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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
WIDMON BUTLER,	)	
Employee	)	OEA Matter No. 1601-0048-11
	)	
v.	)	Date of Issuance: February 15, 2013
	)	
D.C. METROPOLITAN POLICE DEPARTMENT,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

David Branch, Esq., Employee Representative
Ronald B. Harris, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On December 15, 2010, Widmon Butler ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Metropolitan Police Department's ("MPD" or "Agency") decision to suspend him for fifteen (15) days, with five (5) days held in abeyance. Employee was charged with violating the District Personnel Manual ("DPM") § 1603.3. Employee served a ten (10) days suspension effective December 13, 2010. On December 20, 2010, OEA notified Agency of Employee's Petition for Appeal in this matter. Agency submitted its Answer to Employee's Petition for Appeal on January 24, 2011.

I was assigned this matter on July 26, 2012. On August 22, 2012, I issued an Order directing the parties to attend a Status Conference on September 19, 2012. Employee's representative was present for the Status Conference, but the Agency Representative did not appear. Thereafter, I issued an Order for Statement of Good Cause. Agency was ordered to submit a statement of good cause based on its failure to attend the September 19, 2012, Status Conference. Agency had until September 28, 2012, to respond. On October 10, 2012, Agency responded to the Statement of Good Cause, stating that it did not receive notice of the September 19, 2012, Status Conference. On October 12, 2012, I issued another Order scheduling a Status Conference for November 13, 2012. Both parties were present for the November 13, 2012, Status Conference. On November 14, 2012, I issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status Conference. Both parties have now 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 issues in dispute, 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 Employee's actions constituted cause for adverse action; and
2) If so, whether the penalty of fifteen (15) days suspension, with five (5) days held in abeyance, is within the range allowed by law, rules, or regulations.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee was assigned to Agency's Medical Services Branch ("MSB") as a Medical Claims Examiner. His job responsibilities include classifying injuries as Performance of Duty ("POD")[1] or Non Performance of Duty ("Non-POD").[2] On May 30, 2010, an individual resisting arrest spat on Officer X's face and told him that she had AIDS. Officer X was treated on the scene by EMS and reported to the Police and Fire Clinic ("Clinic") the following day. The Clinic prescribed medication, which caused Officer X to become ill, and he was placed on sick leave. A PD-42 Injury or Illness Report was submitted to the Director of the MSB for review and determination. Employee was assigned to Officer X's claim and he prepared a draft of his findings, where he recommended that the illness be classified as Non-POD. Employee submitted his recommendation to the Interim Director of the MSB, Paul Quander.[3] Upon review of the recommendation submitted by Employee, Mr. Quander, asked Employee to change the classification from Non-POD to POD per prior instruction guidelines. Mr. Quander's directive was delivered in

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[1] General Order PER 100.11, III-18a defines POD injuries as "Injury/illness that arises in the course of a member performing his/her duties as a police officer. A member can sustain a POD injury/illness while on or off duty:

> a. An on-duty POD injury/illness is sustained when a member was legally on duty, as evidenced by time and attendance records, and engaged in work for the Department…"

[2] General Order PER 100.11, III-15 defines Non-POD injuries as "Injury or illness that does not arise out of, and in the performance of, a member's duty as a Metropolitan Police Officer.

[3] Mr. Quander was also Employee's supervisor.

writing to Employee on the recommendation Employee submitted to Mr. Quander, followed by an email dated June 27, 2010, which reads as follows:

> "Mr. Butler – the above case is another example of your failure to follow instructions. In exposure cases where the member is exposed to bodily fluids and PFC providers prescribe prophylactic medications the ruling is POD. The medications in most cases make the members very ill. If PFC is prescribing medications then the PFC is treating the member for a work related injury or illness. My instructions, evidence by the attached email sent approximately 2 two weeks ago could not have been clear. Change this to POD." [4]

This matter was referred to Lieutenant Felicia Lucas of the MSB, who determined that an investigation be conducted as to Employee's failure to adhere to Mr. Quander's previous instructions regarding the classification of injuries or illnesses.[5] On September 9, 2010, Agency issued its Notice of Proposed Adverse Action to Employee. Following an investigation, the Deciding Officer submitted an investigative report sustaining the allegations against Employee, and recommended that Employee be suspended for thirty (30) days. A meeting was later held with Employee's attorney and Commander George Kucik of the Forensic Science Services Division. Per Commander Kucik's recommendation, on November 15, 2010, Agency issued its Final Agency Decision ("FAD") suspending Employee for fifteen (15) days, with five (5) held in abeyance, for the following charge and specification:

Charge:

> Violation of D.C. Personnel Management Title 16; Section 1603.3 (f)(4) which states, "Insubordination."

Specification #1: (DISMISSED)

> Mr. Butler was directed by Mr. Quander to rule cases of blood borne pathogen exposure as Performance of Duty when the member is prescribed medication from the Police and Fire Clinic and placed on sick leave. Mr. Butler ruled a February 21, 2010, on-duty officer's injury report as Non-Performance of Duty and a second officer's on-duty report on May 3, 2010 as Non-Performance of Duty injury. Both recommendations were made before being directed to change them by Mr. Quander.

Specification #2: (SUSTAINED)

> On June 10, 2010, Mr. Butler sought clarification from Mr. Quander involving blood borne pathogen exposures. Mr. Quander replied by advising Mr. Butler how the cases were to be ruled upon. On June 24,

[4] Agency's Answer at Tab 4, Attachment 2 and 3 (January 24, 2011).
[5] *Id*. at Tab 4, Attachment 10. On June 10, 2010, Mr. Quander, via email, directed Employee as follows: "if the member was exposed and we treated him by prescribing medications then it's POD. Should the member pay out of his own pocket for medications or other services that our providers prescribe to address a condition created by his employment? POD."

> 2010, Mr. Butler failed to follow Mr. Quander's order by ruling a blood borne pathogen exposure case Non-POD after seeking and being given clear explanation by his superior.[6]

Employee's Position

Employee submits that Agency has not established that Employee's conduct violated any District laws, regulations or policies; and Agency has not provided any admissible evidence to support its arguments, such as citation to the record or sworn statements. Employee admits that he is aware of "Mr. Quander's overall advice for treating possible exposure to blood borne pathogens…" However, he explains that the outcome of any claim would depend on the specific facts of the case, and other requirements of Workers' Compensation laws.[7] Employee further concedes that his recommendation was not consistent with the policy of Agency's Director that blood borne pathogen exposure cases should be ruled POD. He contends that he made his recommendation based on facts and applicable law. Employee also asserts that he provided Mr. Quander with a list of legal justification for his recommendation. Employee maintains that, when Mr. Quander disagreed with his recommendation, he changed the recommendation from Non-POD to POD as requested.[8]

Additionally, Employee submits that the charge and specification for which he was charged does not describe or cite conduct constituting malfeasance, misfeasance or insubordination warranting disciplinary action under DPM § 1603.3. Employee notes that the evidence offered for Specification # 2 does not support the charge, as the subject matter is more complex, and there is no bright line rule. Also, Employee contends that the proposed penalty is unduly harsh, as the cited conduct does not rise to the level of triggering corrective or adverse action.[9] He mentions that he was not on notice that he was violating any rules in making his recommendation. Employee further argues that Agency did not consider the *Douglas* factors. Employee notes that prior to June 2010, he had an unblemished disciplinary record for his eleven (11) years of service with Agency. Employee also submits that fifteen (15) days suspension is inconsistent with the Tables of Penalties ("TAP"). He explains that the TAP calls for ten (10) days suspension for the sustained offense.[10] Employee submits that the matter must be set for an Evidentiary Hearing or in the alternative, Employee requests that this AJ render a decision in his favor since there is no evidence that his suspension was for cause.

Agency's Position

Agency asserts that Employee was on explicit written notice from the MSB Director on how the Director wanted blood borne pathogen exposure cases handled. Agency explains that, prior to this incident, Employee had been informed on two (2) previous drafts (March 8, 2010 and June 10, 2010) on how to prepare recommendations for officers who were prescribed medications by the Clinic, and placed on sick leave.[11] Agency states that, after having been directed on numerous occasions by the Director on how to properly rule on the cases, Employee intentionally chose to be insubordinate and ignore the Director's clear orders. Agency highlights that Employee believes he is on equal footing

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[6] *Id.* at Tab 1. *See also* Employee's Petition for Appeal, at Recommendation Regarding Adverse Action against Mr. Widmon Butler, DRD379-10 (October 4, 2010).
[7] Employee's Brief at p. 6 (January 10, 2013).
[8] *Id.*
[9] *Id.* at p. 7.
[10] *Id.*
[11] Agency's Brief, *supra*. See also Agency's Answer, *supra*, at Tab 4, Attachments 6 and 7.

with the Director when it comes to making determinations on PD-42 claims. Agency mentions that Employee ignores the fact that the MSB Director is his supervisor and that the Director's orders to him must be followed. Agency further contends that the penalty was within the TAP. Agency explains that for first time offense, the penalty is reprimand to ten (10) days suspension, and Employee has served a ten (10) days suspension.[12]

1) Whether Employee's actions constituted cause for discipline

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §1603.3, the definition of "cause" includes any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: Insubordination. Here, Employee's suspension for fifteen (15) days from his position at Agency was based upon a determination by Agency that Employee was insubordinate to the Director of MSB when he failed to follow orders from his superior regarding the classification of blood borne pathogen exposures.

Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: Insubordination

In the instant case, Employee admits that he is aware of Mr. Quander's overall advice for treating possible exposure to blood borne pathogens. Employee also concedes that his recommendation for Officer X's case was not consistent with Mr. Quander's policy that blood borne pathogen exposure cases should be ruled POD. However, he explains that his recommendation was based on facts and applicable law, and that he provided Mr. Quander with a list of legal justification for his recommendation. Agency asserts that prior to the case involving Officer X's injury, Employee had been directed on numerous occasions on how to prepare recommendations for officers who were prescribed medications by PFC, and placed on sick leave. Nonetheless, Agency argues that Employee intentionally chose to be insubordinate and ignore the Director's clear orders. Employee contends that his reasons for classifying Officer X's injury as a Non-POD were supported by District rules and regulations, and Agency's General Order. Employee also notes that the evidence offered for Specification # 2 does not support the charge, as the subject matter is more complex, and there is no bright line rule.

Employee also cites to General Order PER 100.11, V-F1, which states that, "the Chief Physician shall make an assessment of whether the medical causes of the injury/illness supports the member's claim on the PD-42." While Employee may have had good cause to not follow Mr. Quander's previous orders as it relates to the classification of blood borne pathogen exposures, the fact remains that he disobeyed a direct order from his supervisor. Moreover, per General Order PER 100.11, V-F2, it is the Director's (Mr. Quander) responsibility to make a POD/Non-POD determination. As such, Mr. Quander, and not Employee, was responsible for the outcome of the claim classification. The recommendation bears Mr. Quander's name and was for Mr. Quander's signature. Employee was simply tasked with drafting the recommendation according to Mr. Quander's specifications. Therefore, I find that Mr. Quander had the authority to mandate Employee, as his subordinate, to draft the recommendation any way he wanted. And as the Interim Director of

[12] *Id.*

MSB, Mr. Quander specifically directed Employee on previous occasions to classify such claims as POD; yet Employee decided to classify Officer X's claim as Non-POD. Employee maintains that, when Mr. Quander disagreed with his recommendation, he changed the recommendation from Non-POD to POD as requested. However, this was after the fact. The fact that Employee disagreed with Mr. Quander's policy on classifying such claims does not give Employee the right to disregard a direct order from his superior, Mr. Quander. Employee was given a direct order by his supervisor, Mr. Quander on March 8, 2010, and again on June 10, 2010, on how to classify blood borne pathogen claims, yet he failed to follow these orders when he submitted his first draft to Mr. Quander, in the instant case. Consequently, I further find that, Agency was justified in charging Employee with insubordination.

In his brief to this Office, Employee also contends the following; (1) Agency has not established that his conduct violated any District laws, regulations or policies; (2) Agency has not provided any admissible evidence to support its arguments, such as citation to the record or sworn statements; and (3) the matter must be set for an Evidentiary Hearing. I disagree with these contentions. According to our rules, an AJ has the discretion to decide a matter on the record or conduct an Evidentiary Hearing.[13] Since there are no material facts in dispute in this matter, I find that an Evidentiary Hearing is unwarranted. Additionally, the record is very clear as to the specific District laws, regulations or policies that Employee's conduct violates. The FAD refers to the Recommendation from Commander Kucik, which highlights that, Employee was charged for violating D.C. Personnel Management Title 16; Section 1603.3(f)(4).[14] Furthermore, Agency submitted the entire investigative record with its Answer to this appeal, which includes the emails from Mr. Quander to Employee dated March 8, 2010, and June 10, 2010, directing Employee to classify blood borne pathogen claims as POD for officers who were prescribed medications, and placed on sick leave. The fact remains that Employee was given a direct order by his superior on numerous occasions, but he failed to comply with this order when he drafted his initial recommendation to Mr. Quander in this matter. Accordingly, I find that Agency is justified in bringing an adverse action against Employee for violating DPM §1603.3(f) (4).

2) Whether the penalty of fifteen (15) days suspension with five (5) days held in abeyance 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).[15] According to the Court in *Stokes,* OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable TAP; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by the agency. Here, I find that Agency has met its burden of proof for the charges of any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: Insubordination.

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[13] OEA rule §624.2.
[14] *See* DPM §1603.3(f)(4).
[15] *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).

In reviewing Agency's decision to suspend Employee for fifteen (15) days, OEA may look to the TAP. Chapter 16 of the DPM outlines the TAP for various causes of adverse actions taken against District government employees. The penalty for "any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: Insubordination" is found in § 1619.1(6)(d) of the DPM. Here, Employee was given a direct order by his superior to classify blood borne pathogen claims where the officers were prescribed medications and placed on sick leave as POD, but he failed to do so. The penalty range for a first time offense under §1619.1(6)(d) is reprimand to ten (10) days suspension. The record shows that this was Employee's first violation of §1619.1(6)(d), as such, the maximum recommended penalty was ten (10) days. Agency suspended Employee for fifteen (15) days, instead of the recommended maximum penalty of ten (10) days. Agency notes that, it is in compliance with the TAP in that, although Employee was suspended for fifteen (15) days, he only served ten (10) days, with five (5) days held in abeyance subject to imposition if Employee engages in future misconduct that warrants adverse action. It is worth noting that Agency has imposed two (2) additional five (5) days suspensions (August 4, 2010 and August 31, 2010) on Employee.[16] Therefore, I disagree with Agency's assertion that it complied with the TAP. Although Employee only served ten (10) days, according to the FAD in this matter, Agency has since imposed another five (5) days suspension on Employee, thereby going above the maximum allowed penalty for a first time offense under §1619.1(6)(d). And it can be reasonably assumed that this five (5) days suspension imposed on Employee on August 4, 2010, is stems from the five (5) days suspension Agency held in abeyance in the current matter.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[17] 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. As previous stated above, I find that the penalty of fifteen (15) days suspension, with five (5) days held in abeyance was not within the range allowed by law. Including the five (5) days suspension imposed by Agency on August 4, 2010, Employee has now served a total of fifteen (15) days suspension for violating DPM §1603.3(f)(4). Accordingly, I further find that, Agency did not engage in progressive discipline, and thus, abused its discretion.

Penalty was Based on Consideration of Relevant Factors

An agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[18] The evidence establishes that the penalty of fifteen (15) days suspension, with five (5) days held in abeyance constituted an abuse of discretion. Employee argues that Agency did not consider the *Douglas*[19] factors in instituting its penalty in this

[16] Agency's Brief, *supra*, at p.5.
[17] *Love* also provided that "[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." citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).
[18] *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).
[19] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981)

matter. I disagree. Although not specifically outlined or defined as such, Agency presented evidence that it considered relevant factors as outlined in *Douglas*, in reaching the decision to suspend Employee.[20] Specifically, Agency gave credence to Employee's past work (Agency noted that Employee had been instructed on two previous occasions on how to classify blood borne pathogen exposures); the nature and seriousness of the offense (Agency maintains that Employee's conduct was intentional); the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties; and the fact that Employee had been warned about the conduct in question. In accordance with Chapter 16 of the DPM, I conclude that Agency had sufficient cause to suspend Employee. However, I further find that, because Agency's penalty range is not within the TAP, Agency abused its managerial discretion.

ORDER

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

1. Agency re-issue its Final Agency Decision to reflect a ten (10) days suspension; and
2. Agency reimburse Employee five (5) days' pay and benefits commensurate with his last position of record for failure to comply with the penalty range allowed by the TAP; 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:

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MONICA DOHNJI, Esq.
Administrative Judge

[20] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed 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 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.