THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0025-19
ANIL PARKER,	
Employee	
	Date of Issuance: May 6, 2020
v.	
	MICHELLE R. HARRIS, ESQ.
D.C. METROPOLITAN POLICE DEPARTMENT,	Administrative Judge
Agency	

Anil Parker, Employee *Pro Se*
Anna Kent, Esq., Agency Representative

INITIAL DECISION[1]

INTRODUCTION AND PROCEDURAL HISTORY

On January 8, 2019, Anil Parker ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Metropolitan Police Department's ("Agency" or "MPD") decision to suspend him from service for ten (10) days, five (5) of which were held in abeyance for one (1) year. Agency filed its Motion for Summary Disposition on February 14, 2019, citing that OEA lacked jurisdiction over this matter because Employee only served five (5) days of suspension. Following an unsuccessful attempt at mediation, this matter was assigned to the undersigned Administrative Judge ("AJ") on May 3, 2019. On May 8, 2019, I issued an Order requiring Employee to address the jurisdiction issue raised by Agency in its Motion for Summary Disposition. Employee had until May 22, 2019 to respond. Agency was given the option to submit a response on or before June 7, 2019. Employee submitted his brief on May 14, 2019. Agency did not submit a response.[2] On June 18, 2019, I issued an Order finding that this Office had jurisdiction in this matter and scheduled a Status/Prehearing Conference for July 8, 2019. On July 1, 2019, Agency filed a Motion for a continuance citing scheduling conflicts and noted that Employee did not consent to its motion. Upon consideration of Agency's motion and its reasons for requesting the continuance, on July 2, 2019, I issued an Order rescheduling the Status Conference to July 19, 2019.

[1] This Initial Decision was issued during the District of Columbia's COVID-19 State of Emergency.
[2] Agency submitted a statement that it had not received the Order but noted its opposition.

Both parties were present for the conference on July 19, 2019. Following the conference, I issued an Order requiring the parties to submit briefs. Agency's brief was due on or before August 30, 2019; Employee's brief was due on or before September 30, 201; and Agency had the option to submit a sur-reply brief on or before October 14, 2019. On August 21, 2019, Agency filed a Motion for an extension of time to submit its brief due to workload conflicts. Agency requested that it have until September 30, 2019 to submit its brief. Employee submitted an email to the undersigned indicating therein that he did not consent to Agency's request. On August 26, 2019, I issued an Order granting Agency's Motion in part. Agency's brief was now due on or before September 20, 2019; Employee's brief was due on or before October 21, 2019; and Agency had the option to submit a sur-reply brief on or before November 12, 2019. Agency did not submit its brief as required by the August 26, 2019 Order. As a result, on September 25, 2019, I issued an Order for Statement of Good Cause to Agency requiring it to submit its brief and a statement for good cause for its failure to submit the brief as required. Agency had until October 4, 2019 to respond. Employee submitted a response on October 9, 2019.

Agency filed its brief and statement for good cause on October 4, 2019, indicating therein that it had not received the undersigned's August 26, 2019 Order, and had assumed it had until September 30, 2019 to submit its brief. Employee submitted a response on October 9, 2019. Upon consideration of both parties' positions, I issued an Order on October 8, 2019, noting that I found that there had been no prejudice to either party regarding Agency's late submission. However, as a matter of fairness, I extended the time for which Employee could submit his brief until November 4, 2019. Additionally, Agency had until November 19, 2019 to submit its sur-reply brief. Employee did not submit his brief as required. As a result, on November 13, 2019, I issued an Order for Statement of Good Cause to Employee for failure to submit a brief. Employee had until November 22, 2019, to respond. On November 16, 2019, Employee responded via email that the submission he filed with the Office on October 9, 2019, was his brief and response regarding his matter. Accordingly, I advised Employee that he was not required to respond to the Order for Statement of Good Cause, and I would note in the record that his October 9, 2019 submission was his brief. Agency elected not to submit a sur-reply brief in this matter. Upon review of all the submissions filed in this matter, I determined that an Evidentiary Hearing was not warranted. 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 ten (10) day suspension, with five (5) days held in abeyance 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.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

D.C. Official Code § 1-606.03(a) sets forth the jurisdictional limits of OEA. It provides that:

> "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. Any appeal shall be filed within 30 days of the effective date of the appealed agency action." (Emphasis Added)

Employee has been employed at Agency since July 13, 2015 and is a Patrol Officer at the Sixth District. On August 13, 2018, the Disciplinary Review Division (DRD) issued a Notice of Proposed Adverse Action (NPAA) recommending a ten-day (10) suspension for the following charges:

> **Charge No.1** : Violation of General Order Series 1201.21, Attachment A, Part A-16, which states, "Failure to obey orders or directives issued by the Chief of Police.
>
> Specification No. 1: In that, on April 18, 2018, you responded to a call for a family dispute where the complainant stated that the father of her child choked her and made threats to kill her while she was in bed with their [ten-month-old] child. You allowed the suspect to leave the apartment without making a mandatory arrest for the domestic violence offenses. You instead prepared a police report for a Simple Assault and Threats and then cleared the scene. Your misconduct is further described in General Order 304.11, Part V.C.8.a which states, "If after interviewing all parties and witnesses, the member conducting the preliminary investigation determines that probable cause exists that the suspect has committed an intra-family offense, or violated a TPO, CPO, or Foreign Protection Order and the suspect is present or can be located, members shall: a. Arrest the perpetrator of the offense."

Employee appealed this NPAA on September 13, 2018. On November 9, 2018, Agency issued a Final Notice of Adverse Action sustaining the charges and the penalty of a ten-day suspension. On November 20, 2018 Employee filed an appeal of Agency's Final Notice to the Chief

of Police. On December 12, 2018, the Chief of Police issued a final decision denying Employee's appeal but elected to hold five (5) of the ten days suspension in abeyance for one (1) year.

Agency's Position

Agency asserts that it had cause to discipline Employee and that it administered the disciplinary action in accordance with all applicable laws, rules and regulations. Agency argues that it had cause to discipline Employee under General Order 120.21, "Disciplinary Processes and Procedures," and General Order 301.11, "Intrafamily Offenses."[3] Specifically, Agency asserts that pursuant to the "District of Columbia Prevention of Domestic Violence Amendment act of 1990, D.C. Law 8-261, D.C. Official Code § 16-1031, et. seq., and MPD's more detailed protocol on intrafamily offenses in General Order 304.11, officers are required to make arrests for certain intrafamily offenses based on probable cause."[4] Agency cites that General Order 304.11 defines "intrafamily offense" and also has a mandatory arrest provision, "which are to be affected immediately and are exempt from the general prohibition against warrantless misdemeanor arrests." Agency highlights that, General Order 301.11 states the following regarding the intrafamily offense:

> [A]ny criminal offense committed by an offender upon a person:
> a. To whom the offender is related by blood, legal custody, marriage, having a child in common, or with whom the offender shares or has shared a mutual residence; or
> b. With whom the offender maintains or maintained a romantic relationship with someone of the opposite or same sex, but not necessarily including a sexual relationship.
> c. The offense must have occurred within the District of Columbia.

Further, Agency provides that [The] District of Columbia Prevention of Domestic Violence Amendment Act of 1990 . . . requires a police officer to arrest a person if there is probable cause to believe that a person committed an intrafamily offense that:

> a. Resulted in physical injury, including physical pain or illness, regardless of whether or not the intrafamily-related offense was committed in the presence of the officer; or
> b. Caused or was intended to cause reasonable fear of imminent serious physical injury or death to the victim.

Agency avers that on April 18, 2018, Employee was on duty and was assigned to patrol with Officer Christian Mbah ("Officer Mbah). At approximately 10:12 p.m., Employee and Officer Mbah were dispatched to a call for a domestic dispute at an apartment on E Street SE in Washington, DC.[5] Both officers activated the body-worn cameras (BWC). Officer Mbah read the 911 information from the Computer-Aided Dispatch (CAD), which was "domestic dispute with child's mother, domestic disturbance/domestic violence, physical…black female, Ms. Brooks ("Brooks"), can hear the female screaming in background."[6] Upon arrival, the female, Ms. Brooks told the officers to come in and indicated that the man, later identified as Ronald Clipper ("Clipper"), was holding her baby hostage.

[3] Agency's Prehearing Statement (July 11, 2019).
[4] Agency's Brief at Page 15 (October 4, 2019).
[5] Agency's Brief at Page 2 (October 4, 2019).
[6] *Id.*

Ms. Brooks said that Clipper had attacked her on her bed and "spazzed" out and said, "bitch I want to kill you" and jumped on top of her baby." Employee asked Ms. Brooks to step outside, to which she responded, "no he can go outside, this is my house." Officer Mbah told her to go talk to Employee outside. While outside, Ms. Brooks explained that Clipper had to go and that she wanted him arrested. She said that he attacked and jumped on top of their daughter and it was not the first time he had done so. Brooks indicated that Clipper had previously ripped out her hair three prior. Employee can be seen in the BWC footage taking out a pen and notebook. Brooks told Employee that there were two children inside, her five-year-old, who was not Clipper's child, and the baby girl to which Clipper was the father. Brooks was seen visibly crying and kept saying she wanted to get back inside because her son was terrified of Clipper. Employee said that Officer Mbah was in there and that everything was fine. Employee asked Ms. Brooks what happened, and she explained that she went to put the baby in be d and asked Clipper to move over to make room, when he jumped up on top of the baby and said "bitch I want to kill you." Brooks said she then took the baby and put her in her son's room and was going to call 911, but then told Clipper to get out of the bed and go to the living room. While Employee was questioning Ms. Brooks, Agency cites that Officer Mbah was inside the apartment talking with Clipper and Ms. Brooks' son. Agency asserts that Officer Mbah had already told Clipper he was not going to be arrested.[7]

Agency notes that Employee is seen re-entering the apartment with Ms. Brooks behind him, and Ms. Brooks yells and tells Clipper that he had attacked her in front of her kids, and he needed to go. Clipper is heard yelling; "can you prove I attacked you?" Ms. Brooks replies and says he dragged her and beat her two weeks ago. Agency asserts that Ms. Brooks also says neighbors were witnesses. Employee is then seen on the BWC interviewing the Brooks' five-year old son. Agency asserts that the boy is visibly frightened and asks Employee if he is going to arrest Clipper. Employee then asks the boy what happened, the boy talks quietly, and Employee says "so you saw that he had the baby and your mom told him to give the baby back."[8] Employee talks to Clipper and tells him that he will not be going to jail, but that "he ain't trying to have this situation escalate, you feel me?" Clipper states to Employee that he will leave and said he did not want to take the baby with him. Employee asked Clipper to hand the baby to Ms. Brooks' son. Employee then says he'll escort Clipper out, thanks him for his cooperation and asks him for his date of birth and then tells him to keep walking. Officer Mbah is heard talking to Ms. Brooks telling her that they completed their investigation and no crime had occurred. Agency argues that Ms. Brooks tried to say this was not the first incident. Officer Mbah offers their report numbers and Ms. Brooks says she wants them. Employee requested report numbers from the dispatcher and identified himself with his call sign. Ms. Brooks calls 911 again and reports Employee and Officer Mbah for not arresting Clipper.[9] Employee goes back out and is heard saying "we need a Sector 1 official for tac (a request for an official).

Agency asserts that Detective Sergeant Eric Fenton answered this request and Employee told him he would call him on the phone. Agency asserts that Employee told Officer Fenton that he was at the apartment and that it was a DV call. That he found no signs of visible injury and that there was a five-year old present, and he said he only saw the man taking the baby. Employee also said that the lady was mad that they didn't arrest the man, so she called 911 again, and that he just wanted to give a heads up. Agency cites that Sergeant Fenton asked Employee a question, and that Employee's response was that "the lady went to put the baby in the room and the man was in bed and she asked him to move and she saying that he threatened to kill her and he choked her and dragged her and all

[7] *Id.* at Page 4.
[8] *Id.* at Page 6.
[9] *Id.*at Page 7.

this other stuff."[10] Employee also told Sergeant Fenton that Clipper said he didn't do it and she was yelling, but he was calm on the couch, so it was an allegation. Employee said that "the guy left, the lady is there with her two kids", and "she called 911 and is complaining." Agency avers that Sergeant Fenton told Employee that he had recently talked to him about handling domestic violence cases and the law on mandatory arrests. Employee is heard at the end of the call saying that he was just giving you guys a heads up in case a lieutenant wants to know what happened. Following this phone call, Employee talked to Officer Mbah and said, " you know what he said?", and following that both officers turned off their BWC.[11]

Approximately 15 minutes later, both Employee and Officer Mbah reactivated their BWC and returned to Ms. Brooks' door. They asked Brooks if Clipper had returned to which she replied "no, he'll be back at like 2am or 3am in the morning and would likely steal her cell phone and keep it until she lets him stay there" and she expressed that she was trying to explain this to them earlier. Employee is heard asking Brooks "if you guys have been through this before, then why even link back up." Officer Mbah is heard telling Brooks that if Clipper comes back to give them a call.[12] Employee called Sergeant Fenton to relay to him that Clipper was not at the residence, and they were directed to meet him at the police station. Agency asserts that during the meeting, Sergeant Fenton reviewed the BWC footage and told them that they were required to arrest Clipper for intrafamily simple assault and threats to do bodily harm, and that they should not litigate the case or try to do anything short of an arrest.[13] Agency avers that Employee was upset and told Sergeant Fenton that he stood by his decision and that there was no probable cause for an arrest. Sergeant Fenton told Employee and Officer Mbah to write PD 119 statements and requested Incident Summary (IS) numbers for an investigation into their misconduct. Sergeant Fenton also instructed Employee to draft an arrest warrant affidavit for Mr. Clipper to present to the United States Attorney's Office (USAO).[14]

Agency argues that Employee emailed an arrest warrant package for review by the USAO's Sex Offense and Domestic Violence Section, copying Officer Mbah, Sergeant Fenton and Lieutenant Michael Jamison of the Sixth District. Agency avers that in the narrative of his warrant affidavit, Employee wrote that "the defendant voluntarily left because he didn't want any further altercations. After the officers left, they spoke with their official; Sgt. Fenton who advised them to go back and make an arrest because the complainant was reporting an assault. *The officers advised him that they did not believe probable cause existed for an arrest due to their investigation and the [complainant's son] statement. However, Sgt Fenton ordered them to return and make an arrest.* The officers returned and the defendant was not on the scene…Based on the above facts and circumstances, your affiant respectfully request than an arrest warrant be issued for Ronald Clipper."[15] On April 24, 2018, the USAO Rikki McCoy replied and rejected the warrant for review, and cited that if the "affiant does not believe there was probable cause to make an arrest, a warrant should not be submitted."[16]

Agency asserts that Lieutenant Jamison then conducted a chain of command investigation on Employee's misconduct. On May 30, 2018 Lieutenant Jamieson's preliminary investigation was sent

[10] *Id.*at Page 8.
[11] *Id*.
[12] *Id.*at Page 9.
[13] *Id.*
[14] *Id.*
[15] *Id*. at Page 10.
[16] *Id.*

to the chain of command to the Internal Affairs Bureau (IAB). On June 5, 2018, the Director of the IAB, Inspector Kimberly Dickerson, issued a memorandum to the Sixth District authorizing a "Reverse Garrity" warning to Employee and allowing Lt. Jamieson's investigation to proceed as an administrative matter.[17] On July 14, 2018, Lt. Jamieson submitted the Final Investigative Report through the chain of command to the Disciplinary Review Division (DRD). This report found that Employee was negligent by not arresting and charging Clipper with Simple Assault/Domestic Violence and Threats to do Bodily Harm and recommended he be cited for adverse action for violation of MPD General Order 304.11. On August 23, 2018, a Notice of Proposed Adverse Action (NPAA) was issued and advised Employee that he was being charged with failure to obey orders or directives by the Chief of Police.[18] Agency notes that Officer Mbah was also charged with the same, but that he did not file an appeal at OEA. This NPAA also recommended a ten-day (10) suspension. Agency asserts that Employee filed a response to the NPAA on September 13, 2018. On November 9, 2019, a Final Notice of Adverse Action ("Final Notice") was issued to Employee and upheld the misconduct charges and proposed penalty. On November 20, 2018, Employee filed an appeal to the Chief of Police. On December 12, 2018, the Chief of Police issued his decision, and agreed with the determinations made by Sergeant Fenton and every reviewing official in the chain of command that Employee had probable cause to arrest Clipper. The Chief said that Employee's "disregard for the complainant and the legitimacy of her complaint was clear." Further, the Chief noted in response to Employee's attachment of seven family disturbances "that you potentially engaged in similar misconduct in the past does not support your argument that you should not be disciplined in this case."[19] The Chief decided that a ten-day suspension was appropriate, but held five (5) days in abeyance for one year.

Agency argues that Employee was appropriately disciplined for his failure to make the arrest in this matter. Agency asserts that "probable cause" is not a high bar and that it "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity, and its viewed from the standpoint of an objectively reasonable police officer that is a reasonably well-trained law enforcement professional."[20] Agency avers that under General Order 304.11, officers are required to determine whether there is probable cause on the scene of an intrafamily offense by conducting a preliminary investigation. Agency also notes that it trains officers on investigatory techniques regarding domestic violence situations, including allowing the victim to speak first, and always interviewing children whether or not they witnessed the incident and to avoid leading questions with children.[21] Agency provides extensive training and officers continue to receive training through their career with regard to intrafamily offenses. Agency argues that Employee's failure to find probable cause to arrest Clipper, was in violation of General Order 304.11 Agency avers that Ms. Brooks identified Clipper and told the officers that he had choked her that night.

Agency also asserts that Ms. Brooks' statements regarding past violence should have assisted a reasonable officer in determining that probable cause existed for an arrest. Agency notes that while the statements of Ms. Brooks alone would have been enough for probable cause, Ms. Brooks also told the officers that neighbors could corroborate her story, and Employee and Officer Mbah failed to make any effort to contact neighbors for witness statements. Agency found that Employee also failed to recognize that "Ms. Brooks and Mr. Clipper exhibited the demeanor and emotional states of a

[17] *Id.*
[18] *Id.* at 11.
[19] *Id.* at 12.
[20] *Id.* at Page 16, *citing to District of Columbia v. Wesby*, 138 S. Ct. 577, 586 (2018).
[21] *Id.* at Page 17.

victim and domestic abuser, respectively."[22] Agency asserts that Employee's argument that there was not probable cause for Mr. Clippers' arrest based on his assessment that Ms. Brooks was unreliable, was "unavailing." Agency avers that the footage captured on the BWC clearly establish probable cause and provide undisputed evidence in support of its decision to discipline Employee for his actions. Agency cites that this was the finding of MPD officials "at every level of Employee's chain of command and the Disciplinary Review Division (DRD) and the determination was affirmed by the Chief of Police in his review of Employee's appeal." Accordingly, Agency argues that OEA should defer to the opinion of these official, rather than substitute its own judgement.

Finally, Agency argues that its penalty was appropriate under the circumstances and should be sustained. Agency assert that its ten (10) day suspension was in the range of allowable penalties and MPD's Table of Penalties under General Order 1201.21.[23] Agency notes that it appropriately considered the Douglas factors in its consideration and administration of the penalty in this matter. Agency also provides that based on comparative disciplinary cases, MPD typically suspends officers for ten to fifteen days, without holding any days in abeyance as a penalty for failing to make arrest for intrafamily offenses.[24] As a result, Agency asserts that its actions were appropriate and its penalty was not an error of judgment and that its decision to suspend Employee should be upheld.

Employee's Position

Employee argues that he should not have been disciplined in this matter. Employee asserts that arrests are made on probable cause. Specifically, Employee cites that "General Order 304.11, Part V.C.,8 states that "after interviewing all parties and witnesses, the member conducting the preliminary investigation determines that probable cause exists that the suspect has committed an intrafamily offense, or violated at TPO, CPO, or Foreign Protection Order and the suspect is present or can be located, members shall: a. Arrest the perpetrator of the offense."[25] Employee asserts that "arrests are based on probable cause….[w]e took in to account the totality of the circumstances when we determined that probable cause of a crime did not exist to make an arrest in this matter."[26] Employee avers that the "alleged victim was not the 911 caller and that the alleged suspect was on the couch holding their infant child and remained calmed throughout the investigation." Further, Employee says that the alleged victim continued to "interfere when I was interviewing her five-year old child as the alleged victim stated he saw the whole thing."[27] Employee also asserts that the "alleged victim" changed her story, and said that the five- year old did not see the whole incident, and therefore her statements became unreliable. Employee cites that the suspect denied all the allegations and that the apartment showed no signs of struggle, and the "alleged victim" had no visible injuries and did not complain of pain.[28] Employee asserts that he handled the incident the way he was trained, and attached reports to his appeal where arrests were not made in similar matters. Employee also noted that he wrote a warrant for this incident, but it was rejected for review by the USAO.

Employee also avers that Agency insinuates that it was wrong of him to ask Ms. Brooks to leave the apartment during the incident. Employee avers that Ms. Brooks was closest to the door, and

[22] *Id.* at Page 20.
[23] *Id.* at Pag e 22.
[24] *Id.* at Page 26.
[25] Employee's Prehearing Statement (July 8, 2019).
[26] *Id.*
[27] *Id.*
[28] *Id.*

as a result it was easier to have her step outside.[29] Employee also asserts that Ms. Brooks never detailed how she was attacked in the bed, and did not show signs of physical injury or complain of pain. Employee argues that "simply stating bitch, I want to kill you" is not a crime. Employee states that "wanting to do something is not a crime within itself."[30] Employee also argues that the five-year failed to corroborate the story from Ms. Brooks. Additionally, Employee cites that Ms. Brooks' "behavior demonstrated that she was aggressive and that she was the one trying to pick a fight with Mr. Clipper."[31]

Employee maintains that there was no probable cause established to arrest Mr. Clipper. Employee asserts that Ms. Brooks "contradicted her initial statement, thus making her statement unreliable."[32] Employee notes that the definition of probable cause is" [a] set of facts, circumstances, or reliable information that would lead a reasonable, prudent and cautious police officer to believe that a crime has been committed or is about to be committed and that a certain person committed…..The key word in this definition is reliable, which Ms. Brooks was not when she contradicted her statement."[33] Employee also notes that an arrest is required "IF" there is probable cause in accordance with General Order 304.11. However, Employee argues that "there was no injury, complaint of pain or illness." Further, Employee avers that he did not "believe that Ms. Brooks was in fear of serious physical injury or death, as Mr. Clipper was the one who called for help and he voluntarily left the residence."[34]

Employee argues that "if someone threatened me and I felt that they would carry out their threat, I would leave the area, and get away from the person who threatened me….I would also immediately call 911 for help.[35] Employee asserts that Ms. Brooks "did not act in a manner a reasonable person in fear would act."[36] Employee also stated that there were discrepancies in Agency's exhibits, in that there are some dates that are incorrectly stated. Specifically, Employee cites that in Exhibit 1, Page 3, Sergeant Fenton said he was working April 19, 2018, but the incident was April 18, 2018. Further, Employee says that he did not tell Clipper to leave the residence, but just told him that they did not want the situation to escalate. Additionally, Employee notes that the address in the summary notes that the incident address was NE, but the address was SE. Employee also asserts that Ms. Brooks has a "history of giving inconsistent statements and thus had been unreliable, and arrests have not been made in incidents involving her." Accordingly, Employee argues that he should not have been disciplined and that the adverse action against him should be reversed.

ANALYSIS

Whether Agency Had Cause for Adverse Action

In the instant matter, Employee was charged and subjected to adverse action for Violation of General Order Series 1201.21, Attachment A, Part A-16, which states, "Failure to obey orders or directives issued by the Chief of Police. Employee received a NPAA on August 13, 2018, for this

[29] Employee's Brief (October 9, 2019).
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *Id.*
[36] *Id.*

charge and a ten-day suspension was recommended. Employee appealed this action. On November 19, 218, Agency issued a Final Notice sustaining the charges and administered a ten-day suspension. Employee appealed to the Chief of Police. On December 12, 2018, the Chief issued a final decision, sustaining the charges, but administering a five-day suspension with five held in abeyance. Agency argues that Employee failed to make a mandatory arrest in accordance with General Order 301.11, "Intrafamily Offenses, pursuant to the "District of Columbia Prevention of Domestic Violence Amendment act of 1990, D.C. Law 8-261, D.C. Official Code § 16-1031, et. seq. Agency asserts that these code provisions mandate an arrest where probable cause has been established. Employee asserts that he should not be disciplined because there was no misconduct on his part. Employee asserts that he did not find probable cause based on his investigation of the incident and as a result, he was not subject to make a mandatory arrest.

OEA is not to substitute its judgement for that of the agency, and will uphold an agency's decision unless (1) it is unsupported by substantial evidence, (2) there was harmful procedural error, or (3) it was not in accordance with law, or applicable regulations.[37] In the instant matter, Agency charged Employee with failing to follow directives and orders of the Chief of Police pursuant to General Order 120.21, for his failure to make an arrest in accordance with its General Order 304.11, Intrafamily Offenses. Based on the sequence of events as presented by both parties, the undersigned finds that it is undisputed that Employee did not make an arrest during a call and investigation into a domestic violence incident on April 18, 2018. Following the incident, Employee was advised by the chain of command officials that he had not followed the appropriate protocols as mandated by the General Order 304.11, and that based on the BWC footage that was reviewed, there was probable cause for an arrest. Additionally, Employee was advised to issue an arrest warrant, which he did, but noted therein that he did not find probable cause to make an arrest. As a result, a USAO official reviewed the request for the warrant, but rejected the request noting that the affiant (Employee) had indicated there was no probable cause for an arrest. Soon after, an investigation was launched and other MPD officials reviewed the evidence of the April incident and found that Employee had not acted in accordance with the required guidelines. Additionally, in his response to Employee's appeal, even the Chief of Police noted that Employee had failed to make an arrest as required by General Order 304.11.

At the crux of this matter is the issue of probable cause as it relates to the code provisions of D.C. Official Code §16-1031 and General Order 304.11, which collectively require mandatory arrest for intrafamily offenses. "Probable cause" is a Fourth Amendment United States Constitutional provision that requires police officers have "probable cause" before conducting a search or making an arrest etc. In the *District of Columbia v. Wesby*, 138, S.Ct. 577, 583-586 (2018), the Supreme Court held the following regarding probable cause:

> A warrantless arrest is reasonable if the officer has probable cause to believe that the suspect committed a crime in the officer's presence. *Atwater v. Lago Vista*, 532 U. S. 318, 354 (2001). *To determine whether an officer had probable cause for an arrest, "we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause*." *Maryland v. Pringle*, 540 U. S. 366, 371 (2003) (quoting Ornelas v. United States, 517 U. S. 690, 696 (1996)). Because probable cause "deals with probabilities and depends on the totality of the circumstances," 540 U. S., at 371, it is "a fluid concept" that is "not readily, or even usefully, reduced to a

[37] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

> neat set of legal rules," Illinois v. Gates, 462 U. S. 213, 232 (1983). *It "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity*." Id., at 243–244, n. 13 (1983). Probable cause "is not a high bar." *Kaley v. United States*, 571 U. S. ___, ___ (2014) (slip op., at 18)." (Emphasis Added).

In the instant matter, General Order 304.11, requires officers to make an arrest for an intrafamily offense upon a finding of probable cause.[38] Pursuant to section 304.11 (D) (2) and (3) of the General Order, officers are supposed to consider several things when making this determination. This requires officers to check for (D)(2)(a) the existence of injuries; (D)(2)(h) review the demeanor of the victim and suspect and witnesses; and(D)(2)(j) also indicates that officers should consider a prior history of violence. The undersigned reviewed all the evidenced submitted in the record, including the BWC footage of the incident. The undersigned noted that Ms. Brooks, was visibly crying during the investigation, and mentioned several incidents of past violence from Mr. Clipper. She noted that just weeks prior, Clipper had dragged her and pulled her hair out. Further, she said earlier that night, Clipper had jumped on her and told her that he wanted to kill her. Additionally, the undersigned notes that Ms. Brooks' five-year old son is visibly shaking in the BWC footage and asks the officers if they are going to arrest Clipper. Clipper and Brooks both admitted that they were romantically involved, both lived at the residence and shared a child (the ten-month old girl) together. As a result, this relationship meets the requirement for intrafamily offense as defined in 304.11.

Regarding probable cause, as previously highlighted, the U.S. Supreme Court has held that the bar for probable cause is not high, and considering the totality of the circumstances, it "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." Here, Brooks explained the threat and physical attack made by Clipper the evening of the incident, and told the officers of prior violence by Clipper against her. Upon review of the totality of the circumstances, and in accordance with the applicable laws and regulations, the undersigned finds that Agency's finding that Employee failed to find probable cause and make an arrest to be substantiated by the record. Accordingly, I find that Agency has shown substantial evidence that Employee did not follow orders and directives of the Chief of Police as required. Further, the undersigned finds the determinations of the chain of command review (that included several MPD officials) and the review by the Chief of Police, also provide substantial evidence that Employee did not follow orders as directed. Additionally, I find that Agency's actions were conducted in accordance with all applicable laws, rules and regulations, and there was no harmful procedural error in its administration of this disciplinary action. Accordingly, the undersigned finds that Agency had cause to take adverse action against Employee.

Whether the Penalty Was Appropriate

Based on the aforementioned findings, I find that Agency's action was taken for cause, and as such Agency can rely on those charges in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency's penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d. 1006 (D.C. 1985).[39] According to the Court in *Stokes*, OEA must determine

[38] Code provisions previously cited on Page 4 of this Initial Decision.
[39] *Shairrmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). *See also Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter

whether the penalty was in the range allowed by law, regulation and any applicable Table of Penalties as prescribed in the DPM; whether the penalty is based on a consideration of relevant factors; and whether there is a clear error of judgment by agency. Further, "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office."[40] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercise."[41]

Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to suspend Employee from service.[42] Further, MPD General Order 120.21Attachment A, Table of Penalties provides that the range for a first offense of failure to obey orders and directive of the Chief of Police range from reprimand to removal. Accordingly, I find that Agency properly exercised its discretion, and its chosen penalty of a ten-day suspension (5 held in abeyance) is reasonable under the circumstances, and not a clear error of judgment. Moreover, I find that Agency had appropriate and sufficient cause to take adverse action against Employee. As a result, I conclude that Agency's action should be upheld.

No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[40] *See 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*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

[41] *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

[42] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). 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.

ORDER

Based on the foregoing, it is **ORDERED** that the Agency's action of suspending Employee from service for ten(10) days, with five (5) days held in abeyance is here by **UPHELD**.

FOR THE OFFICE:

/s/Michelle R. Harris
Michelle R. Harris, Esq.
Administrative Judge