THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SHERI FOX,	)	
Employee	)	OEA Matter No. 1601-0040-17
	)	
v.	)	Date of Issuance: January 13, 2020
	)	
METROPOLITAN POLICE DEPARTMENT,	)	MONICA DOHNJI, ESQ.
Agency	)	Senior Administrative Judge
	)	

Marc L. Wilhite, Esq., Employee's Representative
Teresa Quon Hyden, Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On May 2, 2017, Sheri Fox ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the Metropolitan Police Department's ("MPD" or "Agency") decision to suspend her for twenty (20) days, effective May 7, 2017. Employee was a Sergeant at the time of the adverse action. On June 5, 2017, Agency filed its Answer.

Following several Status and Prehearing Conferences, as well as the submission of briefs by the parties, an Evidentiary Hearing was held on June 19, 2019 and July 8, 2019. Both parties were present for the Evidentiary Hearing. On September 6, 2019, the undersigned issued an Order requiring the parties to submit written closing arguments on or before October 11, 2019. On October 10, 2019, Employee filed a Consent Motion to Enlarge Time to Submit Post-Hearing Briefs.[1] On October 11, 2019, the undersigned issued an Order granting Employee's Motion. The new deadline for submission of written closing arguments was set for November 1, 2019. Both parties have submitted their respective written closing arguments. The record is now closed.

JURISDICTION

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

[1] This Motion was not signed by Agency's representative.

ISSUES

1) Whether Agency's action of suspending Employee was done for cause; and

2) Whether the penalty of twenty (20) days suspension is within the range allowed by law, rules, or regulations.

SUMMARY OF RELEVANT TESTIMONY

The following represents a summary of the relevant testimony given during the Evidentiary Hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding.

Volume I: June 19, 2019

Employee's Case in Chief[2]

1. Anthony Washington Tr. 19-115

Anthony Washington ("Washington") worked as a Lieutenant in the Fourth District for Agency. He testified that he was a Patrol Service Area ("PSA") manager and was assigned to PSA 407. On August 15, 2016, Washington was assigned to the investigation of Sheri Fox ("Employee"). After Washington read the Incident Summary ("IS") sheet, he verbally informed Captain Andre Wright ("Wright"), that he did not believe that he should conduct the investigation, and the misconduct should have been conducted by the Internal Affairs Division ("IAD"). Moreover, he told Wright that he discussed the incident on social media prior to learning that he would be assigned to the case. However, Wright told him to conduct the investigation. Tr. 20-29.

In an email to Wright and Captain Bray ("Bray"), Washington explained that he had a conversation with a couple of officers condemning the actions of Employee in the video. He explained that Wright verbally told him that he could conduct the investigation; thus, Washington memorialized the conversation in writing. Washington also wrote in the email that he also spoke with Lieutenant Sydney Paul ("Paul") and offered his opinion on the social media site, Facebook, condemning the actions of the officer in the video. In the email, Wright explained that Washington was known to be a fair and objective manager when conducting investigations. Tr. 30-35. Washington believed that African-Americans were being targeted by police officers and expressed this concern to Wright. Washington further explained that when he initially watched the video, he believed that the officer pinned Shandon McMillian ("McMillian") to the car and lifted her off the ground. Initially, Washington thought McMillian was a child due to her stature, however, he later learned that she was an adult. Tr. 42-47.

Washington assigned Sergeant Alicia Carter ("Carter") to obtain a written statement from McMillian. However, after numerous attempts, Carter was unable obtain the statement from

[2] On June 19, 2019, the parties requested that the court allow Employee to present its witnesses first. This request was granted.

McMillian. Washington explained that if McMillian provided a statement, he could have determined if her actions warranted Officer Topper's use of force. Tr. 54-61.

On August 31, 2016, Washington emailed the proposed final investigative report to Bray. He recommended that Employee receive a charge for willfully and knowingly making an untruthful statement. He believed that Employee was untruthful when she asked Sergeant Jason Mastony ("Mastony") if she could go to headquarters for an administrative task. However, Employee's reason for going to headquarters was to meet a retired officer regarding alternative employment. Washington explained that officers are prohibited from handling personal matters while on duty. Employee gave Mastony the impression that she was going to headquarters in official capacity. Washington asserted that as a sergeant, Employee understood the importance of clear communication and receiving proper authorization. Thus, Employee was charged with neglect of duty, failure to obey orders or directives, and conduct unbecoming. The untruthful statement charge was challenged and removed due to lack of evidence obtained by Washington. Tr. 80-90.

Washington testified that when officers use force, a forceful stop report must be completed and immediately reported to a supervisor. He explained that there are multiple forms to report a forceful stop. If a forcible stop did not involve an injury or complaint, it could be reported as a stop and frisk since force was used in that stop. Washington stated that the Use of Force Incident Report ("UFIR") is completed when another level of force is utilized, and the individual complained of an injury or an impact weapon is used or capsicum ("OC") spray is used. All force used by an officer must be reported on the documents based on the level of force used that Agency provides. He clarified that UFIR is separate and distinct from forcible stop, and the stop and frisk report. Washington explained that officers had until the end of their tour of duty to complete and submit their reports. Tr. 92-98.

The final investigative report indicated that Officer Topper attempted to complete a stop and frisk report that Lieutenant Figeras ("Figeras") advised. According to Washington, a full UFIR would not have been required because McMillian did not sustain any injuries, nor did she go to the hospital. Washington further testified that Employee did not use force and assisted McMillian with gathering her belongings that fell on the ground. Additionally, he stated that it was unprofessional of an officer to refer to Ashley McBride ("McBride") as baby girl. Employee should have referred to McBride as ma'am. Tr. 100-105. On cross-examination, Washington testified that if an officer of a different race pinned McMillian against the vehicle, he still would have been angry. Tr. 106. He reiterated that McBride was offended that Employee called her baby girl. Tr. 112.

Washington stated that a Central Complaint Number ("CCN") was issued from the police dispatcher. Agency used the CCN to track and document police reports. Typically, officers would radio the dispatcher and request a set of CCN's in reference to the incident that they were involved in. Washington stated that Topper and Employee did not obtain CCN numbers. Tr. 109-111. On redirect examination, Washington reasoned that an officer should report the utilization of unnecessary force by another officer. Tr. 114.

Agency's Case in Chief

1. Brian Bray Tr. 117-295

Brian Bray ("Bray") worked for Agency as a Captain and Acting Director of the Internal Affairs Division ("IAD"). Bray testified that he was an Administrative Captain in the Fourth District. Tr. 117. Bray ensured that all investigations that were assigned were tracked, timely submitted, and that the findings were based on the evidence. Bray explained that if there was an incident including use of force, a report was generated. Once the number is obtained, IAD views the report and determines whether the case will be an IAD case or chain of command. Bray stated that ninety percent of the incident summary numbers are chain of command. Tr. 119-123. He stated that he worked with Employee when she was an officer in the Second District and he was a lieutenant there. He also stated that he had a good relationship with Employee and described her as a pleasant individual. Tr. 125.

Bray testified that on August 15, 2016, there was a request from Employee to travel to police headquarters to receive paperwork. Mastony approved Employee's request. On the way back from headquarters, Bray learned that Employee and Topper encountered a disorderly subject. The altercation occurred at "7th and T Street", Northwest, Washington D.C. Employee and Topper stopped, exited their vehicle, and saw that McMillian was aiming to throw her shoe at another woman. The shoe was deflected as Topper grabbed McMillian and pinned her against the police vehicle. Bray stated that Topper told McMillian that she could be arrested for assault with a dangerous weapon. Thereafter, Topper released McMillian. Tr. 125-127.

Bray stated that the email from Sergeant Pollock to Lieutenant Washington was sent because Employee and Topper were assigned to Washington's Patrol Service Area ("PSA"). Bray explained that Washington was responsible for investigating the incident. Tr. 129-130. Bray recalled that Washington made racially biased comments on Facebook. He thought that the post Washington made was concerning and believed that the investigation should have been reassigned from Washington. Bray emailed Wright and Commander Manlapaz about the investigation prepared by Washington. In the email, Bray noted that some of the findings that Washington reported on were opinionated versus analyzing of the evidence. After Bray met with Wright and Manlapaz, Manlapaz instructed Bray to take over the investigation from Washington. Bray reviewed Washington's report and removed Washington's chronological narrative, findings, summary, and conclusion. Bray created his own narrative, analysis, and findings; however, he verified the witness statements that were initially taken by Washington and reviewed the video captured by McBride. Tr. 142-149.

During the testimony, Bray watched the video that McBride captured of Employee, Topper, and McMillian. Bray estimated that McMillian's feet were one foot above the ground. He testified that McMillian was suspended against the vehicle by Topper for approximately twenty seconds. Additionally, Bray stated that he heard Topper tell McMillian that she could be arrested for assault with a dangerous weapon. Further, in the video, Bray heard Employee refer to McBride as baby girl. Bray did not believe that the term was professional. Bray explained that officers were taught to use professional language to formally address people. Bray believed that

McBride was offended that Fox called her baby girl. Subsequently, Bray learned that McBride spoke with Figeras and initiated a formal complaint against Employee. Tr. 150-158.

After the case was reassigned to Bray, Washington no longer had a role in drafting the investigative report. Bray asserted that he did not copy Washington's report and sign his name to the document, nor did Washington write any portion of the investigative report for him. Tr. 161-162. Bray summarized the findings in his report. He testified that Employee requested permission to handle an administrative assignment at headquarters, but she went to handle a personal matter to obtain outside employment correspondence. Bray explained that generally officers were not permitted to handle personal matters on duty. Additionally, officers were required to obtain permission to leave the District from a sergeant or a higher authority. Bray also stated that Employee met with a retired police officer and picked up outside employment documents. On the way back to the Fourth District, Employee and Topper observed the disorderly affray that occurred on Seventh and T street, Northwest. Employee and Topper did not contact the dispatcher in the Third District. Bray explained that they should have contacted the dispatcher for additional assistance and to provide officer safety. Tr. 163-176.

Bray testified that, he found Topper's use of force to be justified, with recommended tactical improvement for Officer Topper. Tr. 178. He explained that the use of force framework for MPD says if it's assaultive behavior, you can use everything up to defensive tactics. Tr. 234. Bray reasoned that Topper's action of grabbing McMillian and swinging her around was appropriate since she was assaultive. However, he did not believe that Toppers use of profanity toward McMillian was appropriate. Tr. 180. After, Topper returned McMillian to the ground, Employee assisted with picking up McMillian's belongings.

Bray summarized Agency's Exhibit 11, General Order 304.10, Police-Citizen Contacts, Stops, and Frisks. He testified that the effective date of the General Order was August 30, 2013. Bray stated that a stop occurred when an officer used their authority to talk a person, halt, remain in place, or perform an act such as walking to a nearby location where the officer could use a radio or telephone. If the person was under a reasonable impression that he or she was not free to leave the officer's presence, a stop has occurred. Additionally, it provided that officers shall use the least coercive means necessary to affect a stop, this includes a verbal request or the use of physical force. However, if the officer was attacked or circumstances exist to create probable cause to arrest, the officer may use the amount of force necessary in accordance with the uses of force order to defend themselves in order to effect an arrest. Moreover, General Order 304.10 provides that it is mandatory for officers to report all forcible stops on PD Form 251, the Cobalt Stop Report. Tr. 193-195.

Pursuant to General Order 201.26, Section 3, officers are expected to refrain from harsh, violent, course, profane, sarcastic, or insolent language. Bray stated that Topper's language violated the order. Further, Bray explained that Employee had a duty to report Topper's use of profanity to an official. He also explained that section C-3 of the order did not require that the person to which the harsh, violent, or disrespectful language is directed be offensive since one would not know if a comment was offensive to another. Additionally, Bray testified that McBride videotaped the incident and tweeted that she was offended by Employee's baby girl comment. Tr. 200-204.

On cross examination, Bray testified that the main false statement that Employee provided was that she told Topper to put McBride down. Additionally, Bray stated that although the audio was not clear from the video that McBride submitted, it did not mean that Employee did not make the statement. Bray explained that he always tried to be reasonable and did not believe that it was fair to charge a false statement if there was not strong preponderance of evidence. Tr. 214. Additionally, Bray provided that it was plausible that Topper did not know that he lifted McMillian off of the ground. He believed that it was in Agency's best interest to determine that they did not have enough evidence to determine that a false statement was made. He also reiterated that Agency's use of force framework provided that if there is assaultive behavior, an officer was justified for its actions. Tr. 233-234.

During the investigation of the SUV vehicle, Bray recalled that there was space between the wheels of the vehicle, the ground, and the curb. Additionally, Bray explained that ninety (90) minutes had elapsed between the incident and when Figeras approached Topper and Employee. He further explained that the officers failed to contact the Third District dispatcher, no CCN numbers were obtained, and the officers failed to notify officials in the Third or Fourth Districts about the stop. It appeared more likely than not that Topper and Employee were not going to report the incident. If they were, they would have contacted an official and informed the official that they would complete the report later. Tr. 247. Thus, Bray charged Employee with neglect of duty for Employee's failure to conduct a proper preliminary investigation. Tr. 275.

Bray testified that McBride reasoned it was inappropriate for Employee to request to use McBride's cellular phone. He stated that McBride believed that Employee was going to take her phone and delete the video. Bray stated that there was no violation to sustain the charge because the General Orders do not state that an officer cannot borrow a citizen's cellular phone. Further, Bray did not have evidence that Employee or Topper was trying to delete the video that McBride recorded. Tr. 275. On redirect, Bray confirmed that Topper did not ask the dispatcher for CCN's for the assault. Further, he provided that although Employee did not observe the assault, when she became aware of the assault she would have had to investigate. Tr. 293.

Volume II: July 8, 2019

Agency's Case in Chief

1. Sergeant Jason Christopher Mastony Tr. 5-24.

Jason Mastony ("Mastony") worked for Agency in the Fourth District. He was assigned as a patrol sergeant over PSA 407. Mastony testified that on August 15, 2016, Employee told him that she needed to travel to headquarters for an administrative assignment. Mastony believed that the request was reasonable and granted Employee permission. He explained that headquarters has several functions that officers must take care of, including officer identification and court commitments. Mastony stated that if an officer had a work-related assignment, it was best to go to headquarters while on duty so the officer would be paid. Tr. 5-12.

Mastony admitted that he did not specifically ask why Employee wanted to travel to headquarters because he was preoccupied during the time she requested to leave. Mastony

learned the truth about Employee's request later that day when he received a call from Lieutenant Raul Figueras ("Figueras") who requested assistance with a media issued that occurred. Mastony subsequently learned through the course of the investigation that Employee picked up part-time paperwork at headquarters. Tr. 13-14. On cross-examination, Mastony testified that outside employment applications are to be approved and regulated by Agency. He reasoned that the paperwork for outside employment could be considered as administrative paperwork for Agency. Tr. 18.

On redirect, Mastony stated that it was essential for employees to inform him of the nature of their visit to headquarters. He explained that while outside employment was administered through Agency, the officer would be paid by another company; thus, Mastony considered Employee's request a personal matter and not in the interest of the District of Columbia. Tr. 19-20.

2. Lieutenant Raul Figueras Tr. 24-86

Raul Figueras ("Figueras") worked in the Court Liaison Division under the Internal Affairs Bureau with Agency. Figueras stated that Employee worked in the Fourth District as an officer when he was a sergeant. He stated that he nor Agency had animosity or bias against Employee. Tr. 25.

After listening to the audio recording of the Fourth District radio from the Office of Unified Communications that took place on August 15, 2016, Figueras testified that he heard Employee over the radio. Employee stated that she wanted to be cleared from the administrative assignment. Figueras explained that when an officer went on duty with the dispatcher, the officer must inform the dispatcher of their location. This process provides officer safety and allows the dispatcher to know who is available for dispatch. Figueras further explained that Employee was held on an administrative assignment, and therefore was unavailable to answer any radio runs or conduct police business, except the assignment that she was on. Tr. 30-31.

Figueras testified that he asked the dispatcher to have the unit using Car 4072 or with the call signs 4072 to respond to him. Figueras stated that Topper went on the radio and informed him that he and Employee were Special Beat 407. Figueras requested that a lower end sergeant or watch commander contact him because he was not informed that Topper and Employee left their district. When Figueras met with Topper and Employee, he had Topper complete a stop and frisk report. Additionally, he advised them that they needed to complete a PD-119 report. Tr. 42-58.

On cross-examination, Figueras explained that he had a meeting with Topper and Employee informing them of the investigation that was being conducted against them. Additionally, he informed the officers of the video of them that was circulating on Facebook. Figueras informed them of their right to seek union representation and that they had to provide him with a statement and include their PD-119s. Tr. 72. Figueras testified that Topper and Employee failed to obtain CCN numbers, thus, he determined that they did not plan to report the incident. Further, Figueras reasoned that he was rightful in his actions telling the officers not to

complete the forcible stop report as it would allow Topper and Employee to cover their tracks for failing to initially complete the report. Tr. 78-80.

On redirect, Figueras stated that a report could not be completed without a CCN number. Generally, CCN numbers were not drawn hours after an incident. Figueras asserted that he did not dictate the officer's statements; however, he advised the officers on the information that needed to be included in their report. Tr. 85-86.

3. Inspector Michael Goddard Tr. 88-159.

Michael Goddard ("Goddard") worked as the Director in the Disciplinary Review Division at Agency. He stated that he determined the charges and penalties for all adverse action cases. Goddard explained that a final investigative report could contain different charges or specifications from what was listed in the notice of proposed adverse action because the director may not agree with the charges. If the charge was inappropriate or too severe, the charge would be changed, or additional charges would be added. If no adverse action was warranted, and a corrective action was, the disciplinary division would move forward with the corrective action. If the disciplinary division determined that disciplinary action need not occur, then the employee would not be issued discipline. Tr. 88-95. Goddard testified that Employee personally gained from making a trip to headquarters during her shift as a patrol officer, by picking-up paperwork for her part-time employment. Tr. 123

Goddard provided that Employee failed to obey orders and directives issued by the Chief of Police. Additionally, he stated that the use of force should have been reported. It was Employee's responsibility to write up an enforceable stop. Goddard explained that if Topper and Employee notified an officer in the district that they were in, they would not have needed to take a report. They could have left the scene and let the units from the Third District take charge. Goddard further explained that Topper and Employee should have identified McMillian, since she threw the shoe, and the victim, who was the intended recipient of the shoe. Topper and Employee could have also identified any witnesses or other people involved. Tr. 102-115.

Goddard stated that Employee had three previous adverse actions. He explained that Agency considered one adverse action to be aggravating. The first charge that Employee received was for failure to obey the orders and directives of the Chief of Police, a nine-day penalty. The second disciplinary charge was for neglect of duty with a fifteen-day suspension. The last charge was an orders and directives violation, which resulted in a fifteen-day suspension and a demotion. Goddard stated that pursuant to the Table of Penalties, General Order 120.21, the range of penalties for a second orders and directives violation was suspension for one day to removal; and the range of penalties for a third orders and directives violation was suspension for fifteen-days to removal. Thus, Goddard reasoned that Employee's proposed penalty of suspension for twenty days is consistent with the table of penalties as a second orders and directives violation. Tr. 124-130.

Goddard stated that Employee was in violation of General Order 201.26, which references language, that may be interpreted as derogatory, disrespectful, or offensive to the dignity of any individual. He further explained that Employee violated the order when she called

McBride "baby girl." Tr. 116-117. On cross-examination, Goddard testified that Employee's fifteen-day suspension for the orders and directives violation was overturned on appeal. Tr. 155. On redirect Goddard stated that if Employee's misconduct occurred as a sergeant, he would have considered her actions more egregious given her supervisory role. Tr. 159.

Employee's Case in Chief

1. Jeffrey Jones Tr. 160-168

Jeffrey Jones ("Jones") worked for Agency in the Sixth District Detective's Office. He also held a union shop steward position. Jones testified that on August 15, 2016, he received a call from Employee asking for assistance. When Jones arrived at Employee's location, he was briefed on the incident involving Employee and Topper. Tr. 160-162. As a union representative, Jones' responsibility was to ensure that Employee's rights were abided by Agency and not abused. Jones testified that Employee completed the PD-119 in the Fourth District writing room. He explained that he assisted Topper with completing his statement. According to Jones, Employee did not need assistance since she was experienced. Tr. 163-167.

2. Sidney Paul Tr. 169-178

Sidney Paul ("Paul") worked as a Lieutenant for Agency. Paul testified that he worked with Washington at Agency for several years. He stated that they were Facebook friends. Paul commented on Washington's Facebook page regarding the incident that involved Employee and Topper. He wrote that he did not think that the actions of Topper were excessive. Paul admitted that he did not consider race a factor based on Topper's actions. However, when Paul initially read Washington's comments, he believed that Washington made the incident a racial matter, since Topper, a white officer, handled McMillian in an aggressive manner, by lifting her into the air. Tr. 169-174.

Paul stated that he should have contacted Washington by telephone regarding the incident instead of commenting on Facebook. He considered Washington to be a friend outside of work. Tr. 176. On cross-examination, Paul reiterated that the remarks he made on Facebook were personal. He also stated that officials were able to assess whether there was excessive force or not. Tr. 177-78.

3. Raul Castro Tr. 178-190.

Raul Castro ("Castro") worked as an Officer with Agency. He testified that he was assigned to work with Topper. Castro stated that Topper asked him to be a witness to a meeting that he had to appear for with Captain Bray ("Bray"). Castro could not recall when the meeting took place but stated that the nature of the meeting was to review the investigation of the incident in question and clarify Topper's statement on use of force. Tr. 178-183.

During the meeting, Castro stated that Bray and Topper discussed how Topper never lifted McMillian off the ground, but rather, Topper shifted her onto the vehicle. He stated that Topper explained that the sidewalk was high, and it may have appeared that he lifted McMillian.

Castro testified that after leaving the meeting, he believed that Bray understood that the force Topper used was reasonable with the incident, and any other officer would have also used the same force for that scenario. Tr. 184-186. Castro testified that officers were not permitted to make comments on social media on an open investigation. Tr. 187.

4. Michael Allen Topper Tr. 190-255

Michael Topper ("Topper") worked as an Officer with Agency and was Employee's partner. Topper testified that he and Employee went to headquarters so that Employee could retrieve documents from another individual. After Employee returned to the vehicle, Topper was in route to the Fourth District. Topper was the driver of the police vehicle and stated that he was scanning the area to ensure the public's safety. As he approached the intersection of Seventh and T street, Topper was able to quickly exit the patrol vehicle, grab McMillian, who attempted to throw a shoe at a pedestrian, and pin McMillian against the patrol vehicle. Tr. 190-199.

Topper testified that minimal use of force was used to restrain McMillian. He explained that McMillian was small in stature, so he was able to restrain her by placing his arms around her. Thereafter, Employee approached Topper and told him to put McMillian down to the ground. Initially, Topper stated that he did not understand what Employee meant until he saw that McMillian's feet were dangling in the air. Topper placed McMillian on the ground and after he turned around, he noticed that the crowd had dispersed. Topper stated that McMillian could not see him coming because she had her back towards him. But everyone that was facing and looking at the situation that was about to take place could see him coming. Topper stated that he saw a woman on the side videotaping the incident. Tr. 200-203. Topper testified that he wrote down McMillian's information since the other person was no longer there, and the group that was at the scene when they arrived were no longer there. At that point, he had nothing more than a stop. He avers that he gathered pertinent information from McMillian to make a stop report such as name, date of birth, address. Employee was asking people for a bag to get McMillian's things from the ground. Tr. 203-204.

Topper gathered McMillian's pertinent information to conduct a stop report. As he was obtaining the information, he heard Employee asking bystanders if they had a bag that she could use to collect McMillians belongings. Topper testified that he saw snippets of the video footage and one of the clips he heard Employee refer to McBride as "baby girl." Topper believed that Employee's remark to McBride was not meant in a derogatory manner. Tr. 204-205. Topper explained that it was not uncommon for officers to use street names to relate to the people in the community, such as: "hey slim, hey guy, what's up boss, hey baby girl…" Tr. 206. He also did not believe that Employee's comment to McBride was inappropriate. Tr. 206.

Subsequently, Employee and Topper left the scene and proceed to return the Fourth District. They met with Figueras, who informed them that a complaint was made against them. Figueras inquired about the incident that took place on Seventh and T and requested that Topper and Employee write a statement. Topper wanted to complete a PD-251; however, Figueras advised it could be viewed as a cover-up. Topper informed Figueras that he had until the end of his tour to complete the report; however, Figueras insisted that he not complete the PD-251. Reluctantly, Topper followed Figueras' directives and did not complete the report. Tr. 219-221.

When questioned by the Senior Administrative Judge ("SAJ"), Topper testified that he told Employee that he was going to take care of the report when they left the scene of "7th and T Street" NW. He further explained that he planned on getting the CCN once they returned to the Fourth District, but Miller's call for assistance came in prior to them getting to the Fourth District, and this delayed him from getting the CCN. Tr. 253-254.

Topper stated that fellow officers told him that Washington made comments on Facebook regarding how he handled the incident with McMillian. Topper asserted that he was not a racist. He testified that he was not concerned with who took over the investigation; he wanted to ensure that the official conducting the investigation remained impartial. Ultimately, Topper received a twenty-one day suspension. Tr. 230-234. On cross-examination, Topper testified that he did not speak to McBride or the bystanders near McMillian to investigate what happened before stopping McMillian from throwing the shoe. Tr. 243. On redirect, Topper reiterated that Washington received information from McBride pertaining to the incident with McMillian. Tr. 251.

5. Sheri Fox ("Employee") Tr. 255-305

Sheri Fox ("Employee") worked as an Officer with Agency. She testified that on August 15, 2016, she worked the evening tour from 1430 to 2300. Employee stated that she was partnered with Topper and told him that she needed to travel to headquarters to pick up paperwork. Employee received permission from Mastony to go to headquarters. Tr. 255.

After Employee and Topper left headquarters to return to the Fourth District. Employee and Topper stopped at an intersection between Seventh and T street. She testified that Topper got out of the vehicle to prevent McMillian from throwing a shoe at another individual. Employee saw McBride to the side towards the street with her telephone, video recording the incident. Employee walked towards Topper and McMillian when she realized that Topper had lifted McMillian off of the ground and her feet were dangling in the air. Employee immediately told Topper to put McMillian down. Tr. 263.

Employee testified that she did not see anything wrong with Topper's hold of McMillian. After Topper put McMillian down, Employee asked her if she needed medical assistance, but she did not. Employee looked on the ground and saw that McMillian's personal belongings were spread all over. Employee asked McMillian if she had a bag, but she did not. Employee then asked McBride if she had a bag, however, she did not respond. Employee stated that Topper was able to obtain a bag from the CVS store. Trying to capture McBride's attention, Employee stated that she called McBride baby girl; however, McBride did not respond. Tr. 264-267.

Employee stated that after she and Topper obtained McMillian's contact information and conducted a preliminary investigation, they concluded that no crime had been committed. She explained that since they were in the Third District, they planned to return to their patrol vehicle and proceed to the Fourth District where they were assigned. Tr. 272-274.

Employee stated that Figueras contacted them over the radio and instructed them to meet him in his office. When Employee and Topper arrived at his office, Employee stated that Figueras questioned them on their location in the Third District. Employee and Topper explained that they prevented an altercation on Seventh and T street. Figueras told Employee and Topper that they had to provide statements. Employee also stated that Figueras instructed them not to complete a PD-251 as it would look like a cover-up. According to Employee, Topper did not understand why an official would think completing the PD-251 was a cover-up since their tour of duty had not ended. Tr. 277-284.

Employee asserted that Washington accused her of lying about instructing Topper to place McMillian on the ground. Employee stated that Washington claimed that there was no video or body movement from Employee instructing Topper of that action. Tr. 287. Once Employee received a proposed suspension of twenty days, she immediately contacted Jones so that she would be able to file for the appeals process. Employee filed two levels of appeal, one to the Director of Human Resources and one to the Chief of Police. Tr. 290-291. On cross-examination, Employee stated that the incident on August 15, 2016, was a forcible stop.

Employee testified that her trip from the Fourth District to headquarters took approximately forty minutes. She could not recall the precise time she arrived at headquarters. Thereafter, Topper and Employee proceeded back to the Fourth District and diffused the altercation with McMillian. Employee claimed that she did know that Topper had not gone on the radio to inform the dispatcher. She stated that she did not have a microphone but had a radio that was positioned on her waist. Employee acknowledged that no CCNs were taken at the time of the incident. Tr. 291- 299.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issue of whether Agency's action of suspending Employee for twenty (20) days was in accordance with applicable law, rules, or regulations. During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses. As a result, I was able to determine the credibility of the witnesses. The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's appeal process with this Office.

1) Whether Employee's actions constituted cause for discipline[3]

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, the District Personnel Manual ("DPM') regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. DPM § 1602.1 provides

[3] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. See *Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

that disciplinary action against an employee may only be taken for cause. Employee was suspended for:[4]

Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-16, which states, "Failure to obey orders or directives issued by the Chief of Police."

Specification No. 1: In that, August 15, 2016, you observed a verbal altercation which was leading to an assault in progress between two groups of individuals who appeared to be juveniles at the corner of 7th and T Streets, Northwest. As you and your partner moved in closer to the location, you observed a female preparing to throw a shoe at another person in the group. Officer Topper grabbed the female who was attempting to throw the shoe and pinned the subject against the police cruiser while her feet dangled in the air from the ground. Officer Topper released the female a short time later placing her back on the ground. Afterwards, you and your partner gathered her belongings where she was allowed to leave the scene without making any notifications or taking a report. You failed to report Officer Topper's action on the scene. Your misconduct violated the contents of General Order 201.26, V, A 18, which states Members shall "Immediately report to their supervisor any violations of the rules and regulations of the MPD committed by any other member(s)."

Specification No. 2: In that, upon arriving at the corner of 7th and T Street, Northwest and observing the altercation between two groups, you nor your partner notified the Third District dispatcher indicating your location and advising him/her of the situation at the time. This is a violation of General Order 201.26, V. B, 14, a, b, c, which states that members shall, "Monitor the police radio, Keep the dispatcher advised of his/her location at all times, Advise the dispatcher of any assigned details or when arriving on a scene or clearing a scene, Provide a disposition."

Specification No. 3: In that, after witnessing the offense, you failed to conduct a proper preliminary investigation on the scene. A violation of General Order 401.01, V. A. 1, b, c, d, e, h, "First Members on the scene shall…secure the crime scene to prevent evidence from being lost or contaminated; determine whether a crime has been committed and, if so, the exact nature of the event; determine the identity of the

[4] Agency's Answer at Tab 4 (June 5, 2017).

suspect and make an arrest when probable cause exists; provide flash lookout information to the dispatcher and other units and send out a general broadcast notification in accordance with GO-SPT-302.02 (Radio Broadcasts and Lookouts); identify all victims, witnesses and suspects to determine in detail the exact circumstances of the event and arrange for a detective to be notified if appropriate; arrange for the collection of evidence."

Specification No. 4: In that, when gathering the female's belonging which were scattered on the ground, your actions were being recorded by an uninvolved citizen utilizing a personal cellphone. On the recorded footage, you could be heard asking the same citizen a question and calling her, "Baby Girl." This language was considered offensive and the citizen was offended by these words. This is a violation of General Order 201.26, V, C, 3, which states Members shall "Refrain from harsh, violent, coarse, profane, sarcastic, or insolent language. Members shall not used terms or resort to name-calling, which might be interpreted as derogatory, disrespectful, or offense to the dignity of any person."

Charge No. 2: Violation of General Order Series 120.21, Attachment A. Part A-25, which states, "Any conduct not specifically set forth in the order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force."

Specification No. 1: In that, on August 15, 2016, Sergeant Jason Mastony approved your request for permission to leave the Fourth District and respond to 300 Indiana Avenue, Northwest to obtain paperwork. Further investigation revealed that the paperwork in which you needed to obtain regarded an outside employment matter and did not relate to your current assignment at the Fourth District. You failed to reveal to Sergeant Mastony in full detail the nature for needing to leave the Fourth District so he could make a reasonable decision under the circumstances.

Failure to obey orders or directives issued by the Chief of Police:

In the instant matter, Agency charged Employee with failure to obey orders or directives issued by the Chief of Police (Charge No. 1), with four (4) specifications. Additionally, Agency cited that Employee had two (2) other orders and directives violations. Under Specification No. 1, Agency contends that Employee failed to report Officer Topper's action on the scene of the

incident that occurred on August 15, 2016, in violation of General Order 201.26, V, A 18. Notably, Agency argues that Employee observed Officer Topper grabbing a female who was attempting to throw a shoe and pinned the subject against the police cruiser while her feet dangled in the air from the ground. General Order 201.26, V, A 18, states that Members shall "Immediately report to their supervisor any violations of the rules and regulations of the MPD committed by any other member(s)."

Neither Employee or Office Topper dispute the allegation that Officer Topper grabbed and pinned a female (McMillian) against the police cruiser and her feet dangled in the air from the ground. Moreover, there is video footage of the incident. However, Employee testified that she did not see anything wrong with her partner's hold on McMillian. Additionally, Captain Bray testified that he found Topper's use of force to be justified. Tr. 178. Captain Bray explained that Officer Topper's action of grabbing McMillian and swinging her around was appropriate since she was assaultive. Lieutenant Paul also testified that after watching the video of the incident on Facebook, he did not think that the actions of Officer Topper were excessive in nature. Tr. VOL II 172. Since Captain Bray testified that Officer Topper's action on the scene was justified; Lieutenant Paul noted that he did not think Officer Topper's actions were excessive; and Employee testified that she did not see anything wrong with Officer Topper's hold on McMillian. Accordingly, I find that the grab was approved. Consequently, I further find that Employee was under no obligation to report Officer Topper, since he had not violated any MPD rules and regulations.

Agency's attempt to argue that this specification refers to Employee's failure to report Officer Topper's timely completion of a PD-251 (Forcible Stop Report) as directed under General Order 304.10 is disingenuous. The facts associated to this specification clearly points to Officer Topper's action of grabbing and pinning McMillian against the police cruiser, and Employee's failure to report Officer Topper's alleged use of force in doing so and not for Officer Topper's failure to complete the PD-251.[5] Besides, the responsibility to complete the PD-251 was equally on both Employee and Officer Topper, since they were partners and arrived at the scene of the incident together. They were not required to submit separate PD-251S.

[5] *Assuming arguendo* that this specification referred to the PD-251, I still find that Agency has not met its burden of proof. Employee and Officer Topper were both instructed by Lieutenant Figueras not to complete the PD-251, prior to the end of their tour of duty. General Order 401.01 only requires members to submit their completed PD 251 to their supervisors for approval prior to the end of their tour. Agency explains that prior to doing a report, the members have to obtain a CCN. Agency argues that the fact that Employee and Officer Topper did not get a CCN when they contacted dispatch, indicated that they did not intend to complete the PD-251. However, Lieutenant Figueras testified that he was not sure if there was a requirement in the General Order to request for a CCN at a particular time. Tr. Vol II 82. He also stated that a CCN could be requested at a later time on certain specific things, but not a stop. Tr. Vol II 83. Both Employee and Officer Topper stated that they intended to prepare the PD-251 when they returned to the Fourth District. Employee testified that Officer Topper informed her that he would take care of the report. Officer Topper also testified that he told Employee that he was going to take care of the report when they left the scene of "7th and T Street" NW. He explained that he planned on getting the CCN once they returned to the Fourth District, but Miller's call for assistance came in prior to their arrival at the Fourth District, and this delayed him from getting the CCN. Tr. Vol II 253-254. Moreover, there is evidence that Officer Topper had collected McMillian's information. Officer Topper testified that he wanted to complete a PD-251; however, Figueras advised against it, stating that it could be viewed as a cover-up. Officer Topper maintains that even after informing Figueras that he, Officer Topper had until the end of his tour to complete the report, Figueras insisted that Officer Topper not complete the PD-251. Officer Topper followed Figueras' directives and did not complete the report. Tr. Vol II 219-221.

Consequently, with Officer Topper stating that he would take care of the report, Employee did not have a reason to report him for violating any rules or regulations. Thus, I conclude that this specification referred to Employee's failure to report Officer Topper's action of grabbing and pinning McMillian to the police and not to Officer Topper's failure to complete a PD-251, as Agency would want the undersigned to believe. Based on the above, I find that Officer Topper's action was not a violation of any rules and regulations and as such, Employee was not required to report Officer Topper's action to her supervisor. I further find that Agency has not met its burden of proof with regards to this specification.

With regards to Specification No. 2, Agency argues that upon arriving at the corner of "7th and T Street" Northwest and observing the altercation between two groups, Employee and/or her partner, Officer Topper, failed to notify the Third District dispatcher indicating your location and advising them of the situation at the time, in violation of General Order 201.26, V. B, 14, a, b, c. Specifically, the General Order states that members shall, "Monitor the police radio, Keep the dispatcher advised of his/her location at all times, Advise the dispatcher of any assigned details or when arriving on a scene or clearing a scene, Provide a disposition." Employee acknowledged that she and her partner did not have a chance to advise the Third District dispatcher of their location and action within the Third District ("3D") due to the eminent nature of the potential brawl. Employee further explains that, she was unaware that her partner, Officer Topper did not inform the 3D dispatcher of their stop at "7th and T Street" NW, when he, Officer Topper called 3D while they were still at the scene, to report that Employee's phone was missing. Employee claims that she did know that Topper had not gone on the radio to inform the dispatcher. She stated that she did not have a microphone but had a radio that was positioned on her waist. Regardless of Employee's explanations, the fact remains that Employee and her partner failed to notify 3D of their actions and location, in violation of General Order 201.26, V. B., 14, a, b, c. As such, I find that Agency has met its burden of proof with regards to this specification.

With reference to Specification No. 3, Agency asserts that after witnessing the offense, Employee failed to conduct a proper preliminary investigation on the scene, in violation of violation of General Order 401.01, V. A. 1, b, c, d, e, h - "First Members on the scene shall…secure the crime scene to prevent evidence from being lost or contaminated; determine whether a crime has been committed and, if so, the exact nature of the event; determine the identity of the suspect and make an arrest when probable cause exists; provide flash lookout information to the dispatcher and other units and send out a general broadcast notification in accordance with GO-SPT-302.02 (Radio Broadcasts and Lookouts); identify all victims, witnesses and suspects to determine in detail the exact circumstances of the event and arrange for a detective to be notified if appropriate; arrange for the collection of evidence."

Officer Topper, Employee's partner on the day of the incident testified that he conducted a preliminary investigation. Officer Topper testified that he placed McMillian on the ground and after he turned around, he noticed that the crowd had dispersed. He stated that McMillian could not see him coming because she had her back towards him. But everyone that was facing and looking at the situation that was about to take place could see him coming. Tr. Vol II 200. Officer Topper wrote down McMillian's information since the other person she had to square off with was no longer there, and the group that was at the scene when they arrived had left. Office

Topper explains that he gathered pertinent information from McMillian to make a stop report such as name, date of birth, and address. Employee asked people for a bag to get McMillian's things from the ground. Tr. Vol II 203-204, 212. Officer Topper also stated that because they had no complaint of any type of assault, it was a stop. He questioned McMillian to ensure she was not injured. Since McMillian did not give a statement or complaint of any pain, Officer Topper concluded that there was no crime scene to investigate. Moreover, the crime was stopped before it actually happened, and community policing had taken over. Officer Topper also acknowledged that they have the discretion of making or not making an arrest under certain circumstances.[6] He explained that while the shoe was brought up with an intent of being used, he did not believe the shoe at that time could be identified as a weapon. Tr. Vol II 209-212.

I find Officer Topper's testimony credible regarding the August 15 incident. Based on Officer Topper's testimony with regards to his actions on the scene of the incident, I find that Officer Topper conducted a preliminary investigation as best as he could, giving the circumstance he was faced with. Officer Topper ensured that no one was injured - McMillian did not complain of pain or any injury; since the crowd dispersed upon seeing him exit the police car, and he stopped McMillian from committing a crime, there was no crime scene to secure. Moreover, once the crowd had dispersed, Officer Topper and Employee helped McMillian gather her belongings which were scattered on the ground. Office Topper had the discretion to make an arrest, as well as charge McMillian, and he decided not to do so based on his experience, observation and conclusion that a crime had not been committed. He collected pertinent information from McMillian who was the only person left at the scene. Accordingly, I find that because Employee's partner conducted a preliminary investigation at the scene, Employee was not required to do so. Therefore, I further find that Agency has not met its burden of proof with regards to specification No. 3.

For specification No. 4, Agency asserts that when gathering McMillian's belonging which were scattered on the ground, Employee actions were being recorded by an uninvolved citizen utilizing a personal cellphone. On the recorded footage, Employee could be heard asking the same citizen ("McBride") a question and calling her, "Baby Girl." This language was considered offensive and the citizen was offended by these words. This is a violation of General Order 201.26, V, C, 3, which states Members shall "Refrain from harsh, violent, coarse, profane, sarcastic, or insolent language. Members shall not use terms or resort to name-calling, which might be interpreted as derogatory, disrespectful, or offense to the dignity of any person." Employee acknowledged calling McBride "Baby Girl", however, she explained that she never meant for the term to be derogatory or offensive towards McBride. Employee further explains that she asked McBride if she had a bag, but McBride did not respond. Trying to capture McBride's attention, Employee testified that she called McBride baby girl; however, McBride did not respond. Tr. 264-267.

Pursuant to General Order 201.26, V, C, 3, *supra*, Employee's intentions are irrelevant. What matters is McBride's interpretation of the language used by Employee – in this case, "Baby Girl". McBride interpreted these words as being disrespectful. This is depicted in the comments

[6] General Order 201.26, D. 2. F provides that "In cases of minor violations of the law… and, the judgement of the member, the circumstances surrounding the incident are such that a verbal warning would best serve the interest of the community, the member may issue such a warning as the proper enforcement action."

made by McBride on Facebook after she posted the video of the incident. Specifically, McBride noted above the video that: "Now they giving back her textbook. Ask ME if I have a plastic bag for her. "Baby girl you got a bag" BITCH WTF." This comment elicited numerous responses, such as: "this was my thought seeing that part. I ain't nobody's 'baby girl' but my parents. So disrespectful, dismissive." And "Baby'?? Wow, condescending much?"; "She called you 'baby girl'? Do you look 6 years old? I'm guessing not. WTF"; "Who calls anybody they aren't related to 'baby girl'". Clearly, McBride and her followers on Facebook found Employee's use of the word "Baby girl", to be disrespectful, condescending or offensive to the dignity of any person. Consequently, I conclude that Agency has met its burden of proof with regards to specification No. 4.

Based on the above, I conclude that because Agency met its burden of proof with regards to Specifications Nos. 2 and 4, Agency had cause to discipline Employee for Failure to obey orders or directives issued by the Chief of Police.

Conduct prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force

Agency charged Employee with violating General Order Series 120.21, Attachment A. Part A-25, which states, "Any conduct not specifically set forth in the order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force." Under Specification No. 1 for this cause of Action, Agency noted that on August 15, 2016, Employee failed to reveal to Sergeant Mastony in full detail the nature for needing to leave the Fourth District so he could make a reasonable decision under the circumstances, before approving Employee's request for permission to retrieve paperwork.

Employee testified that prior to beginning her shift on August 15, 2016, she told Sergeant Mastony that she needed to go to headquarters to pick up some paperwork and Sergeant Mastony gave her permission to do so. She explained that Sergeant Mastony was in a hurry and he did not ask her any further questions regarding her request to go to headquarters. Tr. Vol II 257-258. Sergeant Mastony also testified that Employee informed him that she needed to travel to headquarters for an administrative assignment.[7] Sergeant Mastony admitted that he did not specifically ask why Employee wanted to travel to headquarters because he was preoccupied during the time she requested to leave. Based on Employee's and Sergeant Mastony's testimonies with regards to this specification, I find that Employee did not fail to reveal to Sergeant Mastony in full detail the nature for needing to leave the Fourth District. If Sergeant Mastony needed additional information from Employee before making his decision, it was his responsibility to inquire further as to why Employee needed to go to headquarters. The burden was on Sergeant Mastony to ask clarifying questions prior to granting Employee permission to go to headquarter. Employee is not a magician to know what Sergeant Mastony understood her request to mean. Employee assumed that Sergeant Mastony understood her request, just like

[7] While there was an issue as to whether Employee used the word "paperwork" or "administrative" when she made the request to go to headquarters on August 15, 2016, I agree with Agency's assertion that the difference in the wording is negligible.

Sergeant Mastony assumed that Employee's request was related to Agency duties. I do not find that Sergeant Mastony's erroneous assumption should translate to a failure to fully disclose. Sergeant Mastoney bore the responsibility to ask clarifying questions. If Sergeant Mastony had asked for further clarification when Employee made the request and Employee still failed to disclose that she was going to headquarters to pick up paperwork for her outside employment, then, at that time, Agency would have been justified with charging Employee with failure to fully disclose. But since this is not the case here, I find that Agency is not justified in disciplining Employee for failure to fully disclose, when she was not provided the opportunity to do so. Moreover, Sergeant Mastony acknowledged that outside employment applications were approved and regulated by Agency and the paperwork for outside employment could be considered administrative paperwork for Agency. Tr. Vol II 18-19.

Based on the above, I conclude that because Agency has not met its burden of proof with regards to Charge No. 2, Specifications No. 1, Agency does not have cause to discipline Employee for Conduct prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force.

Disparate Treatment

Employee argues that she was subjected to disparate treatment. The parties engaged in a lengthy discovery process in order to address Employee's disparate treatment claim. OEA has held that, to establish disparate treatment, an employee *must* show that she worked in the same organizational unit as the comparison employees (emphasis added). They *must* also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period (emphasis added).[8] Further, "in order to prove disparate treatment, [Employee] *must* show that a similarly situated employee received a different penalty."[9] (Emphasis added). An employee must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to determine that the agency treated similarly-situated employees differently."[10] If a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue.[11]

After a careful review of the record, I find that the evidence provided by Employee in support of her disparate treatment claim is extremely broad and irrelevant. Employee simply provided a list of all Agency employees who were disciplined for failure to obey and prejudicial conduct for the three-year (3) period preceding the 2016 incident. The penalty for these

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[8] *Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, Opinion and Order on Petition for Review (December 12, 2011), citing *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, Opinion and Order on Petition for Review (May 6, 2009); *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).
[9] *Metropolitan Police Department v. D.C. Office of Employee Appeals, et al.*, No. 2010 CA 002048 (D.C. Super. Ct July 23, 2012); citing *Social Sec. Admin. V. Mills*, 73 M.S.P.R. 463, 473 (1991).
[10] *Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15, Opinion and Order on Petition for Review (January 30 ,2018) (citing *Boucher v. U.S. Postal Service*, 118 M.S.R.P. 640 (2012)).
[11] *Id.*

employees ranged from one day (1) suspension to termination. Employee does not specify the employees' supervisor, or organizational unit. Consequently, I conclude that Employee has not provided sufficient evidence to establish a *prima facie* claim of disparate treatment, and therefore, she has not met her burden of proof.

Biased Treatment

Employee argues that the investigation leading up to the instant adverse action was biased. She asserts that Lieutenant Washington, who conducted the initial investigation posted messages on Facebook alluding to the fact that Employee and her partner's action on the scene of the August 15, 2016, incident was racial in nature. She explains that Lieutenant Washington's comments on Facebook created a conflict of interest.

After the video of Officer Topper pinning McMillian to the police cruiser was posted on Facebook, Lieutenant Washington, commented on the video. His comment had some racial connotation. Lieutenant Washington was later assigned to investigate this incident by Captain Wright. He informed Captain Wright that he did not believe that he should conduct the investigation, and the misconduct should have been conducted by the Internal Affairs Division ("IAD"). He also told Captain Wright that he discussed the incident on social media prior to learning that he would be assigned to the case. However, Captain Wright told him to conduct the investigation regardless. Tr. VOL I 20-29. Lieutenant Washington additionally emailed Captain Wright and Captain Bray to explained that he had a conversation with a couple of officers condemning the actions of Employee in the video. In the email, Captain Wright explained that Washington was known to be a fair and objective manager when conducting investigations. Tr. Vol I 30-35. Lieutenant Washington conducted the investigation – he got witness statements from McBride, a Ms. Nankap, and from other police members involved with the incident. Lieutenant Washington also drafted an investigation report which was reviewed by Captain Bray. Thereafter, the investigation was reassigned to Captain Bray.

In conducting the investigation, Captain Bray testified that he reviewed Washington's report and removed Lieutenant Washington's chronological narrative, findings, summary, and conclusion. Captain Bray stated that he created his own narrative, analysis, and findings. Although he used the witness statements that were collected by Lieutenant Washington, Captain Bray noted that he verified them and reviewed the video captured by McBride in the course of his investigation. Tr. Vol I 142-149. Captain Bray explained during the Evidentiary Hearing that, after the case was reassigned to him, Lieutenant Washington no longer had a role in drafting the investigative report. Captain Bray further asserted that he did not copy Lieutenant Washington's report and sign his name to the document, nor did Lieutenant Washington write any portion of the investigative report for him. Tr. 161-162.

While I agree with Employee's assertion that Lieutenant Washington was biased based on the comments he made on Facebook, Lieutenant Washington did not have any input on the final outcome of this matter. Although Captain Bray used the statements collected by Lieutenant Washington, he conducted his own investigation. Therefore, I agree with Agency's assertion that the statements which were collected by Lieutenant Washington, and relied on by Captain Bray in his report were not tainted as (1) they were from sworn members of the agency and bore their

signatures; and (2) the statement from McBride was sent from her work email, and it included her electronic signature. Furthermore, Captain Bray's investigation report was reviewed by multiple individuals prior to the issuance of the instant adverse action. Accordingly, I conclude that although Lieutenant Washington was a part of the investigation process at the beginning, he was later removed from the process, and the investigation conducted by a neutral person who conducted an independent analysis. Therefore, I further conclude that the bias was eliminated when Lieutenant Washington was replaced by Captain Bray.

2) *Whether the penalty of suspension is within the range allowed by law, rules, or regulations.*

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of* Columbia, 502 A.2d 1006 (D.C. 1985).[12] According to the Court in *Stokes,* OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency. In the instant case, I find that Agency has met its burden of proof for the charge of "Failure to obey orders or directives issued by the Chief of Police." I further find that Agency did not meet its burden of proof for "Conduct prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force," as such, Agency cannot discipline Employee under this charge."

With regards to the failure to obey orders or directives charge, Agency noted in its discussion of the *Douglas factors* that this was Employee's third (3rd) offense.[13] Agency cited to two (2) previous offenses wherein, Employee received a nine (9) day suspension for the first offense under this cause of action; and a fifteen (15) day suspension for the second offense under this cause of action. However, Inspector Goddard testified that Employee's fifteen-day suspension for the orders and directives violation was overturned on appeal. Tr. Vol II 155. Thus, the current incident is Employee's second, and not third (3rd) violation for failure to obey orders or directives.

In reviewing Agency's decision to suspend Employee for twenty (20) days, OEA may look to Agency's General Order 120.21, Attachment A.[14] The record shows that this was the

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[12] *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).

[13] *See* Agency's Answer, supra, at Tab 2.

[14] *See* Employee's Exhibit 13, at Attachment A. *See also* Agency's Prehearing Conference Statement at (October 31, 2017).

second time Employee violated this cause of action.[15] The twenty (20) day suspension levied on Employee was for two charges – failure to obey orders and directives and prejudicial conduct. Since Agency did not meet its burden of proof for charge No. 2, the penalty of twenty (20) days suspension shall be modified to a fifteen (15) day suspension.[16]

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[17] When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. Since one of the charges against Employee was reversed, I find that the penalty of twenty (20) days suspension should be modified.

Penalty Based on Consideration of Relevant Factors

An Agency's decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion.[18] Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching the decision to terminate Employee.[19] The Douglas factor analysis included

[15] Employee served a nine (9) days suspension for this cause of action in 2014.

[16] Because Employee was suspended for nine (9) days for her first violation of this cause of action, I find that a fifteen (15) suspension constitutes progressive discipline. Moreover, Agency suspended Employee for fifteen (15) days for the second failure to obey orders and directives charge that was subsequently reversed on appeal. And since this instant incident is now Employee's second offense under this charge, a fifteen (15) day suspension is in line with Agency's prior penalty for a second offense.

[17] *Love* also provided that "[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." Citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).

[18] *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C. Reg. 352 (1985).

[19] 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;

in the record demonstrates that Agency considered all factors in imposing the penalty in this matter. However, for the reasons stated above, I find that Agency's penalty must be modified.

ORDER

Based on the foregoing, it is hereby ORDERED that:

1. Agency's action of suspending Employee for Conduct prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force (Charge No. 2, Specification No. 1) is REVERSED; and
2. Employee is suspended for fifteen (15) days for failure to obey orders and directives of the Chief of Police (Charge No. 1, Specification Nos. 2 and 4); and
3. Agency shall reimburse Employee all back-pay, benefits lost as a result of the adverse action; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Senior Administrative Judge

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.