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**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	OEA Matter No.: 1601-0120-13
KIMBERLI MOTLEY,	)	
Employee	)	
	)	Date of Issuance: November 4, 2015
v.	)	
	)	
DISTRICT OF COLUMBIA	)	
METROPOLITAN POLICE DEPARTMENT,	)	
Agency	)	Sommer J. Murphy, Esq.
_____	)	Administrative Judge
Don Johnson, Employee Representative	)	
Ronald Harris, Esq., Agency Representative	)	

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL HISTORY**

On July 24, 2013, Kimberli Motley (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the Metropolitan Police Department’s (“Agency” or “MPD”) action of suspending her for twelve (12) days from her position as a police officer. Employee was charged with being Absent Without Leave (“AWOL”) after failing to report for duty on January 1, 2013. Employee began serving her suspension on June 26, 2013.

The matter was assigned to the Undersigned in May of 2014. On May 28, 2014, I issued an Order scheduling a Prehearing Conference for the purpose of assessing the parties’ arguments. The conference was held on August 25, 2014. During the PHC, it was determined that there were material facts in dispute, therefore an Evidentiary Hearing (“EH”) was rescheduled to be held on March 2, 2015. The parties were subsequently ordered to submit written closing arguments on or before April 17, 2015. Both parties responded to the order. The record is now closed.

**JURISDICTION**

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

## ISSUE

Whether Employee's suspension should be upheld.

## 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.

## SUMMARY OF RELEVANT TESTIMONY

The following represents what I have determined to be the most relevant facts adduced from the transcript generated as a result of the Evidentiary Hearing in the instant matter. Both Agency and Employee had the opportunity to present documentary and testimonial evidence during the course of the hearing to support their positions.

### *Agency's Case-in-Chief*

#### **Michael Eldridge, Tr. pgs 15-40**

Michael Eldridge ("Eldridge") has worked with MPD as an Inspector for five (5) years and is responsible for directing Agency's disciplinary review branch. As director, Eldridge is responsible for overseeing all of Agency's investigations after they have been cleared through the Internal Affairs Bureau. His office tracks the case in reference to the employee's disciplinary history, and then reviews the *Douglas* factors to determine the appropriate penalty. Eldridge's office also issues notices of proposed disciplinary actions, holds resolution hearings, and then a final notice is issued for review by the director of human resources.

Eldridge testified that Employee was charged with AWOL and prejudicial conduct. His office prepared the Notice of Proposed Adverse Action and the Final Notice of Adverse Action, which was signed by the director of human resources. According to Eldridge, the charges against Employee were levied after his department reviewed the supporting documents to determine what charges could be sustained. After sustaining the investigation, Eldridge's office determined that the appropriate charges to levy against Employee were clear because she was Absent

Without Leave for more than eight (8) hours. After reviewing the *Douglas* factors and Employee's disciplinary history, Eldridge determined that the appropriate penalty should be a twelve (12) day suspension. Employee previously served a ten (10) day suspension for providing untruthful statements in D.C. Superior Court.

Eldridge stated that Employee submitted leave slips to multiple officials, who denied the request. Employee still took leave without it being approved, which is why she was suspended for twelve (12) days. Her position as a police officer required her to be held to a higher standard than the general public. Eldridge noted in his analysis of the *Douglas* factors that Employee was a twenty-two (22) year veteran of MPD and should have known that her actions were against department orders. A second offense for AWOL allows for a penalty of suspension from fifteen (15) days up to removal. Eldridge determined that there were no mitigating factors surrounding Employee's offenses and that a twelve (12) day suspension was a sufficient sanction and deterrent. Eldridge agreed with all the findings of the investigative report; however, he has independent authority to sustain the investigation if it is supported by a preponderance of the evidence.

On cross examination, Eldridge testified that he was not aware that the issue of Employee's alleged false statements in D.C. Superior Court was untrue or that she was, in fact, disciplined for another issue. Eldridge did not discuss the authenticity of Employee's leave slips with Sergeant Rhonda Jackson, Lieutenant Whiteside or Lieutenant Lamond. He further clarified that Employee was first disciplined for prejudicial conduct, and not AWOL. The previous prejudicial conduct charge was imposed as a result of Employee's failure to assist another officer in the cellblock after being attacked by a prisoner.

According to Eldridge, if a police officer was scheduled to work on a particular day, but did not appear for duty, protocol required MPD to attempt to contact the officer by phone number. He did not know if Employee was contacted by her supervisor on the day she was absent in this case.

#### **Shane Lamond, Tr. pgs 40-75**

Shane Lamond ("Lamond") has worked as a lieutenant with MPD for approximately four and a half years and is assigned to the Fourth District. Employee was originally assigned to Lamond's Police Service Area ("PSA") when she was detailed to the Fourth District; however, Employee was transferred to a different PSA after having a conflict with another officer. Lamond received a leave slip from Employee for the period of December 22, 2012 through January 1, 2013. When Lamond received the request, she checked the leave book and discovered that Fourth District Commander Missouri had restricted leave for both Christmas and New Year's days. Since Employee requested leave for both of those days, Lamond denied the leave slip. Missouri notated that there was a restriction in the leave book so that officials would be aware.

At the time Employee requested leave there were ten lieutenants in the Fourth District. Lamond was not supervising Employee during this period; however, an officer could submit their leave request to a non-supervising lieutenant if the request was being made on short notice

or if their supervisor was absent. Leave requests should be first sent to the employee's sergeant or a desk sergeant. Employee was not working when Lamond disapproved her leave request, so she gave it to Sergeant Rhonda Jackson, who was working as the desk sergeant, so that it could be returned to Employee. In general, officers will submit a leave slip to a sergeant, who can review the leave book, but cannot physically enter any leave on the book. Sometimes, leave slips are submitted directly to the lieutenant. If there is an available slot, the lieutenant will put the officer's name in the leave book. The physical leave request will then be approved and dropped in the time and attendance box. If the slip is denied, it will be marked as disapproved and returned to the officer.

If the officer has a question about why their leave was not approved, they could do so directly to the lieutenant. In 2012, Lamond only disapproved leave requests via a written slip and did not utilize email regarding leave requests. Lamond did not have any further contact with Employee regarding the leave slip after returning the denied request to her.

A few days after Lamond denied Employee's request, Lieutenant Whiteside mentioned that Employee had also submitted a leave slip for December 25, 2012 and January 1, 2013 to him. Lamond informed Whiteside that Employee had done the same thing to her. Whiteside told Lamond that he denied Employee's request because leave was restricted for the two days noted in the leave book. Whiteside also told Lamond that he sent an email to Employee stating that he could not approve the leave slip as it was submitted; however, the leave would be approved if she submitted a new leave request that did not include the restricted dates. Lamond stated that she was surprised that Employee submitted a second leave request to Whiteside because it raised the issue of "lieutenant shopping," which occurs when an officer submits leave requests to different lieutenants in hopes of getting a leave request approved if it was previously denied.

On cross examination, Lamond stated that an officer who was on non-contact duty may or may not be able to access their work email depending on what was indicated on the PD77. Lamond reviewed Employee's PD77 Form, CAD No. 4349, which indicated that her police powers were restored on December 12, 2012. Having full police powers meant that Employee was placed on full duty, and received her badge, ammunition, and service weapon. However, Lamond stated that he could not determine if Employee's work email access was restored because the PD77 did not specify if her email was ever restricted in the first place.

Lamond identified Employee's Exhibit 4 as the PSS Book from the Fourth District, January 1, 2013 and stated that "AA" was a notation used to denote that an officer had an authorized absence. He explained that Employee had an "AA" by her name in the PSS Book for that date, shortly after roll call was concluded. Lamond did not know who put "AA" by Employee's name or why the notation was put there.

### **Michael Whiteside, Tr. pgs 75-129**

Michael Whiteside ("Whiteside") has worked as a lieutenant with MPD since 2007. As a lieutenant in the Fourth District, Whiteside's functions include performing the functions of a watch commander—including roll call, supervising sergeants, and approving or denying leave requests from officers. Whiteside stated that he received two (2) leave requests from Employee

in November of 2012. He denied the first leave slip because it encompassed restricted dates on Christmas and New Year's. Whiteside instructed Employee to resubmit a second slip without the restricted days so he could approve it. When Employee submitted the leave request a second time, she gave two slips to Whiteside. The first slip did not include Christmas day; however, in the remarks section marked "To include the holiday." The second slip requested New Year's Day and also stated "To include the holiday" in the remarks section. According to Whiteside, Employee's second submission of the leave slips still included restricted dates and had to be denied for that reason.

Leave slips should first be submitted to the officer's sergeant or the desk sergeant. The sergeant goes into the computer system to view the calendar to see if the requested dates are available. The slips are then given to a lieutenant or the watch commander, who would either approve or disapprove the request. Whiteside stated that Sergeant Jackson did not have the authority to approve leave requests of more than eight (8) hours. The commander informed officers of the restricted leave days either by placing the word "restricted" in the physical PSS book or by blacking out the dates in the electronic leave book, but Whiteside did not recall if MPD was utilizing the electronic leave book in November of 2012. When Whiteside returned the leave slips to Sergeant Jackson, he explained that he put the other dates that Employee requested on the calendar so that other officers could not take the open slots while the slips were being corrected and resubmitted. A few days after denying the leave slips, Whiteside had a conversation with Lamond wherein Lamond stated that Employee had submitted a leave request to him as well. According to Whiteside, it is unusual and inappropriate for an officer to submit the same leave slips to different lieutenants.

Whiteside stated that he subsequently sent an email to Employee in reference to the three leave slips that she submitted to him and reiterated that the requests included restricted leave dates. He did not get a response from Employee and the email did not bounce back to him indicating a technical problem with the server.

On cross examination, Whiteside stated that he knew that Employee was placed on some type of restricted duty status in April of 2012, but he could not specifically confirm that Employee was in non-contact status. Full duty officers can be put on the streets for patrol and have the lawful authority to arrest and detain individuals. When an officer is placed on non-contact status, they usually do have access to their email, depending on the circumstances. Whiteside stated that all three leave slips were physically returned to Employee submitted to him and that he also sent her an email to explain why he denied the leave.

Regarding the discrepancy in time between the date Employee signed the PD77 that restored her police power and the actual date she re-qualified at the weapons range, Whiteside stated that the difference was an administrative issue and could have been a result of an officer's weapon being moved to another facility or the officer being without police powers for more than six (6) months. According to Whiteside, an officer would still follow their regular work schedule if they have been restored to full duty; even if they do not have their service weapon.

Whiteside also testified that if he has been made aware of an officer's absence, there is almost inevitably an AWOL issue. After he has been notified, Whiteside's usual practice is to

first attempt to call the officer via telephone. If that is unsuccessful, then MPD members may or may not go to the officer's house, depending on the circumstances.

When asked how Employee went from having an approved absence on January 1, 2013 to being AWOL on January 2, 2013, Whiteside explained that it was likely an oversight. The roll call sergeant submits their rolls to the station sergeant or the station and then the station is responsible for transcribing the rolls into the book for time and attendance purposes.

*Employee's Case-in-Chief*

**Kimberli Motley, Tr. pgs 129-172**

Kimberli Motley ("Employee") has worked as an officer with MPD for over twenty-four (24) years. She normally submits leave request slips to a sergeant for approval, but recalled times on which her request was denied. Employee has four children, and stated that she only takes leave during spring break, summer or holidays. She typically submits leave requests in January because the holidays are highly requested dates in the department. Employee was in full duty status when she was first detailed to the Fourth District, and became noncontact in April of 2012.

Employee stated she submitted a leave request in January of 2012, but did not hear anything back from MPD. She submitted another request on November 6, 2012, after being told by Sergeant Jackson that Lieutenant Whiteside denied the requests because of the date restrictions in the leave book. On November 8, 2012, Employee submitted another leave slip because she forgot to include all of the requested dates on the form. She stated the following with respect to the leave slips:

I wanted to submit the holidays just in the remarks...I just wanted to put in there what my days off [were] and that the holidays would be there...Just to make it clear for whoever was looking at it, at least they will see everything of what I was requesting. I was trying to make it as clear as I possibly could. My days off are Sunday/Monday, and I was putting in there the holidays because I wasn't allowed to work on holidays anyway...because normally people would...sign up to work holidays....

This [11/10/12] slip was submitted because...Desk Sergeant Rhonda Jackson came down with this in her hand telling me that Lieutenant Whiteside was going to approve it if I submitted two leave slips. Indicating from the 21<sup>st</sup> to the 24<sup>th</sup>, one from the 26<sup>th</sup> to 29<sup>th</sup>, not including January 1<sup>st</sup>. he didn't want the leave slip because I wasn't asking for leave for those days because those days were holidays, so you don't put that on your leave slip....

Desk Sergeant Jackson came to me with the leave slip that I never gave to her because I wasn't working with her at the time that I submitted it. But she gave this to me saying that Lieutenant

Whiteside wanted me to...submit another one and not include the holidays...and I did it. And I then handed it back to her because she gave it to me...and she told me that she didn't want it back. So I asked her could she approve it to make sure that this was right. Because she said, "Look...Lieutenant Whiteside is going to approve your leave. And what I need you to do is to submit another leave form just like he told me to tell you."

And when I heard her say that, I did it exactly the way she said it, and then I said, "Can you just verify? Can you look at it to make sure I'm doing it right on because I don't know what the lieutenant told you?" So she looked at it, and she said, "Yes, that's right." Tr. pgs. 141-145.

Employee testified that she was placed on non-contact status in April of 2012, and performed administrative duties during this time. She did not have her police powers, which included her badge, gun and utility belt. According to Employee, Whiteside informed her that she also did not have access to work email from April 26, 2012 until December 20, 2012.

Employee stated that she took the written exam and went to the shooting range to qualify for her service weapon on December 20, 2012. After December 21, 2012, Employee believed that she was on full duty status and also believed that Whiteside had approved her leave from December 21, 2012—December 24, 2012 and December 26, 2012—December 29, 2012. Employee stated that she was not at work on December 25, 2012 because she went out of town and wasn't told that she had to work on the holiday. Employee further claimed that she was not contacted by Agency via phone on December 25, 2012 or January 1, 2013.

On cross examination, Employee stated that she read and signed the PD77, which restored her police powers effective December 12, 2012. She did not check her work email on December 20, 2012 or December 21, 2012. In addition, Employee testified that she did not check the upstairs schedule in the station because no one informed her that she was supposed to work. Employee admitted that she did not check to see if her email was operational from December 12, 2012 through January 1, 2013.

#### UNCONTESTED FACTS

1. Employee was appointed as a patrol officer with MPD's Special Operation Division on May 7, 1990.
2. At the time she was suspended, Employee was detailed to MPD's Fourth District and was on non-contact duty status.
3. On January 1, 2013, Employee was scheduled to work the midnight shift at the Fourth District, but did not report for duty. Employee was subsequently charged with being Absent Without Leave for a total of eight (8) hours.

4. On January 23, 2013, Agency issued a Final Investigative Report with Recommendation Concerning the Alleged Misconduct by Officer Kimberli Motley of the Fourth District IS# 13000015, finding that there was sufficient evidence to prove that Employee was AWOL on January 1, 2013. The investigating official recommended that Employee be cited with adverse action.<sup>1</sup>
5. On March 3, 2013, Agency issued Employee a Notice of Proposed Adverse Action, citing the following charges and specifications:

**Charge No. 1:** Violation of General Order Series 120.21, attachment A, Part 10, which states, “AWOL (Absent Without Leave), i.e., reporting late for duty without official leave in excess of the first four (4) hours of a scheduled tour of duty, or any unexcused absence from a scheduled duty assignment that is not in the category of “lateness”

Specification No.1: In that, on January 1, 2013, you were scheduled to work the midnight shift at the Second District. You failed to report for duty and were not granted any type of leave. As a result, you were AWOL for eight (8) hours.

**Charge No. 2:** Violation of General Order Series 120.21, Attachment A, Part A-25, which states, “Any conduct not specifically set forth in this 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. 2: In that, on November 10, 2012, you submitted a leave slip to Lieutenant Michael Whiteside requesting leave for January 1, 2013. You did this after Lieutenant Shane Lamond had already denied your leave for that date. Furthermore, you failed to notify Lieutenant Whiteside that you had already requested leave for that date and were denied.

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<sup>1</sup> Agency Answer to Petition for Appeal at Tab 1 (August 28, 2013).



6. On March 28, 2013, Employee submitted an appeal of the Notice of Proposed Adverse Action, arguing that her suspension was unwarranted and unjust.<sup>2</sup>
7. On May 23, 2013, Diana Haines-Walton, Director of Human Resource Management, issued a Final Notice of Adverse Action. Director Haines-Walton concluded that the preponderance of the evidence established that Employee was guilty of the charges and specifications as enumerated in the Notice of Proposed Adverse Action.<sup>3</sup>
8. Employee filed a written appeal of her suspension to the Chief of Police on June 6, 2013.<sup>4</sup>
9. On June 26, 2012, MPD Chief, Cathy Lanier, issued a letter denying Employee's appeal. Chief Lanier further held that Employee would be required to serve the full twelve (12) day suspension without pay.<sup>5</sup>
10. Employee subsequently filed a Petition for Appeal with this Office.

#### FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

##### **Whether Agency's adverse action was taken for cause**

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

(a) 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.

In accordance with Section 1651(1) of the CMPA (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. Section 1603.3(e) of the District Personnel Manual ("DPM") defines cause to include "Any on-duty employment related act or omission that interferes with the efficiency and integrity of government operations: Absence without Official Leave ("AWOL")." 6-B DCMR § 1268.16, provides that an absence from duty that was not authorized or approved, or for which leave request has been denied, shall be charged on the leave record as AWOL. The AWOL action may be taken whether or not the employee has leave to his

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<sup>2</sup> *Id.* at Tab 3.

<sup>3</sup> *Id.* at Tab 4.

<sup>4</sup> *Id.* at Tab 5.

<sup>5</sup> *Id.* at Tab 6.

or her credit. If it is later determined that the absence was excusable, or that the employee was ill, the charge to AWOL may be changed to a charge against annual leave, compensatory time, sick leave, or leave without pay, as appropriate.<sup>6</sup>

The Undersigned has reviewed the documents of record, in addition to the testimony adduced during the course of the Evidentiary Hearing. Relative to the twelve (12) days suspension, Employee's time and attendance records reflect that she incurred eight (8) hours of unauthorized absence on January 1, 2013. In general, the process for requesting leave involves the submission of a leave request to a desk sergeant, who can review the calendar to determine if the requested time is available. The request is then forwarded to a lieutenant, who may approve or deny the officer's leave. If there is an available slot, the lieutenant will put the officer's name in the leave book. If approved, the physical leave slip will be forwarded to the time and attendance box. If the slip is denied, it will be marked as disapproved and returned to the officer. In some cases, leave requests may be submitted directly to a lieutenant for review.

According to Lieutenant Lamond, Employee submitted a leave slip for the period of December 22, 2012 through January 1, 2013. However, per Commander Missouri's notation, leave was restricted on December 25, 2012 and January 1, 2013. Employee was made aware of the restriction, and was instructed to re-submit the leave request without the restricted dates. Employee subsequently submitted two (2) leave slips to Lieutenant Whiteside in November of 2012.<sup>7</sup> The first slip was denied because Employee included restricted dates on the request. Whiteside denied Employee's second leave slip because it stated "To include the holiday" in the remarks section. Employee was again made aware that she was not approved for leave on January 1, 2013.

Employee argues that she remained on non-contact status until December 20, 2012, and was unable to work holidays because she was not restored to full duty. In support thereof, Employee cites to her PD77 (CAD 4349), contending that she could not utilize her government email and did not have possession of her weapon or other equipment.<sup>8</sup> I find Employee's argument to be unpersuasive. According to the record, Employee was restored to full duty status effective December 12, 2012, and was placed on the roll call sheet to work on January 1, 2013 during the midnight shift. When Employee signed the PD77 for the restoration of her police powers, she acknowledged and accepted the clause stating the following:

"I understand that effective the date and time recorded above, my authority to make an arrest and perform any duty requiring the exercise of police powers; my authority to carry a service weapon; and my privilege to engage in outside employment and earn additional compensation are fully restored. I further understand I am no longer subject to the restrictions listed in Part 1.12 above."<sup>9</sup>

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<sup>6</sup> 6-B DCMR § 1268.4.

<sup>7</sup> See Agency Answer to Petition for Appeal, Exhibit 1, FOP Attachment-A.

<sup>8</sup> Employee Exhibit 1.

<sup>9</sup> Employee Exhibit 1.

Employee's lack of service weapon, utility belt, and weapon recertification did not divest her of the requirement to report to work during her regular tour of duty. Employee's restriction on working holidays was lifted effective December 12, 2012, approximately eighteen (18) days prior to her scheduled tour of duty on January 1, 2013.

Moreover, there is no evidence in the record to prove that Employee's work email was inaccessible or inoperable while she was on non-contact status. Employee even conceded that she did not check to see if her email was operational from December 12, 2012 through January 1, 2013. Employee also admitted that she did not check the leave calendar that was posted upstairs in the Fourth District station. Despite her protestations to the contrary, the evidence establishes that Employee was informed of the restricted leave dates by both Lieutenant Lamond and Lieutenant Whiteside. Agency's witnesses provided credible testimony regarding Employee's knowledge that she was not approved for leave on January 1, 2013. Their testimony was further corroborated by Agency's January 23, 2013 Final Investigative Report with Recommendation Concerning the Alleged Misconduct by Officer Kimberly Motely.<sup>10</sup> The Undersigned finds Employee's testimony to be unpersuasive in light of her twenty-plus years as an MPD officer. Although Employee was detailed to the Fourth District at the time she was charged with being AWOL, any questions regarding her leave approval could have been directed to a lieutenant for clarification purposes.

In this case, Employee failed to report for her regularly scheduled tour of duty on January 1, 2013 and was not granted leave from a lieutenant for that date. Thus, Employee was properly classified as being AWOL pursuant to 6-B DCMR § 1268.16 for a total of eight (8) hours. Accordingly, I find that Agency has established by a preponderance of the evidence that Charge No. 1, Specification No. 1, was taken for cause.

Regarding, Charge No. 2, Specification No. 2, the pertinent regulation at issue is General Order ("GO") Series 120.21, Part A-25, which states the following:

"Any conduct not specifically set forth in this 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."

Specifically, Agency asserts that Employee submitted a leave slip to Lieutenant Whiteside on November 10, 2012, to request leave for January 1, 2013, after being denied leave for the same date by Lieutenant Lamond. The documentary and testimonial evidence supports Agency's position. "Lieutenant shopping" is a practice wherein an officer submits leave requests to different lieutenants in hopes of having his or her leave request approved if it was previously denied. While "lieutenant shopping" is not implicitly enumerated in Agency's GO 120.21, Employee's actions were nonetheless prejudicial to the good order of the police force. As a veteran officer, Employee knew, or should have known, that her conduct was inappropriate and

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<sup>10</sup> Agency Answer to Petition for Appeal, Tab 1.

violated the proper procedure for requesting leave. As such, I find that Agency has also met its burden of proof with respect to Charge No. 2, Specification No. 1.

Based on the foregoing, and Employee's length of service with MPD, it is reasonable to believe that Employee was fully aware of her responsibility to report to work on time every day; and that failure to do so would lead to further disciplinary action. I therefore concludes that both Charge No. 1 and Charge No. 2 are supported by a preponderance of the evidence

**Whether the penalty was appropriate under the circumstances**

With respect to Agency's decision to suspend Employee, any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.<sup>11</sup> Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."<sup>12</sup> When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."<sup>13</sup>

In *Douglas v. Veterans Administration*,<sup>14</sup> the Merit Systems Protection Board, this Office's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Although not an exhaustive list, the factors are as follows:

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

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<sup>11</sup>See *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, Opinion and Order on Petition for Review (July 2, 1994).

<sup>12</sup>*Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

<sup>13</sup>*Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).

<sup>14</sup>5 M.S.P.R. 280, 305-306 (1981).

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

In considering the *Douglas Factors*, Lieutenant Eldridge determined that Employee's conduct was significant, but not egregious; because it called into question her judgment and integrity.<sup>15</sup> Law enforcement officers are expected to perform their duties and responsibilities in accordance with the law as well as MPD's mission. Eldridge stated that Employee's actions eroded Agency's confidence in her ability to perform the functions of her job. He further noted that, after serving twenty-two (22) years as an MPD officer, Employee was aware, or should have been aware, that her unauthorized absence was in violation of Agency's rules and regulations.<sup>16</sup> In addition, Eldridge noted that Employee had a 2010 administrative charge of Prejudicial Conduct and a 2011 administrative charge of Providing Untruthful Statements in her

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<sup>15</sup> Agency Answer to Petition for Appeal at Tab 2 (August 28, 2013).

<sup>16</sup> *Id.*

disciplinary record. In selecting the appropriate penalty to levy against Employee, Eldridge stated that a twelve (12) day suspension was appropriate to serve as a deterrent for future misconduct.<sup>17</sup> Employee refutes Eldridge's testimony by arguing that his findings under the *Douglas* factors did not reflect the true disposition of the purported charges against her. However, Employee has failed to submit any evidence to support a finding that she was not administratively charged with Prejudicial Conduct and Providing Untruthful statements in 2010 and 2011, respectively.<sup>18</sup> Thus, I find that Agency properly included the aforementioned charges in considering the appropriate penalty to levy against Employee.

Agency has the discretion to impose a penalty, which cannot be reversed unless "OEA finds that the agency failed to weigh relevant factors or that the agency's judgment clearly exceed the limits of reasonableness."<sup>19</sup> The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for a first offense of AWOL is reprimand to removal. Agency's General Order 120.21, provides that the penalty for a second offense of Prejudicial Conduct may range from suspension for fifteen (15) days to removal.

In reviewing the record, I find that Agency adequately considered the *Douglas Factors* in choosing the appropriate penalty to levy against Employee in light of the circumstances. Employee's failure to obtain leave approval for January 1, 2013 violated Agency's General Order 120.21 and constituted conduct that was prejudicial to MPD's rules and regulations. There is no evidence in the record to support a finding that Agency abused its discretion in considering these factors, and there is no *credible* reason to disturb its findings. Accordingly, I find that Agency's action was taken for cause, and that the penalty of a twelve (12) day suspension was the appropriate penalty in this case. Based on the foregoing, Employee's suspension must be upheld.

### ORDER

It is hereby **ORDERED** that Agency's action is **UPHELD**.

FOR THE OFFICE:

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Sommer J. Murphy, Esq.  
Administrative Judge

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<sup>17</sup> *Id.*

<sup>18</sup> DRB# 326-10, IS# 10-001916; DRB# 429, IS# 10-000926, Agency Answer to Petition for Appeal at Tab 2.

<sup>19</sup> See *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985).