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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
MARTIN D. HARRIS,	)	
Employee	)	OEA Matter No. 1601-0059-16
	)	
v.	)	
	)	
D.C. DEPARTMENT OF GENERAL	)	Date of Issuance: April 5, 2017
SERVICES,	)	
Agency	)	Michelle R. Harris, Esq.
	)	Administrative Judge
_____	)	
Martin D. Harris, Employee <i>Pro Se</i>		
C. Vaughn Adams, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 6, 2016, Martin D. Harris (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Department of General Services’ (“Agency” or “DGS”) decision to suspend him from service for ten (10 days) from his position as a Supervisory Special Police Officer, CS-083-9, based on the following causes: “[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty, failure to carryout assigned tasks”<sup>1</sup>; and “[a]ny on-duty or employment related-act or omission that interferes with the efficiency and integrity of government operations: insubordination–refusal to comply with a direct order.”<sup>2</sup> Agency’s Answer was due on or before August 5, 2016. Following an unsuccessful attempt at mediation, this matter was assigned to the undersigned Administrative Judge (“AJ”) on October 4, 2016. On October 18, 2016, I issued an Order convening a Prehearing Conference in this matter.<sup>3</sup> Prehearing statements were due on or before November 23, 2016.

On November 30, 2016, a Prehearing Conference was held in this matter. A Post Prehearing Conference Order was issued the same day, and the parties were ordered to submit briefs in

<sup>1</sup> District Personnel Manual §1603.3(f)(3).

<sup>2</sup> District Personnel Manual §1603.3 (f)(4).

<sup>3</sup> The Prehearing Conference was held in conjunction with Employee’s other appeal, OEA Matter No. 1601-0060-16, which was filed simultaneously with the instant appeal.

accordance with the briefing schedule agreed upon during the conference. Agency's brief was due on or before December 30, 2016. Employee's brief was due on or before January 30, 2017. Based on the briefs submitted by the parties, I determined that an Evidentiary Hearing was not warranted. The record is now closed.

### JURISDICTION

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

### ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether the ten (10) day suspension was appropriate under the circumstances.
3. Whether Agency, in administering the adverse action utilized the appropriate version of Chapter 16 of the District Personnel Manual ("DPM").

### 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.

### SUMMARY OF PARTIES' POSITION

#### *Agency's Position*

Agency asserts that there was just cause for the adverse action levied against Employee, and that the penalty of a ten (10) day suspension was appropriate. Agency asserts that on December 8, 2015, Employee was given a direct order from Lieutenant George Smith (Lt. Smith).<sup>4</sup> Employee was ordered to report to the District of Columbia National Guard (DCNG) post for duty. Agency contends that Employee responded to Lt. Smith indicating that "he was not going to go over to the DCNG because my job doesn't have anything to do with buildings."<sup>5</sup> Agency argues that Employee was told to go home if he was not going to report to the DCNG as assigned.<sup>6</sup> Agency proffers that

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<sup>4</sup> *Id.* at Page 2.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

Employee did not report for duty at the DCNG as ordered, and remained in his office space at the Protective Services Division Headquarters at 64 New York Avenue (PSDH). Agency avers that Employee failed to follow instructions and that he also failed to assist with any other work throughout that night.<sup>7</sup> Following this incident, in an Advance Written Notice of Proposed Suspension dated January 29, 2016, and delivered to Employee on February 2, 2016<sup>8</sup>, Employee was given a fifteen (15) day advance notice of Agency's proposal to suspend him without pay for ten (10) days for violation of DPM §1603.3(f)(3)—“Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty, failure to carry out assigned tasks; and DPM § 1603.3(f)(4) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: insubordination—refusal to comply with a direct order.”<sup>9</sup>

Agency asserts that on February 9, 2016, Employee submitted a response regarding his proposed suspension to Associate Director Anthony Fortune (Asst. Dir. Fortune), who was the deciding official. Agency contends that Employee proffered that he was not given a direct order to report to DCNG for duty because he had previously indicated that he would not go to DCNG and that he was just “expressing his feelings and that he was not being insubordinate.”<sup>10</sup> Agency contends that on June 6, 2016, Employee received a Final Written Notice regarding Agency's decision to suspend him without pay for ten (10) days for violation of DPM §1603.3(f)(3); and DPM § 1603.3(f)(4). Agency asserts that the ten (10) day suspension was justified for Employee's neglect of duty and insubordination, and that there is substantial evidence in the record to support the adverse action. Agency proffers that its actions were appropriate upon consideration of the relevant sections of the DPM, and relevant Douglas factors.

### **Employee's Position**

Employee argues that he was not given a direct order by Lt. Smith. Employee asserts that he is a first line supervisor with Agency and that as a result he is responsible for issuing tasks and implementing them.<sup>11</sup> Employee avers that his job duties do not include building supervision, but patrol on midnight shift.<sup>12</sup> Employee argues that he did not formally refuse a direct order. Additionally, Employee contends that the incident was not written up by his Lieutenant but by the investigative officer, Captain Collins.<sup>13</sup> Employee argues that Captain Collins authored the report and in doing so, changed the intent of Lt. Smith, who was just going to issue verbal warnings for all charges.<sup>14</sup> Employee argues that Lt. Smith never intended for this situation to be “blown into this large infarction.”<sup>15</sup>

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<sup>7</sup> *Id.*

<sup>8</sup> Agency's Answer at Tab 1 (August 5, 2016).

<sup>9</sup> Agency's Answer (August 5, 2016).

<sup>10</sup> Agency's Brief at Page 3 (December 28, 2016).

<sup>11</sup> Employee's Brief at Page 1 (February 1, 2017).

<sup>12</sup> Employee's Brief at Page 1 (February 1, 2017)

<sup>13</sup> *Id.* at Page 2

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

## FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee is employed by Agency as Supervisory Special Police Officer, CS-083-9, with the Protective Services Division (PSD) with the Department of General Services.<sup>16</sup> In a Final Written Notice dated June 6, 2016, Employee received notice of Agency's decision to suspend him without pay for ten (10) days from his position for violation of DPM §1603.3(f)(3)—“Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty, failure to carry out assigned tasks; and DPM § 1603.3(f)(4) Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: insubordination—refusal to comply with a direct order.”<sup>17</sup> The effective dates of the suspension were June 21, 2016, through July 2, 2016.

### **ANALYSIS**

#### **Appropriate Version of DPM**

In the Post Prehearing Conference Order dated November 30, 2016, the undersigned required the parties to address whether Agency, in administering the adverse action against Employee utilized the appropriate version of the District Personnel Manual (“DPM”). Employee proffered that this issue should be determined by the court.<sup>18</sup> Agency asserted that its adverse action was properly guided by, and assessed under the August 27, 2012 version of DPM Chapter 16. Agency contends that Employee's conduct that resulted in the instant adverse action took place on December 8, 2015.<sup>19</sup> As a result, Agency proffers that Employee's actions that resulted in the adverse action occurred while the 2012 version of the DPM was still effective.

Agency contends that the current DPM Chapter 16 version which was effective as of February 26, 2016, would be inappropriate to apply in this instant matter as that would result in retroactive application of a new statute.<sup>20</sup> The undersigned agrees. The actions for which Employee was subject to an adverse action occurred during the time in which the 2012 version of the DPM was effective. Consistent with the findings of the U.S. Supreme Court, OEA has held that there is a presumption in which the “legal effect of one's conduct should be assessed under the law that existed when the conduct took place.”<sup>21</sup> Because the current DPM Chapter 16 did not become effective until February 26, 2016, I find that it would be improper for it to have been applied retroactively in the instant matter. As a result, I find that Agency did utilize the appropriate 2012 version of the DPM in administering adverse action against Employee.

#### **Whether Agency had cause for adverse action**

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

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<sup>16</sup> Employee's Petition for Appeal (July 6, 2016).

<sup>17</sup> Agency's Brief Pages 1-2 (December 28, 2016).

<sup>18</sup> See Employee's Brief (February 1, 2017).

<sup>19</sup> Agency's Brief (December 28, 2016)

<sup>20</sup> *Id.* at Page 4.

<sup>21</sup> *Dana Brown v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0036-07 *Opinion and Order on Petition for Review* (March 10, 2010).

(a) 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. (*Emphasis added*).

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Additionally, DPM § 1603.2 provides that disciplinary actions may only be taken for cause. Employee's suspension was levied pursuant to DPM § 1603.3, wherein the definition of cause includes the following: §1603.3(f)(3): “[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty, failure to carryout assigned tasks”; and §1603.3 (f)(4): “[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations :insubordination—(refusal to comply with a direct order).”

***“[A]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations; specifically Neglect of Duty- failure to carryout assigned tasks.”***

District of Columbia personnel regulations provide that there is a neglect of duty in the following instances: (1) failure to follow instructions or precautions regarding safety; (2) *failure to carry out assigned tasks*; or (3) careless or negligent work habits (*emphasis added*).<sup>22</sup> In the instant matter, on the night of December 8, 2015, Employee was told by his supervisor, Lieutenant Smith (Lt. Smith) to assume a post at the DCNG. Employee indicated to Lt. Smith that the assignment was not a part of his duties, and ultimately did not assume the post at the DCNG. Employee maintains that he did not refuse a direct order; rather, he asserted that the assignment was not a part of his job duties. Further, Employee argued that he is a supervisory officer, and that the Lieutenant “passes him information and it’s up to me to see that tasks or duties are implemented.”<sup>23</sup> However, the undersigned finds that there is no dispute that Lt. Smith was Employee’s supervisor on the evening of December 8, 2015.

Further, Employee acknowledges Lt. Smith indicated that he was to cover the DCNG post, but merely proffers that this was not a direct order, and as a result, he did not formally refuse a direct order for the assignment. The undersigned finds this argument by Employee to be unpersuasive and unsupported by the record. It is clear that Lt. Smith ordered Employee to assume a post at the DCNG, and that Employee ultimately failed to do so. Additionally, Employee seems to suggest in his brief that Lt. Smith was only inclined to give a verbal warning for actions surrounding the incident on the night of December 8, 2015, and that Captain Collins unreasonably escalated the matter.<sup>24</sup> Based on

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<sup>22</sup> *Karen Falls v. Department of General Services*, OEA Matter No. 1601-0044-12R14 (August 12, 2014). *See also* 6-B DCMR §1619.1 (6), Table of Appropriate Penalties (2015).

<sup>23</sup> Employee Brief at Page 2 (February 1, 2017).

<sup>24</sup> *Id.* at Page 3.

the record, I find that Employee was given an order to report to a post by his superior and that he refused to do so. As a result, I find that Employee neglected his duty and failed to carryout tasks that he was assigned.

***“Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: insubordination—refusal to comply with a direct order.”***

Moreover, based on the aforementioned, I find that Employee’s failure to report for the assignment at the DCNG also results in his insubordination. OEA has held that “insubordination is based on a refusal of a subordinate to obey an order that a supervisor is entitled to give and entitled to have obeyed.”<sup>25</sup> In the instant matter, there is no dispute that Lt. Smith was Employee’s supervisor. On December 8, 2015, Lt. Smith ordered Employee to assume a post at the DCNG. Employee indicated that this was not a part of his job duties, and ultimately did not assume the post as ordered. Regardless of what Employee regarded as his job duties, the undersigned finds that this does not give Employee license to refuse an order from a superior. As a result, I find that Employee was insubordinate, and failed to comply as directed. Consequently, the undersigned finds that Agency had cause to charge Employee with insubordination.

### **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>26</sup> According to the Court in *Stokes*, OEA must determine whether the penalty was in the range allowed by law, regulation and any applicable Table of Penalties as prescribed in DPM 1619.1; 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>27</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>28</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

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<sup>25</sup> *Kisha Spencer v. District of Columbia Taxicab Commission*, OEA Matter No. 1601-0033-11 (August 13, 2013).

<sup>26</sup> *Shairrmaine Chittams v. D.C. Department* See also *Stephens v. Department of State Police*, P.2d 788 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. 1601-0101-02, *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>27</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>28</sup> *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

for ten (10) days.<sup>29</sup> Further, Chapter 16 § 1619.1 of the District Personnel Manual Table of Appropriate Penalties (“TAP”) provides that the appropriate penalty for a first offense for “any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically; neglect of duty, failure to carryout assigned duties,” ranges from reprimand to removal.<sup>30</sup> Further, the TAP provides that the appropriate penalty for a first offense of “any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, specifically insubordination (refusal to comply with direct orders, accept an assignment or detail)” ranges from reprimand to suspension for up to ten (10) days.”<sup>31</sup>

Accordingly, I find that Agency properly exercised its discretion, and its chosen penalty of a ten (10) 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.

### ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency’s action of suspending Employee for ten (10) days from service is **UPHELD**.

FOR THE OFFICE:

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Michelle R. Harris, Esq.  
Administrative Judge

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<sup>29</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 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.

<sup>30</sup> 6-B DCMR §1619.1 (6), Table of Appropriate Penalties (2015).

<sup>31</sup> 6-B DCMR §1619.1(7), Table of Appropriate Penalties (2015).