THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
WIDMON BUTLER,	)	
Employee	)	
	)	OEA Matter No.: 1601-0041-14
v.	)	
	)	
	)	Date of Issuance: December 19, 2017
METROPOLITAN	)	
POLICE DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Widmon Butler ("Employee") worked as a Civilian Claims Specialist with the Metropolitan Police Department's Medical Services Branch ("Agency"). On November 8, 2013, Agency issued Employee a Notice of Final Decision ordering him to serve a thirty-day suspension based on a charge of "[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: Misfeasance." The charge stemmed from an incident wherein Employee submitted a "PD 42 Findings & Determination" memorandum which recommended that a sworn member of the Metropolitan Police Department be placed in Non-Performance of Duty ("Non-POD") status.[1] In his memorandum, Employee

[1] For privacy purposes, the parties agreed to identify the MPD employee as "Officer O."

allegedly omitted pertinent and relevant information from Officer O's medical history that could have resulted in the denial of a lawful worker's compensation claim for the sworn officer involved. Employee's suspension commenced on December 30, 2013.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 23, 2013. In his appeal, Employee argued that the Agency's charge was false and misleading because his conduct did not constitute misfeasance. In addition, he claimed that Agency's adverse action was not supported by evidence and that the charge was "divorced from the circumstances." As a result, Employee requested that his suspension be reversed.[2]

Agency filed its Answer to the Petition for Appeal on January 16, 2014. It denied Employee's substantive allegations and requested that a hearing be held in the matter.[3] An OEA Administrative Judge ("AJ") was assigned to the matter in July of 2014. After several scheduling conflicts, a newly-assigned AJ held a prehearing conference on November 30, 2015 to assess the parties' arguments.[4] An evidentiary hearing was subsequently held on December 21, 2016, wherein the parties presented testimonial and documentary evidence in support of their positions.

An Initial Decision was issued on January 27, 2017. The AJ first held that Agency met its burden of proof with respect to the misfeasance charge. According to the AJ, Employee admitted that he never conducted any additional research into Officer O's medical history to determine if he had prior injuries related to the claim at issue. In addition, the AJ dismissed Employee's arguments that his supervisor rushed him to finish the form PD 42; that Officer O was to blame for not explicitly stating that that his current injury was related to a prior claim; and that Employee did not believe there was an issue with the claim because his supervisor ultimately instructed him to change the recommendation from a Non-POD to a POD status. The AJ further

[2] *Petition for Appeal* (December 23, 2013).
[3] *Agency Answer to Petition for Appeal* (January 16, 2014).
[4] *Order Convening a Prehearing Conference* (October 30, 2015).

stated that Employee's testimony was defensive, combative, evasive, and not credible. Lastly, he determined that Employee consistently performed his duties in a careless and unprofessional manner. Consequently, the AJ determined that Agency had sufficient cause to charge Employee with misfeasance.

Regarding the penalty, the AJ relied on the holding in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), wherein the D.C. Court of Appeals held that OEA must determine, *inter alia*, whether the penalty imposed upon an employee is within the range allowed by law, regulation, and any applicable Table of Penalties. In reviewing Agency's adverse action, the AJ provided that the penalty for a charge of misfeasance is found in Chapter 16 of the District Personnel Manual ("DPM"). Since Agency identified at least one previous instance wherein Employee was disciplined for misfeasance, the AJ concluded that a thirty-day suspension was proper under the Table of Appropriate Penalties. Accordingly, Employee's suspension was upheld.[5]

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on February 22, 2017. He makes a myriad of arguments regarding the AJ's findings of fact. Of note, Employee contends that Agency did not have cause to charge him with misfeasance and that it did not meet its burden of proof with respect to the charge and specification levied against him. Employee also disagrees with the AJ's credibility determinations. In addition, Employee submits that the Initial Decision was not based on substantial evidence. According to Employee, the AJ made a mistake of fact by including prior incident of discipline in his analysis that was previously settled by the parties. He further states

[5] *Initial Decision* at 6.

that Agency's adverse action was an act of retaliation and a part of a "workplace mobbing event." Thus, Employee requests that the Board reverse his suspension.[6]

Burden of Proof

Employee contends that Agency failed to meet its burden of proof in this matter. OEA Rule 628.1 provides that 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." As previously stated, there is an abundance of evidence in the record to prove that Employee conducted his duties as a Claims Examiner in a careless manner. His misconduct constituted an on-duty or employment-related act or omission that interfered with the efficiency and integrity of government operations. Therefore, This Board agrees with the AJ's determination that Agency met its burden of proof in this matter.

Misfeasance

Employee argues that Agency failed to establish that it had cause to take disciplinary action against him. In accordance with Section 1651(1) of the CMPA (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. The definition of cause includes "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations." Under Section 1619 of the DPM, a charge of misfeasance includes "careless work performance, failure to investigate a complaint, providing misleading or inaccurate information to superiors; dishonesty; unauthorized use of government resources; using or authorizing the use of government resources for other than official business."

[6] *Petition for Review* (February 22, 2017).

As a Civilian Claims Specialist, Employee's duties included making determinations on Worker's Compensation claims filed by Agency employees who reported an injury or illness that he or she believed was incurred while on duty. Employee was tasked with determining whether the claim was compensable or non-compensable. As part of the process, he was required to review each report associated with the claim; consort with the legal department, if needed; speak with the case managers who were handling the claim; and talk with the medical providers who treated the employee making the claim. Employee was ultimately required, based on the totality of the circumstances, to make a recommendation to designate the injury as "Performance of Duty" or "Non-Performance of Duty."[7]

After reviewing the record, the AJ concluded that there was sufficient evidence to support a finding that Employee performed his job duties in a careless manner when he failed to conduct a full and exhaustive research of Officer O's medical file prior to recommending that she be placed in Non-POD status. This Board agrees with the AJ's determination. Employee failed to communicate with the legal or medical department regarding Officer O's previous on-the-job (POD) injury to determine if there was a causal relationship to the current claim. In this regard, Employee fell short of the standard required of his position. Officer O's medical file included a recordation of previous injuries to her left knee, which required multiple surgeries. As Agency has argued, omitting relevant information from the PD 42 Findings & Determination could have resulted in the denial of the officer's legitimate and lawful Worker's Compensation claim. Accordingly, this Board finds that Employee's conduct constituted misfeasance as defined under DPM § 1619.

[7] Evidentiary Hearing Transcript, p. 22.

Reasonableness of Penalty

According to Employee, the AJ made a mistake of law in allowing Agency to include a prior charge of misfeasance in selecting the penalty levied against him. He states that the previous matter that the AJ referenced was settled via a Whistleblower lawsuit on October 24, 2016. The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for a first offense of any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations (misfeasance) is a suspension for fifteen days. A second offense carries a penalty of suspension for twenty to thirty days. The penalty for a third offense of misfeasance is termination. Under D.C. Personnel Regulation ("DCPR") § 1606.2, adverse actions occurring within a three year period may be considered when imposing a penalty.

In his Initial Decision, the AJ noted that OEA has previously upheld Employee's twenty-five day suspension for misfeasance and insubordination in an unrelated matter.[8] On November 3, 2015, OEA's Board denied Employee's Petition for Review and upheld Employee's suspensions.[9] Accordingly, Agency was permitted to rely upon the aforementioned charge in selecting the appropriate penalty in this case because it occurred within the previous three-year statutory period as required under DCPR § 1606.2.

The record reflects that the current matter is Employee's second offense of misfeasance.[10] Under the Table of Appropriate Penalties, a second offense carries a maximum penalty of thirty

[8] *See Butler v. D.C. Metropolitan Police Department*, OEA Matter Nos. 1601-0236-12 and 1601-0069-14 (September 28, 2015). In the first matter, Employee was suspended for twenty-five days. In the second matter, Employee was suspended for thirty days for insubordination. These matters were consolidated by the AJ for efficient adjudication.
[9] The case is currently pending in D.C. Superior Court. *See* 2017 CA 003455 P(MPA).
[10] The AJ stated that this matter was the third charge of misfeasance, referencing OEA Matter No. 1601-0049-15 (November 30, 2016). However, Employee was not charged with this offense at the time Agency issued its advance

days. In addition, Agency considered the *Douglas* factors in selecting the penalty to levy against Employee.[11] Based on the foregoing, Employee's suspension for thirty days was appropriate under the circumstances.

Witness Credibility

In his Petition for Review, Employee disagrees with nearly all of the AJ's findings of fact and credibility determinations. However, the AJ found Employee's testimony to be inconsistent, combative, and not credible. Conversely, he found that Agency's witnesses provided ample evidence to support its adverse action. The D.C. Court of Appeals in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. The OEA Administrative Judge was the fact finder in this matter. As this Board has consistently ruled, we

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notice of proposed suspension in this case. *See also* Evidentiary Hearing Transcript, pg. 12. Therefore, we will analyze the appropriateness of the penalty accordingly.

[11] Evidentiary Hearing Transcript, p. 10. In *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981) the Merit Systems Protection Board ("MSPB") provided the standard for assessing the appropriateness of a penalty. The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

> 1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
> 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
> 3) the employee's past disciplinary record;
> 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
> 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
> 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
> 7) consistency of the penalty with any applicable agency table of penalties;
> 8) the notoriety of the offense or its impact upon the reputation of the agency;
> 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
> 10) potential for the employee's rehabilitation;
> 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
> 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

will not second guess the AJ's credibility determinations.[12] Moreover, Employee's voluminous assertions in his Petition for Review are merely disagreements with the AJ's findings. This is not a valid basis for appeal. Accordingly, we find Employee's arguments to be without merit.

Substantial Evidence

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[13] 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. In this case, the AJ's findings were based on substantial evidence. His conclusions of law flowed rationally from the evidence presented. As a result, Employee's charge of misfeasance was taken for cause and the penalty of a thirty-day suspension was appropriate. Consequently, Employee's Petition for Review must be denied.[14]

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[12] *Ernest H. Taylor v D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Derrick Jones v. Department of Transportation*, OEA Matter No. 1601-0192-09, *Opinion and Order on Petition for Review* (March 5, 2012); *C. Dion Henderson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0050-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Ronald Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); and *Theodore Powell v. D.C. Public Schools*, OEA Matter Nos. 1601-0281-10 and 1601-0029-11, *Opinion and Order on Petition for Review* (June 9, 2015).

[13] *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).

[14] Employee makes several other arguments in his appeal regarding his disagreements with the Initial Decision. This Board finds that Employee was not substantially prejudiced by scheduling delays, as he argues. In addition, he submitted no credible evidence during the course of this appeal that Agency's adverse action was a result of retaliation, malice, or bad faith. Employee states that Agency's decision to place him on Performance Improvement Plan was unwarranted, but provided no evidence in support of his assertions. This Board will also not consider his arguments relative to failed mediations before OEA, as discussions at the conference and the offers of the parties are confidential and may not be offered or received into evidence or otherwise disclosed in subsequent adjudication or litigation. *See* OEA Rule 606.9. We also find that any minor mistakes in the AJ's decision, such as referring to this matter as a termination, rather than a suspension, were de minimus in nature and did not substantially impact the outcome of the case.

ORDER

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

FOR THE BOARD**:**

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Sheree L. Price, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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P. Victoria Williams

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Jelani Freeman

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.