

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
Jason Gulley,	)	OEA Matter No. 1601-0027-17
Employee	)	
	)	Date of Issuance: August 11, 2017
v.	)	
	)	Joseph E. Lim, Esq.
Metropolitan Police Department,	)	Senior Administrative Judge
Agency	)	
_____	)	
Jason Gulley, Employee <i>pro se</i>		
Brenda Wilmore, Esq., Agency Representative		

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

On January 30, 2017, Jason Gulley (“Employee”) filed a Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the Metropolitan Police Department’ (“MPD” or “Agency”) decision to suspend him from his position as a Police Sergeant for fifteen days (with five days held in abeyance) for violation of General Order Series 120.21, Attachment A, Part A-16, which states “Failure to obey orders or directives issued by the Chief of Police.”

On March 1, 2017, Agency submitted its Answer to Employee’s Petition for Appeal. This matter was assigned to the undersigned Administrative Judge (“AJ”) on May 5, 2017. Thereafter, I held a Prehearing Conference in this matter on May 24, 2017. Both parties were present for the Status Conference. On May 25, 2017, I issued a Post Conference Order requiring the parties to submit written briefs addressing the issues raised at the Conference. Both parties timely submitted their briefs. After considering the parties’ arguments as presented in their submissions to this Office, I have decided that there are no material issues of facts in dispute, and therefore, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUE

Whether Employee's penalty is within the range allowed by law, rules, or regulations.

FINDINGS OF FACTS,<sup>1</sup> ANALYSIS AND CONCLUSIONS OF LAW

Pursuant to the Order dated May 25, 2017, the Metropolitan Police Department (Agency), by and through counsel, and Employee, Jason Gulley, submitted the following Joint Stipulation of Facts.

On June 11, 2016, Lieutenant David Hutchinson was the 6D Watch Commander for the day tour of duty. Employee, Lieutenant Jason Gulley, was scheduled to relieve Lieutenant Hutchinson as the on-coming evening Watch Commander.

Before the start of the Employee's tour, (1) officers from the Narcotic and Special Investigations Division, Narcotics Enforcement Unit (NSID), conducted a successful buy/bust operation in the Sixth District (6D). During the operation, officers observed the suspect, Mr. Charles Buie, attempting to conceal drugs in the crotch area of his pants/underwear. Mr. Buie was arrested and transported to 6D for processing.

NSID Sergeant Christopher Dove called Employee and requested authorization to conduct a strip search of Mr. Buie. Employee gave such authorization even though he was not yet on duty and was, therefore, not the 6D Watch Commander.

NSID Officer John Stathers conducted a strip search of Mr. Buie at the Sixth District and recovered approximately twelve zips of heroin from under his foreskin. Lieutenant Hutchinson became aware of the search and asked Officer Stathers who had authorized it. Officer Stathers responded that Employee had authorized it.

Lieutenant Hutchinson stated that Employee was not present at 6D at any time during the search. Employee acknowledges that he authorized the strip search while not being the current Watch Commander.

Captain George Caldwell investigated the matter and recommended that the Employee be cited for Adverse Action and that Sergeant Dove be issued a PD 750 (2).

On September 15, 2016, Employee was served with the Notice of Proposed Adverse Action, charging him with one specification of Failure to Obey Orders or Directives and proposed a 15-day suspension:

Charge: Violation of General Order Series 120.21, Attachment A, Part A-16, which states "Failure to obey orders or directives issued by the Chief of Police."

Specification No. 1 - In that, on June 11, 2016, while in an off-duty status and not serving as the Watch Commander, you authorized

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<sup>1</sup> Based on the parties' joint stipulation of facts and submitted documents of record.

members of the Narcotics and Special Investigations Division to conduct a strip search at the Sixth District. This misconduct is further described in General Order 502.01, Part V, Section B-4(a), which states, in part, "...members shall obtain the approval of the watch commander to conduct a 'strip' or 'squat' search." General Order 120.21, Attachment A, Part A, Section 16, prohibits "Failure to obey orders or directives issued by the Chief of Police."

On September 22, 2016, Employee filed his response. On December 6, 2016, Employee was served with the Final Notice of Adverse Action advising that the 15-day suspension would be upheld, but that five days would be held in abeyance.

On December 14, 2016 Employee filed an appeal to the Final Notice. The Chief of Police denied the appeal on January 4, 2017.

### ***Employee's Position***

Employee acknowledges that he disobeyed Agency's General Order Series 120.21, Attachment A, Part A-16, which states "Failure to obey orders or directives issued by the Chief of Police," and Agency's General Order Series 502.01, Part V, Section B-4(a), which states, in part, "...members shall obtain the approval of the watch commander to conduct a 'strip' or 'squat' search," when he gave permission when he was not yet the watch commander.

Employee explains that he received a phone call from Sergeant Dove asking permission to conduct a strip search of a recently arrested drug suspect. Since he was the in-coming watch commander, he believed he himself could authorize the strip search as he was arriving in about fifteen minutes. Employee also complains that the General Order was unclear as it does not specify which watch commander must be notified. He excuses his mistake by mentioning he had been a lieutenant for only two months at the time of the incident.

Employee complains that his penalty was not progressive and unfairly harsh for a first offense. He contends that the penalty meted out to him was far greater than the penalty given to Sergeant Dove. Employee asks this Office to reduce his penalty.

### ***Agency's Position***

Agency asserts that its action of suspending Employee for fifteen days with five days held in abeyance was proper. Agency dismisses Employee's excuse of being a lieutenant for only two months by pointing out that Employee had been a Sergeant before, which is also a supervisory position and that as a veteran officer, Employee is expected to be well-versed in all departmental orders and directives and to adhere to them.

With regards to the penalty, Agency asserts that it weighed the *Douglas* factors<sup>2</sup> and concluded that given the seriousness of Employee's misconduct, the suspension was the

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<sup>2</sup> *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).

appropriate penalty to impose and within the range of penalty guidelines. Furthermore, as to Employee's claim of disparate treatment, Agency states that the penalty is consistent with that imposed against other members with like or similar misconduct.

***Whether the penalty of 15-day suspension with five days held in abeyance 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>3</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. In the instant case, Agency maintains that it considered the *Douglas* factors in imposing the penalty of termination. Employee on the other hand states that Agency engaged in disparate treatment in imposing its penalty when Sergeant Dove received a lesser penalty.<sup>4</sup>

Disparate Treatment

Employee alleged in his brief that Agency engaged in disparate treatment. OEA has held that, to establish disparate treatment, an employee must show that he worked in the same organizational unit as the comparison employees. They must also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period.<sup>5</sup> Additionally, "in order to prove disparate treatment, [Employee] must show that a similarly situated employee received a different penalty."<sup>6</sup>

Here, apart from his bare allegation, Employee has submitted no evidence to show that there was another employee who was charged with the same cause of action within the same general time period, but who received a different penalty than Employee.

I find that Employee has not met his burden of proof in this matter. Employee does not show that the comparison employee held the same position as Employee, or that both employees were disciplined by the same Supervisor. First, I note that Sergeant Dove, the comparison

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<sup>3</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>4</sup> Employee did not specify Sergeant Dove's penalty.

<sup>5</sup> *Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, *Opinion and Order on Petition for Review* (December 12, 2011), citing *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, *Opinion and Order on Petition for Review* (May 6, 2009); *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).

<sup>6</sup> *Metropolitan Police Department v. D.C. Office of Employee Appeals, et al.*, No. 2010 CA 002048 (D.C. Super. Ct July 23, 2012); citing *Social Sec. Admin. V. Mills*, 73 M.S.P.R. 463, 473 (1991).

employee, has a different rank and duties than Employee. In addition, Sergeant Dove's offense of conducting a strip search by asking permission from the wrong watch commander is different from Employee's offense of giving permission for the search when he was not the watch commander. Accordingly, I find that Employee has not established a prima facie showing of disparate treatment.

Next, Employee states that his penalty was not progressive and should be reduced to a reprimand or fewer days of suspension. However, the general order that he cited, Metropolitan Police Department General Order 120.21<sup>7</sup> Table of Offenses and Penalties,<sup>8</sup> provides that the appropriate penalty for Failure to Obey Orders and Directives of the Chief of Police ranges from reprimand to removal. The record shows that the Agency's decision was based on a full and thorough consideration of the nature and seriousness of the offense, as well as any mitigating factors present.

For the foregoing reasons, I conclude that the Agency's decision to select a fifteen day suspension with five days held in abeyance as the appropriate penalty for the employee's infraction was not an abuse of discretion and should be upheld.

#### ORDER

It is hereby ORDERED that the agency's penalty for the employee is UPHeld.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.  
Senior Administrative Judge

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<sup>7</sup> Metropolitan Police Department General Order 120.21 governs discipline of sworn officers within the Department pursuant to D.C. Official Code § 1-608.01(d) (2001) ("The Mayor may issue separate rules and regulations concerning the personnel system affecting members of the uniform services of the Police and Fire Departments . . . which accord such member of the uniform services of the Police and Fire Departments separate treatment under this chapter") and pursuant to 6 DCMR § 1601.5 "Any procedures for handling corrective or adverse actions involving uniformed members of the Metropolitan Police Department . . . provided for by . . . regulations of the . . . department( ) in effect on the effective date of these regulations . . . shall take precedence over the provisions of this chapter to the extent that there is a difference.").

<sup>8</sup> Agency Exhibit A at Attachment A, p. 5.