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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0064-14
JUAN JOHNSON,)	
Employee)	
)	Date of Issuance: September 13, 2016
v.)	
)	
METROPOLITAN)	
POLICE DEPARTMENT,)	
Agency)	
_____)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Juan Johnson (“Employee”) worked as a Police Officer with the Metropolitan Police Department (“Agency”). On October 23, 2013, Agency issued a Notice of Proposed Adverse Action to Employee advising him that he would be suspended for thirty-five days.¹ Employee was charged with violating Agency’s General Order (“GO”) Series 120.21 for “Conduct Unbecoming of an Officer,” “Prejudicial Conduct,” and “Failure to Obey Orders and Directives.”² The charges stemmed from a June 19, 2013 incident in which Employee was found sleeping inside of his personal vehicle while under the influence of alcohol. In addition, it was reported that several police officers stopped Employee for Driving Under the Influence (“DUI”)

¹ *Petition for Appeal* (March 18, 2014).

² *Id.* Employee admitted to Charge No. 3 (Failure to Obey Orders and Directives) in a November 14, 2013 letter to MPD Director of Human Resource Management, Diana Haines-Walton. Therefore, this Board will not consider this charge.

following a previous arrest on July 18, 2010.³ On December 17, 2013, Employee was served with a Final Notice of Adverse Action. The Prejudicial Conduct charge was dismissed, and he admitted to the Failure to Obey Directives charge. Accordingly, his penalty was reduced to a twenty-five day suspension, with five days held in abeyance.⁴

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on March 18, 2014. In his appeal, he apologized for consuming alcohol while in possession of his off-duty firearm and carrying the weapon in an unauthorized holster.⁵ However, Employee stated that he was not under the influence of alcohol on June 19, 2013 when a fellow police officer, Corporal Timothy White, saw him “passed out” behind the wheel of his car in Greenbelt, Maryland. In addition, he argued that there were insufficient facts to establish that his actions constituted conduct that was unbecoming of an officer. Therefore, Employee asked that this Office reverse the twenty-five day suspension.

The matter was assigned to an OEA Administrative Judge (“AJ”) on January 18, 2014. On November 14, 2014, a Status Conference was held and the parties were subsequently ordered to submit written briefs addressing whether Employee was suspended for cause and whether the twenty-five day suspension was appropriate under the circumstances.⁶

In its brief, Agency argued that Employee was suspended for cause because he violated General Order 120.21 by sleeping inside of his personal vehicle while under the influence of alcohol.⁷ It also argued that Employee admitted to failing to obey directives by drinking beer

³ Employee was charged with DUI, but was not convicted of the offense.

⁴ *Agency Answer to Petition for Appeal* (April 14, 2014).

⁵ *Petition for Appeal*, Attachment (March 18, 2014).

⁶ *Post-Status Conference Order* (November 14, 2014).

⁷ *Agency Brief* (December 19, 2014). *See also Agency Answer to Petition for Appeal*, Tab 1 (April 14, 2014). Corporal White provided a witness statement, which provided that he approached Employee and observed him in the driver’s seat of a 1998 Mercedes and that the engine was running. White further stated that Employee was unresponsive, so he opened the driver’s door and shook Employee until he woke up.

while in possession of his approved off-duty Glock. Lastly, Agency believed that the twenty-five day suspension, with five days held in abeyance for one year, was within the range of penalties allowed under Agency's Table of Offenses and Penalties. In his response brief, Employee reiterated that he was not under the influence of alcohol when Corporal Timothy White found him sleeping in his car on June 19, 2013.⁸ He did not provide any additional arguments in support of his position other than a January 2, 2014 letter to MPD Chief, Cathy Lanier, and a November 13, 2013 letter to MPD Human Resource Director, Diana Haines-Walton. Both letters offered apologies for his actions, but disputed the wording of the charges and specifications levied against him.⁹

The AJ issued an Initial Decision on April 28, 2015. He held that Employee's January 2, 2014 letter to Agency included an admission that he failed to obey General Order 120.21 by carrying a firearm while consuming alcohol.¹⁰ The AJ further relied on Employee's admission that he carried his off-duty weapon in an unauthorized holster. Accordingly, he determined that Employee's actions constituted conduct unbecoming of an officer and prejudicial conduct. He also stated that Agency established that it had cause to take adverse action against him.¹¹ In addition, the AJ concluded that the penalty of a twenty-five day suspension, with five days held in abeyance, was appropriate under the circumstances. He, therefore, upheld Employee's suspension.¹²

Employee disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on June 2, 2015. He argues that there is insufficient evidence in the record to prove that

⁸*Employee Brief* (January 20, 2015).

⁹ *Id.*

¹⁰ *Initial Decision*, p.2 (April 28, 2015).

¹¹ *Id.*

¹² *Id.* at 4.

his actions constituted conduct unbecoming of an officer.¹³ Again, he explains that he was not under the influence of alcohol on June 19, 2013 when he was approached by Corporal White. According to Employee, White should have offered him a Blood Alcohol Content (BAC) test to conclusively prove that he was actually under the influence of alcohol.¹⁴ Therefore, he asks this Board to reduce his punishment to either a five or a seven day suspension.

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:

- (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
- (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
- (c) The findings of the Administrative Judge are not based on substantial evidence; or
- (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

Conduct Unbecoming of an Officer

Agency's General Order 120.21, Table of Offenses and Penalties, provides in pertinent part that the following conduct is prohibited, and shall serve as the basis for an Official Reprimand or Adverse Action: "Drinking "alcoholic beverage" or "beverage" as described in Section 25-101, subsection (5) of the D.C. Code..."while in uniform off duty," or being under the influence of alcoholic beverage when off duty." Moreover, a charge of "Conduct Unbecoming" includes "any acts that are detrimental to good discipline, conduct that would

¹³ *Petition for Review* (June 2, 2015).

¹⁴ *Id.* at 2.

adversely affect the employee's or the agency's ability to perform effectively, or any violations of any law of the United States...."¹⁵

In this case, Employee admitted to drinking two beers on June 19, 2013 while he was watching the NBA finals earlier that evening. The reporting officer, Corporal White, stated that he smelled an odor of alcohol emanating from Employee's vehicle as well as his breath. White also observed Employee stumbling across the parking lot toward his residence after being shaken awake.¹⁶ Although he was not given a BAC test to detect the amount of alcohol in his system, this assertion alone does not divest Employee's duty to exhibit conduct, both on and off duty, in such a manner as to avoid bringing discredit upon himself and agency. There is an overwhelming amount of evidence in the record to support a finding that Employee was under the influence of alcohol while off duty on June 19, 2013. This conduct is unbecoming of a police officer and has the potential to affect Employee's ability to perform his job effectively, especially in light of his past infractions for similar offenses involving the use of alcohol while operating a vehicle. Accordingly, this Board finds that the AJ correctly concluded that the charge of Conduct Unbecoming should be upheld.

Prejudicial Conduct

Employee was also charged with violating General Order 120.21, Attachment A, Part A-25, which prohibits "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." Based on documents presented by Agency, including officer statements and Employee's own admissions, it is clear that his actions met the definition of the aforementioned charge.

¹⁵ General Order Series 120.21, Attachment A, Part A-12.

¹⁶ *Final Notice of Adverse Action* (December 17, 2003).

Agency is a paramilitary entity whose members are sworn to uphold and defend the laws within the District of Columbia; accordingly, members should conduct themselves in an upright manner. As will be discussed below, there is substantial evidence in the record to support the AJ's conclusion that Employee's actions constituted prejudicial conduct.

Appropriateness of Penalty

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). According to *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties. The Court in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised."¹⁷ Consequently, OEA has held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.¹⁸

In *Douglas v. Veterans Administration*,¹⁹ the Merit Systems Protection Board, this Office's federal counterpart, set forth a number of factors that are relevant for consideration in

¹⁷ Additionally, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that although selection of a penalty is a management prerogative, the penalty cannot exceed the parameters of reasonableness. Moreover, *Love* citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981), provided the following: [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.

¹⁸ *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

¹⁹ 5 M.S.P.R. 280, 305-306 (1981).

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;
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.

Agency considered each factor in reaching its decision to suspend Employee. They gave significant weight to the nature and seriousness of the offense; Employee's job level and type of employment; Employee's past disciplinary record; Employee's past work record; the effects of

the offense upon Employee's ability to perform at a satisfactory level and its effect on his supervisors' confidence in her ability to perform assigned tasks.²⁰ Agency's Table of Offenses and Penalties Guide states that the penalty for a first offense for Conduct Unbecoming is suspension for three days to removal. Likewise, a first time charge of Prejudicial Conduct carries a penalty of reprimand to removal.

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.²¹ Based on a review of the record, this Board finds that there was no clear error in judgment by Agency. There is substantial evidence in the record to support the charges of Conduct Unbecoming of an Officer and Prejudicial Conduct. Moreover, the penalty of a twenty-five day suspension, with five days held in abeyance was based on a consideration of the relevant factors outlined in *Douglas*. Consequently, we must dismiss Employee's Petition for Review.

²⁰ Agency Answer to Petition for Appeal, Tab 2 (April 14, 2014).

²¹ *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DISMISSED**.

FOR THE BOARD:

Sheree L. Price, Interim Chair

Vera M. Abbott

A. Gilbert Douglass

Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.