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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0062-20
EMPLOYEE, ¹)	
Employee)	
)	Date of Issuance: August 2, 2022
v.)	
)	
D.C. METROPOLITAN POLICE DEPARTMENT,)	MICHELLE R. HARRIS, ESQ.
Agency)	Administrative Judge
_____)	
Employee, <i>Pro Se</i>)	
Anna Kent, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On September 28, 2020, 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 her from service for twelve (12) days. The suspension was effective October 4, 2020, through October 21, 2020. Following a letter dated February 4, 2021, from OEA requesting an Answer; Agency filed its Answer on March 3, 2021. Following an unsuccessful attempt at mediation, this matter was assigned to the undersigned Administrative Judge (“AJ”) on September 3, 2021. On September 10, 2021, I issued an Order convening a Prehearing Conference for October 27, 2021. On October 15, 2021, Employee filed a Motion for Continuance citing more time was needed to obtain documents from Agency needed to present her case. Agency did not oppose this Motion. On October 26, 2021, I issued an Order granting this request and rescheduled the Prehearing Conference to December 15, 2021.

On November 29, 2021, Employee filed a Motion to Compel citing that Agency had not disclosed documents she made in a Freedom of Information Act (FOIA) request. Employee also requested to reschedule the Prehearing Conference. The undersigned issued an Order on November 30, 2021, changing the Prehearing Conference to a Status Conference in order to address Employee’s Motion. Further, Agency had the option to submit a response to Employee’s Motion to Compel by

¹ Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.

December 8, 2021. The Status Conference was held on December 15, 2021. Agency filed a Motion to Dismiss and its Opposition to Employee's Motion to Compel on December 15, 2021.²

During the Status Conference, it was determined that there was outstanding discovery that needed to be completed. On December 15, 2021, I issued a Post Status Conference Order requiring discovery be completed by January 21, 2022. A Prehearing Conference was scheduled for February 9, 2022, and Prehearing Statements were due by February 4, 2022. On December 16, 2021, I issued an Order regarding Employee's Motion to Compel, denying Employee's Motion.³ Both parties submitted their Prehearing Statements and appeared for the February 9, 2022 Prehearing Conference.

Following the Prehearing Conference, I issued an Order that same day requiring the parties submit briefs addressing whether Agency had cause for adverse action and followed all applicable laws, rules and regulations. Agency's brief was due on or before March 4, 2022. Employee's brief was due by April 4, 2022. Agency had the option to submit a sur-reply brief by April 18, 2022. On March 3, 2022, Agency filed a Motion for an Extension of time citing that a new representative had been appointed to this matter and needed additional time to respond until March 18, 2022. I issued an Order on March 3, 2022, granting this request. Agency's brief was now due on March 18, 2022, Employee's brief was due by April 14, 2022, and Agency had the option to file a sur-reply by April 28, 2022. Agency filed its brief as required.

On April 14, 2022, Employee filed a Motion for an Extension of time to submit her brief, citing medical and health complications.⁴ I issued an Order extending the time for Employee's brief to April 29, 2022. On April 29, 2022, Employee filed an additional Motion for Extension noting ongoing health issues. The undersigned issued an Order on May 2, 2022, granting Employee's Motion and extending the time for the brief to May 31, 2022. Agency now had the option to submit a sur-reply by June 17, 2022. Employee filed her brief by the prescribed deadline. On June 10, 2022, Agency filed a Consent Motion for an extension of time to July 1, 2022, to file a sur-reply brief citing workload and schedule conflicts. On June 13, 2022, I issued an Order granting Agency's request and required the brief be submitted by July 1, 2022. Agency complied with this deadline. 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 whether the action was administered in accordance with all applicable laws, rules and regulations; and

² Agency emailed courtesy copies prior to the receipt of the official copies that were file stamped and entered into the record.

³ The undersigned addressed Employee's Motion to Compel at the Status Conference and noted that upon receipt of the official copies of Agency's response, an Order would be issued regarding the Motion to Compel. The undersigned advised during the Status Conference that Employee's Motion would be denied as was related to documents she obtained through FOIA and OEA does not have jurisdiction to compel those documents. Employee must assert any issues with FOIA's disclosures as provided in DC Code § 2-534 and §2-537. Further, it was determined that discovery had not been completed by the parties in this matter, so discovery was extended through January 21, 2022.

⁴ Employee contacted the undersigned and Agency's representative via email with this request. Due to the nature of the health and medical issues Employee faced, the undersigned permitted Employee's Motion to be filed via email.

2. If so, whether the twelve (12) day suspension was an appropriate penalty 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 at the time of the adverse action she was assigned as a Patrol Officer in the Second District. On June 18, 2020, the Disciplinary Review Division (DRD) issued a Notice of Proposed Adverse Action (NPAA) recommending a 20-day (20) 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 February 21, 2020, following roll call, you failed to respond to your assigned patrol area, PSA 209, in a timely manner. Your misconduct is further described in General Order 201.26, Part V, Section B, 7, which states in part, "*Members shall...Respond to their assigned area in a timely manner and patrol their area.*"

Specification No. 2: In that on February 21, 2020, you were dispatched to a radio assignment by the OUC directing you to respond to the 12th & L Streets, Northwest, to relieve a midnight officer, and you failed to immediately respond. Your misconduct is further described in General Order 201.26, Part V, Section C, 5 which states in part, *“Members shall...Respond without delay to calls for police assistance from citizens or other members.”*

Following an appeal by Employee to the Chief of Police, a Final Notice was issued by the Chief on September 23, 2020, sustaining the action, but reducing the penalty to a twelve (12) day suspension.

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 in that Employee failed to obey directives as required. Further, Agency avers that the twelve (12) day suspension was an appropriate penalty for the charges. Agency cites that on Friday, February 21, 2020, the following occurred which led to Employee's disciplinary action⁵:

“Employee was working the Day Shift tour of duty in a marked cruiser starting at 0500 hours in the Second District. Employee was assigned to work in Police Service Area (PSA) 209. Officer William Peterson, who had been working the Midnight Shift the night before, advised that morning that he was still at the scene of a car accident at 12th and L streets, NW waiting for a tow truck, and needed another officer to relieve him. Officer Peterson's shift was scheduled to end at 0630 hours that morning. At approximately 0629 hours, Employee was dispatched to respond to her first assignment of the day at the intersection of 12th and L Streets, NW to relieve Officer Peterson, within her assigned PSA. During this time, Employee was at a Starbucks located at 3347 M Street, NW where she was having coffee. This Starbucks is not within Employee's PSA. Another officer, Officer Maximillian Park, also happened to be inside the Starbucks at the same time and heard the assignment come over the Second District radio channel for Employee to relieve Officer Peterson. Employee acknowledged the assignment over the air but did not leave the Starbucks at that time. Instead, she continued talking to Officer Park and drinking coffee...

Officer Tristan Engler, another Day Shift officer assigned to PSA 209, heard the radio assignment to relieve Officer Peterson being assigned to Employee. As he continued patrolling the area, Officer Engler noticed on his Mobile Data Terminal (MDT) that Employee had not yet moved from her location at the time of dispatch. Sergeant (now Lieutenant) Christopher Woody, the Midnight Check-Off Official, noticed that Officer Peterson had not yet returned to the station for check off. Supervisors then contacted the dispatcher and confirmed that Employee, assigned to relieve Officer Peterson, had not yet arrived on scene. At approximately 0644 hours,

⁵ Agency's Prehearing Statement at Pages 1-3 (February 4, 2022).

Officer Engler arrived on the scene of 12th and L Streets, NW to relieve Officer Peterson...

By the time Officer Engler cleared the call and left the scene, Employee still had not arrived. Sergeant Gregory Alemian, the Roll Call Official for the Day Shift, then went over the radio to ask for Employee's current location. Employee stated that she was near 15th and K Street, NW, approximately 1.4 miles away from the assignment. The radio dispatcher then advised Employee not to respond since Officer Engler had already relieved Officer Peterson. Employee went to deactivate her body worn camera ("BWC") at which time she realized she failed to activate it upon receiving the assignment from the dispatcher.

Agency avers that following this incident, an investigation revealed that Employee's cruiser had remained in the area of the Starbucks and "did not start to move until 11 minutes later at 0641 hours, as shown by global positioning data." Agency asserts that following a chain of command investigation into Employee's misconduct, on March 25, 2020, Lieutenant Jonathon Pongratz issued a Final Investigative Report recommending adverse action against Employee for her failure to respond in a timely fashion as required by General Order 201.26- Calls for Service. A Proposed Notice of Adverse Action was issued on June 18, 2020, charging Employee with Failure to Obey Orders and Directives and included an assessment of a suspension of twenty (20) workdays.⁶ On July 1, 2020, Employee filed a response with the Human Resource Management Division (HRMD). On August 8, 2020, the HRMD issued a Final Notice of Adverse Action sustaining the 20-day suspension. On September 1, 2020, Employee filed an appeal with the Chief, wherein Agency asserted that Employee specifically noted "...[i]t is not my guilt I dispute." The Chief sustained the action and on September 23, 2020, issued a decision reducing the penalty from 20 days to a 12 days suspension.

Agency asserts that Employee admitted to the misconduct for which she was charged. Specifically, Agency avers that Employee admitted that she remained at the Starbucks instead of responding to her PSA and admitted that she was still at that location when she was dispatched for service, over an hour later.⁷ Additionally, Agency proffers that Employee noted in her appeal to the then Chief of Police, Peter Newsham, that "...[i]t is not my guilt that I dispute. By the letter of General Order 201.26, I did not immediately respond to an assignment." Then based upon her own assessment of her misconduct, Employee requested that Chief Newsham change the 20-day suspension to "suspension days more proportional to the ten (10) minute delay in responding to a Code 2."⁸ As such, Agency notes that the OEA Board has held that "an employee's admission is sufficient to meet the Agency's burden of proof as to cause."⁹ Agency asserts that there is no dispute of material facts and that Employee's other arguments are without merit, irrelevant or immaterial in nature.¹⁰ As a result, Agency avers that it had cause to discipline Employee for her misconduct and that the instant action should be upheld.

Agency also argues that Employee's claims regarding discrimination and retaliation are outside of OEA's jurisdiction. Further, Agency avers that Employee's claims of disparate treatment

⁶ *Id.* at Page 4.

⁷ Agency's Reply Brief at Pages 2-3. (July 1, 2022).

⁸ Agency's Motion to Dismiss at Page 1 (December 15, 2022).

⁹ *Id. citing to Employee v Agency*, OEA Matter No. 1601-0047084, 34 D.C. Reg. 804, 806 (1987); *Michael Lawrence v MPD*, OEA Matter No. 1601-0036-17 (June 11, 2018).

¹⁰ Agency's Reply Brief (July 1, 2022).

fail to meet the requirements for consideration, in that Employee “failed to identify any similarly situated employee to show she was subjected to disparate treatment.”¹¹ Agency avers that while Employee mentioned another officer, Officer Park, that Officer Park did not receive a dispatch and thus did not engage in the same misconduct as Employee did. Agency also avers that Employee’s mention of Officer Wingo from an incident on February 21, 2020, also does not meet the example of disparate treatment. Agency maintains it acted in accordance with all applicable laws, rules, and regulations and that its penalty is appropriated and should be upheld.

Employee’s Position

Employee argues that she was treated unfairly and was discriminated against in Agency’s action. Employee avers that she was subject to harassment, discrimination, retaliation and FMLA violations. Employee noted that she believed the instant adverse action was retaliatory following her complaints that she said are pending before the Office of Human Rights (“OHR”).¹² Employee also asserts that her 12-day suspension is unfair and that other employees that had committed similar actions were not disciplined at all. Employee also avers that Agency’s action violated the “Labor Agreement between the Metropolitan Police Department and the National Association of Government employees (Article 23 Discipline Page # 20) which states that the discipline shall be administered in a fair, equitable, consistent objective and nondiscriminatory manner.”¹³ Employee avers that on February 21, 2020, the following occurred¹⁴:

“On February 21, 2020, I was working the daywork tour of duty in a marked cruiser starting at 0500 hours in the Second District. I was assigned to work in Police Service (PSA) 209. During roll call I was never given the assignment to go [sic] relieve any details including Officer William Peterson from any held assignments nor details...

When I checked my computer MDT in my cruiser there were no pending calls for service in my patrol service area (PSA) 209 nor were there any assignments assigned to me to relieve any details... When I stopped to get coffee, a routine that officers at the Second District typically do where there are no pending assignments and that in many instances my PSA 209 partners including Officer Engler that [sic] even the Starbucks store owner know my name do. I observed Officer Park was also at the Starbucks [sic] respondent key witness. Officer Park was neither investigated nor disciplined for not calling a lunch break or not being in his designated PSA something I was investigated and disciplined with a 12-day suspension for...

I was given a priority 2 assignment meaning that lights and sirens and speed cannot be used for this type of call for service to go relieve Officer Peterson one minute prior to Officer Peterson’s check off time would not have been sufficient time to relieve Officer Peterson...

Following this call for service I gathered up my stuff responded to my cruiser and followed procedure by writing the assignment on my PD 775 daily activity and report

¹¹ *Id.* at Page 1.

¹² Employee’s Petition for Appeal (September 28, 2020).

¹³ *Id.*

¹⁴ Employee’s Prehearing Statement (February 8, 2022).

sheet. While in route Sergeant now (Lieutenant) Woody came over the air to ask Officer Peterson of his status and Officer Peterson responded he was in route to check off given the fact that Officer Engler had already relieved him. This is a common practice of [sic] Officer's when another Officer is closer to a particular assignment they usually take the call given the fact that they are closer to the assignment and I have done this in instances and taken calls for service assigned to Officer Engler and other fellow [sic] officer's when I am closer to the call for service and this has never been a problem in the past...

I was then asked by Sergeant Alemian by my location, and I responded that I was in-route to the call for service and that he did not understand why Officer Peterson had been in that call for so long without [sic] no official (supervisor) checking up on him.”

Employee avers that Lieutenant Woody's actions did not follow agency policies and procedures. Further, Employee asserts that she had been subject to discrimination and denials of her requests for FMLA and other unfair actions of harassment, retaliation and hostile work environment. Employee also asserts that Agency's key witness, Officer Park, was in a similar circumstance on the same date and time and did not go to his assigned PSA and was at the Starbucks where Employee was, but that he was not disciplined.¹⁵ Employee also argues that Agency's assertion that she went into service at 0500 hours on February 21, 2020, is false because the shift begins at 0500 hours and employees must respond prior to going into service, which in her case meant roll call at 0500hrs.¹⁶ Employee avers that the roll call sheet shows that she was in roll call at 0500hrs, and she is required her to be at the Second District Police Station located at 3320 Idaho Avenue, NW. Employee avers that roll call may take up to 30 minutes or longer. Employee asserts that she drove to get coffee from a Starbucks near her PSA at 3347 M Street NW given that she had no pending calls for service. Employee asserts that at approximately 6:29am “approximately one minute prior to Ofc. Peterson check off time” the Office of Unified Communications (OUC) 2D dispatcher assigned her to relieve an officer from a midnight shift who was waiting for a tow crane.

Employee asserts that she acknowledged her assignment over the 2D main radio channel and was in route to the assigned location within a twelve-minute time span.”¹⁷ Employee maintains that Officer (now Lieutenant) Woody came over the radio while she was in route and indicated another officer who was closer had taken the assignment. Employee asserts that she was asked by Sergeant Alemian of her location and she told him that she was at 14th and K Street NW. Employee avers that she still “responded to the call and spoke to Officer Engler who stated that he responded to the call for service given the fact that he was closer to that call for service.” Employee avers that she “never missed her first assignment and that based on the MPD general orders, an employee must be called several times in order to be classified as having “missed” an assignment.¹⁸ Employee asserts that this case assignment was cancelled by the Second District dispatcher and was taken by another employee and this was allowed by the Second District supervisors.

Employee also argues that MPD's penalty violates the labor agreement and that it is retaliatory in nature and unduly harsh. Additionally, Employee asserts that she did not spend the first

¹⁵ Employee's Brief (May 26, 2022).

¹⁶ *Id.* at Page 2.

¹⁷ *Id.* at Page 3.

¹⁸ *Id.* at Page 5.

hour and a half of her shift at Starbucks and that MPD's statements in that regard are false. Employee avers that other employees, including Alemian, Park and an Officer Wingo have had similar instances of conduct and none of them were disciplined and that MPD turned a "blind eye" to their actions. As a result, Employee avers MPD "has not met its burden of proof of what constitutes a delay in measurement of time in a non-emergency code 2 assignment."¹⁹ Further, Employee avers that Agency's penalty has been wrongly and unfairly assessed and should not be upheld.

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.

OEA is not to substitute its judgment 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.²⁰ 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. In the instant matter, on February 21, 2020, Employee was on duty for the day shift and assigned to Patrol Service Area (PSA) 209. Agency asserts that at 0500 on that day, Employee went on duty in her marked cruiser. Employee asserts that 0500 she reported for roll call at the Second District Police Station. The undersigned notes that Employee makes this distinction regarding her location at 0500hrs but finds this distinction to be unimportant to the events related to the call and assignment that occurred later that morning. At 0629hrs, Employee was dispatched to respond to an assignment at 12th and L, NW Streets to relieve another officer (Officer Peterson). It was noted that Officer Peterson had been on the Midnight Shift and at the time of dispatch was on a scene awaiting a tow truck. Agency asserts that Employee answered the radio but did not report to the assignment in timely manner. Employee averred that this call to dispatch came "only 1 minute" prior to Officer Peterson's off duty time but cited that she "acknowledged her assignment on the 2D main radio channel and was in route to the assigned location within twelve minutes."

Agency proffers that another officer, Officer Engler, heard this dispatch and noted in the Mobile Data Terminal (MDT) that Employee had not moved from her location at a Starbucks. Officer Engler picked up the assignment and relieved Officer Peterson. Agency asserted that by the time Officer Engler cleared the call and left the scene, Employee still had not arrived. Sergeant Gregory Alemian, the Roll Call Official for the Day Shift, then went over the radio to ask for Employee's current location. Employee stated that she was near 15th and K Street, NW, approximately 1.4 miles away from the assignment."²¹ Agency also notes that it was then that "the radio dispatcher advised Employee not to respond since Officer Engler had already relieved Officer Peterson." Employee avers that while in route, she was told that the call was cancelled and that another officer who was closer went to the assignment, and that this was a common practice. Further, Employee noted that this was a non-emergency call and that no sirens or speed were required. Following this incident, an investigation occurred wherein it was found that Employee

¹⁹ *Id.* at Page 13.

²⁰ *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

²¹ Agency's Brief at Page 2. (March 18, 2022).

failed to respond to her assignment in a timely manner and without delay as required by MPD General Orders.²²

Following the investigation, a Proposed Notice and subsequent Final Notice sustained the adverse action and levied a suspension for 20 Days. On September 1, 2020, Employee filed an appeal to the Chief of Police.²³ In that appeal, Employee specifically noted that she did not dispute her guilt regarding the charges but did argue about the penalty. The Chief of Police issued a notice on September 23, 2020, sustaining the charges, but reduced the penalty to 12-days. It should be noted that Employee did not address this admission in her submissions to OEA but argued that the penalty was excessive and that she was treated unfairly. Upon review of the evidence submitted with the investigation in this matter and in consideration of Employee's admission, the undersigned finds that Agency had cause to discipline Employee. Here, it is clear that Employee did not answer her assignment in a timely manner as required by the general orders.

Employee asserts that she acknowledged her assignment and was in route within a 12-minute frame, but Agency noted in the investigative report that nearly 15 minutes after the assignment was dispatched, Employee still had not appeared on scene.²⁴ Statements from others involved noted the same. Of particular note, Officer Park stated that he was with Employee and heard her receive the assignment to relieve a midnight duty officer.²⁵ Additionally, Officer Engler who ultimately answered the assignment, cited in his statement that after hearing the call, he saw Employee's cruiser had not left the location, so he went to the scene and advised he'd remain until Employee arrived to relieve the midnight officer. While Employee asserts that the call was not an emergency call, I find that the General Orders regarding timeliness in response to assignments would still be applicable. Further, Employee also admitted to the conduct for which she was charged in her statement to the Chief of Police to appeal the initial suspension. OEA has consistently held that an employee's admission to the misconduct for which they are charged meets the burden of proof for the cause.²⁶

Discrimination Claims/Grievances

Employee asserts that she was subject to harassment and discrimination. D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of the OHR is to "secure an end to unlawful discrimination in employment...for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Rights Act.²⁷ That is not to say that

²² Employee was charged with the following:

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 February 21, 2020, following roll call, you failed to respond to your assigned patrol area, PSA 209, in a timely manner. Your misconduct is further described in General Order 201.26, Part V, Section B, 7, which states in part, "*Members shall...Respond to their assigned area in a timely manner and patrol their area.*"

Specification No. 2: In that on February 21, 2020, you were dispatched to a radio assignment by the OUC directing you to respond to the 12th & L Streets, Northwest, to relieve a midnight officer, and you failed to immediately respond. Your misconduct is further described in General Order 201.26, Part V, Section C, 5 which states in part, "*Members shall...Respond without delay to calls for police assistance from citizens or other members.*"

²³ Agency's Answer at Tab 5 (March 3, 2021).

²⁴ Agency's Answer at Tab 1- Investigative Report (March 3, 2021).

²⁵ *Id.*

²⁶ *Employee v Agency*, OEA Matter No. 1601-0047084, 34 D.C. Reg. 804, 806 (1987); *Michael Lawrence v MPD*, OEA Matter No. 1601-0036-17 (June 11, 2018)

²⁷ D.C. Code §§ 1-2501 *et seq.*

Employee may not press her claims elsewhere, but rather that OEA lacks the jurisdiction to hear Employee's other claims regarding discrimination.

Retaliation Claims/Hostile Work Environment

Employee also claimed that she was subject to retaliation regarding the instant adverse action. Specifically, Employee submits that she was retaliated against due to her claims of sexual discrimination and also regarding issues with her FMLA. To establish a retaliation claim, the party alleging retaliation must demonstrate the following: (1) (s)he engaged in a protected activity by opposing or complaining about employment practices that are unlawful under the District of Columbia Human Rights Act ("DCHRA"); (2) his/her employer took an adverse personnel action against him; and (3) there existed a causal connection between the protected activity and the adverse personnel action.²⁸ A prima facie showing of retaliation under DCHRA gives rise to a presumption that the employer's conduct was unlawful, which the employer may rebut by articulating a legitimate reason for the employment action at issue.²⁹ Here, Employee only states that there is history of retaliation and discrimination, but fails to provide substantive evidence to support this claim or set forth the specifics of the concerns raised. Consequently, I find that Employee's retaliation claims are unsubstantiated, and as such, find that Agency's adverse action is not retaliatory.

Disparate Treatment Claims

Employee raises a disparate treatment argument in her assertion that Agency's discipline against her was unduly harsh, and was unfair and that others were not disciplined. In *Jordan v. Metropolitan Police Department*, OEA's board set forth the considerations regarding a claim of disparate treatment.³⁰ The Board held that:

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

Accordingly, an employee who makes a claim of disparate treatment has the burden to make prima facie showing that they were treated differently from other similarly-situated employees.³¹ To support this contention, Employee lists other officers and notes they were not disciplined for similar actions. However, Employee fails to provide any cohesive and substantive evidence regarding similarities of actions, or otherwise. As a result, I find that Employee's disparate treatment argument fails to meet the burden of proof for this claim. Upon consideration of the aforementioned findings, I find that Agency has met its burden of proof in this matter, and it has

²⁸ *Vogel v. District of Columbia Office of Planning*, 944 A.2d 456 (D.C. 2008).

²⁹ *Id.*

³⁰ *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-95, *Opinion and Order on Petition for Review* (September 29, 1995).

³¹ See *John Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15 (March 1, 2017), citing to *Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 22, 1994).

adequately proven that there was proper cause for adverse action against Employee. Further, I find that Agency's actions were conducted in accordance with all applicable laws, rules and regulations in its administration of this disciplinary action. As a result, 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).³² According to the Court in *Stokes*, OEA must determine 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."³³ 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."³⁴

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.³⁵

³² *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 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).

³³ 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).

³⁴ *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

³⁵ *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 its 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;

Further, MPD General Order 120.21, Attachment A, Table of Penalties provides that the range for a third offense and subsequent offenses for failure to obey orders and directives of the Chief of Police range from suspension for 15 days to removal.³⁶ Accordingly, I find that Agency properly exercised its discretion, and its chosen penalty of a twelve (12)-day suspension 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.

ORDER

Based on the foregoing, it is **ORDERED** that the Agency's action of suspending Employee from service for twelve (12) days is hereby by **UPHELD**.

FOR THE OFFICE:

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

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.

³⁶ See. Agency's Prehearing Statement at Attachment – MPD General Orders (February 4, 2022). It should be noted that Employee's record reflects four (4) disciplinary actions in the preceding three (3) years. Three (3) of these charges were charges for violation of orders and directives. See also. Agency's Brief at Page 4 (March 18, 2022).