

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

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| _____ |) | |
| In the Matter of: |) | |
| |) | |
| DOMINIQUE CARTER, |) | OEA Matter No. 1601-0022-20 |
| Employee |) | |
| |) | |
| |) | Date of Issuance: |
| |) | December 17, 2020 |
| v. |) | |
| |) | |
| METROPOLITAN POLICE DEPARTMENT, |) | JOSEPH E. LIM, Esq. |
| Agency |) | Senior Administrative Judge |
| _____ |) | |
| Dominique Carter, Employee <i>pro se</i> | | |
| Anna McClanahan, Esq., Agency Representative | | |

INITIAL DECISION¹

PROCEDURAL HISTORY

On December 23, 2019, Dominique M. Carter (“Employee”), a Police Officer at the Metropolitan Police Department (“MPD” or “Agency” or the “Department”), filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) challenging Agency’s final decision to suspend him for twenty (20) days with ten (10) days held in abeyance for Insubordination and Conduct Unbecoming an Officer. After this matter was assigned to me, I held a Telephonic Prehearing Conference on May 5, 2020, and I ordered the submission of legal briefs on the issues identified at the conference. Following extensions requested by the parties, they have fully complied. The record is closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause for adverse action against Employee.
2. If so, whether Agency’s penalty of a twenty (20) day suspension with ten (10) days held in abeyance is appropriate under the circumstances.

¹ This decision was issued during the District of Columbia’s Covid-19 State of Emergency.

UNCONTROVERTED FACTS²

1. Employee was appointed to the Metropolitan Police Department on February 11, 2013, as a Patrol Officer. He was later appointed to the position of Detective Grade II and assigned to the Criminal Investigations Division.
2. On September 2, 2017, Employee responded to the scene of a traffic stop in Washington, D.C. made by other MPD members. Following the stop and during the subsequent arrest of the driver, a crowd began to gather. The crowd was hostile and yelled slurs at the officers.
3. One member of the group threatened to spit on Employee, and he responded “Try it and see how it goes. See how that shit goes.”
4. Another individual in the crowd challenged Employee to a fight. Employee responded with “It is an alley, right here.” At that point, Employee deactivated his body worn camera (“BWC”).
5. Employee walked through the nearby parking lot with a crowd of bystanders. While crossing the parking lot toward an alley, Employee removed his duty belt. Officer Rochelle Butler grabbed Employee to stop him from following the bystanders, telling him to put his belt back on and that he has too much to lose. The bystander who had been taunting Employee took off his jacket on the way to the alley.
6. Officer Nico Scott followed Employee and urged him to turn around, saying “Carter, come on.” At the top of the alley, Officer Butler held Employee back from the bystander, while Officer Gregory Turner urged, “Carter, come on, man. Come on bro. Let them talk. They are not doing nothing. We are not doing this shit.”
7. In the alley, Sergeant Christopher Dove approached Employee and asked, “What happened?” Employee responded, “He is talking shit and I am tired of that shit.” Sergeant Dove then advised Employee to put his duty belt back on.
8. Turning off a member’s BWC is misconduct described in General Order 302.13, Part V, Section A-11(a 1-2), which reads:

Deactivation of BWCs

a. Once activated in accordance with this order, members shall not deactivate their BWC until unless:

- (1) They have notified the dispatcher of their assignment’s disposition, and they have cleared the assignment or, in the case of arrest, have transferred custody of the arrestee to another member.
- (2) Their involvement in the citizen contact or detention has concluded.

² Derived from the parties’ joint stipulations of facts and uncontested documents and exhibits of record.

9. Following the incident, two adult occupants of the stopped vehicle, LaToya Robinson on September 6, 2017, and Michael Tobias on September 13, 2017, filed separate complaints with the Office of Police Complaints (“OPC”) concerning their treatment by Employee and other officers on the scene. OPC interviewed the complainants and officers and reviewed the relevant evidence, including BWC footage of all officers at the scene.
10. On September 21, 2017, MPD’s Internal Affairs Division (“IAD”) assigned Incident Summary (“IS”) #17-003029 to Employee’s case.³ Because D.C. Official Code § 5-1114(c), precludes the Department from initiating a disciplinary proceeding against a member with regard to the misconduct alleged in the complaint until the OPC finishes its investigation, MPD did not initiate its own investigation of the complaints.
11. Employee received a letter from OPC dated May 11, 2018, advising him that Complainant LaToya Robinson had filed a complaint, and that a formal investigation had begun.
12. On July 25, 2018, OPC interviewed Employee as part of its investigation.
13. On April 25, 2019, the OPC Report of Investigation (“ROI”) found reasonable cause that Employee violated Department policy by challenging a bystander to a physical altercation and removing his duty belt from his uniform while on duty. The matter was referred to a Complaint Examiner for a Merits Determination.
14. On July 15, 2019, the OPC Complaint Examiner considered the ROI and Employee’s objections, and then sustained his misconduct in her OPC Findings of Fact and Merits Determination.
15. On July 26, 2019, OPC referred the matter to the MPD and gave notice to Employee. After a review of the OPC investigative records and other pertinent information, MPD determined that Employee had engaged in the misconduct charged by the OPC.
16. On September 18, 2019, Employee was served with a Notice of Proposed Adverse Action (“NPAA”), wherein he was charged as follows:

Charge No. 1. Violation of General Order 120.21, Disciplinary Procedures and Processes, Tables of Offense and Penalties, A, 12, which states, “Conduct Unbecoming an Officer, including acts detrimental to good discipline, conduct that would adversely affect the employee’s or the agency’s ability to perform effectively, or violations of any law of the United States, or any law, municipal ordinance, or regulation of the District of Columbia.

³ Officers Rodney Ervin, Ramon Moe and Kevin Van Hook were also named on the IS forms and under the same IS number as Detective Carter.

Specification No. 1: In that, the OPC determined that on September 2, 2017, you were provoked by the hostile bystanders into a potential fight. You were captured on BWC being challenged to a fight by one of the bystanders, to which you responded, “It is an alley right here.” You began following the bystanders towards the alley, where you started to remove your duty belt with the apparent intention of engaging in a fight with a citizen. Only the actions of other MPD members avoided a fight between you and a citizen of the District of Columbia.

Charge No. 2: 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, the Office of Police Complaints (OPC) determined that on September 2, 2017, you used inappropriate language directed at a group of bystanders. Specifically, you were captured stating the following: [response to bystander who threatened to spit on Employee] “try it and see how it goes. See how that shit goes.” Your misconduct is described under General Order 201.26, V, C, 1 (a) and (3), which states in part, “all members shall be courteous and orderly in their dealings with the public. Members shall perform their duties quietly, remaining calm regardless of provocation to do otherwise. [Members shall] refrain from harsh, violent, coarse, profane, sarcastic, or insolent language. Members shall not use terms or resort to name-calling, which might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person.”

Specification No. 2: In that, on September 2, 2017, as discussed in Charge No. 1, you were challenged to a fight by a citizen. You directed that citizen to an alley and followed him there and began removing your duty belt with the apparent intention of fighting him. As you began walking towards the alley, you turned off your Body Worn Camera (BWC). This misconduct is described in General Order 302.13, Part V, Section A-11(a 1-2), which reads, “(Deactivation of BWCs a. Once activated in accordance with this order, members shall not deactivate their BWC until unless:
(1) They have cleared the assignment or, in the case of arrest, have transferred custody of the arrestee to another member. (2) Their involvement in the citizen contact or detention has concluded.”

17. The proposed penalty for Employee’s misconduct was a 30-workday suspension.
18. On October 22, 2019, Employee was served with the Final Notice of Adverse Action (“FNAA”), wherein he was advised that he would receive a 30-workday suspension.
19. On November 5, 2019, Employee filed his Final Appeal with Chief of Police Peter Newsham, wherein he admitted to deactivating his body worn camera, and using the word “shit” on the scene of the incident.

20. On November 26, 2019, Chief Newsham denied Employee's appeal, in part. He sustained both misconduct charges. Chief Newsham noted, however, that in consideration of Employee's full acceptance of responsibility and Chief Newsham's reclassification of *Douglas Factor*⁴ No. 3, the 30-day suspension is reduced to a 20-day suspension, with ten days held in abeyance for one year.

21. Employee's appeal to the Office of Employee Appeals followed.

Agency's Position⁵

Agency contends that Employee was guilty of violating General Order 120.21, Disciplinary Procedures and Processes, Table of Offense and Penalties, A, 12, which states, "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or any law, municipal ordinance, or regulation of the District of Columbia. Specifically, Employee was charged with accepting a challenge to a fight by a taunting bystander.

Agency also contends that Employee violated General Order Series 120.21, Attachment A, Part A-16, which states, "[f]ailure to obey orders or directives issued by the Chief of Police." Specifically, Employee was charged with disobeying General Order 201.26, Part V, Section C-3, which states, "[a]ll members shall: Refrain from harsh, violent, coarse, profane, sarcastic, or insolent language. Members shall not use terms or resort to name-calling, which might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person." Employee was charged with stating to a hostile crowd, "try it and see how it goes. See how that shit goes." He was also charged with violating General Order 302.13, Part V, Section A-11(a 1-2) when he impermissibly turned off his BWC when he appeared to accept a challenge to a fight by a bystander. Lastly, Agency disputes all of Employee's defenses.

Employee's Position⁶

First, Employee asserts that Agency's action should be reversed as it violated the 90-day rule. Second, Employee states that Agency is unreasonable and guilty of disparate treatment as it gave the same penalty to a fellow MPD member who committed more severe offenses. Third, Employee states that his use of profanity should not be considered solely as "Conduct Unbecoming an Officer" and not also as insubordination as it was not a serious offense. Fourth, Employee argues that his penalty should be voided as the Office of Police Complaints ("OPC") violated the law by hearing the complaint against him and that OPC did not operate in good faith. Lastly, as will be discussed below, Employee disagrees with Agency's *Douglas Analysis*.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Whether Agency had cause for adverse action against Employee.

⁴ See footnote 9 for *Douglas* citation.

⁵ See Agency Brief (August 3, 2020) and Agency's Opposition to Employee's Reply Brief (September 18, 2020).

⁶ Employee's Reply to Agency's Brief (August 21, 2020).

In this matter, Employee readily admits to the conduct alleged in Agency's charges and specifications. To the charge of "Conduct Unbecoming an Officer," Employee admits to its specification that on September 2, 2017, he accepted a challenge to a physical fight by hostile bystanders when he removed his duty belt and began following the bystanders towards an alley with the apparent intention of engaging in a fight with a citizen.

Employee also admits to the specifications listed under the charge of "Failure to obey orders or directives issued by the Chief of Police." Employee violated General Order 201.26, V, C, 1 (a) and (3), which states in part, "all members shall be courteous and orderly in their dealings with the public. Members shall perform their duties quietly, remaining calm regardless of provocation to do otherwise. [Members shall] refrain from harsh, violent, coarse, profane, sarcastic, or insolent language. Members shall not use terms or resort to name-calling, which might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person." Employee admitted that he allowed himself to be provoked into using insolent language and then turning off his BWC in apparent violation of MPD's General Order on BWC. Based on Employee's admissions, I find that Agency had cause for adverse action against him.

If so, whether Agency's penalty of a twenty (20) day suspension with ten (10) days held in abeyance is appropriate under the circumstances.

Ninety-day rule

Agency states that it complied with the 90-day rule. While MPD generated an IS number for Employee on September 21, 2017, it asserts that the 90-day period for commencing the adverse action was tolled pending the completion of OPC's investigation. MPD asserts that the 90-day clock was immediately tolled because OPC began an investigation of Employee based on a complaint filed by LaToya Robinson on September 6, 2017. MPD states that the 90-day period for commencing an adverse action began on July 26, 2019, when OPC referred its report on Employee to MPD. MPD served Employee with the Proposed Notice of Adverse Action ("PNAA") on September 18, 2019, which is the 38th business day following the notice to MPD.⁷ Accordingly, Agency contends that it did not violate the 90-Day rule and Employee's arguments must be rejected.

Employee counters that it should not have taken almost two years for MPD to issue its PNAA. He argues that Agency failed to propose its adverse action within 90-days as mandated by D.C. Official Code § 5-1031. He calculates that it was five hundred and twenty-five (525) workdays between the inciting event and the proposed adverse action. As such, Employee argues that Agency's commencement of the adverse action against Employee was untimely and therefore his suspension must be reversed.

D.C. Official Code § 5-1031 (2015) states:

(a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department shall be commenced more than 90 days, not

⁷ Weekends and the holiday of September 2, 2019 (Labor Day) were excluded.

including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department knew or should have known of the act or occurrence allegedly constituting cause.

(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 MPD 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.

(b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department or any law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of the Inspector General, the Office of the District of Columbia Auditor, or the *Office of Police Complaints*, the 90-day period for commencing a corrective or adverse action under subsection (a) or (a-1) of this section shall be tolled until the conclusion of the investigation. (*Emphasis provided.*)

To properly address this question, it is imperative to lay out the statutory relationship of MPD and OPC. OPC is an independent agency within the District of Columbia government. The Office of Citizen Complaint Review Establishment Act of 1998 (“OPC Act”), codified at D.C. Official Code § 5-1101 *et seq.*, governs the relationship between MPD and OPC. In summary, MPD and OPC are separate and distinct entities within the District government, each with its own responsibility and authority concerning citizen complaints.

Importantly, MPD exercises no authority or control over OPC beyond having one MPD member appointed to the five-member Board of Police Complaints. *See* D.C. Official Code § 5-1104(a). Rather, OPC was established to operate explicitly and intentionally separate from MPD. In enacting the legislation establishing OPC, the Council of the District of Columbia found, “[t]he need for independent review of police activities is recognized across the nation. Effective independent review enhances communication and mutual understanding between the police and the community, reduces community tensions, deters police misconduct, and increases the public’s confidence in their police force.” D.C. Official Code § 5-1101(4). In addition, there is no provision in Chapter 11 of the D.C. Code that sets a limitation on the time allowed for OPC investigations.

OPC’s independence is reflected in the jurisdiction it maintains regarding citizen complaints. *See* D.C. Official Code § 5-1107, “Authority of [OPC] and processing of complaint.” D.C. Official Code § 5-1107(a) states: The MPD and the Office shall have the authority to receive a citizen complaint against a member or members of the MPD, and any other agency pursuant to

subsection (j) of this section that alleges abuse or misuse of police powers by such member or members, including:

- (1) Harassment;
- (2) Use of unnecessary or excessive force;
- (3) Use of language or conduct that is insulting, demeaning or humiliating;
- (4) Discriminatory treatment based upon a person's race, color religion, national origin sex, age, marital status; personal appearance, sexual orientation, gender identity or expression, family responsibilities, physical disability, matriculation, political affiliation, source of income, or place of residence or business;
- (5) Retaliation against a person for filing a complaint pursuant to this chapter; or
- (6) Failure to wear or display required identification or to identify oneself by name and badge number when requested to do so by a member of the public.

If MPD receives a citizen complaint that falls within OPC's jurisdiction, MPD is required to transmit that complaint to OPC, "within 3 business days after receipt." D.C. Official Code § 5-1107(a-1). In contrast, OPC has significant discretion when it receives a citizen complaint. D.C. Official Code § 5-1107(b-1) states, "[OPC] shall have the sole authority to dismiss, conciliate, mediate, adjudicate, or refer for further action to [MPD] a citizen complaint received under subsection (a) or (b) of this section." OPC conducts its investigations with autonomy from MPD. *See generally*, D.C. Official Code § 5-1107. While OPC conducts its investigations without interference from MPD, members of the Department are required, by statute, to cooperate with OPC's investigations and would face discipline for any failure to do so. *See* D.C. Official Code § 5-1111(d).

MPD's authority concerning the receipt and review of OPC complaint files is constrained by D.C. Official Code § 5-1112. While the Department may refer cases back to OPC in certain limited circumstances, the Chief of Police is statutorily bound to accept OPC's findings, and must issue discipline consistent with those findings. D.C. Official Code § 5-1112(e), states in pertinent part:

"The Police Chief may not reject the [OPC's] merits determination, in whole or in part, unless the Police Chief concludes, with supporting reasons, that the merits determination clearly misapprehends the record before the complaint examiner and is not supported by substantial, reliable, and probative evidence in the record before the complaint examiner. The Police Chief may not supplement the evidentiary record."

Because the two agencies are independent of each other, MPD does not exercise authority or control over OPC. Accordingly, a notice of complaint to OPC is not considered a notice of complaint to MPD. Rather, MPD has notice of a complaint to MPD at the time MPD receives

written notice from OPC that an allegation in a complaint processed by OPC has been sustained. The D.C. Council considered the question of notice in the OPC Act. *See* D.C. Official Code § 5-1107(i).⁸

D.C. Official Code § 5-1031(a-1)(1) requires that disciplinary action against MPD members be commenced within ninety (90) business days after the Department “had notice of the act or occurrence allegedly constituting cause.[,]” subject to the exceptions in D.C. Code § 5-1031(b). The date that the Department had notice is defined as, “the date that the Metropolitan Police Department generates an internal investigation system tracking number for the act or occurrence.” D.C. Code § 5-1031(2). Pursuant to D.C. Official Code § 5-1031(b), the “90-day rule” is tolled during the pendency of an OPC investigation.

If the act or occurrence allegedly constituting cause . . . is the subject of an investigation by the Office of the Inspector General, the Office of the District of Columbia Auditor, or **the Office of Police Complaints**, the 90-day period for commencing a corrective or adverse action under subsection (a) or (a-1) of this section shall be tolled until the conclusion of the investigation.

D.C. Official Code § 5-1031(b) (Emphasis added).

D.C. Official Code § 5-1107(g), provides that the Executive Director of OPC will screen each complaint within seven (7) working days of receipt of the complaint. The Executive Director may request additional information from the complainant. Then, within seven (7) working days of receipt of the additional information requested from the complainant, the Executive Director shall take one of the following actions: dismiss the complaint, refer the complaint to the U.S. Attorney’s Office; attempt to conciliate, refer to mediation, refer the complaint for investigation; or, refer the officer or officers to complete appropriate policy training by the MPD or HAPD.⁹ In the instant matter, the records do not indicate the exact date that the OPC Executive Director completed the “screening” portion of the investigation and referred the complaint to an investigator for continued investigation.

MPD’s Internal Affairs Division (IAD) generated IS #17-003029 on September 21, 2017, and that number was assigned to Employee’s OPC case. Upon receipt of the OPC complaint form, MPD requested the IS number from its Internal Affairs Division. However, D.C. Official Code § 5-1114(c), precludes the Department from initiating a disciplinary proceeding against a member with regard to the misconduct alleged in the complaint until the OPC disposes of its complaint. Thus, the Department was prohibited, by statute, from conducting an investigation until the OPC concluded its own investigation in July 2019.

⁸ While the section of the Merit Personnel Act referenced below has since been repealed, the Council’s intent regarding notice as it applies to MPD is clear. D.C. Official Code § 5-1107(i), provides, “For purposes of § 1-616.01 [repealed], the receipt by the Office of an oral or written complaint shall not constitute knowledge or cause to know of acts, occurrences, or allegations contained in such complaint. For purposes of § 1-616.01 [repealed], the MPD shall be deemed to know or have cause to know of the acts, occurrences, or allegations in a complaint received by the Office at the time the MPD receives written notice from the Office that an allegation in a complaint processed by the Office has been sustained.”

⁹ HAPD refers to District of Columbia Housing Authority Police Department.

OPC began its investigation of Employee when Ms. LaToya Robinson filed her OPC complaint on September 6, 2017. In accordance with D.C. Official Code § 5-1107 (g), the OPC Director has the responsibility to ensure that each complaint is screened within seven (7) working days of its receipt, and then decide whether the complaint should be referred for investigation, or if it should be routed through any of the other five dispositions noted in this section. The dispositions include dismissing the complaint; referring to the U.S. Attorney's Office; attempting to conciliate; referring to mediation; or, referring the subject police officer for appropriate policy training by the MPD or HAPD. Before deciding upon a specific course of action, the Executive Director can request additional information from the complainant. After receiving the additional information, the Executive Director again has seven (7) working days to determine how he/she will handle the complaint.

Since the OPC complaint and investigation concerning Employee were forwarded to MPD by OPC on September 21, 2017, the MPD could not, and did not initiate any disciplinary proceeding against Detective Carter, until the OPC forwarded the citizen complaint file to the Chief of Police in July 2019. MPD did not initiate a separate investigation of Detective Carter's September 2, 2017 misconduct. D.C. Official Code § 5-1112 (a), provides, "Upon receipt of a complaint file in which one or more allegations in a complaint has been sustained, the Police Chief shall cause the file to be reviewed within five (5) working days after receiving the complaint file." Furthermore, § 5-1112(b-g), describes the MPD Police Chief's duties and responsibilities in ensuring that the complaint file is reviewed, and that the reviewing members make a written recommendation concerning, with supporting reasons, an appropriate penalty for the misconduct. The recommendation may include a proposal for any additional action by the Police Chief, which is not inconsistent with the intent and purpose of the citizen complaint review process. However, the Chief of Police may not supplement the evidentiary record.

Based on the undisputed timeline outlined above, OPC received its first citizen complaint regarding the September 2, 2017, incident and Employee's actions on September 6, 2017. OPC received a second complaint on September 13, 2017. While it is true that MPD generated an IS number for Employee on September 21, 2017, the 90-day period is tolled as OPC was still investigating the complaints during that period. It was not until May 11, 2018, that OPC informed Employee regarding the complaints and states that its formal investigation began that day. While this is roughly 169 business days since the first citizen complaint, D.C. Official Code § 5-1111 does not impose any deadline on OPC for finishing its investigation. Regardless, D.C. Official Code §5-1031(b) states that this period is tolled for purposes of the 90-day rule. Indeed, the rule was tolled until OPC completed its investigation on July 15, 2019.

The OPC "Findings of Fact and Merits Determination," concluding OPC's investigation was signed by Laurie S. Kohn, OPC Complaint Examiner on July 15, 2019. This is when OPC completed its investigation of Employee. However, MPD was not notified that OPC had concluded its investigation until OPC transmitted the final "Findings of Fact and Merits Determination" sustaining the citizen complaints against Employee on July 26, 2019. Before that date, MPD did not conduct any investigation of Employee as D.C. Official Code § 5-1114(c) precludes MPD from conducting an investigation until the OPC concludes its own investigation. There are 37 business days from July 26, 2019 to September 18, 2019, the day Employee received his NPAA

from MPD. This is well short of the 90-business day deadline imposed by the 90-day rule. I therefore conclude that Agency complied with D.C. Official Code § 5-1031 (a) (2001).

Disparate Treatment

Next, Employee takes issue with Agency's choice of a twenty-day suspension with ten days held in abeyance for a year as the appropriate penalty and asserts that the penalty is wildly unreasonable in light of *Christopher Micciche v. MPD*, OEA Matter No. 1601-0019-18 (January 10, 2020). He asserts that the twenty-day suspension and demotion in rank that *Micciche* received for the more egregious act of criminally and improperly accessing the medical records of fellow members makes his comparatively lesser non-criminal charges pale in comparison. Employee says that like *Micciche*, he received a demotion in the sense that this matter cost him a promotion. In other words, Employee is asserting disparate treatment.

In *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, *Opinion and Order on Petition for Review* (September 29, 1995), the Office's Board set forth the law regarding a claim of disparate treatment:

“[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 surrounding the misconduct are substantially similar to his 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.”(citations omitted).

Additionally, the employee bears the burden of proof in disparate treatment claims. *Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 22, 1994); *Frost v. Office of the D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995).¹⁰

Here, Employee has failed to make a *prima facie* showing of disparate treatment. He failed to show that *Micciche* was similarly-situated to him. *Micciche* was a Deputy Director of MPD's Medical Services Division while Employee was a Police Officer. Not only was *Micciche* under a different supervisor and unit, the offenses attributed to them differed greatly. Thus, I find that Employee has failed to meet his burden of proof on his claim of disparate treatment.

Characterization of Charges

¹⁰ Regarding this Office's well-established law on disparate treatment, *see also* *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92, *Opinion and Order on Petition for Review* (September 29, 1995); *Adewetan v. D.C. General Hospital*, OEA Matter No. 1601-0021-93 (July 11, 1995); *Shade v. Department of Administrative Services*, OEA Matter No. 1601-0360-94 (August 3, 1999).

Next, Employee asserts that his use of profanity should be considered the same event as “Conduct Unbecoming” and not a separate offense. He also asserts that the violation should not be considered a serious violation of Orders and Directives. This defense is unavailing. Employee cites no law or regulation that would allow an accused employee to dictate how his superiors should frame the charges and/or specifications against him or her.

OPC Investigation of Complaint

Employee then states that OPC violated the law by entertaining the citizen’s complaint against the Employee. Specifically, Employee states that complainant waited 176 workdays from the date of the incident to the time that she filed a complaint against Employee. However, Employee is mistaken in his assumption. As the undisputed facts listed above show, the date of the incident was September 2, 2017. Complainant Robinson filed her complaint with OPC on September 6, 2017, and Tobias on September 13, 2017. Thus, I find that it was four days, not 176 days, between the incident and the filing of the complaint.

OPC’s Lack of Good Faith regarding Mediation Effort

Next, Employee accuses OPC of not acting in good faith when it failed to convey his desire to mediate the complaint against him with the complainant. Again, Employee fails to cite any statute or regulation that requires OPC to mediate the complaint. Indeed, I find that D.C. Official Code § 5-1107(g) gives OPC the sole authority to decide how to process a citizen complaint against a police officer.

MPD’s *Douglas* factors analysis

Lastly, Employee disagrees with the way MPD weighed the *Douglas* factors in deciding his penalty. He states that his past disciplinary record was not properly evaluated and that the letters of support written by his fellow officers should have weighed more on MPD’s choice of penalty. He then goes on to dispute MPD’s characterization of some of the factors.

In *Douglas v. Veterans Administration*¹¹, the Merit Systems Protection Board, this Office’s federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Although not an exhaustive list, the factors are as follows:

1. The nature and seriousness of the offense, and its relation to the employee’s duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
2. The employee’s job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3. The employee’s past disciplinary record;

¹¹ 5 M.S.P.R. 280, 305-306 (1981).

4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. Consistency of the penalty with any applicable agency table of penalties;
8. The notoriety of the offense or its impact upon the reputation of the agency;
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10. Potential for the employee's rehabilitation;
11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

The legal standard for the appropriateness of a penalty was established by the Merit Systems Protection Board in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981). In *Douglas*, the MSPB set forth a list of factors to be considered when assessing the appropriateness of a penalty. *Douglas*, at 331-332. The reasoning and factors established in *Douglas* have been adopted by the District of Columbia Court of Appeals in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). The Court in *Stokes* stated:

Review of an Agency imposed penalty is to assure that the Agency has considered the relevant factors and has acted reasonably. Only if the Agency failed to weigh the relevant factors or the Agency's judgment clearly exceeded the limits of reasonableness, is it appropriate...to specify how the Agency's penalty should be amended. *Stokes*, at 1010.

The court in *Stokes* goes on to state that the reviewing tribunal, may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate. *Stokes*, at 1011. In *Gregory Miller v. Department of Public Works*, OEA Matter No. 1601-0113-98 (November 22, 2002), this Office held "Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office."

Here, MPD balanced the *Douglas* Factors and concluded that a twenty-day suspension was an appropriate penalty. Employee has not argued that this suspension is not within MPD's table of penalties for the charged misconduct. Employee's disagreement with MPD's conclusions regarding the penalty centered on his objections to the specific way it did the *Douglas* analysis. This does not provide a basis to reverse the decision to suspend Employee, a police officer who was found by both OPC and MPD to have acted unprofessionally in dealing with an unruly civilian. Accordingly, I find that Agency's decision to suspend Employee for twenty (20) days with ten (10) days held in abeyance was within management's discretion and should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of suspending the Employee from service for twenty (20) days with ten (10) days held in abeyance is **UPHELD**.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge