THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MICHAEL ROBERTS,	)	OEA Matter No. 1601-0093-12
Employee	)	
	)	Date of Issuance: January 5, 2016
	)	
DISTRICT OF COLUMBIA	)	
METROPOLITAN POLICE	)	
DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Michael Roberts ("Employee") worked as a Police Officer with the Metropolitan Police Department ("Agency"). On April 2, 2012, Agency notified Employee that he would be suspended for ten days, with five days held in abeyance. Employee was charged with insubordination and conduct unbecoming of a Police Officer.[1] Employee challenged his termination by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on May 1, 2012. He provided that his actions were proper and requested that OEA dismiss

[1] During a barricade on August 15, 2011, Employee was ordered to meet his sergeant at 1515 Ogden Street, N.W., D.C. to receive an assignment. Agency claimed that Employee failed to obey this directive and instead went to an unassigned location. Agency also provided that Employee failed to monitor the barricade, police activity, and his radio.
Petition for Appeal, p.4 (May 1, 2012).

Agency's action.[2]

In response to the Petition for Appeal, Agency simply admitted to suspending Employee and requested a hearing.[3] The matter was assigned to an OEA Administrative Judge ("AJ"), who scheduled an evidentiary hearing.[4] Following the hearing, Agency submitted a Motion for Summary Disposition. It argued that OEA did not have jurisdiction over the matter because Employee only served a five-day suspension.[5] In response, Employee asserted that he served all ten days of the suspension.[6]

The AJ ordered both parties to submit closing arguments.[7] In Employee's submission, he argued that he was ". . . the sole focus of a flawed investigation built on fabricated evidence to cover up other errors made by high ranking officials . . . ."[8] He explained that Agency relied on false information provided by another member in order to bring the adverse action against him.[9] Therefore, Employee requested that his record be cleared and that he be reimbursed for lost wages and benefits.[10]

In Agency's Closing Argument, it explained that Employee ignored a direct order by an official and remained at an undesignated location for over six hours. Agency explained that the error that Employee referenced regarding false information did not contaminate its investigation, nor did it negate the fact that he failed to follow a direct order. Additionally, Agency provided that Employee's failure to monitor the barricade, police activity, and his radio adversely affected

[2] *Id.* at 2.
[3] *Metropolitan Police Department's Answer to the Petition* (June 11, 2012).
[4] *Order Convening a Hearing* (October 15, 2013).
[5] *Metropolitan Police Department's Memorandum in Support of Motion for Summary Disposition* (January 22, 2014).
[6] *Response to Agency's Motion for Summary Disposition* (January 30, 2014).
[7] *Order to Submit Closing Arguments* (February 25, 2014).
[8] *Closing Statement* (March 31, 2014).
[9] Employee explained that Lieutenant Pearce provided false statements when she incorrectly testified where Employee was located during the barricade incident. He argued that this false statement led to Agency's disciplinary action against him. Employee also explained that Sergeant Maradiaga, the assigned official for the evening shift, failed to account for all of the officers who were assigned to him on the night of the barricade.
[10] *Closing Statement*, p. 2 (March 31, 2014).

its operations. Thus, it submitted that its actions were proper, and the penalty was appropriate.[11]

The AJ issued her Initial Decision on April 18, 2014.[12] She found that Agency met its burden of proof for the charge of insubordination. She reasoned that Employee should have followed the direct order of his sergeant instead of going to an irrelevant traffic post. As for the charge of conduct unbecoming of an officer, the AJ held that Agency did not meet its burden of proof. She reasoned that Employee could not be held accountable for a radio transmission that he did not receive.[13] Accordingly, the AJ concluded that Agency had cause to suspend Employee and upheld its adverse action.[14]

Employee filed a Petition for Review on May 5, 2014. He argues that the Initial Decision was not based on the evidence provided. Employee reiterates that the insubordination charge cannot stand because he responded to 16th and Ogden Street, N.W., D.C. as ordered by Sergeant Maradiaga. Therefore, his traffic post was not irrelevant. Furthermore, Employee alleges that the information in Agency's investigation was falsified in an effort to justify the adverse action against him.[15] Accordingly, he requests that the Board dismiss the insubordination charge.[16]

In accordance with OEA Rule 633.3, a Petition for Review should present one of the following arguments for it to be granted:

> The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a petition for review when the petition establishes that:

[11] *Metropolitan Police Department's Closing Argument* (April 4, 2014).
[12] She denied Agency's Motion for Summary Disposition, noting that although Employee may have served only five days of a ten-day suspension, the possibility of him serving the other five days allowed OEA to retain jurisdiction over the matter. *Initial Decision*, p. 2-3 (April 18, 2014).
[13] The AJ explained that the order by Sergeant Maradiaga was made on the Third District main channel, and Employee was ordered to switch his radio transmission channel to MPD-C1. As a result, he did not receive the radio transmission by Sergeant Maradiaga.
[14] The AJ noted that in accordance with the Table of Penalties, the penalty for insubordination ranged from a ten-day suspension to removal. Therefore, she held that Agency's decision to suspend Employee for ten days, with five days held in abeyance, was not an error of judgment. *Initial Decision*, p. 12 (April 18, 2014).
[15] Employee explains that during the evidentiary hearing, Lieutenant Pearce admitted to a mistake in her investigation.
[16] *Petition for Review* (May 5, 2014).

(a) New and material evidence is available that, despite due diligence, was not available when the record closed;

(b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;

(c) The findings of the Administrative Judge are not based on substantial evidence; or

(d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Employee's petition raises the same arguments that were presented to the AJ on Petition for Appeal. There is no new evidence presented that was not available or previously considered by the AJ. The arguments made by Employee on Petition for Review seem to merely be disagreements with the AJ's ruling in this matter. That is not a valid basis for appeal.

This Board believes that the AJ's decision was based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[17] Therefore, if there is substantial evidence to support the AJ's decision, then this Board must accept it.

Cause

The AJ offered a thorough review of the evidence presented by both parties and the testimonies offered during the evidentiary hearing. She found that Agency had cause to suspend Employee based on the charge of willfully disobeying orders or insubordination. The record established that Employee failed to obey a directive to obtain a traffic post assignment.

[17]*Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

Employee and his partner admitted, during the OEA evidentiary hearing, that they decided to assign themselves to a traffic post.[18] Unlike all of the other officers on the scene, neither Employee nor his partner received a traffic post assignment from the sergeant as directed.[19] Moreover, none of the other officers at the scene recalled seeing Employee present at all.[20] Therefore, the AJ's holding that Agency had cause to suspend Employee is based on substantial evidence.

Appropriateness of Penalty

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). According to *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties. The Court in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised."[21] As a result, OEA has consistently held that the primary responsibility for managing and disciplining an

[18] OEA Hearing Transcript, p. 42, and 57-58.
[19] *Id.*, 68, 79-80.
[20] *Metropolitan Police Department's Closing Argument*, Exhibit 1, Attachments 2, 7, 8, and 10-17 (April 4, 2014).
[21] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). Additionally, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that although selection of a penalty is a management prerogative, the penalty cannot exceed the parameters of reasonableness. Moreover, the Merit Systems Protection Board ("MSPB") in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981), provided the following:

> [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.

agency's work force is a matter entrusted to the agency, not this Office.[22]

Penalty within the Range Allowed by Law, Regulation, or Applicable Table of Penalties

When discussing the imposition of penalties, *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981) provides that "any disciplinary action demands the exercise of responsible judgment so that an employee will not be penalized out of proportion to the character of the offense . . . ."[23] The D.C. Court of Appeals has consistently relied on the Table of Penalties when determining the appropriateness of an agency's penalty.[24] In the current case, the Table of Penalties is outlined in General Order 120.21. In accordance with General Order 120.21, the range of penalty for the first offense of insubordination is suspension for ten days to removal. Because a ten-day suspension was within the range of penalties, the AJ's ruling was appropriate. Accordingly, the Initial Decision is upheld, and Employee's Petition for Review is denied.

[22] *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 and Emergency Medical Services*, OEA Matter No. 1601-0119-90, Opinion and Order on Petition for Review (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

[23] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 330 (1981). Furthermore, *Power v. United States*, 531 F.2d 505, 507-508, 209 Ct.Cl. 126 (1976) (citing *Daub v. United States*, 292 F.2d 895, 154 Ct.Cl. 434 (1961) and *Cuiffo v. United States*, 137 F.Supp. 944, 950, 131 Ct.Cl. 60, 68 (1955)), held that there are two scenarios in which courts will not uphold the punishment imposed by the agency because of an invalid penalty. The first is where the sanction exceeds the range of permissible punishment specified by statute or regulation. The second scenario is where a court has determined that the discipline is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion by the agency. Although the decisions issued from these courts are not binding on the OEA Board, we believe that they offer sound guidance regarding Table of Penalties.

[24] *Department of Public Works v. Colbert,* 874 A.2d 353 (D.C. 2005); *Stokes v. District of Columbia,* 502 A.2d 1006 (D.C. 1985); *Brown v. Watts,* 993 A.2d 529 (D.C. 2010); *Hutchinson v. D.C. Office of Employee Appeals,* 710 A.2d 227 (D.C. 1998); and *District of Columbia v. Davis,* 685 A.2d 389 (D.C. 1996).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

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Sheree L. Price, Vice Chair

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Vera M. Abbott

_____
A. Gilbert Douglass

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Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.