

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
ERNEST GRANT,	)	
Employee	)	OEA Matter No. 1601-0086-07
	)	
v.	)	Date of Issuance: March 27, 2009
	)	
DISTRICT OF COLUMBIA	)	
METROPOLITAN POLICE	)	
DEPARTMENT,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge
_____	)	
Ernest Grant, Employee <i>Pro-Se</i>	)	
Teresa Hyden, Esq., Agency Representative	)	

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 18, 2007, Sergeant Ernest Grant (“Employee”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the District of Columbia Metropolitan Police Department (“MPD” or “the Agency”) adverse action of suspending him for 15 (fifteen) days without pay. After I was assigned this matter, a prehearing conference was held on October 30, 2007. After considering the parties positions as related during this conference as well as the documents of record, I decided that an evidentiary hearing was unnecessary. Accordingly, I ordered the parties to submit final legal briefs in this matter. The Agency has supplied its brief while Employee has not. The record is closed.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) 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 629.3 *id.* states:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

### ISSUES

1. Whether Agency complied with D.C. Official Code § 5-1031.
2. Whether Agency’s adverse action was taken for cause.
3. If so, whether the penalty was appropriate under the circumstances.

### FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

The following represents the undersigned’s understanding of the relevant events in this matter which is derived from the documents of record. According to the Agency, in its prehearing statement, the charges and specifications that led the Agency to impose the instant adverse action against Employee involve: Employee striking an arrestee with his armament system procedure (“ASP”); Employee failing to complete a PD 313 Arrestee’s Injury/Illness Report in violation of established Agency protocol; and, Employee placing a hat over the arrestee’s head to conceal his injury. See, Agency’s Prehearing Statement at 1.

The event that predicated said charges occurred at approximately 12:30 pm on March 4, 2006. Employee, who was then assigned to the Sixth District Focus Mission Unit as a supervisor, was serving a search warrant of a residence along with two other colleagues. While effectuating this search warrant, Employee utilized his ASP<sup>1</sup> against an eventual arrestee who was located inside the residence when the arrestee did not follow his verbal commands. In doing so, Employee struck the arrestee’s upper torso and head. The strike to the head was allegedly inadvertent. Employee then noticed that the arrestee had suffered a small laceration on his head. Employee then asked the arrestee if he was alright. When the arrestee answered in the affirmative, Employee then wiped away the small amount of blood that had pooled in the area of the laceration and put a band aid on it. Employee then placed a hat on arrestee’s head. Because of the Employee’s actions, arrestee’s medical treatment was delayed for approximately nine

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<sup>1</sup> From what I gather, an ASP is an Agency approved baton or billy club.

hours. Eventually, the arrestee was transported to the Sixth District Police Station for processing and was then sent to the Central Cell block. Subsequently, the arrestee was returned to the Sixth District because of his head wound. At that time, the Sixth District watch commander on duty, Lt. Chase, inspected the injury and questioned the arrestee. Afterwards, Lt. Chase ordered a PD 313 be prepared and sent the arrestee to Greater Southeast Community Hospital for treatment. Afterwards, the arrestee complained that Employee hit him three times with the ASP and had told him that he did not need medical treatment in spite of his requesting same. *See*, Agency's Prehearing Statement at 1 – 4.

Agency contends that Employee's actions have left the MPD and the District government open to potential civil liability. Agency further contends that Employee's actions are all the more egregious given that at the time of the incident, Employee was employed as a Sergeant – a position of leadership within the MPD.

Agency further argues that Employee's conduct in this instance was lacking in that: Employee should have taken the arrestee to get medical treatment for his injuries even though they appeared slight at the time; Employee should not have attempted to conceal the injury by placing a hat over it; and Employee should have filed out a PD 313 Arrestee's Injury/Illness.

Employee admitted to not procuring medical treatment for the arrestee, placing a hat over the arrestee's injury in order to hide the laceration, and failing to prepare a PD 313. Employee made this admission in writing while this matter was being contemplated by the Agency before it issued its final decision. In responding to the imposition of the penalty, Employee sought leniency before the Agency and eventually the undersigned and noted that the situation that gave rise to this matter was potentially dangerous, that the use of force was later determined to be justified given the circumstances, and that the imposition of a suspension would have profound financial impact on Employee's livelihood. While these circumstances do not go without notice to the undersigned, it is something that is outside of my purview to fully consider given the instant circumstances.

Of note, there remains the issue as to whether Agency acted in imposing sanctions within the statutorily mandated time frame imposed by D.C. Official Code § 5-1031 (2005 Supp.), which provides as follows:

Commencement of corrective or adverse action.

(a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.

(b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of Attorney General, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

I find that the event that gave rise to the instant matter first occurred on March 4, 2006. I find that Agency had knowledge of Employee's acts that led to the instant adverse action on that same date. However, a criminal investigation of Employee's actions was instituted by the United States Attorney for the District of Columbia, triggering the tolling clause of D.C. Official Code § 5-1031 (b). The United States Attorney for the District of Columbia issued a letter, dated September 28, 2006, declining criminal prosecution of Employee. *See*, Respondent's [MPD] Answer to the Petition, Tab G, Attachment 32. Agency then commenced its adverse action on February 8, 2007. I find that Agency's action relative to D.C. Official Code § 5-1031 was commenced in a timely fashion.<sup>2</sup>

Employee has admitted in writing to the salient facts that are the subject of the instant adverse action. Further, the Board of the OEA has previously held that an employee's admission is sufficient to meet Agency's burden of proof. *See, Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987). Considering as much, I find that Agency has met its burden of proof in this matter. I further find that the Agency's adverse action was taken for cause. The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office. *See, Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), \_\_ D.C. Reg. \_\_ ( ); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), \_\_ D.C. Reg. \_\_ ( ). Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

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. *See Stokes, supra; Hutchinson, supra; Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996), \_\_ D.C. Reg. \_\_ ( ); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (Sept. 21, 1995), \_\_ D.C. Reg. \_\_ ( ).

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<sup>2</sup> By my calculation, excluding Saturdays, Sundays, and all applicable legal holidays – Agency instituted its action on the 89<sup>th</sup> day.

ORDER

Based on the foregoing, it is ORDERED that the Agency's action of suspending Employee for 15 days is hereby UPHELD.

FOR THE OFFICE:

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ERIC T. ROBINSON, Esq.  
Administrative Judge