This decision may be formally revised before it is published in the District of Columbia Register and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	OEA Matter No. 1601-0027-22
EMPLOYEE[1] Employee v	Date of Issuance: December 1, 2023
DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT Agency	LOIS HOCHHAUSER, Esq. Administrative Judge

Frank Hill, Esq., Employee Representative
Tricia Brissett, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Employee filed a petition with the Office of Employee Appeals ("OEA") on December 8, 2021, appealing the final decision of the District of Columbia Metropolitan Police Department ("Agency"), to suspend him for 15 days without pay, effective December 6, 2021. On December 14, 2021, Sheila Barfield, Esq., OEA Executive Director, notified Robert J. Contee III, Chief of Police that Employee had filed a Petition for Appeal ("POA") and provided him with a copy of the appeal. The Executive Director advised Chief Contee that, pursuant to OEA Rule 607.2, the filing deadline for Agency's response was January 13, 2022. Agency filed its Answer on January 10, 2022. At the request of the parties, the matter was then referred for mediation, and a mediation session was scheduled for February 17, 2022. On February 15, 2022, the mediation was cancelled and Mediator Arien Cannon, Esq. notified the parties that the matter would be assigned to an Administrative Judge. ("AJ"). The matter was assigned to this AJ on or about March 15, 2022.

On March 30, 2022, the AJ issued an Order scheduling the prehearing conference (PHC) for April 28, 2022. Agencv filed its Prehearing Conference Statement on April 29, 2022. The PHC took place as scheduled. An Order was issued on June 2, 2022 scheduling the hearing for August 10, 2022 and setting filing deadlines.[2] On July 5, 2022, Agency filed its Request for Admissions, and Application for *Subpoena*. The *subpoena* was issued on July 26, 2022. On August 2, 2022, Agency filed the parties' Joint Pre-hearing Stipulations and Agency's List of Exhibits.

On or about August 8, 2022, Agency asked for a continuance of the hearing because of the unavailability of two witnesses. The unopposed request was granted, and the hearing was rescheduled for August 18, 2022. The AJ reissued the *subpoena* for the new hearing date on August

[1] This Office does not identify employees by name in Initial Decisions published on its website.
[2] The issuance of this Order as well as other Orders scheduling hearing dates was delayed until parties' confirmed their availability and the availability of witnesses.

8, 2022. Several days before the hearing, Employee's counsel emailed the AJ, asking for a continuance because he had become ill. This unopposed request was granted, and with the participation of the parties, the hearing was rescheduled for October 12, 2022.[3] Agency filed its Application for *Subpoena* on October 5, 2022. The October 12, 2022 hearing had to be rescheduled, and the AJ offered October 27, 2022 for the rescheduled hearing. The parties were unavailable on that date, and subsequently agreed to January 25, 2023.[4] The hearing was held that day, and a second hearing date was scheduled, primarily because BC,[5] the witness subpoenaed by Agency, who it considered essential, did not appear. On February 10, 2023, the AJ issued an Order, following confirmation by Agency of BC's availability, that the hearing would continue on March 1, 2023. Agency filed its Application for *Subpoena* on February 23, 2023; and the AJ issued the *subpoena* on February 16, 2023.[6] Agency filed its Affidavit and Certified Mail Receipt on March 1, 2023.

The proceedings took place at OEA in the District of Columbia. The representatives and Employee were present at all times.[7] At the proceedings, the parties had full opportunity to, and did, present testimonial and documentary evidence and argument to support their positions.[8] Although *subpoenaes* were issued and served on BC, and hearing dates were scheduled based on her availability; she did not appear at any proceeding. At the end of the March 1 hearing, Agency stated that it would close its case without calling BC as a witness. (Tr2, 161, 163). The parties agreed to file written closing arguments by May 1, 2023. They also agreed to file a statement regarding redacted documents, if any, by May 15, 2023.[9] The parties filed closing briefs and the *Praecipe* Regarding Joint Exhibits. The record closed on May 8, 2023.[10]

JURISDICTION

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

ISSUES

Did Agency meet its burden of proof regarding its decision to suspend Employee without pay? Did Agency "reasonably consider" all relevant factors in its selection of a 15 day suspension?[11] Is there any basis to disturb the penalty?

SUMMARY OF EVIDENCE

1. Stipulated Facts[12] and Summary of Documentary Evidence

On the morning of April 1, 2021, Employee, a patrol officer with more than 20 years of

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[3] *See*, September 12, 2022 Order
[4] *See*, December 12, 2022 Order
[5] The individual is identified as "BC" in this document.
[6] The *subpoena* was issued following receipt of the courtesy copy sent by Agency to the AJ on that date.
[7] In addition, Curtis Miller was present to assist Ms. Brissett.
[8] Witnesses testified under oath and the proceedings were transcribed. The transcript is cited as "Tr" followed by "1" (January 25, 2023) or "2" (March 1, 2023), followed by the page number. Exhibits ("Ex") are cited as "J" (Joint) and "A" (Agency) followed by exhibit number. Employee did not enter any exhibits.
[9] *See*, March 16, 2023 Order
[10] Submissions were originally due May 1, but an extension until May 8 was granted..
[11] This issue is based on Joint Prehearing Stipulations.
[12] The Stipulated Facts were submitted by the parties. (Ex J-15).

experience who was in permanent status, was assigned to traffic and was on-duty near North Capitol Street and New York Avenue in the District of Columbia.[13] He was conducting a traffic stop and preparing notices of infractions for several vehicles, when according to his BWC[14] footage, BC drove her vehicle toward him, stopping it in front of him. At 7:39 a.m., the following conversation took place:

BC: Excuse me
Employee: Yes ma'am
BC: Are you busy, 'cause I'm…
Employee: Yes…
BC: I'm…
Employee: …I'm busy
BC: OK. Somebody just tried to shoot me and my kids in the face.
Employee: OK. I'm busy. Put your seatbelt on.
BC: My seatbelt is on, but I…
Employee: No. Alright, put it [sic] right away. (Ex J-9)

The conversation concluded at 7:49 a.m. when Employee left the location and walked back to his vehicle. CB then left, and drove to the Sixth District substation where she reported the incident with Employee. Subsequently, Lt. Curtis Miller was assigned to investigate the matter. Employee submitted his first statement to investigators about the incident on April 19, 2021, before he had reviewed the BWC. After viewing the BWC, he submitted a second statement on May 4, 2021. After completing its investigation, Agency issued the Final Investigation Report ("FIR") on May 6, 2021. It concluded, in pertinent part, that Employee had "willfully failed to take proper police action and be attentive to" [BC] and what she was reporting; and that he had displayed "bad conduct and lack of consideration" in violation of General Order ("GO") 120.21. (Ex J-1).

On or about July 29, 2021,[15] Agency issued its Notice of Proposed Adverse Action ("NOP"). (Ex J-2). Winkle Hong, Director of Agency's Disciplinary Review Division ("DRD"), was the proposing official. Employee was charged with violating GO 120.21, Attachment A, Part A-14 "neglect of duty to which assigned or required by rules and regulations adopted the Department" based on the finding that Employee responded to BC's report of being threatened by someone with a handgun, by telling her that he was busy and to put on her seatbelt, and then walked away. Agency charged that Employee's "lack of action was neglectful" and that if he had taken "proper steps" a suspect could have been apprehended. He was also charged with violating GO 120.21, Attachment A, Part A-16, *i.e.*, "failure to obey orders or directives issued by the Chief of Police." This charge was based on Agency's determination that Employee failed to take any action regarding BC's allegation, and "appeared dismissive" by telling her that was busy. The charge referenced GO 201.26 Part V, C,1, D which orders members to "avoid giving the impression that they are evading…their duty or…not interested in the problems of persons who are referred elsewhere for service."

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[13] It is undisputed that Employee had no medical issues that impacted on his hearing ability at the time.
[14] Body Worn Camera. Exs J-6, J-9. Employee does not dispute the accuracy of the BWC, but maintains that due to noise and other factors, he did not hear BC tell him that someone threatened to shoot her and her children.
[15] the AJ is using the date Employee acknowledged receipt of the proposed and final notices, since neither has an issuance date.

In the NOP, the proposing official discussed the *Douglas*[16] Factors. He found that the "nature and seriousness of the offense and its relation" to Employee's duties, and his position as a law enforcement officer "sworn to uphold the law and follow Department rules" were aggravating factors because he failed to perform essential duties of a patrol officer. The proposing official also found that Employee's conduct had a negative impact on Agency's reputation, and that Employee was on notice of the rules he had violated were both aggravating factors. Employee's past disciplinary record and length of service were considered mitigating factors. Dir. Hong determined that the proposed penalty of a 15 day suspension without pay complied with the applicable table of penalties and was consistent with penalties imposed on employees for similar offenses. Employee appealed the NOP to Angela Simpson, Director Human Resource Management Division ("HR") on August 19, 2021. (Ex J-3).

The Final Notice of Adverse Action ("FN") was issued on or about September 28, 2021, with Dir. Simpson serving as deciding official. (Ex J-4). In the FN, Dir. Simpson responded to the arguments raised by Employee in his appeal; and concluded that "a preponderance of the evidence" established that Employee was "guilty" of the charges and specifications" and that the penalty was "consistent with sanctions imposed under similar circumstances." Employee appealed the FN to Chief Contee on October 21, 2021. (Ex J-5).

On November 9, 2021, Chief Contee issued Agency's "final decision."(Ex J-6). He stated that he had reviewed Employee's submissions and arguments, and addressed his arguments. He found that the words "flagged down" and "handgun" were erroneously used by Agency but constituted "harmless error." He did not find Employee's allegation that the investigation was "not up to par" was persuasive. He agreed with the Dir. Hong's analysis of the *Douglas* Factors and provided his

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[16] These 12 factors, known as the "*Douglas* Factors," were first enunciated in 1987 in *Douglas v. Veterans Administration*, 5 MSPR 313 (1981). In that decision, the Merit Systems Protection Board provided a framework for agencies to determine a penalty by rating each of the factors below as neutral, mitigating or aggravating.

1) the nature and seriousness of the offense, and it's 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.

rationale. Chief Contee concluded by denying the appeal and sustaining the 15 day suspension. He also directed Employee to "attend training regarding the importance on community relations and interacting with the public."[17]

2. Positions of the Parties and Summary of Testimonial Evidence

Agency's position is that Employee violated the cited GO when he failed to properly respond to BC on April 1, 2022. It maintains that its investigation was complete and fair. Agency asserts that it considered all relevant factors in reaching its decision to suspend Employee for 15 days without pay, which it considered reasonable and consistent with similar cases. (Tr1, 32-36)

Timothy Finnegan, Agency's first witness, stated that he was a Patrol Officer for 15 years and then became a Patrol Supervisor more than seven years ago. (Tr1, 49). He stated that he met BC on April 1, 2021 when she came to the substation and reported that a police officer had not assisted her with "investigating [a] crime or conducting a preliminary investigation." He said that he completed a Complaint Witness Statement based on her allegations. (Tr1, 52-53; Ex J-1, Att. 4). The witness narrated the BWC video and audio footage of his interview with BC. (Tr1, 53-54; Ex J-11). He stated that at times during the interview, BC was "upset and crying," and at other times she was "calm and okay," which, he added, was not unusual with civilian witnesses and victims. (Tr1, 60).

On cross-examination, Officer Finnegan stated that he thought that he had "seen [Employee] around before" the incident. (T1, 61). He testified on redirect that BC's report that "someone threatened to shoot her" would be taken seriously even if she did not mention a gun. (Tr1, 65).

Agency's next witness, Curtis Miller, stated that in his 19 years of employment with Agency, he was an "officer, patrol, teacher at the Academy, a master patrol officer, [and] field training officer…detective,…ERT[18] operator and a Sergeant in patrol" and moved to DRD several years ago. (Tr, 71). He said that he had conducted about 40 investigations at the time he investigated this matter. (Tr, 105). Lt. Miller said that the last three years he has completed about 120 investigations. (Tr, 72-73; Ex J-1). The witness stated that as part of his investigation, he interviews witnesses, takes written statements, reviews audio and video BWC footage; and that he did so in this investigation. (Tr, 74-75; Ex J-9).

The witness described Employee's misconduct as "[n]eglect to take further action…inability to discern whether or not a shooting took [place]," stating that "an alleged shooting [takes] precedence over writing a ticket." He testified that there were "multiple different ways" that Employee could have handled the matter, such as "calling for back up [or] asking [BC] questions [such as] if the person had a gun, but instead he responded that he was "busy." (Tr1, 75-76). Lt. Miller testified that he believed that Employee heard BC's report of the threat to shoot her and her children, based on the "dialog back and forth" between Employee and BC, noting that when BC told Employee that she was wearing a seatbelt in response to his directive, he told her to " move on, and he shoos her on and tells her to basically drive off. (Tr1, 80).

On cross-examination, Lt. Miller testified that he watched Employee's BWC footage on his

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[17] By memorandum dated November 19, 2021, Agency notified Employee that his suspension would begin on November 30, 2021 and end on December 18, 2021.

[18] Emergency Response Team (Tr1, 71).

desktop computer in his office several times. He stated again that he thought Employee heard BC's report of being threatened, noting that Employee "acknowledge[d] and answere[d]" BC by stating he was busy which made it "clear" to him that Employee was "able to hear [BC] clearly." (Tr1, 86). He did not recall why he wrote that Employee was handling "a traffic crash" instead of "more than one traffic stop" in the report. (Tr1, 88).[19] Lt. Miller testified that he used the word "gun" in his report although BC did not report that because she said that someone threatened to shoot her and "what else would you shoot someone with?" (Tr1, 93). In addition, he said that he saw BC's interview with Sgt. Finnegan which mentioned a "gun." (Tr1, 95). Lt. Miller stated that Employee should have asked BC more questions if he was unsure of what she said. (Tr1, 106).

Brad Wagner, Agency's third witness, stated that he has been with DRD since 2019, and was its Deputy Director in 2021. He testified that in accordance with the procedures in effect at that time, he would determine charges based on the GOs, and the penalty based on the *Douglas* Factors.[20] (Tr1, 109-117; Ex J). He stated that Employee was charged with neglect of duty because his response to BC's claim of being threatened by someone with a gun was "neglectful." (Tr1, 111-112). He testified that this was a first offense, for which the suggested penalty ranged from reprimand to removal. The witness testified that the second charge was based on GO 201.26 because members must "avoid giving the impression that they are evading the performance of duty or that they are not interested in the problems presented by citizens, and Employee failed to do so. (Tr1, 114). The witness said that he and Dir. Hong would discuss a case before drafting the NOP. (Tr1, 119).

Lt. Wagner testified that he was "very familiar with comparative cases," and estimated that DRD issues about two NOPs weekly. (Tr1, 122). With regard to this matter, the witness testified that he could not "say definitively" if he discussed the matter with Dir. Hong. He said that although he could not testify how Dir. Hong decided on a 15 day suspension, he could testify why a 15 day suspension would have been proposed. (Tr1, 125). The witness then reviewed the *Douglas* Factors, stating that the first factor, *i.e.,* the nature of the offense, was considered aggravating because it involved a citizen who requested police assistance. He explained Agency's reasoning:

> Part of a patrol officer's primary responsibilities is to address inquiries, requests for service from citizens, especially if it involved an allegation of a serious crime…And the description reiterates that the member was notified by the driver, she was a victim of a crime. (Tr1, 128).

Lt. Wagner stated police officers "are generally…held to a higher standard," and are sworn to uphold the law and Department rules. He testified that Employee failed to "carry out the most fundamental responsibility of a police officer [which is] responding to a citizen's request for [help] in response to …an alleged crime." (Tr1, 129). He stated that Employee's past discipline record was considered a mitigating factor since he had not had an adverse actions in the prior three years. (Tr1, 130). The witness testified that the fourth factor was considered mitigating since Employee had been an officer for 20 years. He testified that the effect of the misconduct on the confidence of Employee's supervisor in Employee's ability to perform his duties was deemed aggravating because the conduct "raised a question" about Employee's judgment. (Tr,1 32). The witness stated that potential notoriety and Employee's awareness that his conduct violated Department rules were both deemed aggravating factors, stating that with 20 years of experience, there was "little doubt that [Employee] was aware

[19] Subsequently, the AJ noted that Employee stated in his supplemental statement that he was "handling a traffic accident" at the time of the incident and provided that reference to the parties. (Tr1, 101).
[20] *Douglas v. Veterans Administration*, 5 MSPR 313 (1981).

or…should have been aware" that his conduct violated Department rules. With regard to the factor of rehabilitation, the witness said that although the misconduct was "serious," Agency thought that Employee could be rehabilitated. As to the penalty, the witness testified that the 15 day suspension was determined to be "the best course of action in this matter," and that ''although no two cases are alike,'' the penalty was consistent with similar cases. The witness reviewed three other cases involving the same or similar charges and explained why he considered those cases comparable to this matter. (Tr1, 148).

On cross examination, Lt. Wagner stated that he could not recall if a different penalty was discussed. (Tr1, 160). He stated that the comparable cases were not identified in the document because it was not the practice of the DRD to do so. (Tr1, 162). The witness noted that no two cases are identical and will generally have different facts (Tr1, 167-168). Asked if it was fair for Agency to have two specifications when the language was substantially alike, the witness stated that "it could be done either way" but that Agency uses separate specifications. He said that he could not apportion the number of days of suspension for each specification, but that the same number of days would have been charged if there had only been one specification. (Tr1, 176).

On redirect, Lt. Wagner explained that Employee utilized the appeal process, appealing first to HR and then to the Police Chief. He also explained that the provision for an employee to discuss a proposed adverse action with his or her supervisor is limited to employees suspended for less than ten days, so it was not available to Employee. (Tr1, 188). The witness testified that the 15 day suspension would have been imposed in this matter, even there had only been one charge. (Tr1, 193).

Dir. Hong, Agency's final witness, said that he is DRD Director and held that position at the time of this adverse action. He stated that the basis for the first charge was that Employee failed to investigate BC's allegation, an action required of a police officer. (Tr2, 19). The witness reviewed GO 120.21, stating that he was "very familiar [with it] because [it] specifically addresses the disciplinary process for the department." (Tr2, 20, Ex J-12). He noted that this was Employee's "first offense" and that the penalty for a first offense of this charge ranged from "reprimand to removal." (Tr2, 21). The witness reviewed the second charge, stating that Employee's failure to take any action and appearing dismissive of BC's claim, violated GO 2126, Part 5C1D, which requires officers to "avoid giving the impression that they are evading the performance of their duty or…are not interested in the problems" being reported to them. (Tr2, 23).

Dir. Hong testified that in this matter, the charges and specifications were supported by the evidence. (Tr2, 24). He reviewed his analysis of the *Douglas* Factors, stating that the first two factors were considered aggravating because Employee, an experienced law enforcement officer, was dismissive of someone telling him that she had been threatened by someone with a gun. (Tr2, 27-28). Dir. Hong stated that the third and fourth factors were mitigating since Employee had not been disciplined in the last three years and there were no prior issues regarding his performance. (Tr2, 29-30). He stated that the fifth factor was aggravating because Employee's performance was unsatisfactory and negatively impacted on his supervisor's confidence in him; and that the eighth factor was aggravating because Employee's dismissive treatment of a victim of crime seeking his assistance could cause notoriety for the Department. He said he considered the ninth factor was also aggravating since Employee was a 20 year veteran who was on notice of how to respond. (Tr2, 31-38).[21]

[21] The other factors were rated "neutral."

The witness testified that the 15 day suspension was appropriate, noting that it is "problematic" for a member to refuse to provide assistance to someone claiming to be a victim of a crime and asking for his help. (Tr2, 39-42). Asked about comparable cases, the witness stated that although no two cases are "going to be alike clearly," his office looks for recommended discipline in similar matters. He noted that the discipline in the three cases found by Agency ranged from 15 to 25 days. (Tr2, 44-46, Ex A-2).

On cross-examination, Dir. Hong stated that he watched the BWC footage in his office where there was no "background noise." He thought he watched it more than once. (Tr2, 50-54). He testified that neither he nor anyone on his staff thought that Employee did not hear BC tell Employee that someone threatened to shoot her and her children. (Tr2, 56). He said that Agency's failure to identify comparable cases in the report did not raise a "legitimate concern" for Employee because he can review them as part of his preparation. He stated that his focus is on "ensuring that what…leaves this office is a detailed, thorough, fair and equitable recommendation with respect to discipline for the sustained misconduct." (Tr2, 59).

Dir. Hong testified that no one from HR or the Police Chief's offices contacted him about this matter. (Tr2, 71). He stated that he did not find "any mitigating circumstance" related to the 11th *Douglas* factor, and did not recall if an alternative sanction was considered. (Tr2, 77). Asked why it was necessary to have two charges instead of one, he responded that one charge was neglect of duty and the other was failure to obey directives and orders; so that two charges were appropriate and "necessary." The witness stated that he did not apportion a number of days to each charge and specification. (Tr2, 77-80).

On redirect, Dr. Hong stated that in determining the penalty, he does not focus on the monetary loss to the member caused by the suspension as a result, since it is not his "concern." (Tr2, 84). He asserted that BC told Employee that "she had been the victim of a crime, and was "threatened with being shot" and as a police officer, Employee was "responsible" for helping her, and providing the "first line of protection," but failed to provide any support. (Tr2, 85).

Dir. Hong testified on recross, that based on the charges, he would recommend a 15 day suspension even if only one charge was sustained. (Tr2, 90). He said that he did not speak with any of Employee's superiors or ask them if they lost confidence in Employee as a result of this incident since that is not part of the process. He added that no supervisors approached him about the matter.(Tr2,96- 97). He stated that it would not be appropriate for DRD to obtain "favorable information," about employees, such as commendations and evaluations, so they could be considered in the review of the *Douglas* factors, explaining that the appeal process was the appropriate venue" for that information. (Tr2, 99).

During additional redirect examination, Dir. Hong reviewed the Chain of Command investigation ("CCI") submitted by officers in Employee's chain-of-command, including supervisors. He stated that after the CCI is completed, the FIR is prepared and submitted to the DRD. Dir. Hong noted that his office agreed with the "neglect of duty" charge; but changed the second charge from "prejudicial conduct," to "failure to obey orders and directives." (Tr2, 99-103; Ex A-2).

Employee's position is that the penalty, although within the permitted range, is "too harsh" and that there were flaws in the investigation. He maintained that his actions were not intentional since

he did not hear CB. He argued that there were "certain shortcomings" in Agency's investigation as well as "[inaccuracies in the] application and analysis of the *Douglas* Factors." He contended that the loss of $8,000 resulting from the 15 day suspension was severe and should have been considered. He also argued that as a result of the suspension, he cannot be promoted or transferred at this time. (Tr1, 37-39, 43-45; Tr2, 108, 111).

Employee testified that because the suspension was for 15 days, he was not able to meet with his commander to explain the details of the matter with him. He said that he felt that Lt. Miller "wasn't really listening" to him when he was being questioned, but instead was "just focusing [on] getting the investigation completed in a timely manner." (Tr2, 109). Employee stated that he had agreed "from the beginning" that he "could have handled this [situation] differently:"

> If I wasn't so focused on the aggressive driver that I already had stopped and the multiple people that were in the area surrounding. For my safety and everybody else's safety, I probably could've said, [BC] when I'm finished what I'm doing here, I'll be right with you. I feel bad about [BC] (Tr2, 109-110)

Employee testified that, as he had said to Lt. Miller, he heard BC's voice but "didn't actually hear what she said" or "comprehend her words," but that he heard her say that she was wearing her seatbelt. He explained that he was initially "focusing on the traffic stuff…writing tickets…[and] doing multiple things at the time when she pulled up," and added that his radio "was going off" at the busy intersection. (Tr2, 109-110). Employee pointed out that when people listen to the BWC they can adjust the volume and rewind the video, but that he had "only got one chance to hear what" BC said to him" on April 1, 2023 when he was "on the street interacting with multiple drivers that violated the traffic laws of the District of Columbia." He added:.

> It was rush hour, traffic, horns and everything, people yelling. The other drivers that I had pulled over, they were yelling. And there was just a lot going on." (Tr2, 111).

Employee testified that when he heard the BWC played at the proceeding "it sounded really bad," but that on the street…[he]was concentrating" on his safety, everybody's else's safety," and performing his duties. (Tr2, 112-113). He noted that BC never used the word "gun," and that if she had used the word, it was "highly likely" the word would have "drawn [his] attention," adding that he "love[d] to get guns [and had] gotten guns off the street." (Tr2, 113).

Employee testified that the traffic stop is "one of the most dangerous assignments for a police officer," (Tr2, 117). He contended that it appeared to him that Lt. Miller and Dir. Hong thought that he "wasn't doing anything," at the time of his interaction with BC, but if they had seen the entire BWC they "would have seen how these aggressive people were surrounding [him]." (Tr2, 118). Employee explained that he included information about the number of tickets he had issued in his appeal to show that he was doing his job, noting that he had written more than 5,000 citations the previous year. He asserted that he "love[s]" Agency, but that the penalty, *i.e*., the loss of $8,000, and the negative impact on his ability to be promoted or to transfer, [was] very harsh." (Tr2, 115). Employee stated that he is still "out there every day," working in traffic enforcement, patrol [and] engaging with the community." (Tr2, 126).

Employee maintained that it was unfair that his penalty was determined by "all civilians who have never actually conducted a traffic stop." He said that Lt. Wagner who had done many traffic

stops was not involved in determining the penalty. (Tr2, 116). Employee also asserted that Dir. Hong focused only on BC, since she was "a victim of a crime" and did not consider "officers or their thoughts." (Tr2, 125). He further maintained that he should have gotten a lesser penalty because no assault actually took place:

> It wasn't a shooting, it wasn't [an] assault with a deadly weapon. There was no gun seen, there was no gun visible. It was just words exchanged for a road rage. (Tr2, 120).

On cross-examination, he was asked about his assertion that the penalty was determined by civilians with no experience in traffic enforcement determined the penalty, and agreed that Chief Contee was an experienced police officer. (Tr2, 132). He stated that his appeal to the Chief focused on how much revenue his traffic citations generated and his desire to become the "number one ticket writer," but also showed that he was busy with his duties at the time of the incident. (Tr2, 136-137). Asked about his statement that due to the suspension, he cannot be promoted or transferred for a period of time, Employee agreed that he has been a patrol officer for his entire career. (Tr2, 144).

ANALYSIS, FINDINGS OF ADDITIONAL FACTS AND CONCLUSIONS OF LAW

The jurisdiction of this Office is established by the District of Columbia Comprehensive Merit Personnel Act of 1978 (CMPA), D.C. Law 2-139; D. C. Official Code § 1-601.01 *et seq*. (2016 Repl.. and 2019) as amended by the Omnibus Personnel Reform Amendment Act of 1998, D.C. Law 12-124. Pursuant to OEA Rule 631, Agency has the burden of proving the charges that resulted in removal. Agency must meet this burden by a preponderance of evidence, *i.e*., "the 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 offered multiple arguments to support his position that the investigation and decision-making processes were flawed, resulting in unfair findings and an unduly severe penalty. The AJ considered each of his arguments in reaching her decision. The AJ addresses some of the primary arguments below, but may not address each argument. She notes that doing so would increase the length of this decision but have no impact on the outcome. *Antelope Coal Company/Rio Tino Energy America v. Goodin*, 743 F.3d 1331 (10th Cir. 2014).

Employee maintained that Agency did not "seriously" consider his assertion that he did not hear [BC] tell him that someone had threatened to shoot her and her children, noting that her calm demeanor and failure to use the word "gun" or "weapon" denied him triggers that would have led him to realize that something serious was being reported. Employee argued that the noise and activity in the immediate area impeded on his ability to hear BC. The AJ agrees with Employee's contention that he should be judged on what he experienced in real time, since unlike the investigators and decisionmakers, on the morning of April 1, 2021, he did not have the luxury of hearing what BC said while sitting in a quiet office with the option of replaying the BWC until he was certain of what BC said. (Employee Closing Argument, 3-8). However, she finds that Agency presented sufficient evidence that it considered his contention that he did not hear BC report the threat. Dir. Simpson addressed the contention, stating in the FN, as did other witnesses, that Employee responded affirmatively to BC's question about being busy at the start of the conversation and to her statement about wearing a seatbelt at the end of the conversation that it was reasonable for investigators and the proposing official to find that Employee heard BC tell him of the threat. She stated, however, that the result would be the same even if he had not heard anything since it was "incumbent" on Employee

"to ask [CB] for clarification" if he did not hear her. Using this analysis, Dir. Simpson determined that *Douglas* Factors One, Two and Nine should remain "aggravating" factors. The AJ finds that Agency considered Employee's arguments. The AJ does not find it unreasonable that Agency questioned Employee's assertion that he did not hear BC since during this very brief exchange he did heard her first and last statements, only missing the critical sentence in-between. However, Agency did not charge Employee with intentional misconduct, *i.e*., that he heard BC's allegations and deliberately failed or refused to respond which could have resulted in a more severe penalty.

Employee was charged with negligence for performing his duty "in a manner that demonstrates that the member is not using due care or prudence in carrying out job responsibilities." GO 120.21, Attachment A, Part A-14 defines negligent conduct as conduct which "falls below the standards established by the element, and can include such actions as <u>inadvertence, thoughtfulness and inattention</u>. (emphasis added). The AJ concludes that Agency met its burden of proof regarding the charges and the penalty. In reaching her decision, the AJ accepted Employee's position that he did not hear BC tell him of the threat to shoot her and her children, and found this does not affect the charges or penalty. However, Employee did testify that he heard BC's voice, but not what she "actually… said" and did not "comprehend her words." (*Infra* at 9). Employee was a veteran with more than 20 years of experience, for whom issuing traffic citations was a regular part of his duties. He did not present sufficient evidence that his actions with other drivers that morning was unusual or of a critical nature. Employee knew or should have known the requirements pertaining to interactions with civilians, particularly those approaching him to speak. In this instance, BC was not involved in the traffic stops, but drove over to Employee and stopped her car to speak with him. Since he did not clearly hear what she was saying, he was required to obtain more information from her. If he felt unsafe or needed support, he could have called for back-up. However, he failed to elicit more information; but instead dismissed her after telling her to put on her seatbelt.

Employee argued that BC did not report a shooting or assault, or say that there was a visible gun, maintaining that she was really reporting an incident of "road rage." (Tr2, 120). This argument is similar to his contention that but for BC 's calm demeanor and failure to use the word "gun" or weapon" he might have realized that she was reporting a serious matter. The AJ does not find these arguments compelling. BC asserted that someone had just threatened to shoot her and her children. She reported a crime. It is irrelevant that all parties were in their vehicles and the threat was a report of "road rage." In addition to the threat, which is by itself a crime; it is possible that the person who made the threat was prepared to carry out his threat. It is reasonable that BC was concerned enough about the threat to immediately find a police officer to report the matter. It was the duty of the Department to investigate the matter and take the appropriate action. It could not do so unless Employee obtained the necessary information from BC, which he failed to do.

Employee was also charged with "failure to obey orders and directives issued by the Chief of Police" (Ex J-12). The charge relates to GO PER 201.26, entitled "Duties, Responsibilities and Conduct of Members of the Department" which includes a provision entitled "Conduct Toward the Public" which states in part::

> Members shall avoid giving the impression that they are evading their performance of their duty, or that they are not interest in the problems of persons who are referred elsewhere for service

In the provision entitled "Citizen-Police Officer Relationships," the GO stresses the importance of maintaining good relations with the public, stating in part:

> It is expected that every member of [Agency] is keenly aware… that public support and cooperation is essential if members are to effectively fulfill their police responsibilities. The extent to which the public will cooperate with the MPD is dependent upon its respect for and confidence in, the MPD and its members…In any effort to strengthen the citizen-police officer relationship, the personal conduct and attitude of the police officer is of parament importance. (Ex J-13). .

Agency has the primary responsibility for managing its employees, including determining penalties in adverse action. The AJ's review is limited to ascertaining if "managerial discretion [was] legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). The AJ concludes that Agency established that it "reasonably considered" all relevant factors in reaching its decision; and there is no basis for disturbing this penalty. *Stuhlmacher v. U.S. Postal Service,* 89 M.S.P.R. 272 (2001). She did not find any "significant mitigating factor," including those Employee would change from neutral or mitigating, that would offset the "seriousness of the sustained misconduct," thereby rendering the 15 day suspension to be "outside the bounds of reasonableness." *Von Muller v. Department of Energy*, 101 M.S.P.R. 91, (2006).

The District Personnel Manual ("DPM") states, in relevant part, that an adverse action is "warranted" when an employee violates standards of conduct. The applicable Table of Illustrative Actions provides that the penalty for a first occurrence for each charge ranges from reprimand to removal. Thus, the penalty imposed comes within the permitted range. For these reasons, based on her review of the evidence and arguments of the parties and consistent with this analysis, the AJ determines that Agency met its burden of establishing that the penalty of 15 days and training on the importance on community relations and interacting with the public was not "[a]rbitrary, capricious, an abuse of discretion or otherwise not in accordance with law." *Smallwood v. D.C. Metropolitan Police Department*, 956 A.2d 705, 707 (D.C. 2008).

ORDER

Agency's decision is sustained. The appeal is hereby dismissed.

FOR THE OFFICE: LOIS HOCHHAUSER.