THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
CAROLYN A. ROBINSON Employee	OEA Matter No. 1601-0036-04
v.	Date of Issuance: March 16, 2006
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT Agency	Daryl J. Hollis, Esq. Senior Administrative Judge

Frederic Schwartz, Esq., Employee Representative
Sandra Little, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On February 24, 2004, Employee, a Fire Communications Operator, DS-7 in the Career Service, filed a petition for appeal from Agency's final decision suspending her for 40 days for "Rude and disrespectful behavior toward a citizen."[1]

[1] Agency originally proposed to suspend Employee for 60 days. *See* Advance Notice of Proposal to Suspend, *infra*.

This matter was assigned to me on September 21, 2004. I conducted a Prehearing Conference on October 21, 2004 and a Status Conference on January 6, 2005. I scheduled an evidentiary Hearing for May 19, 2005. However, pursuant to the parties' consent motion, the Hearing was postponed and initially rescheduled for August 11, 2005. A second postponement became necessary when on July 29, 2005, Employee filed a Pre-Hearing Memorandum of Law concerning the statutory reach of the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, and the weight that should be given to three prior corrective and adverse actions that had been taken against Employee.[2] Pursuant to my Order, Agency responded to Employee's memorandum on August 31, 2005.

The essence of Employee's argument is set out in the conclusion section of her memorandum:

> Under [OPRAA], the District's employee disciplinary scheme now punishes the offense, not the employee. To the extent that a prior offense is similar to the current offense, it is highly relevant to whether the employee can learn from his or her errors and whether the offense will be repeated. To the extent there is no nexus between the past and current offense, however, concerns of due process and adherence to the regulatory scheme minimize or eliminate the role a prior offense plays in establishing a current penalty. To ensure that this kind of dichotomy is satisfied, the Senior Administrative Judge must consider the nature of the prior offense[s], its nexus with the current offense, and its overall seriousness.

Employee's July 29, 2005 Memorandum at 4. (footnote omitted).

In pertinent part, Agency's response reads as follows:

> Under prior [pre-OPRAA] law, the concept of "nexus" was never used in determining a penalty, but to establish off-duty conduct as a "cause" for disciplinary action. Under the [post-OPRAA] personnel regulations, the law eliminated the

[2] On March 12, 2002, Employee was issued a Letter of Admonition for reporting late for duty without calling in. On February 17, 2003, she was suspended for five days for entering an incorrect address for an emergency (911) call into the Computer-aided Dispatch System (CADS). On June 7, 2003, she was suspended for ten days for Inexcusable Absence Without Leave (AWOL).

requirement to show a "nexus" between off duty conduct and employment. The concept of "nexus" is mentioned in only one section of [OPRAA] and only in the Committee Report. The committee report advised the executive to be guided by nexus principles in making decisions on enforced leave. Although [Employee] argues that this language indicated the desire of the Council for the executive to be guided by nexus principles in imposing progressive penalties, there are two obvious reasons why this interpretation is erroneous. First, enforced leave is not considered an adverse or corrective action, and is in a different section of the code from the section dealing with disciplinary matters. There is no indication in the legislative history that the Council intended nexus case law to also be considered in the section dealing with general disciplinary matters.

Second . . . the due process afforded personnel who are placed on enforced leave is minimal when compared to the due process afforded employees facing adverse or corrective action in general. It is not necessary to prove the underlying facts of the misconduct in order to place a person on enforced leave. . . .

In selecting a penalty, the new personnel regulations permit an agency to consider "any mitigating or aggravating circumstances that have been determined to exist, to such extent and with such weight as is deemed appropriate." There is no specific requirement that the agency apply principles of progressive discipline although past disciplinary history is one of the factors that would normally be considered. *See* § 1606.3 of the D.C. personnel regulations. Section 1606.3 of the D.C. personnel regulations limits the use of an employee's disciplinary history to three years. It provides that although a permanent record of the disciplinary action will be retained in the employee's official personnel folder (OPF), an agency may not consider any prior disciplinary actions beyond the three year period.

The OEA has held that when assessing the appropriateness of a penalty, the OEA is not to substitute its judgment for that of

> the agency but to ensure that "managerial discretion has been legitimately invoked and properly exercised."

Agency's August 31, 2005 Response at 2-3. (citations omitted). (footnote omitted).

On September 12, 2005, I issued an Order Regarding Employee's Memorandum of Law. That Order reads as follows:

> On July 29, 2005, Employee submitted a Prehearing Memorandum of Law in which she raised certain arguments pertaining to the effect of the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA) on this case. Agency submitted its response to Employee's memorandum on August 31, 2005.
>
> First of all, the parties must remember that Agency bears the burden of proof (by a preponderance of the evidence) in two aspects of any case involving an adverse action: 1) whether there was cause for taking *any* adverse action; and 2) if so, whether the penalty was appropriate under the circumstances. In this case, if Agency cannot meet its burden of establishing cause for disciplining Employee for the September 6, 2003 incident, then my Initial Decision will not contain any discussion of the 40-day suspension, save for an Order reversing the action and restoring to Employee all pay and benefits lost as a result of the suspension.
>
> Regarding the proper weight that I should give to Employee's prior offenses, assuming that Agency meets its burden of establishing cause, both parties have cited § 1603.9 of the "new" (post-OPRAA) Chapter 16 (General Discipline and Grievances), 47 D.C. Reg. 7097 (2000). In pertinent part, that section reads:
>
> > In selecting the appropriate penalty to be imposed in a corrective or adverse action, consideration shall be given to any mitigating or aggravating circumstances that have been

> determined to exist, to such extent and with such weight as is deemed appropriate.
>
> Thus, in determining whether the 40-day suspension was a reasonable exercise of Agency's discretion in disciplinary matters, I will give "such weight as [I deem] appropriate" to Employee's prior offenses. My consideration will encompass the nature and seriousness of the prior offenses. My consideration *will not* extend to the concept of "nexus", as that term applies only to "Enforced Leave" (§ 1615, 47 D.C. Reg. at 7104 *et seq.*), and not to adverse actions.

(emphasis in original).

The evidentiary Hearing was held on October 18, 2005. This decision is based on the testimony elicited at the Hearing and on the exhibits of record. Following receipt of the parties' closing briefs, I closed the record effective February 14, 2006.

JURISDICTION

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

ISSUES

1. Whether Agency's adverse action was taken for cause.

2. If so, whether the penalty was appropriate under the circumstances.

STATEMENT OF THE CHARGES

On December 2, 2003, Agency, through Captain Kenneth Mallory of the Fire Communications Division, issued Employee an advance notice of a proposal to suspend her for 60 days for "Rude and disrespectful behavior toward a citizen." In pertinent part, that notice reads as follows:

The details in support of this proposed action are as follows:

On September 7, 2003, Metropolitan Police Department Communications Supervisor Hammond made a complaint, alleging that you were rude to a citizen who had called on September 6, 2003, at approximately 2113 hours [9:13 p.m.] to request an ambulance for her asthmatic child. After listening to a tape recording of the conversation, there is no question that you were rude.

You asked the caller at least five times to repeat her address. At times, you would talk over the caller or cut her off mid-sentence, claiming that she was speaking too low. You were very argumentative and the tone of voice that you used while instructing the caller to repeat her address was very harsh and abrasive.

You continued chastising the caller as you attempted to obtain her telephone number. After the caller repeated her telephone number for the third time, she pleaded with you to send an ambulance. You responded by making offensive comments. An excerpt of the conversation is as follows:

Caller: "By the time [you get the information] my son could die."

Robinson: "Yeah well, I can't – I don't have anything to do with that ma'am. I need to get the correct information."

Caller: "What's your name?"

Robinson: "Don't worry about it."

Caller: "What do you mean, don't worry about it, bitch."

Robinson: "That's why you can't get any help, ma'am. When you curse people out on the phone and you want somebody to help you, you can't get nobody. If your son is dying, then I

don't have anything to do with that – but if you curse me out, you can't get any information, you can't get an ambulance, ok."

Caller: "So, are you telling me that because I used foul language, you're not going to give me an ambulance?"

Robinson: "No, I'm saying that you don't need to use foul language to me if you want me to help you."

In defense of your actions, you stated in your special report dated September 11, 2003, that you had difficulty hearing the caller because the volume was very low and there was noise in the background. However, you could have remedied this problem by turning up the volume. There is no acceptable reason for being abrasive and making offensive comments. Your actions are inexcusable and cast doubt on whether you possess the level of sensitivity and compassion needed to perform the job successfully.

In determining the appropriate penalty, I considered that you were appointed to your position on March 11, 2002. I also considered the following factors of your past disciplinary record: [*See* n.2, *supra*].

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

a. The September 6, 2003 conversation between Employee and a 911 caller.

Following the conclusion of the October 18, 2005 Hearing, I asked the Agency's representative to submit a transcript of the September 6, 2003 conversation between Employee and a 911 caller that was the basis for Employee's 40-day suspension. The transcript was received on November 28, 2005. By using that transcript and the excerpts set forth in the above advance notice, what follows is a reasonable account of the conversation:

Employee: What is the exact location of your emergency?

Caller: My son is a [inaudible].

Employee: Could you speak up, please, ma'am?

Caller: My son is a asthma [inaudible]. [audio distortion].

Employee: Yes? I'm listening. Go ahead. You're talking very low, but go ahead.

Caller: He's out of breath.

Employee: What's your address, ma'am?

Caller: 11 R Street, N.E.

Employee: What is your address, please?

Caller: 11 R Street, N.E., Apartment 303.

Employee: No. 11 R.

Caller: Yes.

Employee: I can't hear you. I can barely hear you, ma'am. That's why I'm asking.

Caller: It's R Street, N.E., it's apartment - -

Employee: Okay. Well, don't get excited. I need – you know.

Caller: Okay. [inaudible] trying to talk loud.

Employee: R Street, N.E. Is that an apartment? Home? An apartment?

Caller: It's an apartment.

Employee: What's the apartment number?

Caller: Eleven - -

Employee: So you're in - -

Caller: It's R Street.

Employee: No. 11 R Street, N.E.?

Caller: That's the building number.

Employee: Say that again.

Caller: That's the building number.

Employee: Okay. Now what's your apartment number?

Caller: Apartment 303.

Employee: Okay. That's what I was trying to have you say, ma'am. What's the phone number there?

Caller: (202) 526-7117 [?]. He can hardly breathe.

Employee: I can't hear you.

Caller: He can hardly breathe. He's an asthmatic.

Employee: What is your phone number?

Caller: (202) 526-7117 [?].

Employee: I need to be able to put it down, ma'am. You don't need to say it that fast.

Caller: [inaudible].

Employee: But see, you need to speak so I can hear you, ma'am.

[Simultaneous conversation].

Employee: You want me to help you, right? What is the phone number, please?

Caller: 526-7117 [?]. [Inaudible].

Employee: Well, see, I can get the dispatcher to call the ambulance soon as I get all the information right quick, okay?

Caller: By the time [you get the information] my son could die.

Employee: Yeah, well, I don't have anything to do with that, ma'am. I need to get the correct information, okay. If I don't have any information, you know, I can't - -

Caller: [Inaudible].

Employee: How old is your son?

Caller: He's fourteen [?]. He's [inaudible].

Employee: Is he conscious and breathing now?

Caller: Yeah.

Employee: The ambulance is on its way. No. 11 R Street, N.E. - -

Caller: What's your name?

Employee: -- Apartment 303. Don't worry about it.

Caller: What do you mean, don't worry about it, bitch.

Employee: That's why you can't get any help, ma'am, when you curse people out on the phone, you want somebody to help you, you can't get nobody. If your son is dying, then I don't have anything to do with that. But if you curse me out, you can't give any information, you can't get an ambulance, okay?

Caller: So, are you telling me that because I used foul language, you're not going to get me an ambulance?

> Employee: No, I'm saying that you don't need to use foul language to me if you want me to help you. I've already said an ambulance is coming to your house. Be sure to have all his medications together. Be sure the apartment building's open. Be sure if you have any pets, put `em outside. The ambulance is on its way. No. 11 R Street, N.E., Apartment 303. Be on the lookout for `em.

b. Summary of testimony.

1. Deborah Trimiar: She is currently a Transcriber for the recently-created Office of Unified Communications (OUC).[3] At the time of the incident in question, she held the same job with Agency.

As a Transcriber, Ms. Trimiar first listens to the raw tape recording that is made of a 911 call. She is able to hear all of the audio channels on which the original tape was made. That is, she can hear both the caller and the 911 operator. She stated that she is able to hear everything "loud and clear". Tr. at 22. She then creates an analog audio transcription of the original tape, which includes the entire 911 conversation. The transcription that she creates in oftentimes used in Agency investigations. Ms. Trimiar noted that she has testified before trial boards and the D.C. Superior Court.

2. John Clayton: He is currently the liaison between the OUC and Agency. In September 2003 he was a Deputy Chief and the Director of Agency's Communications Division. Chief Clayton was the Deciding Official in this matter.

Employee's duties are "to process 911 calls into the computer and dispatch system." Tr. at 24. There are four classifications of 911 calls: Alpha, Bravo, Charlie and Delta. Alpha is the lowest priority, Delta the highest or most critical. The priority assignment refers to the amount of time allotted from the time the call comes in until the person for whom the call is made arrives at either a hospital emergency room or an emergency department of some other medical facility. Employee classified the September 6, 2003 call involving the asthmatic child as "Charlie". *See* Agency Ex. 3, the "Event Information Sheet" that was completed for the call in question.

---

[3] In part, OUC was created to consolidate many of the communications functions that had been performed by both Agency and the Metropolitan Police Department.

Chief Clayton described the processing of a 911 call in September 2003 as follows:

> The citizen dials 911. The call is intercepted by a Metropolitan Police Department call taker, which was [the] primary answering point [or PSAP]. MPD . . . would transfer the caller to either police or fire depending upon their request, medical or fire. If it's medical, a certified EMD, Emergency Medical Dispatcher, will process the information, enter into the CAD [Computer Assisted Dispatch] System a priority or event type depending on the answers that he or she receives from the caller. [Employee performed these duties].
>
> [Further, in responding to calls, the call taker uses the] Clauson Medical Party Dispatch System. It's scripted questions that the call taker asks the caller so that the correct dispatch code can be entered into the CAD System.

Tr. at 27-28.

Agency's disciplinary policy at the time of the September 2003 incident was "progressive". For example, "[if a call taker] entered an incorrect address, it was an automatic five-day suspension for a first offense. For a second offense it could go to a ten-day suspension. A third offense would be [a] huge or lengthy suspension." Tr. at 31.

As set forth earlier, Chief Clayton was the Deciding Official in this matter. In rendering his decision, he reviewed the evidence that was presented to him, including the tape of the September 6, 2003 call (Agency Ex. 1). He also reviewed Employee's prior disciplinary history[4], and considered Employee's time on the job at the time of the incident in question, which was approximately a year and a half. He did not interview Employee or anyone else.

When he reviewed the tape, he heard "a parent calling for her child in distress having an asthma attack. I heard a telecommunicator, Ms. Carolyn Robinson, [being] totally unprofessional." Tr. at 51. What struck him as particularly unprofessional was Employee saying words to the effect that whether or not the caller's child died had nothing to do with her. Additionally, he testified that when the caller asked Employee for her name, she was

---

[4] *See* n.2, *supra*. *See also* Agency Exs. 5, 6 and 7 (official documents pertaining to Employee's prior discipline).

required to give the caller her ID number. She should not have said, "Don't worry about it."

Further, Chief Clayton stated that if Employee had trouble hearing the caller, she could have turned the volume up to its maximum. He noted that Employee had never reported any problems to him concerning the volume controls on her console. Additionally, Agency Ex. 9 is the "Trouble Reporting Journal" that is used to report, among other things, equipment malfunctions. The period covered in the journal is from June 30, 2003 through October 19, 2004. Around the time of the call in question (September 6, 2003), there are no entries reflecting malfunctions with Employee's equipment.

Over a three-year period, Chief Clayton has disciplined approximately 25 to 30 employees for infractions involving 911 calls. Comparing Employee's infraction with the others, he testified that on a scale of one to ten, with one reflecting a particularly egregious infraction, he would have rated her performance on September 6, 2003 as a "one". Nevertheless, he reduced the proposed suspension from 60 days to 40 days. He did so because he "thought that a 40-day suspension would correct [Employee's] deficiencies." Tr. at 37.

3. Lt. Brandon Burke: He is a Watch Commander and has been with Agency for 37½ years. He learned of the 911 call in question when an on-duty police supervisor, Ms. Hammond, brought it to his attention and asked him to listen to the tape of the call. After listening to the tape, his impression was that "It was not one that I would have approved of. It was not what we are taught." Tr. at 98.

Lt. Burke then spoke with Employee, who told him that she had had some trouble with that particular call. Afterwards, he wrote a special report to Fire Chief Adrian Thompson entitled "Disrespect to a caller." (Agency Ex. 10). That document reads as follows:

> On Sunday, September 7th 2003, Ms. Hammond MPD supervisor brought to my attention a call that MPD call-takers were concerned about. I listened to the call on the "Vesta IRR"[5] that she made available to me and I was shocked by what I heard. A caller was calling for a child with an asthma

[5] According to Lt. Burke: "Vesta IRR is the name Verizon has given to their 911 call taking system. The IRR is one function of that that allows us to replay any call that comes in." Tr. at 111.

> attack and the call-taker was giving the caller rude and un-professional (sic) questions and answers. The call was for # 11 R Street N.E.; Apt. 303. It was taken on Saturday September 6th 2003 at about 21:13 hours. The incident number was #FOO3101902. The call-taker was Ms. Caroline (sic) Robinson. I recommend further investigation by the DCFD/EMS.

(footnote added). Lt. Burke did not have the authority to recommend that an adverse action be taken against Employee. He could only recommend that the agency conduct a further investigation into the incident. However, in his opinion Employee's performance warranted disciplinary action.

Lt. Burke was asked to define the term "repetitive persistence". He did so as follows:

> It's talking to a caller in a calm, reassuring manner, trying to reassure them that help is on the way and to get the necessary information that you need such as the address, the telephone number, the nature of the call, section of the city. If you are having trouble getting that information then you are allowed to raise your voice. At one point in the conversation you are allowed to actually shout at the person to try to get their attention.

Tr. at 107-108.

3. David Mott: He is the Supervisory Monitor Instructor. He supervises a staff of four and manages the training program for fire communications operators. This training program lasts eight to 12 weeks. Employee successfully completed that program. *See* Agency Ex. 11, Employee's Emergency Medical Certification Examination.

Mr. Mott was asked to define "repetitive persistence". He did so as follows:

> The technique itself is for a call taker to repeat a phrase over in the same tone and manner to gain control of a [hysterical] caller. . . . [The call taker repeats] a phrase such as "if you want us to help your baby you are going to have to remain calm" or "you are going to have to calm down." By repeating this in the

> same tone and manner in a low voice, it is proven to [calm] the caller down. . . . The change in your . . . tone of voice would depend on how many times you have gone through the repetition to gain control. If at first you don't succeed then you would try a different [voice] level . . . and generally it goes down [in] level until a whisper can grab that person. . . . [T]he more hysterical the caller the quieter you get. This is what we teach.

Tr. at 115-116, 131.

Mr. Mott listened to the tape of the September 6, 2003 call. He described the caller as "difficult" rather than "hysterical". His assessment of Employee's performance in handling that call was as follows: "She lost control of the call and . . . she tried to interact with the caller as opposed to helping. She was giving her opinion of the caller's attitude, which was inappropriate." Tr. at 117. The following colloquy then took place between Ms. Little and Mr. Mott:

> Q: How are operators trained to handle callers like that?
>
> A: We inform them prior to them even taking a first call that they will encounter abusive language, they will be called names, and not to respond to that, that you still must do your job, which is to help that person. We teach them techniques in which to overcome that to help the person rather than engaging them.
>
> Q: Is there anywhere in the training that permits an . . . operator to engage in dialog with a caller about whether or not the caller's conduct is appropriate?
>
> A: No, we have no such teaching or policy.
>
> Q: So when a caller becomes belligerent how is an operator supposed to respond?
>
> A: To remain calm and not to go with the caller, but to remain calm and professional.

Tr. at 117-118. Further, there was no reason for Employee to have responded in the manner she did after the caller called her a bitch. Although he did not characterize Employee's response as a "personal attack" on the caller, he testified: "I said it became personal. She engaged in a conversation with the caller that was outside the bounds of the job." Tr. at 143. Also, according to Mr. Mott, "If a call becomes too difficult to handle, you can transfer the call to your supervisor. That's the policy." Tr. at 134.

Agency Ex. 12 is the course outline from which Employee was trained. Module 2 – Unit 1 of that outline pertains to obtaining information from callers. During cross-examination, Mr. Schwartz focused Mr. Mott's attention on the following samples of "trainee text" from Module 2 – Unit 1 as they related to the call of September 6, 2003:

> Page 2-9, paragraph 3: *Be firm.* You need to maintain control of the call. The best way to deal with difficult callers is to handle them firmly. Just be careful not to become impolite in the process.
>
> Page 2-9, paragraph 4: *Be clear, concise and use accurate speech.* Don't confuse callers by using jargon or difficult terms. Try to speak in a clear voice (so the caller can hear every word). Try to keep your questions, comments, etc. short and to the point. If you dispatch units to respond, tell the caller that help is on the way and will be there soon, don't just tell the caller "they're on the way." However, do this ONLY after you have dispatched assistance to the caller.
>
> Page 2-10, paragraph 3: *Take control of the conversation.* Don't let callers ramble. Direct and focus their attention to answering your questions. Otherwise, you waste precious time.
>
> Page 2-12, paragraph 4: *You need to be quick.* You need to quickly determine the location of the patient/caller and the nature of the emergency being reported. Ask one question at a time and record the answer. Only repeat a question if a caller hasn't understood you or has not provided the information you need to answer your question. Use the questions contained in your protocol. This does not mean you cannot ask additional questions, provided they do not delay dispatch.

(emphasis in original).

4. Employee: During the September 6, 2003 call in question, there was a lot of background noise. Consequently, she had trouble hearing the caller and that is why she had to repeatedly ask her for her address and phone number. Employee was aware that the caller was becoming frustrated when she had to continually repeat this information. Further, the "clicking" noise that can be heard on the tape was Employee's keyboard as she was typing in the information the caller was relaying.

After a fire communications operator gets the caller's address, phone number and chief complaint, she uses the "Pro Q&A", a set of scripted questions that appear on the call taker's computer screen. Employee described the Pro Q&A as follows:

> Pro Q&A is the Clauson method of the event types and how we categorize the calls. So after you get the correct address and the phone number in and you verify it . . . then you hit the Pro Q&A in the computer and that gives you the age, whether they are conscious or breathing. [For the call in question] it's trouble breathing, 14-year-old male, and, then, yes, he's conscious, yes, he's breathing.
>
> Then you hit . . . the event type. Trouble breathing is a Code 6. So you hit Code 6. Then there are special questions under the trouble breathing problems that we are supposed to ask. Then the computer categorizes the call by the way they answer the questions.

Tr. at 158-159.

Employee reviewed the exchange between her and the caller that was set forth in the advance notice, above at pp. 6-7. She then testified as follows:

> The caller was getting upset because I was asking her her address and the phone number and the apartment number repeatedly. So she was wanting me to just hurry up and send her an ambulance. I told her that I needed to get the exact information. So that's when she said: "Well, my son could die while you are trying to get the information or ask me the questions."

> I just explained to her, then when she said: "Okay, what's your name?" I didn't have to give her my name because we are not supposed to give our names. I mean, [I am] just the Ambulance Dispatcher No. 7, and I said that when I answered the call. So I had already given my name, in essence. I had already given her my name when the call was first transferred to me. . . .
>
> So when she said what's my name, I said: "Don't worry about it." Then that's when she said: "What do you mean?" That's when she called me a name. That's when I told her that she didn't have to say that, if she was really concerned about her son getting the ambulance, then she shouldn't have said that to me.
>
> So I just said: "If you are trying to get help, you don't have to talk to me in that fashion." We were already having problems hearing, you know, I was already having problems hearing her. So I was wondering why did she even say that to me in the first place if this was a critical situation. . . .
>
> I had no intentions of insulting or belittling her at all. I was trying to get her to try to calm down and try to understand what my position was and what my job was to get the correct information so I could send her help as soon as possible. We are supposed to . . . put the calls in [in] 60 seconds, but a lot of times it takes more than 60 seconds just to extract the address out of the people. It depends on how cooperative they are.

Tr. at 160-162.

Employee testified that she did not believe that she was rude or disrespectful to the caller. However, in Agency Ex. 13, Employee's December 14, 2003 response to the advance notice, she wrote in pertinent part as follows:

> In retrospect, I do acknowledge that I could have handled some aspects of the call better. I admit that I was a bit frustrated and did not give my name. I should have identified

> myself to the caller beyond giving her my Operator number as I did when I initially answered the call. . . .

Agency Ex. 14 at 1. Further, on cross-examination, the following exchange occurred between Ms. Little and Employee:

> Q: What was your purpose for making that statement: "That's why you can't get any help ma'am."[?]
>
> A: [W]ell, the lady had called me a name. She was disrespectful and rude to me.
>
> Q: So was that why you responded the way that you did?
>
> A: I just responded, I wasn't responding in a belittling or demeaning way. I was just trying to explain to her that wasn't necessary for her to say that to me when she was really trying to get help for her son who was having trouble breathing.

Tr. at 182.

Additionally, Employee testified that the caller in question was not the person that lodged the complaint against her, *viz.*:

> I have never had any complaints about being rude or disrespectful to anyone. . . . [A]s a matter of fact, since I have been there I have never had any complaints from a citizen. This complaint came from the MPD supervisor to Mr. Brandon Burke, who really wasn't even my Watch Commander, two days after the incident occurred.

Tr. at 171.

Regarding Module 2-Unit 1 of the training course (Agency Ex. 12, *supra*), Employee testified that she was taught to be firm with a caller and to always have control of the conversation. Additionally, she defined "repetitive persistence" as follows: "Repetitive persistence is to keep repeating to the caller . . . like when I kept saying "what is your address ma'am", "what is your address?" I kept asking her to repeat her address." Tr. at 164-165.

c. Findings of fact, analysis and conclusions.

D.C. Official Code § 1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority, to "issue rules and regulations to establish a disciplinary system that includes", *inter alia*, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The agency herein is under the Mayor's personnel authority.

On September 1, 2000, the D.C. Office of Personnel (DCOP), the Mayor's designee for personnel matters, published regulations entitled "General Discipline and Grievances" that meet the mandate of § 1-616.51. *See* 47 D.C. Reg. 7094 *et seq.* (2000). Section 1600.1, *id*, provides that the sections covering general discipline "apply to each employee of the District government in the Career Service who has completed a probationary period." It is uncontroverted that Employee falls within this statement of coverage.

Section 1603.3 of the regulations, 46 D.C. Reg. at 7096, sets forth the definitions of cause for which a disciplinary action may be taken.[6] Here, Employee was suspended for 40 days for "Rude and disrespectful behavior toward a citizen." This cause is properly subsumed by either "any on-duty . . . act . . . that interferes with the efficiency or integrity of government operations" or "any other on-duty . . . reason for corrective or adverse action that is not arbitrary or capricious." *See* n.6, *supra.* Further, in an adverse action,

---

[6] The entire list of causes in § 1603.3 is as follows:

> [A] conviction (including a plea of *nolo contendere*) of a felony at any time following submission of an employee's job application; a conviction (including a plea of *nolo contendere*) of another crime (regardless of punishment) at any time following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or job activities; any knowing or negligent material misrepresentation on an employment application or other document given to a government agency; any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law; any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious. This definition includes, without limitation, unauthorized absence, negligence, incompetence, insubordination, misfeasance, malfeasance, the unreasonable failure to assist a fellow government employee in performing his or her official duties, or the unreasonable failure to give assistance to a member of the public seeking services or information from the government.

this Office's Rules and Regulations provide that the agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "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 629.1, 46 D.C. Reg. 9317 (1999).

There is but one salient, and uncontroverted, fact in this case, and that is that on September 6, 2003, Employee engaged in a conversation with a 911 caller. That conversation was set forth above at pp. 7-11. The key question is whether Employee's response to the caller, after the caller told Employee that her son could die, reached the level of "rude and disrespectful behavior" as Agency has alleged.

Let me begin by setting forth my conclusions as they pertain to the call in question prior to the time that the caller told Employee that her son could die: My review of the tape recording clearly shows that there was a lot of background noise, as Employee asserted in her testimony. Consequently, it was difficult for Employee to hear the caller, and thus it was a proper exercise of "repetitive persistence" for Employee to ask the caller to speak up and to repeatedly ask her for her address and phone number. Further, it was proper for Employee to tell the caller that "I can get the dispatcher to call the ambulance [as] soon as I get all the information." Therefore, I conclude that at this point in the conversation Employee performed her duties in a professional manner.

However, her performance after the caller told her that her son could die was anything but professional. Employee's response to that statement was, "Yeah, well, I don't have anything to do with that." Viewed in the best light, that response was unbelievably callous. Shortly after that exchange, the caller asked Employee for her name. Employee responded, "Don't worry about it." Chief Clayton testified that Employee was not required to provide her name, but was required to give her ID number. In both her testimony and in her December 14, 2003 response to the advance notice (Agency Ex. 13, *supra*), Employee confirmed that this was the policy. However, she did not give the caller her ID number. In her testimony, Employee attempted to excuse her response by claiming that she had already provided her ID number when she first answered the call, and therefore felt no need to repeat it. Nonetheless, according to the policy of which Employee admitted knowledge, she should have again given the caller her ID. But she did not, telling the caller instead, "Don't worry about it." Quite simply, this response was rude.

It was at this point that the caller cursed at Employee. Supervisor Mott testified credibly and without contradiction that communications operators are taught that they will encounter abusive language, but that they are not to respond to such language. He further

testified that Employee gave her opinion of the caller's attitude, "which was inappropriate." And indeed it was inappropriate. Given her training, Employee had no business concerning herself with "why did [the caller] even say that to me in the first place." Further, her job was to obtain information as efficiently as possible. It was not to chastise the caller, nor was it to say a second time to the caller, "If your son is dying, then I don't have anything to do with that."

Additionally, although at the end of the call Employee did provide the caller with necessary information regarding the patient's medication and the need to assure that the responders had ready access to the apartment, she did so very quickly and in a dismissive tone.

Therefore, I conclude that Agency has established cause for disciplining Employee for "rude and disrespectful behavior toward a citizen."[7]

d. Whether the penalty was appropriate under the circumstances.

Generally speaking, selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Section 1603.9 of the pertinent regulations, 47 D.C. Reg. at 7097, states that "in selecting the appropriate penalty to be imposed in an . . . adverse action, consideration shall be given to any mitigating or aggravating circumstances that have been determined to exist, to such extent and with such weight as is deemed appropriate."

Here, Employee was suspended for 40 days for "rude and disrespectful behavior toward a citizen." It is important to initially note that the proposed penalty set forth in the advance notice was a 60-day suspension. However, Chief Clayton, the Deciding Official, reduced the penalty to a 40-day suspension. He did so after reviewing the relevant evidence, considering Employee's limited time on the job at the time of this incident (approximately a year and a half), and reviewing her past disciplinary record, which included three prior corrective or adverse actions. Further, he found her performance on September 6, 2003 to be "particularly egregious" when compared with other infractions involving 911 calls for which he was the Deciding Official. Nonetheless, he decided to mitigate the proposed penalty, because he believed that a 40-day suspension "would correct Employee's deficiencies."

---

[7] In her testimony, Employee attached a great deal of significance to the fact that that basis for the charge against her came not from the caller, but from some supervisors who reviewed the call. However, there is no evidence that the charge had to be based on a caller's report.

As set forth earlier at n.2, Employee's prior disciplinary actions were as follows: 1) on March 12, 2002, she was issued a Letter of Admonition for reporting late for duty without calling in; 2) on February 17, 2003, she was suspended for five days for entering an incorrect address for a 911 call into the Computer-aided Dispatch System (CADS); and 3) on June 7, 2003, she was suspended for ten days for AWOL.

Thus, the instant matter involved a first offense by Employee for "rude and disrespectful behavior toward a citizen." However, in the case of an employee with a prior disciplinary record, there is no requirement that in selecting a penalty for a first offense involving a different cause that an agency consider the nature of the prior offenses. Further, as I stated in my September 12, 2005 Order, *supra* at p. 5, there is absolutely no requirement that an agency consider a "nexus" between any prior offenses and the current one.

Including the instant offense, Employee had four disciplinary actions taken against her from March 12, 2002 through February 6, 2004 (the effective date of the instant suspension), a span of less than two full years. For these infractions, she was, in chronological order, 1) issued a Letter of Admonition; 2) suspended for five days; 3) suspended for ten days; and 4) now, suspended for 40 days. Thus, it is clear that Agency has applied "progressive discipline", which is an altogether proper use of its discretion. Given this, and given the fact that the Deciding Official mitigated the proposed 60-day suspension, I conclude that Agency's penalty was appropriate under the circumstances and will not be disturbed.

ORDER

It is hereby ORDERED that Agency's action suspending Employee for 40 days is UPHELD.

FOR THE OFFICE:

DARYL J. HOLLIS, Esq.
Senior Administrative Judge