northwest, Employee failed to monitor the situation and police activity at the location, as well as his police radio. Therefore, Employee failed to realize that all evening units had been relieved from the incident by 0030 hours on August 16, 2011. This caused Employee to be held over for several hours. Agency explained that there is no evidence that Employee made any notification to any official that his radio was inoperable. Agency, states that Employee could have used his cellular telephone. Agency maintains that the department cannot and does not properly function when officers initiate their own assignments and take it upon themselves to dictate their tour of duty.

On the other hand Employee asserts that, he followed instructions and monitored the radio on the frequency MPD-C1 as ordered by the Watch Commander, Captain Mongal. (Tr.pg. 30) Employee explained that because Sergeant Maradiaga voice relief of the evening unit on the third (3<sup>rd</sup>) district main channel and not on MPD-C1 as requested by Captain Mongal, Employee did not receive the relief notification and thus, he was held over several hours. Employee also alleges that while his car radio was on MPD-C1, the handheld radio batteries were no longer functional at this point as they had been held over pass their regular tour of duty and were already into the midnight tour. (Tr. pgs. 30-31). Employee further notes that although he was close to the barricade scene, he did not notice that other units had gone from the scene because the vehicles had not left and the barricade incident continued until 0400 hours. (Tr. pgs. 46-47). Employee further states that he did not call to see if he could have been relieved because it was not the proper protocol. (Tr. pg. 50).

I find that Agency has not met its burden of proof with regards to this charge and specification. The record shows that Captain Mongal did order all units to switch to MPD-C1; however, Sergeant Maradiaga's transmission relieving all evening units was made on the third (3<sup>rd</sup>) district main channel. Therefore, Employee and his partner did not receive this transmission, and I find that this was through no fault of theirs as they followed Captain Mongal's instructions and switched to MPD-C1. Further, Agency has not provided this Office with any evidence to contradict Employee's assertion that their handheld batteries had died. Agency has also failed to submit any evidence to contradict Employee's contention that the handheld radio batteries are usually good for eight (8) hours of use. (Tr. pg. 31). Moreover, Agency has failed to provide any evidence to show that it is Agency's procedure/policy for an employee with an inoperable handheld radio to utilize their cellular phones or to immediately notify an official if their handheld batteries died. Accordingly, I find that Agency has not met its burden of proof by a preponderance of the evidence with regards to Charge No. 2, and therefore, Agency cannot utilize this charge to institute adverse action against Employee.

**2) If so, whether the penalty of suspension is within the range allowed by law, rules, or regulations**

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).<sup>8</sup> According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties ("TAP"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.<sup>9</sup> Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching the decision to suspend Employee.<sup>10</sup>

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<sup>8</sup> 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. 1601-0101-02, *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>9</sup> *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).

<sup>10</sup> 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;

In this case, I find that Agency has not met its burden of proof for Charge 2, and as such, Agency cannot rely on this charge in disciplining Employee. Nonetheless, Agency can use Charge 1, in instituting adverse action against Employee. 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.<sup>11</sup> According to GO 120.21, Table of Offenses/Penalties, the penalty for a first time offense for Charge 1, ranges from a ten (10) day suspension to removal. The record shows that this is the first time Employee is being charged with this cause of action. Accordingly, I conclude that Agency had sufficient cause to suspend Employee for ten (10) days, with five (5) days held in abeyance. I further conclude that Agency has properly exercised its managerial discretion and its chosen penalty of ten (10) days suspension is reasonable and is clearly not an error of judgment. Consequently, I find that Agency's action should be upheld.

### ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of suspending Employee for ten (10) days with five (5) days held in abeyance is **UPHELD**.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.  
Administrative Judge

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- 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>11</sup> *Id.*; See also *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 (Sept. 21, 1995).