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

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| In the Matter of: |) | |
| |) | |
| LENDIA JOHNSON, |) | |
| Employee |) | |
| |) | OEA Matter No. 1601-0011-17 |
| v. |) | |
| |) | Date of Issuance: September 28, 2018 |
| METROPOLITAN POLICE |) | |
| DEPARTMENT, |) | |
| Agency |) | Michelle R. Harris, Esq. |
| |) | Administrative Judge |
| Robert Shore, Esq., Employee Representative | | |
| Jhumur Razzaque, Esq., Agency Representative | | |

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On November 18, 2016, Lendia Employee (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the D.C. Metropolitan Police Department’s (“Agency” or “MPD”) decision to terminate her from service, effective October 19, 2016. On December 19, 2016, Agency filed its Answer to Employee’s Petition for Appeal.

Following a failed attempt at mediation, I was assigned this matter on May 5, 2017. On May 15, 2017, I issued an Order Convening a Prehearing Conference for June 28, 2017. On June 21, 2017, Agency filed a Consent Motion to Continue the Prehearing Conference. On June 23, 2017, I issued an Order granting Agency’s Motion and rescheduling the Prehearing Conference for August 15, 2017. Both parties were present for the Prehearing Conference on August 15, 2017. Following that conference, I issued a Post Prehearing Conference Order requiring the parties to submit briefs addressing whether Agency had cause to take adverse action against Employee and whether the penalty was appropriate under the circumstances. Agency’s brief was due on or before October 2, 2017, and Employee’s brief was due on or before November 3, 2017. On September 25, 2017, Agency filed a Consent Motion to Enlarge the Briefing Schedule. On September 26, 2017, I issued an Order granting Agency’s Motion. Agency’s brief was now due on or before October 17, 2017, and Employee’s brief was due on or before November 17, 2017. Briefs were submitted in accordance with the prescribed deadlines.

Following a review of the briefs, I issued an Order on December 4, 2017, scheduling a Status/Prehearing Conference for January 9, 2018, for the purposes of discussing issues in the briefs

and scheduling an Evidentiary Hearing in this matter. Both parties appeared for the Status/Prehearing conference. Following the conference, I issued an Order Convening an Evidentiary Hearing for March 21, 2018. Due to inclement weather on March 21, 2018, the Office of Employee Appeals was closed. As a result, I issued an Order on March 23, 2018, rescheduling the Evidentiary Hearing for April 11, 2018. The Evidentiary Hearing was held on April 11, 2018, where both parties presented testimonial and documentary evidence. At the close of the Evidentiary Hearing, both parties requested that their previously submitted briefs be considered in lieu of the submission of closing arguments. The transcript from the hearing was completed on May 4, 2018, and was sent to both parties for their records. 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 Agency had cause to take adverse action against Employee; and
2. If so, whether the termination was appropriate under the circumstances.

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 TESTIMONY

On April 11, 2018, an Evidentiary Hearing was held before this Office. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding. Both Employee and Agency presented testimonial and documentary evidence during the course of this matter to support their positions.

Agency's Case-In-ChiefPaul Shelton ("Shelton") Tr. Pages 15-67.

Shelton testified that he was a Captain with the Metropolitan Police Department (MPD), and has been employed with Agency for over 27 years. Shelton was assigned to the Seventh District several times over the course of his career, and most recently was there as an administrative captain from early 2015 to around March or April of 2016. Shelton explained that his supervisor during this time at the Seventh District was Commander Vendette Parker. Shelton indicated that during his tenure at 7th District, that he investigated, Employee, Lendia Employee. Shelton explained that he was assigned to investigate Employee for allegations of misconduct, specifically with regard to a Halloween Party and solicitations from businesses for donations of candy. Shelton also explained that he investigated Employee for an issue with a delivery to the Seventh District.

During the course of his investigation, Shelton explained that Employee faced a charge of violating MPD General Order 201.26 which indicated that members shall not accept gifts or gratuities from organizations, businesses or individuals with which there is a reasonable expectation of official relationship with the District of Columbia. Shelton testified that he found that Employee had prepared letters for the solicitation of donations of gratuities for the October 2015 Hallowed party. Shelton explained that he sustained these charges based on his review of the documents that were used and that he also took a formal statement from Employee. Shelton testified that letters were sent to local business owners with a Citizens Advisory Council (CAC) and MPD logo. Shelton indicated that this violates the General Order because it looked like MPD was asking the local business to assist with sponsorship of supplying candy or other Halloween goods for the event, and that this amounted to solicitation which is prohibited by the General Order. Shelton explained that in his experience, it is not appropriate for the CAC or MPD logos to be utilized for such purposes. Shelton explained that the CAC is an auxiliary group of the MPD, but is a separate entity.

Shelton testified that with regard to the other incident regarding the "Webrestaurant" delivery, he sustained the charge of neglect of duty. Shelton explained that he sustained this charge because Employee did not properly ensure the delivery and receipt of the products. Shelton indicated that Employee could have asked for aid from the watch commander in ensuring the delivery. Shelton cited that an email that was received indicated that a delivery attempt had been made, but that Employee, on her own volition sent the products back despite being advised that additional expenses would accrue for redelivery or restocking. Shelton explained that Employee sent an email to Sergeant Wiggins, who was the administrative sergeant at the time, citing that there was no one available to receive a delivery on October 9, 2015, and that the driver left. Shelton testified that the documents showed that delivery was attempted on October 9, 2015, and that Employee received communication from Webrestaurant on October 14, 2015, and that the email was sent to Sergeant Wiggins at some time therein. Shelton indicated that there is always someone at the Seventh District station, even in times of full deployment. Shelton explained that Employee's statement that no one was around did not seem plausible given that there is always someone at the station and that Employee could have contacted the commander if needed. Shelton stated that everyone at the Seventh District has access and information to contact the watch commander if needed. Shelton testified that he was not sure if Employee had received deliveries at the Seventh District before.

, Shelton testified that Employee was the point of contact for deliveries, but did not instruct the delivery driver to take the products back. Shelton also indicated that he did not find any information that contradicted Employee's statement that the delivery driver said he could not access

the elevator at the Seventh District. Shelton also explained that he did not confirm how many people were present at the Seventh District during the time of the delivery incident. Shelton also testified that with regard to the letters sent to community businesses for the Halloween party, that Mr. Muhammad of the CAC signed the letters. Shelton stated that the letters didn't suggest that Employee had solicited anything for herself, but that she was the actual point of contact for the letters. Shelton agreed that the letters specifically stated that the communication indicated that the candy was for the Safe Haven activity for youth on Halloween. Shelton testified that some CAC members are selected by the Chief of Police. Shelton explained that the CAC is a formal relationship with the MPD.

Shelton cited that CAC members are voluntary and are not paid by MPD. Shelton explained that CAC helps MPD by delivering services directly to the community in which they are serving. Shelton cited that the CAC and MPD have regular meetings and is a strong relationship. With regard to the delivery, Shelton cited that he indicated that Employee had refused delivery because she was the point of contact for the delivery. Shelton cited that during the course of his investigation he did not speak to the delivery driver about the incident. Shelton testified that during his investigation that he did not see any time between October 9, 2015, and October 14, 2015, where Employee notified someone about the issue with the delivery from Webrestaurant. Shelton also testified that with regard to his investigation into the Halloween candy that he found no reason to explore how candy had been received in prior years.

Shelton testified that he didn't have any evidence to support that Employee told the delivery driver to leave. Shelton also explained that he did not make a determination if it was normal practice if the Community Outreach Coordinators accepted donations for events or requested/solicited donations.

Sergeant Shan Thompson (Thompson) Tr. Pages 68-95.

Thompson testified that she is a sergeant with MPD and has been a part of the agency for 21 years. Thompson indicated that she was a sergeant at the Seventh District from 2005 until the time of the hearing. Thompson explained that she is a supervisor to both civilians and officers. Thompson cited that in 2015, she was an administrative sergeant, where she answered to the commander and handled all daily activities for the building. Thompson indicated that she and another sergeant, Sergeant Holden, were responsible for the supervision of Employee. Thompson stated that she did not conduct any performance reviews for Employee, but did witness counseling sessions with Employee that were held by Sgt. Holden. Thompson cited that she became aware of the Halloween candy solicitation incident after the fact. Thompson explained that Employee was counseled about that incident after it had happened. Thompson testified that she did not call the counseling session for Employee, but was present for the session. Thompson could not recall if Employee had received any other counseling on this matter.

Thompson explained that during the counseling session, Employee was told that she was not to use MPD letterhead to send out any type of request as it was violation of MPD general orders. Thompson could not recall exactly when this counseling session was held, but indicated that Commander Dandridge was in the meeting as well. Thompson testified about an AWOL issued that Employee had faced with regard to a doctor's note where there was a discrepancy in the time she was to report versus her being at a doctor's appointment. Thompson testified that the note was not from a physician but from a counselor and that the note did not give authorization for leave. Thompson cited that Employee received counseling with regard to this incidence and with her schedule and

solicitation. Thompson indicated that Employee was also advised at one point about not directly emailing the Chief of Police. Thompson also recalled an incident regarding the use of the “P Card” (purchase card) for events, and that there were issues that caused them to revoke the P-Card from Employee. Thompson testified that Employee was counseled on numerous occasions for incidents of incompetence.

Thompson explained that Employee was counseled several times for incidents that were cited as incompetence. Thompson could not recall whether she mentioned the numerous counseling sessions with Employee in her statement to Inspector Michael Eldridge. Thompson testified that with regard to the solicitation of Halloween candy that she met with Employee after the event and advised her that was not to be done. Thompson cited that Employee’s union rep also told her that. Thompson iterated that she did not recall any prior meeting about solicitation. Thompson testified that she was aware of all three specifications in the charging documents and that they led to discipline, but that she cannot remember the timeline by her own recollection because she was no longer in the administrative capacity at the Seventh District.

Inspector Vendette Parker (“Parker”) Tr. Pages 95 -168.

Parker testified that she has been a member of MPD for approximately 25 years. She explained that she worked at the Seventh District in 2014 as a Captain and in 2015 as a Commander. Parker explained that she supervised Employee in 2014, and was the commander in 2015. Parker cited that she worked closely with Employee and reviewed her work performance on a day to day basis in 2014. Parker indicated that the solicitation policy was an agency policy and that she did not think there was training needed on accepting or receiving goods, but that it was more an expectation of good judgement. Parker testified that she has known Employee to be the community outreach coordinator for the Seventh District for a substantial amount of time.

Parker explained that to her knowledge, Employee was responsible for accepting deliveries and had done so on more than one occasion. Parker testified that she was aware of incidents of misconduct from Employee. Parker explained that she was familiar with the CAC, and they are a separate entity of volunteer. Parker cited that Mr. Anthony Muhammad is the co-chair of the Seventh District CAC and he worked closely with Employee. Parker explained that Employee was responsible to serve as a liaison between the police department and the community to help foster better relationships. Parker testified that CAC is aware of some of the broad policies at MPD because they meet with the chief.

Parker explained that she was first made aware of the incident of the solicitation with MPD logo when Mr. Muhammad came outside with the letters and she could see them. Parker testified that she asked Mr. Muhammad to show her the letters, but he refused, so she went and ask Employee about the letters. Parker explained that there were three letters to different business in the Seventh District that were asking for Halloween candy and other goods for the Safe Haven party. Parker cited that the letterhead is not MPD’s actual letterhead, but it says Metropolitan Police Department at the top. Parker cited that the letterhead that is used outside the agency is the District of Columbia letterhead. Parker explained that the MPD logo that is on the letter used by Employee is one that can be pulled up on Google and could be cut and pasted into documents, but is not the official MPD logo. Parker testified that the MPD official logo is a badge, but the logo used by Employee was a picture of scout cards.

Parker testified that the MPD logo used on the CAC agendas were not authorized to be used either. Parker testified that she had not seen other documents with the CAC and MPD logo on it, but that as commander she should have seen them, as commanders are required to attend the CAC meetings. Parker stated that the agenda she had seen were just generic without any logo or letterhead. Parker testified that Employee had previously been counseled with regard to solicitation prior to the October 2015 incident. Parker explained that she personally counseled Employee when she was a Captain at the Seventh District, but could not recall the exact number of times. Parker cited that she spoke with Employee approximately two or three times about not soliciting. Parker recalled a time in 2014 in which the solicitation issues arose in with regard to summer prime initiatives in the commit. Parker testified that she told Employee that she could not solicit from the community, but was to use the P Card to make purchases needed or donations had to go directly to the CAC. Parker iterated that she knew it was in 2014, because she was unfamiliar with the policies herself, so once she learned of them, she talked with Employee about it.

Parker also testified that in 2015, she talked to Employee after she saw the letters for the Halloween event. Parker indicated that she told Employee that those letters were not authorized and that she needed to contact Mr. Muhammad and tell him those letters could not be used. Parker said that she made it clear that these types of solicitations were not permitted.

Parker cited that she was aware of the incident regarding the Webrestaurant delivery, because she was told by the administrative sergeant that there was going to be an additional delivery cost because of a failed delivery attempt. Parker explained that Sgt. Wiggins contacted Employee to find out what happened, and cited that Employee said that the delivery was to be made and she wasn't there and that there was no one at the station to accept the delivery. Parker explained that there were people present on that day, but that Employee did not reach out. Parker cited that there is always a manager on duty at the station 24 hours a day. Parker said that there was a leave restriction that day due to the Million Man March event in the city, but that there were still people present at the station. Parker stated that the delivery incident did not come to her attention on the day of delivery, but some days later, so she is unsure whether she was in the building at the time of the attempted delivery. Parker testified that to her knowledge Sergeant Wiggins was not contacted on the day of delivery. Parker stated that they were notified about the restocking fee on October 14, 2015, pursuant to an email communication. Parker says that Employee should have contacted Sergeant Wiggins, the commander, or her to address the situation with the delivery.

Parker explained that the logo used on the Advisory Neighborhood Commission (ANC) was not an authorized MPD logo. Parker noted her signature on a disciplinary document from a Commander's Resolution Conference worksheet regarding an incident of June 2015, which resulted in a one-day suspension. Further, Parker noted her signature on another disciplinary document dated August 2015, where the discipline was an official reprimand, but she could not recall what the discipline was related to. Parker cited that Employee's incompetence with regard to the Halloween solicitation incident and did not feel like she could be rehabilitated.

Parker testified that she felt that letters from the CAC were solicitation on behalf of the Agency. Parker explained that the letters were not really on MPD letterhead, but she used MPD name and CAC so it made it appear as if it was a solicitation from MPD on its letterhead, even though it was not official MPD letterhead. Parker indicated that that was not included in the specifications of the charges against Employee, but that was the intent. Parker testified after reading Employee's statement regarding the delivery that Employee indicated that she asked the delivery driver to come to the back near the elevators and that the driver told her he could not do that. Parker explained that

she did not talk to Employee directly on the day of the delivery incident, but that Employee spoke to Sergeant Wiggins. Parker indicated that she could not be sure if Employee had left work or was not at work that day, but thought that was what Sgt. Wiggins indicated.

Parker cited that Employee's job responsibilities were to assist with the CAC. Parker testified that when she asked Employee for the letters, that she gave them to her without resistance. Parker also cited that she made it clear to Employee in 2015 that solicitations could not be made on behalf of MPD. Parker testified that she never found out if the businesses thought that the letters were solicitations from MPD, and indicated that she didn't have to because the misconduct was Employee's drafting of the letters without approval. Parker stated that she did not have any documentary or written evidence to cite to regarding her counseling Employee in 2014 with regard to solicitation. Parker explained that in regard to Employee's past discipline that she had knowledge of the discipline but not the investigations. On redirect examination, Parker testified that even though Employee did not use official MPD letterhead, she did use an MPD logo that was not authorized.

On questions from the administrative judge, Inspector Parker testified that there are many MPD members who may make "letterhead" with different MPD logos that are not official. Parker explained that there is not an internal authorization process, but that the Chief of Police must authorize use of MPD letterhead by outside entities. Parker cited that there is a general order with regard to this process.

Parker cited that she did not do the investigation and but stated that she believed if an employee received three adverse actions within a 12-month period that it automatically goes to a charge of incompetence. Parker cited that this goes progressive discipline.

Sergeant Alberta Holden ("Holden") Tr. Pages 170-189.

Holden has been with MPD for approximately 30 years and currently is a Sergeant with the Criminal Investigations Divisions, Warrant, and Domestic Violence and CPO Unit. Prior to this position, Holden explained that she worked at the Seventh District as a Sergeant and administrative sergeant. Holden testified that she was an administrative sergeant at the Seventh District from late 2014 until September 2015, where after she moved on to be a Control Sergeant. Holden cited that she supervised Employee along with Sergeant Shan Thompson during her tenure at Seventh District. Holden testified that she supervised Employee's work, conducted performance reviews and monitored time and attendance. Holden explained that Employee was the Community Outreach Coordinator responsible for helping with interactions in the community and interacting with the public and members of the CAC.

Holden said that she counseled Employee regarding the prohibitions against solicitation, and was present for a couple of meetings, though she could not recall exactly how many meetings there were. Holden cited that all the meetings were prior to October 2015. Holden cited that one meeting was held around June or July 2015, where she, Commander Dandridge, a union representative and Sgt. Thompson were present. Holden testified that one meeting was solely about solicitation, and recalled that Employee's union representative drafted a letter for Employee to sign regarding the "dos and don'ts" of solicitation. Holden explained that this meeting was held because a pastor in the community indicated that Employee had contacted him about buying items for a community meeting.

Holden also testified that Employee was counseled about the use of MPD logos. Holden could not recall how many times, but cited that she was present for another meeting that was held.

Holden explained that during this meeting Employee was advised about use of MPD logo and letterhead and that this meeting was held prior to October 2015, and that her union representative was present. Holden testified that she had personal knowledge of the AWOL incident that happened in September 2015 and was the supervisor who reported the misconduct, wherein Employee did not report for work. Holden testified that she was aware of the insubordination charge, in that she was told by Commander Dandridge to report an incident where Employee sent an email to Chief Lanier. Holden cited that there were issues with the doctor's note that Employee had presented.

Holden cited that when she became the Administrative Sergeant, she did not change any policies or procedures. Holden testified that she did not have confidence in Employee's ability to work at MPD. Holden indicated that she gave Employee many directives that she failed to follow, despite counseling. Holden testified that outside of the three disciplinary issues previously discussed that she did not administer any other discipline to Employee. Holden said that her commander told her to contact the doctor's office to investigate the authenticity of Employee's note, but that she had never done that before. Holden explained that she did not have any copies of the notes that union representative drafted during counseling sessions with Employee.

Commander Willie Dandridge ("Dandridge") Tr. Pages 190- 205.

Dandridge has been with MPD since 1988 and currently serves as the Commander of the Control Branch and Equipment Supply Branch. Dandridge testified that previously he was the District Commander at Seventh District from February 2015 through August 2015. Dandridge explained that he did not directly supervise Employee, but was the overall supervisor at the Seventh District, and had the opportunity to review Employee's work. Dandridge explained that Employee was counseled about solicitation sometime in the spring of 2015. Dandridge recalled that there was a meeting with Employee, where he the union president Antonio Reed was present, Genet Amare, a shop steward, Sgt. Shan Thompson, and Sgt. Renee Holden, Cpt. Andre Wright were all present. Dandridge explained that during this meeting, Employee was advised that MPD does not solicit. Dandridge cited that it was the only meeting that he had with Employee. Dandridge he told Employee that the credit card could be used for purchase for events, but made clear that solicitation was not allowed. Dandridge testified that he made it clear that there was to be no solicitation. Dandridge also explained that he had Sgt. Holden investigate the AWOL charge to verify Employee's attendance and that he has done so in the past for other similar issues.

Dandridge testified that he had Sgt. Holden investigate the AWOL with the doctor's note in person instead of calling the doctor's office because it was a part of an investigation. Dandridge noted that the letter for solicitation was signed by Anthony Muhammad of the CAC. On redirect, Dandridge explained that the logo on the letter was improper because it has police on it, but wasn't the MPD logo approved by the Chief of Police. Dandridge testified that the letter was in violation of the no-solicitation policy because it asked for donations of Halloween treats.

Sergeant Ilah Wiggins ("Wiggins") Tr. Pages 207 -221.

Wiggins testified that she is a Sergeant with the MPD and has been with Agency since 2004. Wiggins is currently assigned to the Internal Affairs Division, but previously worked at the Seventh District in patrol, an administrative sergeant and as a station sergeant. Wiggins was administrative sergeant at Seventh District from September 2015 through May 2016 and during that time was a direct supervisor to Employee. Wiggins cited that she was familiar with the delivery incident from October 2015. Wiggins testified that she provided a statement to Paul Shelton. Wiggins indicated

that on October 14, 2015, Employee called her to tell her that the delivery of items from Webrestaurant on October 9, 2015, for a community event were not delivered because no one was present to receive them. Wiggins explained that she the contact information for the company and found out that there would be a re-delivery fee or a restocking fee for the items. Wiggins, by referring to her written statement, was able to recall that there was a restocking fee. Wiggins testified that she contacted the commander and that the commander told her to give Employee the option to pay for the items or that an investigation would be launched. Wiggins indicated that she contacted Employee and told her this, and that Employee told her she would not pay the fees. As a result, Wiggins stated that she explained to Employee that and investigation would occur.

Wiggins cited that she was at the station on October 9, 2015 and that she was never notified of the issues with the delivery. Wiggins explained that the first time she learned of the situation was on October 14, 2015. Wiggins testified that Employee forwarded an email to her from Webrestaurant. Wiggins cited that Employee should have notified her when the delivery driver indicated that delivery was not possible, or the watch commander because there is always a watch commander on duty and that person would have notified her about the situation. Wiggins iterated that there were people at the station on that October date, because there was a leave restriction due to the Million Man March, and that here was definitely someone present at the station that could have assisted Employee with the delivery. Wiggins recalled that Employee was at the station that day.

Wiggins testified that Employee's behavior constituted incompetence, but that she was not aware of any other previous disciplinary matters with Employee. Wiggins explained that she did not believe that Employee could be rehabilitated. On cross-examination, Wiggins testified that she was told that if Employee did not pay the fees that an investigation would have to occur. Wiggins indicated that she was not sure if an investigation would have happened or not, but that Employee was given the option to rectify the situation by paying the fees herself.

Kathleen Crenshaw ("Crenshaw") Tr. Pages 222 – 256.

Crenshaw has been a member of MPD since February 2016 and was the Director of Human Resources until March 2017, and currently is the Director of Recruiting. During her tenure as HR Director, Crenshaw testified that she was the custodian of personnel files, including notices of adverse action and the like. Crenshaw cited that she executed the Notice of Adverse Action for Employee. Crenshaw stated that Agency terminated Employee based on the charges and specifications indicated in that document. Crenshaw indicated that the decision to terminate Employee was done in accordance with the District Personnel Manual (DPM).

Crenshaw explained that as the HR Director, she was the signatory on all final notices of termination and that she agreed with the contents of the notice, but that the Assistant Chief of Police, Robert Alder, was the actual deciding official. Crenshaw cited that she did not interview Employee, but based her decision on the hearing examiner's recommendations. Crenshaw testified that in the proposed action that she could not see where it was cited that Employee intentionally committed the misconduct as alleged. Crenshaw explained that it was her and the Assistant Chief's responsibility to consider the Douglas Factors in reviewing this matter. Crenshaw iterated that with regard to comparative discipline that there were four others that received different discipline than Employee for the same charges.

Crenshaw cited that the used of the word "intentional" is not required to be used in the Notice of Proposed Adverse Action. Crenshaw testified that when considering comparative discipline, there

are factors that are considered and given weight that may vary with employees and that specifications can make a difference. Crenshaw also cited that she did not look at the cases Assistant Chief Alder looked at of his review of Douglas Factors and that she normally does not do this for disciplinary matter.

Employee's Case-In-Chief

Linda Perkins ("Perkins") Tr. Pages 264 – 266.

Perkins worked with Employee on a grant project when Perkins was with the United Way. Perkins cited that Employee's outreach work resulted in a \$50,000 grant.

Anthony Muhammad ("Muhammad") Tr. Pages 267-281.

Muhammad is the Vice President of the Citizens Advisory Council (CAC) and has been since 2012. Muhammad testified that he knows Employee through his work as Advisory Neighborhood Commissioner, and that he worked with her in her capacity at MPD as well. Muhammad explained that Employee helped to raise funds for CAC by providing letters to vendors in Ward 8. Muhammad stated that Employee sent out fliers and emails and letters. Muhammad indicated that he first asked Employee to help with donations in 2013, for a fundraiser to benefit the police and an award ceremony. Muhammad explained that Employee sent out letters for CAC to request donations to help defer costs. Muhammad cited that no one informed him that it was inappropriate for Employee to do so. Muhammad testified that he asked Employee to create a letter and letterhead for the Halloween event. Muhammad stated that Employee did not receive any personal gain from sending the letters. Muhammad explained that the CAC funds these events with donations from vendors and stores and other community partners in Ward 8.

Muhammad testified that he is a volunteer with CAC. He cited that he is not a member of MPD and therefore is not aware of all the policies and procedures. Muhammad explained that he has a general knowledge of MPD policies due to his tenure with ANC. Muhammad testified that no commander ever told him that the use of letters with MPD letterhead or logos was a violation of policies. Muhammad cited that neither commander Robin Hoy, nor Willie Dandridge told him there was an issue and stated that both commanders saw the letters that were used. Muhammad explained that he was aware that MPD could not solicit funds or money. Muhammad testified that the letters were sent on his behalf.

Lendia Employee ("Employee") Tr. Pages 281 – 366.

Employee worked at MPD from 2004 through 2016. Employee testified that for fourteen years, she had the same position of Community Outreach Coordinator. Employee explained that part of her duties included partnering with the CAC to host community outreach events and serve as the community liaison between the community and MPD. Employee stated that throughout a given year, she would work on planning events and working with the community to meet needs. Employee testified that she also worked to get donations for the events. Employee explained that she would get certain community entities that would volunteer to make donations. Employee testified that the MPD would only provide \$6,000 a year for events, so she was constantly working with CAC to find more resources. Employee explained that she never benefitted from receiving any of these resources.

Employee testified that she worked very closely with CAC, helping with events and meetings. Employee cited that she prepared the agenda's for the CAC meetings, which were held on a monthly basis. Employee testified that she was never told by anyone at MPD the formats she used for the agendas were inappropriate and that she had used them for the fourteen years that she was with Agency. Employee cited that commanders attended the meetings where the agendas were circulated.

Employee testified that she was evaluated several times over the course of her tenure with Agency. Employee cited (after reviewing exhibits) that previous evaluations, specifically one in 2007 she received an "excellent" rating. Employee explained that both Sergeants Holden and Wiggins were her supervisors. Employee cited that neither sergeant provided her with any training and that there were no trainings related to MPD General Order 201.26 solicitation policies. Employee stated that prior to the incident in October 2015, she had not been trained on the solicitation policies or with regard to deliveries. Employee explained that there was a meeting in June 2015, but that it was related to the Purchase card ("P Card"). Employee cited that she also met with Inspector Parker in September 2015, but that it was related to another disciplinary matter.

Employee explained that she had an AWOL matter related to a doctor's appointment she had. Employee explained that she told Sergeant Holden that she had the appointment and that since she was going to be working at night that day, she just adjusted her time. Employee cited that she got to work after two o'clock and that Sgt. Holden told her she was supposed to be at work at eleven. Employee stated that she was scheduled to work at night and that is why she was not there during the daytime shift. Employee also received discipline for insubordination. Employee testified that she received an official reprimand regarding the use of sick leave in August 2015. Employee cited that she was assigned to COPE and that ultimately the Agency determined that she was not at a "doctor's" appointment. Employee explained that she had a relationship with the Chief of Police so she contacted him about the issue, which is what resulted in the reprimand because she did not contact her next line supervisor and went to the chief.

Employee testified that with regard to the Halloween party, she was asked by Mr. Muhammad to prepare the letters to send out. Employee explained that Mr. Muhammad said to just use the same letters as the previous year, so she changed the date and Mr. Muhammad picked them up. Employee maintained that she was not soliciting on behalf of herself or MPD, but that the letters were for CAC. Employee explained that the letterhead was not official, but was a "made-up" letterhead that she had been using for 14 years. Employee testified that no one had ever criticized or told her not to use the "made-up" logo. Employee cited that they were instructed not to use the "badge" letterhead, but that what she used was the logo on the police cars and that it had been used on several types of correspondence. Employee cited that she never accepted any gift or gratuity from an organization as cited in the adverse action against her. Employee cited that from the time she started with Agency until 2015, she had never received any discipline.

Employee testified that she was experienced in her position as outreach coordinator and knew the policies and procedures. Employee explained that she did receive training during the course of her tenure as a Community Outreach Coordinator. Employee maintained that she did not receive counseling with regard to MPD's solicitation's policy. Employee also testified that she did have a P-Card but that there was a limited amount on the card each year from the police foundation. Employee explained that she was not familiar with General Order 403.1, which addresses accepting donations and solicitation. Employee was not aware if funds she had received had been done through the process outlined in General Order 403.1.

Employee explained that she used the letterhead on CAC meeting agendas and that Vendette Parker should have seen those. Employee testified that Parker, Wiggins and Holden's should have seen these documents because they were included in the weekly reports she submitted to her supervisors. Employee stated that it was in her weekly reports and she submitted those to her supervisors, but she could not testify whether they looked at the reports. Employee stated that it was untrue that she was told not to use the MPD logos.

Employee explained that she did not think the previous discipline constituted incompetence and that while there may have been mistakes, she didn't know that she had violated anything. Employee indicated that they were encouraged to make up letterhead, by a previous supervisor Yvonne Smith. Employee explained that they had to work with CACs and this was how it all came about. Employee testified that Sgt. Holden initiated disciplinary action against her, and also was issued discipline by Inspector Parker. Employee cited that neither Wiggins nor Holden issued discipline against her, unless they were somehow involved in the discipline that Parker administered.

With regard to the delivery incident, Employee maintained that there was no one in the station available to help her with the delivery issue. Employee explained that there was one person there, but that he was unable to help her. Employee stated that the driver came into the station to ask for help, and that he couldn't find help to park the truck as it was 5pm and rush hour at the time. Employee cited that there could've been someone in the detective's office, but no one in the station. Employee testified that the delivery driver became frustrated and told her that he would just come back on Monday, but Employee told him that was a holiday (Columbus Day), so the driver said he would return on Tuesday. Employee cited that it was after this happened that she got the notice about the additional charges. Employee testified that there was no one on the second floor, but that she did call and try to contact people for assistance. Employee testified that she called the Watch Commander and even spoke with William Lyke, who told her he could not help her. Employee also cited that she did call Sgt. Wiggins, but that she was not at the office, and nor was Commander Parker, so she did not contact her.

Employee explained that she did not include this information about who she tried to call in the investigative report, because she was just relaying the events around the incident and didn't know she needed to provide a "defense" for herself. Employee explained that she never refused the delivery of the items, but that the driver indicated that he would have to come back another day. Employee testified that she learned about the re-delivery fee on that following Wednesday through email. Employee stated that she was told by Sgt. Wiggins that if she didn't pay the redelivery fee that they would start an investigation against her. Employee said she did not pay the fee because she felt didn't have to. Employee testified that she did recall having disciplinary meetings in 2015, but that those meetings were related to the use of the P-Card and were not with regard to the solicitation policy. Employee recalled the meetings held with union representatives and MPD staff, but cited that there was only the meeting in July 2015 and not any others during that summer.

Summary of Agency's Position

Agency avers that it has cause to take adverse action against Employee for incompetence and that it administered its action in accordance with all applicable laws, rules and regulations. Agency asserts that there were two incidents in October 2015 that resulted in Employee being charged with

incompetence and subsequently terminated. Agency cites that the first incident occurred on October 9, 2015, wherein it Employee refused the delivery of ordered goods from Webrestaurant. Agency asserts that Employee failed to seek help from others in the station on that date, and that she told the delivery driver he would have to come back. Agency avers that Employee's actions caused Agency to be charged a re-delivery/restock fee. Agency cites that a representative from Agency told Employee that she would have to pay the delivery fee or be subject to disciplinary investigation.

On or around October 28, 2015, Agency asserts that Employee wrongfully issued letters with a MPD logo for the purpose of soliciting goods for a Halloween party. Agency contends that Employee printed letter head for the Citizen's Advisory Council that included an MPD logo and contained solicitation requests from local businesses to contribute candy and other items for a Halloween party. Agency avers that Employee was counseled on prior occasions that the use of the MPD logo on the letterhead for these letters was against the General Order guidelines regarding solicitation. Agency cites that in authoring and distributing the letters, that Employee violated General Order 120.21, Part VIII, Attachment A Table of Penalties (16), which is further specified by General Order 201.26 Part V (A)(6).¹ Further, Agency found that Employee had prior disciplinary actions and cited those in the instant adverse action. Agency issued an Advanced Written Notice of Proposed Removal on January 26, 2016, citing that Employee should be removed from service for the charge of incompetence.²

On October 6, 2016, Agency issued its Final Written Notice to Employee removing her from service, effective October 19, 2016. Agency contends that its actions were done in accordance with all applicable laws rules and regulations. Further, Agency assert that its reference to Employee's past disciplinary actions in the Final Notice were appropriate and "demonstrated Employee's history of serious and repeated mistakes."³ Agency cites that it was required to include Employee's past disciplinary history under its specification number three, "in order to show Employee's pattern of repeatedly making mistakes in order to justify its charge of incompetence."⁴ Agency argues that Employee's past disciplinary history "is a part of Douglas factors" and since it was required to be considered under that analysis, that it should not be deemed inappropriate to support its cause of action against Employee.⁵

Summary of Employee's Position

Employee avers that Agency lacked sufficient cause to discipline her, and that even if there was cause, that the penalty of termination was too harsh.⁶ Employee asserts that she worked at Agency as a Community Outreach Coordinator for twelve (12) years. Employee indicated that her work responsibilities included establishing partnerships with the local Citizen Advisory Council and hosting community related events. Employee avers that she had no disciplinary actions for ten (10) years while at Agency, until she accrued three adverse actions over three (3) months in 2015.⁷

¹ Agency's Brief at Page 5 (October 16, 2017).

² Agency also issued an addendum to the proposed notice to Employee on February 12, 2016. On July 11, 2016, the hearing officer issued a memorandum recommending termination. See Agency's Brief at Page 7 (October 16, 2017).

³ Agency's Brief at Page 12 (October 16, 2017).

⁴ *Id.*

⁵ *Id.*

⁶ Employee's Brief (November 17, 2017)

⁷ *Id.* It should be noted that Employee also avers that she made a request for reasonable accommodation due to her disabilities in May 2015, and that a month later, her supervisor, Sgt. Holden "began harassing" her and issued the three adverse actions.

Employee cites that she was subject to an adverse action in June, July and August of 2015.⁸ With regard to the charges that resulted in her termination, Employee avers that on October 9, 2015, that a delivery of supplies she ordered from Webrestaurant was scheduled. Employee contends that the delivery driver expressed to her that he could not access the parking lot to get to the elevator to unload the delivery. Employee contends that the driver told her he would have to come back when he could access the parking lot, but did not tell her that this action would incur a fee. Employee indicated that she told her supervisor about the fee, and that her supervisor told her she would have to pay the fee or be subject to an investigation.⁹ Employee avers that she told her supervisor she could not afford to pay it. Employee asserts that an investigation was conducted, and that she told the investigators that the delivery driver indicated he could not access the delivery and that he never told her about any additional fee that would be incurred.

On October 28, 2015, Employee avers that she prepared letters for Halloween candy donations at the request of the Vice President of the Citizens Advisory Council (CAC), Anthony Muhammad. Employee asserts that Mr. Muhammad indicated that he had done this in the previous year from the same vendors. Employee argues that the CAC is permitted to accept donations on behalf of MPD.¹⁰ Employee also contends that the letter she prepared was also previously used by MPD personnel who worked with the CAC. Employee argues that she was also investigated for these actions. Employee cites that on January 26, 2016, she received an Advanced Written Notice to terminate her from service, with three specifications. The first was with regard to the Halloween candy solicitation, the second with regard to the delivery fee, and the third was with regard to the past disciplinary measures that Employee has received. On October 6, 2016, Employee received a final notice to terminate her from service. Employee asserts that the penalty of termination assessed against her, was “far harsher” than discipline administered to other employees with similar misconduct. Employee also argues that Agency’s disciplinary action was not completed in a timely manner, because she was terminated nearly a year after the incidents for which she was charged.

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee was employed by Agency at the Seventh District as the Community Outreach Coordinator.¹¹ In a Notice of Final Decision dated October 6, 2016, Employee received Agency’s decision to remove her from service for violation of Chapter 16 of DPM §1603.3(f)(5): —“ Any on duty or employment related act or omission that interferes with the efficiency or integrity of government operations to include...incompetence. Incompetence includes: careless work performances; serious or repeated mistakes after given appropriate counseling or training; failing to complete assignments timely. The effective date of the termination was noted as November 5, 2016, however, Agency cites that following negotiations, all parties agreed that the effective date of removal would be October 19, 2016.¹² Employee notes this as the effective date in her Petition for Appeal.

⁸ These incidents were not included in the charges for incompetence, but were listed in specifications as prior discipline in the Final Notice of Adverse.

⁹ Employee’s Brief at Page 4-5 (November 17, 2017).

¹⁰ *Id.*

¹¹ Employee’s Petition for Appeal (November 18, 2016).

¹² Agency’s Brief at Page 8, see also Tab 5. (October 16, 2017).

ANALYSIS

Untimely Initiation of Adverse Action/ 90 Day Rule

Employee asserts that Agency failed to initiate the instant adverse action in a timely fashion in accordance with D.C. Code §5-1031(a) (90-Day Rule). Employee avers that the actions for which she was charged occurred in October 2015, and that adverse action was not completed until a year later in October 2016 and, as a result, violated the D.C. Code. The “90-Day Rule” requires agencies to initiate adverse actions against sworn members of the police force no later than 90 days from the date that Agency “knew or should have known of the act or occurrence constituting cause.”¹³ Agency did not address the timeliness issue in its brief.¹⁴ In the instant matter, an investigation of the charges that led to Employee’s adverse action was commenced by Captain Shelton in November 2015.¹⁵ On January 26, 2016, Agency issued its Advance Written Notice of Adverse Action. Additionally, on February 11, 2016¹⁶, Agency issued an Addendum to the Proposed Notice which had two changes, one changing Employee’s response due date, and the other notified Employee of the change in hearing officers.¹⁷ Following that, on July 11, 2016, the hearing officer issued a memorandum recommending termination. On July 26, 2016, Agency issued the Notice of Adverse Action Hearing Officer’s Decision. On August 4, 2016, Agency notes that Employee met with the then Assistant Chief Newsham and her union representatives. Following that meeting, on October 6, 2016, the Final Notice was issued. D.C. Code §5-1031 - Commencement of Corrective Adverse Action provides in pertinent part that:

(a-1)(1) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.

(2) For the purposes of paragraph (1) of this subsection, the Metropolitan Police Department has notice of the act or occurrence allegedly constituting cause on the date that the Metropolitan Police Department generates an internal investigation system tracking number for the act or occurrence.

In the instant matter, the investigation into Employee’s alleged misconduct commenced in November 2015, and the investigator submitted his final report in December 2015.¹⁸ Agency issued its Advance Notice of Proposed Adverse Action on January 26, 2016. Accordingly, I find that Agency commenced the adverse action within ninety (90) days of the time in which it had notice of Employee’s acts constituting the cause, and as result, I find that Agency’s adverse action was initiated in a timely manner. While the procedures following the issuance of the Advance Notice of

¹³ *Alice Lee v MPD*, OEA Matter No. 1601-0087-15 (March 15, 2017).

¹⁴ It should be noted that neither party raised this issue during the course of the Evidentiary Hearing in this matter.

¹⁵ Agency’s Answer at Tab 1 “Condensed Investigative Report” (December 19, 2016).

¹⁶ Agency’s notes it was served to Employee on February 12, 2016.

¹⁷ Agency’s Brief at Page 6 (October 16, 2017). Agency notes that the response date was changed following a request from Employee for an extension of time to respond.

¹⁸ Agency’s Answer at Tab 1- Investigative Reports (December 19, 2016). The report for the investigation for October 28, 2015 incident was signed by Investigator Shelton on December 15, 2015, and Commanding Officer’s signature reflects a date of December 24, 2015. The investigative report for the October 9, 2015 incident was signed by Shelton on December 20, 2015.

the action were conducted over the course of an entire year, the undersigned finds that Agency did not violate D.C. Code §5-1031.

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:

(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*).

Additionally, DPM § 1603.2 provides that disciplinary actions may only be taken for cause. 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. Employee was assessed terminated pursuant to: DPM § 1603.3(f)(5): —“Any on duty or employment related act or omission that interferes with the efficiency or integrity of government operations to include...incompetence.

OEA has held that, pursuant to the DPM, a charge of incompetence includes the following: (1) careless work mistakes, (2) serious or repeated mistakes after giving appropriate counseling or training, or (3) failing to complete assignments timely.¹⁹ In the instant matter, Agency charged Employee with incompetence, with two charges and specifications, namely an incident that occurred on October 9, 2015, with regard to a delivery and an incident on October 28, 2015, related to improper solicitation of donations from local businesses. Additionally, Agency cited that Employee had two other adverse actions and one official reprimand in 2015.²⁰ As a result, Agency cites that it had cause and appropriately administered adverse action and that removal was appropriate under the circumstances.

Specification 1 - Delivery Incident - October 9, 2015

Agency avers that on October 9, 2015, a delivery from WebRestaurant was scheduled. Agency argues that Employee “refused” delivery and directed the driver of the truck to come back another day. Agency cites that Employee’s actions resulted in the assessment of a re-delivery fee from the company.²¹ As a result of this charge, Employee’s supervisor, Sgt. Wiggins advised Employee that she would have to pay the re-delivery fee or be subject to disciplinary investigation. Employee informed Sgt. Wiggins that she could not pay the fee. Subsequently, an investigation took

¹⁹ *Kevin Baldwin v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0070-12 (January 14, 2015). *See also*. DPM § 1619.1(6)(e). Table of Appropriate Penalties

²⁰ Employee’s Petition for Appeal at Final Notice (November 18, 2016).

²¹ Agency’s Brief at Page 9 (October 16, 2017).

place, and Employee was disciplined and charged with incompetence. During the Evidentiary Hearing, I had the opportunity to listen to the testimony of Employee's supervisor, the investigator and Employee with regard to this incident. Agency avers that Employee did not seek out appropriate help, nor did she contact her supervisors. Agency's witnesses testified that there is always someone at the station, and Sgt. Wiggins cited that she was at the station on the day of the incident. Employee testified that she did seek help and tried to call, but that no one was available. Further, Employee avers that when she learned of the re-delivery fee, she contacted her supervisor to inform her of the charges. Additionally, Employee cited that the delivery driver told her he was not able to park or maneuver the truck during the rush hour times and that he would have to come back another day.

Based on the information in the record and the testimony from the Evidentiary Hearing, the undersigned finds that Employee did not refuse the delivery of items. Upon review of the evidence in the record, it appears that the delivery driver made the decision that he was unable to deliver the items on that date, because he was unable to maneuver the truck in a manner conducive to make the delivery. As a result, the delivery was not able to be made. Agency argues that Employee did not contact the appropriate people on that day to get help with the logistical challenges of the delivery. Employee asserts that she did try to find help, but that no one was available. Further, the investigator testified that he did not find any information to contradict Employee's statement that the driver was unable to access the elevator for the delivery. I had the opportunity to observe Employee's testimony during the hearing and found her statements to be credible. Consequently, I find that Employee did not refuse delivery, but rather, the delivery driver failed to complete the delivery due to the inability to access the building as needed, and indicated he would return another day. Employee contacted her supervisor when she learned about the fee that had been assessed due to inability of the goods to be delivered on the date scheduled, after which her supervisor told her she would have to pay the fee or be subject to disciplinary investigation. The undersigned is deeply troubled by the supervisor's declaration to Employee she had to pay the redelivery fee or be subject to a disciplinary investigation, as it placed Employee in the precarious situation of facing discipline if she did not pay the fee. The undersigned finds that Agency failed to meet its burden of proof that Employee exhibited incompetence with regard to this specification. Wherefore, I find that Employee did not act in a manner consistent with aforementioned definitions of incompetence, and as a result, Agency did not have cause to take adverse action for this specification.

Specification 2 - Solicitation/Use of MPD Logo - October 28, 2015

Agency also assessed the charge of incompetence for Employee's use of letterhead in the solicitation of candy and other donations for the Halloween party. Agency argues that Employee improperly used an MPD logo on a solicitation letter for the CAC, and as a result violated General Order 201.26, Part V, which prohibits MPD's solicitation of goods. Agency argues that Employee was counseled numerous times about not using those logos on the CAC letters. During the Evidentiary Hearing, Agency witnesses Sgt. Thompson, Inspector Parker, Sgt. Holden and Commander Dandridge all testified that they had counseled Employee about the prohibition of solicitation and the use of the MPD logo on the letters that she authored. Sgt. Thompson cited that she was an administrative sergeant at the Seventh District in 2015, and that Employee was made aware about the Halloween incident after it had happened, and that she recalled Employee being counseled about it after it had occurred. Sgt. Thompson cited that she did not schedule the counseling, but was present. Inspector Parker indicated that she was a Captain at Seventh District in 2014 and was the commander in 2015. Parker testified that she had counseled Employee about the prohibition against solicitation and the use of the logo approximately two or three times while she

was a Captain in 2014, and believed it may have taken place in the summer of 2014. Parker cited that she spoke to Employee about the Halloween 2015 letters after she saw them and told Employee that they were not authorized and that she would need to tell Mr. Muhammad that they could not be used. Sgt. Holden was an administrative sergeant at Seventh District from 2014 to September 2015, where she then became the Control Sergeant. Holden testified that she counseled Employee in a couple of meetings about the prohibition of solicitation and the logo, though she could not recall exactly how many, but cited that they were held before October 2015. Holden noted that there was one meeting in June or July where she was present with Commander Dandridge, Employee's union representative and Sgt. Thompson and cited that the union representative drafted a letter in that meeting for Employee to sign citing the "dos and don'ts" of solicitation. Commander Dandridge cited that he was at the Seventh District from February 2015 through August 2015 and that he had counseled Employee about solicitation and made it clear that it was prohibited. Employee testified that she had a meeting with union representatives and Commander Dandridge in July of 2015, but cited that only the use of the P-Card was discussed, and not the solicitation of donations.

Employee testified that she had not received any counseling or training with regard to the solicitation policy until after the Halloween incident had occurred. Further, Employee avers that she had been using these same letters for the CAC for prior years and that the supervisors were aware of these actions. Employee asserts that she never solicited for her own personal gain, and as a result, did not violate the General Order. Employee asserts that General Order 201.26, Part V, which she is alleged to have violated, states that "Members shall not accept a gift or gratuity from organizations, businesses or individuals..."²² Employee cites that she did not violate this General Order because she did not personally accept any gifts or gratuity, nor did she solicit any donations or gratuity to MPD.²³ The undersigned finds that the language of General Order 201.26, Part V,²⁴ cites to the prohibition of member's *personal* solicitation or receipt of gratuity from organizations, businesses or individuals. The letters authored by Employee and signed by the CAC Vice President did not solicit for personal gifts or otherwise, but were noted that they were specifically for the CAC Halloween Safe Haven party. As a result, the undersigned finds that Employee did *not violate* General Order 201.26, Part V. Consequently, the undersigned finds that Agency has not met its burden by preponderant evidence and has not adequately proven that there was cause for action with regard to this specification.

Disparate Treatment

Employee raises a disparate treatment argument in her assertion that Agency's discipline against her was unduly harsh, and was "far harsher than those charged with similar misconduct."²⁵ In

²² Employee's Brief at Page 7 (November 17, 2017).

²³ *Id.*

²⁴ *See*. Agency's Brief at Exhibit 1 -General Order 201.26 Part V (6) The General Order provides that: "[Members shall] ... 6. Not accept a gift or gratuity from organizations, businesses, or individuals with whom he/she has or could reasonably be expected to have an official relationship or business with the District of Columbia Government. (a) Members are prohibited from accepting personal or business favors (e.g. social courtesies, loans, discounts services of other considerations of monetary value) which might influence or be reasonably suspected of influencing their decisions as representative of the District of Columbia Government. (b) Members shall guard against any relationships which may be construed as evidence of favoritism, collusion or a conflict of interest."

²⁵ *Id.* at Page 15 (November 17, 2017).

Jordan v. Metropolitan Police Department, OEA's board set forth the considerations regarding a claim of disparate treatment.²⁶ The Board held that:

[An Agency must] apply practical realism to each [disciplinary] situation to ensure that employees receive fair and equitable treatment where genuinely similar cases are presented. It is not sufficient for an employee to simply show that other employees engaged in misconduct and that the agency was aware of it, the employee must also show that the circumstances surround the misconduct are substantially similar to [their] own. Normally, in order to show disparate treatment, the employee must demonstrate that he or she worked in the same organizational unit as the comparison employees and that they were subject to [disparate] discipline by the same supervisor [for the same offense] within the same general time period.

Accordingly, an employee who makes a claim of disparate treatment has the burden to make a prima facie showing that they were treated differently from other similarly-situated employees.²⁷ In the instant matter, Employee argues that with regard the four (4) "comparator" employees submitted by Agency during the discovery process, that none of those employees were issued a termination for misconduct.²⁸ Specifically, Employee argues that another civilian employee was issued only a 35 day suspension on a proposed action that included three individual charges, and the same employee had four other incidents of past discipline, three of which were suspensions. Employee also argues that another employee who had two charges, one for neglect of duty and the other for incompetence, was only suspended for one day. As a result, Employee argues that Agency failed to appropriately apply the Douglas factors in its administration of the adverse action against Employee. In the instant matter, while Employee cites to comparator employees and the differences of discipline, Employee does not exhibit that the circumstances surrounding their misconduct are *substantially* similar to her own. Specifically, Employee does not address whether the comparator employees who were subject to adverse actions received prior discipline within the same 12-month period, or that they had the same supervisor, or were in the same organizational unit. As a result, I find that Employee's disparate treatment argument fails to meet the burden of proof for this claim.

Whether the Penalty was Appropriate

Based on the aforementioned findings, I find that Agency did not have cause for adverse action against Employee. As a result, I find that the penalty of termination was inappropriate under the circumstances.

ORDER

Based on the foregoing it is hereby **ORDERED that:**

1. Agency's action of terminating Employee from service is hereby **REVERSED**.
2. Agency shall reinstate Employee to her position of record, and Agency shall reimburse employee all pay and benefits lost as a result of her removal.

²⁶ *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-95, *Opinion and Order on Petition for Review* (September 29, 1995).

²⁷ See *John Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017), citing to *Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 22, 1994).

²⁸ Employee's Brief at Page 15 (November 17, 2017).

3. Agency shall file within thirty (30) days from the date this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MICHELLE R. HARRIS, Esq.
Administrative Judge