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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
MICHAEL ROBERTS,)	OEA Matter No. 1601-0101-12
RANDY ROGERS,)	OEA Matter No. 1601-0102-12
Employees,)	
)	
v.)	Date of Issuance: February 27, 2014
)	
DISTRICT OF COLUMBIA METROPOLITAN)	
POLICE DEPARTMENT,)	
Agency)	MONICA DOHNJI, Esq.
_____)	Administrative Judge
Michael Roberts, <i>Employee Pro Se</i>		
Randy Rogers, <i>Employee Pro Se</i>		
Brenda Wilmore, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On May 18, 2012, Michael Roberts and Randy Rogers (“Employees”), separately filed their Petition for Appeal with the D.C. Office of Employee Appeals (“OEA” or “Office”) contesting the Metropolitan Police Department’s (“MPD” or “Agency”) decision to suspend them without pay¹. Employees are Officers with MPD, and were charged with a violation of General Order (“GO”) 120.21, Part VIII, and Attachment A-14, and General Order 120.21, Part VIII, and Attachment A-25.² On June 20, 2012, Agency submitted its Answer to Employees’ Petition for Appeal.

Following failed mediation attempts, these matters were separately assigned to the Undersigned Administrative Judge (“AJ”). On November 19, 2014, and on December 17, 2013, separate Status Conferences (“SC”) were held in both matters.³ All parties were present for the scheduled SCs. Following the SCs, the parties agreed that the matters be consolidated for efficiency

¹ Ofc. Roberts was suspended for a total of twenty-one (21) days without pay, with three days held in abeyance. Five (5) days out of the eighteen (18) days he served was from a penalty that was held in abeyance from a prior adverse action.

Ofc. Rogers was suspended for a total of twenty-one (21) days, with six (6) days held in abeyance for one year.

² Agency’s Answer to the Petition, Tab 4 (June 20, 2012).

³ The SC with regards to Ofc. Roberts was initially scheduled for November 18, 2013. While Employee was present for the SC, Agency’s representative was a no-show. Subsequently, the Undersigned issued an Order for Statement of Good Cause to Agency for its failure to attend the November 18, 2013, SC. Agency had until November 26, 2013 to respond. On November 29, 2013, Agency submitted its response to the Show Cause Order; accordingly, the SC in this matter was rescheduled for December 17, 2013.

purposes. Thereafter, these matters were consolidated in an Order dated December 18, 2013. Additionally, this Order also provided the parties with a revised briefing schedule. Both parties have submitted their written briefs. After considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no material facts at issue, and as such, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUES

- 1) Whether Employees' actions constituted cause for adverse action; and
- 2) If so, whether the penalty of suspension is within the range allowed by law, rules, or regulations; and
- 3) Whether Agency engaged in disparate treatment in disciplining Employees.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employees responded to a 911 call on October 11, 2011 at a Target store located at 3100 14th Street, NW, Washington, DC, involving a juvenile shoplifter. When Employees arrived at the scene, they spoke with a Mr. Flores, a Target store employee with regards to the incident. Unsatisfied with Employees' decision not to arrest the juvenile shoplifter, Mr. Flores contacted Sergeant Nevel, an MPD Officer, who was also a part-time Target store employee. Sergeant Nevel was off duty at the time he was contacted by Mr. Flores with regards to the shoplifting. After talking to Mr. Flores, Sergeant Nevel spoke to Employee – Michael Roberts ("Ofc. Roberts"), requesting that he arrest the juvenile shoplifter, as opposed to requesting that he be barred from the store. Ofc. Roberts noted to Sergeant Nevel that because he was also a Target store employee, there existed a conflict of interest. As such, Sergeant Nevel contacted Third District Sergeant Craig Simmons to apprise him of the situation. Employee – Randy Rogers ("Ofc. Rogers") also spoke to Sergeant Simmons who advised him to make the arrest of the juvenile. Employees subsequently placed the juvenile shoplifter under arrest and transported him to the Juvenile Processing Center ("JPC"). Ofc. Rogers completed the PD-379 form used to process the juvenile shoplifter, who was later released into his mother's custody. Ofc. Rogers called the Target store later that evening to gather more information with regards to the incident. Employees immediately prepared a PD 379 and PD 168 for Shoplifting, and a PD 251 classified as Miscellaneous. However, a PD 251 for Shoplifting was not completed until November 6, 2011.

On October 12, 2011, Employees received a 911 call to the same Target store as on October 11, 2011, for yet another shoplifting incident. When Employees arrived at the store, the shoplifters – a Mother and her son, had been detained by Target store employees. The mother also had two (2) other minor daughters with her when she and her son were detained by the Target employees for shoplifting. Employees met with Mr. Ahmed, a Target store employee who indicated to them that he had apprehended the mother and her juvenile son for shoplifting \$766 worth of merchandise. Mr. Ahmed asked Employees if the woman and her son could be arrested. After a conversation with Employees and the other Target employees present, Mr. Ahmed barred the mother and her son from

the store. Employees witnessed this action and requested a copy of the notice barring the shoplifters from the store. Employees did not file any PD 76 or PD 379 regarding the October 12, 2011 incident.

During Agency's investigation into these incidents, Agency received written statements from Mr. Flores, Mr. Ahmed, Sergeant Nevel, Sergeant Simmons and Employees. In an Investigative report, Lieutenant Emerman recommended that Employees be charged for violating General Order 120.21, Section VIII, Part 14; General Order 120.21, Section VIII, Sub-Section A, Part 6; General Order 120.21, Section VIII, Sub-Section A Part 25; and General Order 120.21, Section VIII, Sub-Section A, Part 5, collectively.⁴ Agency issued a Notice of Proposed Adverse Action on February 3, 2012 to Employees. Employees were charged with the following causes of actions:⁵

Charge No. 1: Violation of General Order 120.21, Part VIII, and Attachment A-14, which reads: "Neglect of Duty to which assigned, or required by rules and regulations adopted by the Department."

Specification No. 1: In that, on October 11, 2011, you were dispatched to the Target store, located at 3100 14th Street, Northwest, for a "Shoplifter". Upon arriving on the scene, you and your partner...responded to where Mr. Flores, the Loss Prevention Specialist was holding a juvenile male for shoplifting. Subsequently, the juvenile was placed under arrest and transported to the JPC for processing. However, you left the Target store, without completing an investigation and obtaining sufficient information to process the arrest (i.e., items stolen, cost etc...).⁶ Furthermore, your failure to obtain this information prior to leaving the Target store hindered you from completing the arrest; until you contacted and interviewed Mr. Flores via telephone to obtain the information.

Specification No. 2: In that, on October 11, 2011, you processed an arrest of a juvenile for Shoplifting from the Target store and failed to complete a PD 251 (Incident-Based Event Report) for that offense; as required.⁷

Specification No. 3: In that, on October 12, 2011, you responded to the Target store for a suspected shoplifter. Upon completion of the on-scene investigation, a determination was made to bar the subjects from the business. However, you failed to complete a PD 76, and/or a PD 379 C for the four (4) subjects involved; as required.⁸

Charge No. 2: Violation of General Order 120.21, Part VIII, and Attachment A-25, which reads: "Any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or

⁴ Agency's Answer, *supra*, at Tab 1.

⁵ Agency's Answer, *supra*, at Tab 2.

⁶ Employees were both charged with is specification, however, Ofc. Rogers was not charged with interviewing Mr. Flores at a later time, in order to get complete information to process the arrest.

⁷ Both Employees were charged with this specification.

⁸ Both Employees were charged with this specification.

involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force.”

Specification No. 1: In that, on October 11, 2011, you spoke with Sergeant Dustin Nevel via telephone regarding the circumstances surrounding not placing a juvenile under arrest for shoplifting. During the conversation, you informed Sergeant Nevel that MPD Policy requires that juveniles detained for shoplifting on a first offense are to be barred and not arrest[sic]. You made this statement knowing that it was not the policy of the MPD.⁹

Specification No. 1: In that, on October 11, 2011, you informed Mr. Flores that it was the MPD policy to bar juveniles for the first offense of shoplifting rather than arrest and once that subject was released you could not obtain an arrest warrant. You made this statement knowing that it was not the policy of the MPD; in an attempt to avoid the arrest.¹⁰

Specification No. 2: In that, on October 12, 2011, you responded to the Target store for suspected shoplifters. Upon arriving on the scene, you were informed by Mr. Mazin Ahmed (Target Security), that four (4) subjects were stopped for shoplifting. Mr. Ahmed advised you that he wanted the subjects arrested and you proceeded to persuade him (Mr. Ahmed) to rescind his arrest request and bar the subject. However, you were given a standing order on October 11, 2011, by Sergeant Craig Simmons, advising you that if Target security requested that an individual be arrested; then you were obligated to do so, if sufficient probable cause existed. As such, you failed to follow the order and negotiated with the Target staff to bar and release the subjects.¹¹

Thereafter, on April 11, and April 21, 2012 respectively, Agency issued a Final Notice of Adverse Action, suspending Ofc. Roberts for sixteen (16) workdays, with three (3) days held in abeyance for a period of twelve (12) months. In addition, Agency noted that Ofc. Roberts would also serve the five (5) days suspension that was held in abeyance regarding another matter, for a total of eighteen (18) days.¹² With regards to Ofc. Rogers, he was suspended for twenty-one (21) workdays, with six (6) days held in abeyance for a period of one (1) year.¹³

Employee's Position

Employees contend that with regards to Charge No.1, Specification No.1, the juvenile was arrested and transported to the JPC. Employees explain that at the JPC, the juvenile was processed and diverted to his mother. Employees further explain that, Agency contradicted itself when it stated that Employees failed to obtain enough information to process the arrest of the juvenile, and yet, later noted that Employees did process the juvenile after the arrest. Employees also maintained that, their

⁹This specification only applied to Ofc. Roberts.

¹⁰This specification only applied to Ofc. Rogers.

¹¹This specification only applied to Ofc. Rogers.

¹² Agency's Answer, (1601-0101-12), at Tab 4.

¹³ Agency's Answer, (1601-0102-12), at Tab 4.

calling of the Target store to get additional information after the arrest on October 11, 2011, is considered a follow-up investigation as stated in GO 401.01.

With regards to Charge No. 2, Specification No. 2, Employees aver that a PD 251 was initiated on November 6, 2011 for Shoplifting, and the report was completed before the end of their tour, in compliance with GO 401.01. Employees maintain that in compliance with Agency's policy for completing a PD 251, the report is only initiated once report numbers are obtained from the dispatcher, and this happened on November 6, 2011. Employees maintain that the Central Complaint Number 11-163-525 was obtained.¹⁴

For Charge No.1, Specification No. 3, Employees argue that there was no police involvement with regards to stopping the juvenile. Employees explain that on October 12, 2011, the Target store employees stopped and barred the shoplifters from their location. Employees further note that the Barring Notices for the shoplifters was completed by the Target store employees, and that pursuant to CIR-13-16 (Barring Notices), *MPD members may assist business owners in service of barring notices upon individuals by acting as a witness and by maintaining peace.* (Emphasis added).¹⁵

As to Charge No. 2, Employees state that there is no evidence to support these claims. Employees states that the statements made by Sergeant Nevel were fabricated. Employees explain that Sergeant Nevel gave an unlawful order to arrest a juvenile when he knew it did not meet the requirements of D.C. Code (Probable Cause Misdemeanor).¹⁶

Employees also highlight that Agency failed to follow its own policy with regards to discipline. Employees explain that pursuant to GO 120.21, [d]iscipline shall be prompt, consistent, fair, and equitable, and the department shall utilize progressive discipline as appropriate. Employees maintain that a fair investigation would have revealed that no misconduct was committed, and that even if Agency's accusations had merit, Agency did not attempt to utilize any type of progressive discipline. In addition, Employees note that Shoplifting is a Probable Cause Misdemeanor, and as such, any arrest has to be based on probable cause. Employees maintain that, an arrest based on probable cause must be accompanied by at least one of the following conditions: unless immediately arrested: 1) the accused may not be apprehended; 2) the accused may cause injury to others; and 3) the accused may dispose of, tamper with, or destroy evidence.¹⁷ Employees explain that 1) the juvenile shoplifter's legal Guardian had been contacted and she was en-route to provide the Target store with the same documentations that were given to the JPC, which allowed the juvenile shoplifter to be diverted by the JPC, to his legal Guardian; 2) the juvenile shoplifter was stopped for Shoplifting; and 3) the store had recovered their property.¹⁸

Employees contend that from 2008 through 2014, there has not been a single PD 76 or PD 379-C completed for the Target store in question. Additionally, Employees note that per Agency's own admission, no employees have been disciplined for failing to complete a PD 76 or PD 379-C.

¹⁴ Employees brief (January 27, 2014).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.* at Exhibit #9.

¹⁸ Employees Brief, *supra*.

Employees assert that Agency took two (2) separate incidents that occurred on two (2) separate dates and combined them in an attempt to establish a pattern of misconduct.¹⁹

In the course of Agency's investigation into the incidents, Ofc. Roberts stated that he did not tell Mr. Flores on October 11, 2011, that MPD policy prevents them from arresting a juvenile shoplifter on a first offense. Ofc. Roberts also stated that he never informed Sergeant Nevel that MPD policy prevent them from arresting a juvenile shoplifter on a first offense. Ofc. Roberts noted that they collected all necessary information needed to process the juvenile shoplifter once they arrived on the scene. Ofc. Roberts noted that he classified the October 11, 2011, PD 251 as "Miscellaneous" because he didn't believe a PD 251 would be completed for shoplifting because it was two separate incidents. Further, Ofc. Roberts notes that Mr. Ahmed never asked for the shoplifters to be arrested, and that they asked Mr. Ahmed what he wanted them to do, such as bar the individuals. Ofc. Roberts stated that they did not complete PD 76 or 379 C for the October 12, 2012, incident.²⁰

Ofc. Rogers stated that he obtained all the pertinent information for the shoplifting arrest such as the value of the items, victims/employees. He explained that he called the Target store and spoke with the loss prevention employee in order to obtain pertinent information about the arrest. Ofc. Rogers averred that Mr. Ahmed did not ask him to arrest the alleged shoplifters. Ofc. Rogers asserts that during the October 11, 2011, incident, he did not persuade the store security to not prosecute the shoplifter. Ofc. Rogers explained that he gave them the option and that it was going to be a warrant case.²¹

Agency's Position

In its submissions to this Office, Agency submits that Employees' conduct was a violation of GO 120.21. Agency explains that with regards to the October 11, 2011 shoplifting offense, both Employees were charged with neglect of duty for leaving the Target store without completing an investigation and obtaining information to process the arrest. Agency also asserts that Employees failed to timely complete a proper PD 251 in reference to the arrest until one (1) month after the incident. With regards to the October 12, 2011 incident, Agency notes that Employees failed to complete a PD 76 and/or PD 379-C for the barring of the subjects from the Target store.²²

Furthermore, Agency contends that Ofc. Roberts engaged in prejudicial conduct, in violation of GO 120.21 when on October 11, 2011, he improperly informed Sergeant Nevel that MPD policy required that juveniles detained for shoplifting on the first offense be barred as opposed to arrested. Agency notes that this is not its policy.²³

Agency also states that Ofc. Rogers engaged in prejudicial conduct when on October 11, 2011, he informed Mr. Flores that once the subject was released, an arrest warrant could not be obtained. Agency also maintains that regarding the October 12, 2011, incident, Ofc. Rogers was well aware of the order to arrest if probable cause was established per directives from Sergeant Simmons

¹⁹ *Id.*

²⁰ Agency's Answer at Tab 1.

²¹ *Id.*

²² Agency's Brief, *supra*.

²³ *Id.*

the previous day, yet, Ofc. Rogers negotiated with, and finally persuaded a reluctant Mr. Ahmed to bar four (4) subjects, instead of arresting them. Agency explains that the elements of shoplifting were met and there was no indication that any identifying information was provided that would have obviated the necessity of an immediate apprehension. Therefore, the mother and juvenile son should have been arrested.

Agency additionally submits that, D.C. Official Code § 23-581 allows law enforcement officers to make arrests without a warrant for probable cause misdemeanors such as Shoplifting. Agency explains that both incidents met the criteria for making an arrest for Shoplifting as defined in D.C. Official Code § 22-3213. Agency further explains that on October 11, 2011, the juvenile was observed with the merchandise by Mr. Flores outside of the Target store, he attempted to flee and was apprehended by Mall security and then detained by Mr. Flores. The stolen property was valued at \$49.99 and was recovered from the juvenile shoplifter's possession, and on October 12, 2011, a juvenile and his mother were observed and apprehended with stolen merchandise worth \$766.64. Agency notes that because Shoplifting is considered a probable cause misdemeanor, once Employees arrived on the scene on October 11, 2011, and established that a Shoplifting offense had occurred, and that the juvenile's identifying information was strictly by word of mouth, they should have placed him on arrest because they had probable cause that a crime had been committed, and that unless immediately arrested, the juvenile most likely would not later be apprehended. Agency maintains that the lack of identification of the juvenile shoplifter could have hindered his apprehension at a later time, had the information provided proved to be false or inaccurate.²⁴

Agency submits that there were no PD 76s completed for incidents at the Target store for the period of January 2, 2011 through October 31, 2011. Agency explains that the retention period for PD 76s was two (2) years before being disposed. And since PD 76s were not captured in Agency's automated database until the middle of 2013, they had to be hand counted. There were 1,464 PD 76s completed during the period in question. Agency also notes that there were 3,286 PD 379-Cs completed during the relevant period, however, due to the fact that there was insufficient manpower to cull through them individually, it could not determine whether there were any prepared in reference to incidents at the Target store. However, Agency notes that for the period of January 1, 2011, through October 30, 2011, there were no adverse actions for failure to complete a PD 76 or PF 379-C that resulted in a penalty.²⁵

Agency also highlights that the juvenile shoplifter for the October 11, 2011, incident who was arrested was not prosecuted, but rather diverted and released to his parent. With regards to the penalty, Agency asserts that according to the Table of Offenses and Penalty, suspension was an appropriate penalty and it was within the range of the penalty guideline.²⁶

1) Whether Employees' actions constituted cause for suspension

According to the record, Agency's decision to suspend Employees was based upon these enumerated causes: 1) Violation of General Order 120.21, Part VIII, and Attachment A-14, which reads: Neglect of Duty to which assigned, or required by rules and regulations adopted by the Department; and 2) Violation of General Order 120.21, Part VIII, and Attachment A-25, which

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

reads: 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.

A. Charge No. 1: Violation of General Order 120.21, Part VIII, and Attachment A-14, which reads: Neglect of Duty to which assigned, or required by rules and regulations adopted by the Department.

For Specification No. 1, under this charge, Agency asserts that, on October 11, 2011, Employees were dispatched to the Target store, located at 3100 14th Street, Northwest, for a “Shoplifter”. Upon arriving on the scene, Employees responded to where Mr. Flores, the Loss Prevention Specialist was holding a juvenile male for shoplifting. Subsequently, the juvenile was placed under arrest and transported to the JPC for processing. However, Employees left the Target store, without completing an investigation and obtaining sufficient information to process the arrest (i.e., items stolen, cost etc...). Furthermore, Agency notes that, Employees’ failure to obtain this information prior to leaving the Target store hindered them from completing the arrest; until Ofc. Rogers contacted and interviewed Mr. Flores via telephone to obtain the information.

Pursuant to the District of Columbia Metropolitan Police Department GO-SPT-401.01, Part IV, A-5, members shall investigate and complete the appropriate reports and paperwork as outlined in the GO in all incidents or crimes resulting in an arrest. GO-SPT-401.01, Part IV, D further notes that, it shall be the responsibility of the first member on the scene, regardless of his/her assignment, to begin conducting the preliminary investigation after safety precautions have been taken and the investigation does not interfere with the criminal case or defeat the ends of justice. GO-SPT-401.01, Part V, A-(1-8) defines the preliminary investigation as the combination of those actions that should be carried out, as soon as possible, after the first responding member arrives on the scene. It provides in relevant parts that, at minimum, the first member on the scene shall determine whether a crime has been committed and, if so, the exact nature of the offense or incident; determine the identity of the suspect and make an apprehension when appropriate; identify, interview, and take statements from all victims, witnesses and suspects to determine in detail the exact circumstance of the offense or incident; and take any other action that may aid in resolving the situation or solving the crime as directed by a supervisor. GO-SPT-401.01, Part V, B also states in pertinent parts that, the purpose of the preliminary investigation is to determine the facts of an offense or incident. It goes on to note that, the reports generated from the preliminary investigation should contain the information gathered at the scene, to include a description of, and value assigned to, any property that was stolen, damaged or destroyed; the location of any stolen property that has been recovered; and the time, date and location where the crime or incident occurred.

Here, relying on the abovementioned provisions, I find that Agency has not provided this Office with sufficient evidence in support of this specification. Agency simply asserts that Employees left the Target store without completing an investigation and obtaining sufficient information to process the arrest, noting that Employees’ failure to obtain this information prior to leaving the Target store hindered them from completing the arrest. However, Agency fails to demonstrate the exact type of investigation that Employees failed to complete – preliminary or follow-up investigation. Although Employees provided contradictory statements with regards to whether or not they obtained pertinent information about the arrest before leaving the Target store, this is reasonable since Ofc. Roberts may not have known that Ofc. Rogers had collected the

information needed. Further, apart from noting that Ofc. Rogers called the Target store to interview Mr. Flores after the arrest, there is no evidence in the record to prove that there was an issue with processing the arrest once the juvenile was taken to the JPC. Nor has Agency submitted evidence to show that Ofc. Rogers called the Target store before the juvenile was processed. Moreover, GO-SPT-401.01, Part V, C highlights that, the members can conduct a follow-up investigation by interviewing victims to accumulate sufficient information and evidence that corroborates probable cause for affecting an arrest. Ofc. Roberts noted that the call to the Target store was a follow-up investigation. Additionally, GO-SPT-401.01, Part V, C, does not specify when a follow-up investigation should be conducted.

Furthermore, GO-SPT-401.01, Part V, B states that, the purpose of the preliminary investigation is to determine the facts of an offense or incident. Employees knew the nature of the offense and facts surrounding the offense, hence; 1) their ability to determine that a crime had occurred – shoplifting; 2) that it was a probable cause misdemeanor case; 3) and that they did not have probable cause to arrest the juvenile shoplifter since he had identified himself. Further, the juvenile’s mother was on her way to the Target store with his identification information; the Target store had recovered the stolen items; and there was no evidence that the juvenile shoplifter would cause injury to others. Employees had all of this information while still at the scene of the crime. I find that, had Employees not have all the relevant facts to make the decision for arrest while at the crime scene, they would not have been able to have a conversation with Sergeants Nevel and Simmons about the incident.

Also, while this section of the GO-SPT-401.01, Part V, B notes that the *reports* generated from the preliminary investigation should contain the information gathered at the scene; a description, value of any property that was stolen; the location of any stolen property that has been recovered; the time, date and location where the crime or incident occurred; this section is irrelevant to this specification as Agency does not make mention of any reports. (Emphasis added). Moreover, the PD 379 completed by Ofc. Rogers accurately identifies the item stolen, and cost. Consequently, I find that Agency’s submitted documents do not corroborate the above-referenced specification, and as such, I further find that Agency has not met its burden of proof for this specification.

Specification No. 2, under this charge highlights that, on October 11, 2011, Employees processed an arrest of a juvenile for Shoplifting from the Target store and failed to complete a PD 251 (Incident-Based Event Report) for Shoplifting; as required. GO-SPT-401.01 Part V, I-2 states that the reporting member is responsible for ensuring that the report is accurate and legible prior to submitting it to a supervisor, however, it does not specifically provide a time limit upon which a member should have a PD 251 completed by. GO-SPT-401.01, Part V, I-3 provides that all reports *shall have a valid CCN number*. (Emphasis added). Ofc. Roberts maintained that, he filed the PD 251 on November 6, 2011, by the end of his tour of duty, after receiving the CCN number. Agency has not offered any evidence to contradict Ofc. Robert’s assertion that he only received the CCN number for the Shoplifting on November 6, 2011. Moreover, GO-SPT-401.01, Part V, I-4 also puts the responsibility to ensure that reports are timely submitted, on the supervisory officials. Pursuant to GO-SPT-401.01, Part V, I-4, the Supervisory official *shall* be held responsible for collecting completed reports and reviewing them for legibility, accuracy and completeness at the end of each tour of duty. It goes on to note that, when a discrepancy is found in a report, the Supervisor *shall counsel* the reporting member and require the member to make the necessary corrections. (Emphasis added). Lieutenant Emerman, states in the investigative report that, Employees submitted their

reports to multiple officials (Sergeant Maradiaga and Sergeant Simmons), and as such, there was no way for Sergeant Simmons to know that a PD 251 had not been completed. I disagree with this assertion. Sergeant Simmons had knowledge of the Shoplifting incident from the start and should have been expecting a PD 251 from Employees. Consequently, upon receiving the PD 379, PD 252, and PD 168, from Ofc. Rogers, Sergeant Simmons had the duty to inquire as to completion of the PD 252. Agency's submitted documentation does provide evidence to portray that Employees' supervisor complied with the provisions of GO-SPT-401.01, Part V, I (4), referenced above. Accordingly, I find that Agency has not met its burden of proof with regards to this specification.

According to specification No.3, under this charge, on October 12, 2011, Employees responded to the Target store for a suspected shoplifter. Upon completion of the on-scene investigation, a determination was made to bar the subjects from the business. However, Employees failed to complete a PD 76, and/or a PD 379 C for the four (4) subjects involved; as required. Agency, by its own admission stated that there were no PD 76s completed for incidents at the Target store for the period of January 2, 2011 through October 31, 2011, and there were no adverse actions brought against its members for failure to complete a PD 76 that resulted in a penalty. Agency also noted that, while there were about 3,286 PD-379-Cs completed for the period of January 2, 2011, through October 30, 2011, it could not determine whether there were any prepared in reference to incidents at the Target store in question, due to the volume and insufficient manpower to go through the reports individually. However, Agency admits that for the period of January 2, 2011, through October 30, 2011, there were no adverse actions for failure to complete a PD 379-C that resulted in a penalty. Consequently, I conclude that, by instituting an adverse action and disciplining Employees for failing to complete a PD 76 and PD 379-C for the October 12, 2011, incident, Agency has engaged in disparate treatment, and therefore, cannot utilize this specification to discipline Employees.²⁷

Given the totality of the circumstances, and based on the above reasoning, I find that Agency has not met its burden of proof by a preponderance of the evidence with regards to Charge No. 1, and therefore, Agency cannot utilize this charge to commence adverse action against Employees.

B. Charge No. 2: Violation of General Order 120.21, Part VIII, and Attachment A-25, which reads: 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 1, under Charge No. 2, only applies to Ofc. Roberts and it provides that, on October 11, 2011, Ofc. Roberts spoke with Sergeant Dustin Nevel via telephone regarding the circumstances surrounding not placing a juvenile under arrest for shoplifting. During the

²⁷ OEA has held that, in order to establish disparate treatment, an employee must show that he worked in the same organizational unit as the comparison employees. They must also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period. See *Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, Opinion and Order on Petition for Review (December 12, 2011), citing *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, Opinion and Order on Petition for Review (May 6, 2009); *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).

conversation, Ofc. Roberts informed Sergeant Nevel that MPD Policy requires that juveniles detained for shoplifting on a first offense are to be barred and not arrested. It further notes that, Ofc. Roberts made this statement knowing that it was not the policy of the MPD. In his statements throughout his appeal process, Ofc. Roberts has maintained that he did not inform Sergeant Nevel or Mr. Flores that MPD policy prevents them from arresting a juvenile shoplifter on a first offense.

Although an Evidentiary Hearing was not conducted in this matter to assess the credibility of Ofc. Roberts and Sergeant Nevel in reference to this issue, I find Sergeant Nevel's recount of the events contradictory. Sergeant Nevel stated that after speaking to Ofc. Roberts about arresting the juvenile shoplifter, he, Sergeant Nevel, contacted Sergeant Simmons to apprise him of the situation. However, in the statement submitted by Sergeant Simmons, he only mentions that Ofc. Roberts indicated to him that the General Orders state that a subject can be barred from the store instead of making an arrest and that it was at the officer's discretion as to which way to proceed. Had the conversation between Ofc. Roberts and Sergeant Nevel been different from what Sergeant Simmons stated, it is probable that he would have mentioned it in his statement. Sergeant Simmons spoke with Sergeant Nevel and Ofc. Roberts, and at no time did he state that he was informed by Ofc. Roberts or Sergeant Nevel that Ofc. Roberts had advised that MPD Policy requires that juveniles detained for shoplifting on a first offense are to be barred and not arrested. Instead, Sergeant Simmons' statement corroborates Ofc. Roberts' version of the conversation that he had with Sergeant Nevel. Given the totality of the circumstances and the documents on record, I find that Ofc. Roberts' and Sergeant Simmons' version of the incident are more credible. As such, I further find that, Agency has not met its burden of proof for this specification.

Specification No. 1, under Charge No. 2, only applies to Ofc. Rogers. Here, Agency asserts that, on October 11, 2011, Ofc. Rogers informed Mr. Flores that it was the MPD policy to bar juveniles for the first offense of shoplifting rather than arrest and once that subject was released you could not obtain an arrest warrant. Agency explained that Ofc. Rogers made this statement knowing that it was not the policy of the MPD; in an attempt to avoid the arrest. Ofc. Rogers maintains that he did not inform Mr. Flores that MPD policy prevents them from arresting a juvenile shoplifter on a first offense. According to the statement Agency collected from Mr. Flores, he stated that both Employees informed him that since it was the first offense for the juvenile shoplifters, they couldn't arrest him.²⁸ However, only Ofc. Rogers was charged with this specification. Therefore, I find that, by only charging Ofc. Rogers and not charging Ofc. Roberts with this specification, Agency engaged in disparate treatment. Employees work in the same organization unit - they are partners; they responded to the same incident at the Target store; they were disciplined by the same official; and during the same period of time. Thus, I conclude that, because Agency engaged in disparate treatment, Agency cannot use this specification in disciplining Ofc. Rogers.

Specification No. 2, under Charge No. 2, also applies only to Ofc. Rogers. This specification provides that, on October 12, 2011, Ofc. Rogers responded to the Target store for suspected shoplifters. Upon arriving on the scene, he was informed by Mr. Mazin Ahmed that four (4) subjects were stopped for shoplifting. Mr. Ahmed advised him that he wanted the subjects arrested, but Ofc. Rogers persuaded him (Mr. Ahmed) to rescind his arrest request and bar the subject despite the standing order given on October 11, 2011, by Sergeant Craig Simmons. The standing order from Sergeant Simmons advised that if Target store security requested that an individual be arrested, then Ofc. Rogers was obligated to do so, if sufficient probable cause existed. As such, MPD asserts that

²⁸ Agency's Answer, Tab 1, Attachment 1 and 2.

Ofc. Rogers failed to follow the order and negotiated with the Target store staff to bar and release the subjects.

Ofc. Rogers asserted that, he did not persuade Mr. Ahmed to bar the suspects. He explained that, he simply provided Mr. Ahmed with his options, given the situation. Because a member cannot bar a subject, the ultimate decision of whether or not to bar a suspect lies with the store, and Mr. Ahmed made the decision to bar the suspects, and not Ofc. Rogers. Further, at no time does Mr. Ahmed state that he was persuaded by Ofc. Rogers to bar the suspects. He noted in his statement that after he asked Employees if they could arrest the suspects, they stated that because the suspects were comprised of a mother, son and daughters with no father, “if we arrested the mother, we will have to take the son and the two daughters as well for the fact that they are juveniles, and we have to pull more officers from the street to be able to transport all of them....Are you sure you want to prosecute the mother? If so, why the children have to pay for it?....We [Mr. Ahmed] can bar them after you talk to them if you want to.” (Emphasis added).²⁹ Additionally, a review of the surveillance tape submitted into evidence by Ofc. Rogers shows that, apart from Employees being on the scene, there was another MDP officer (female officer) present at the scene at the same time as Employees.³⁰

Further, apart from Mr. Ahmed’s statement, Agency has not advanced any statement to corroborate Mr. Ahmed’s statements with regard to this specification. Moreover, Mr. Ahmed noted that he was advised by both Employees to bar the suspects, however, only Ofc. Rogers was charged with this specification. Consequently, I again conclude that Agency engaged in disparate treatment in charging Ofc. Rogers and not charging Ofc. Roberts with this specification. Thus, I find that, because Agency engaged in disparate treatment, Agency cannot use this specification in disciplining Ofc. Rogers.

Based on the record, and the reasoning above, I find that Agency has not met its burden of proof by a preponderance of the evidence with regards to Charge No. 2, and therefore, Agency cannot utilize this charge to commence adverse action against Employees.

2) *If so, whether the penalty of suspension is within the range allowed by law, rules, or regulations*

In determining the appropriateness of an agency’s penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).³¹ According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties (“TAP”); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. In the instant case, I find

²⁹ Agency’s Answer, Tab 1, Attachment 3.

³⁰ Petition for Appeal (May 18, 2012). The surveillance tape does not have audio.

³¹ See also *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

that Agency has not met its burden of proof for the above-referenced charges, and as such, Agency cannot rely on these charges in disciplining Employees.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of suspending Employees from service is **REVERSED**; and
2. Agency shall reimburse Employees all back-pay, benefits lost as a result of their suspension; and
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Administrative Judge