THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ROBERT ATCHESON,	)	OEA Matter No. 1601-0055-06
Employee	)	
	)	Date of Issuance: October 25, 2010
	)	
	)	
D.C. METROPOLITAN POLICE	)	
DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Robert Atcheson ("Employee") worked as a lieutenant with the D.C. Metropolitan Police Department ("Agency"). Employee was charged with conduct unbecoming an officer in violation of General Order 1202.1, Part I-B-12. Agency alleged that Employee used coarse and profane language regularly and consistently when addressing his subordinates and used coarse and profane language while addressing Investigator Wai Tat Chung. Initially, Agency recommended that Employee be terminated for his actions. However, on March 30, 2006, Employee received a final Agency notice which provided that the Chief of Police rescinded his termination and instead imposed a thirty-day suspension for his conduct.

On May 1, 2006, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). He argued that there was no evidence to sustain the charges against him. Employee requested that the suspension be reversed; his record be expunged; and all lost back pay and benefits be restored.[1] Agency countered and argued that it had cause to suspend Employee. It contended that the 30-day suspension was appropriate and warranted to maintain discipline, to ensure the efficiency of service, and to uphold the integrity of its police officers.[2]

The OEA Administrative Judge ("AJ") held a three-day hearing on this matter and issued her Initial Decision on September 12, 2007. In her Initial Decision, the AJ provided a detailed summary of all of the witness testimonies presented during the OEA hearing. She relied heavily on the testimonies of certain Agency witnesses, as well as Employee's own testimony. She found that Employee committed acts unbecoming his position by using profanity and harsh language toward other officers and by acting discourteously.[3]

After weighing all of the evidence and testimonies presented, the AJ found that Agency did have cause to suspend Employee for his actions. She reasoned that Employee's actions violated Agency's regulations pertaining to communication between employees. The AJ held that Employee knew or should have known that continuously berating his subordinates was unacceptable and an actionable offense. Moreover, she found that Employee cursed at and insulted his subordinates in a twisted effort to motivate them. He even cursed an officer who was within his rights to approach him with a compensation issue.

Accordingly, the AJ found that the penalty was appropriate for the charges against

[1] *Petition for Appeal,* p. 3, 7-9 (May 1, 2006).
[2] *Agency's Closing Argument,* p. 9-10 (February 9, 2007).
[3] *Initial Decision,* p. 19 (September 12, 2007).

Employee. She considered the factors outlined in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981) and held that although his performance evaluations and commendations were stellar, they did not negate his history of discourteous treatment of his subordinates. The AJ noted in her decision that although the thirty-day suspension was within the range of penalties for the charges, she thought that the penalty was moderate given the pattern of discourteous treatment over the years. She found that Agency's decision to impose a thirty-day suspension was not arbitrary or capricious. Thus, she did not disturb its final decision.[4]

On October 17, 2007, Employee filed a Petition for Review with the OEA Board. He made many of the same arguments that were presented in motions filed prior to the AJ's issuance of her Initial Decision. There were only a few new arguments presented. The first was that the Environmental Crime Unit was disbanded; Employee believed that it was disbanded because he insisted on higher performance standards for the entire unit.[5] Next, he contended that the AJ relied on testimony of Employee's subordinates with who he had limited contact. He also asserted that the AJ failed to consider the *Douglas* factors when evaluating Employee's penalty. Accordingly, he requested that the OEA Board dismiss the charges against him or in the alternative, reduce the penalty imposed.[6]

Agency filed its response to Employee's Petition for Review on November 28, 2007. It provided that Employee failed to present new and material evidence that would warrant a different outcome. It asserted that the AJ's decision was based on substantial evidence and consistent with the applicable laws. Finally, Agency reasoned that the AJ addressed all material

[4] *Id.*, 20-22.
[5] *Petition for Review*, p. 18 (October 17, 2007).
[6] *Id.*, 19-20, 22-23.

issues of fact and law, and thus, Employee's Petition for Review should be denied.[7]

This Board must determine if the Administrative Judge's Initial Decision was based on substantial evidence. We must also determine if Agency proved that Employee committed the acts for which he was charged. Further, we must consider if the acts were cause for an adverse action against Employee. Finally, we have to determine if the 30-day suspension was an appropriate penalty for the cause.

Employee was charged with violating General Order 1202.1, Part I-B-12 which reads:

> Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia.

This misconduct is further defined in General Order Series 201.26, Part I-C-2, which provides that "members shall be courteous, civil and respectful to their supervisors, associates, and other persons." Employee is also charged with violating Part I-C-3[8] which reads that:

> Members shall refrain from harsh, violent, coarse, profane, sarcastic or insolent language. Members shall not use terms or resort to name calling which might be interpreted as derogatory, disrespectful or offensive to the dignity of any person.

Specifically, Employee was charged with using coarse and profane language regularly and consistently when addressing his subordinates **and** using coarse and profane language while addressing Investigator Chung regarding overtime compensation [Emphasis added].

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[7] *Agency's Response to Employee's Petition for Review* (November 28, 2007).

[8] The Initial Decision and other documents in the record provide that General Order Series 201.26, Part I-C-3 and Part I-C-4 are applicable in this matter. However, after reviewing the General Order, it appears that the applicable sections are mis-numbered in the Initial Decision. The parts of the General Order that are applicable to this case appear to be General Order Series 201.26, Part I-C-2 and Part I-C-3. *OEA Hearing Transcript,* Agency Exhibit #2 (November 1, 2006).

As previously noted, the AJ relied heavily on the testimonies of certain Agency witnesses, as well as Employee's own testimony. Employee concedes in his testimony before the OEA Administrative Judge that he engaged in coarse and profane language when addressing his subordinates. When expressing his frustration with Corporal Garcia after a raid, Employee said to Corporal Garcia, "Corpy, what in the fuck were you thinking?" He went on to state that his comment "startled [Garcia], woke him up, [and] got him not to do it again."[9] Employee testified that during a weekly staff meeting regarding the location of a murder suspect, he told Corporal Garcia, "you know, you don't want me chewing you a new ass next week during this meeting if you ain't got him located by that time."[10] Additionally, he asserted that during his conversations with his supervisors (which could have been overheard by others), he recalled saying, "I've got to get these guys off their asses" and that he "can't believe the fucking guy is lazy."[11] Employee also recalled a conversation that he had with Garcia when Garcia confronted him about his cursing. Employee provided that Garcia said, "Lieutenant, we are all adults here [;] we are professionals, and why do you keep cursing all the time." Employee stated that his response was "yeah, my wife tells me the same sometimes. I'm supposed to stop cursing, but it is not below me."[12]

Employee also testified to using coarse and profane language during a discussion with Investigator Chung regarding overtime compensation. He provided that during this discussion,

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[9] *OEA Hearing Transcript,* p. 579 (November 15, 2006).
[10] *Id.* at 580.
[11] *Id.*, 589-590.
[12] *Id.* at 620. Employee also testified to conversation that he had with Investigator Johnson regarding his cursing. He said that Johnson asked "why he continued to refer to him as a motherfucker." *Id.* at 626. After questions regarding staff complaints about his cursing, Employee admitted that four of his eight staff members complained to him about his conduct. *Id.*, 629-630. Moreover, Investigator Gaitling testified that he heard Employee use profanity and speak to officers in a degrading manner. *OEA Hearing Transcript,* p. 262-270 (November 1, 2006).

he was bothered that Chung got a union representative to intervene. Employee testified that he said, "Chung, what in the fuck are you doing going to the union over 30 fucking minutes of comp. time that you weren't authorized to receive?"[13]

As a result of Employee's own admissions, Agency proved that Employee engaged in coarse and profane language with his subordinates. In addition to Employee's testimony, the AJ relied on the testimonies of other witnesses to reach her determination. To comply with previous OEA decisions, this Board will not question the AJ's credibility determinations.[14]

This Board agrees with the AJ's assessment that Employee's conduct was cause to suspend him. Employee's actions constitute a violation of General Order 1202.1, Part I-B-12 and General Order Series 201.26, Part I-C-2 and Part I-C-3. Agency's General Order, Disciplinary Procedures and Processes, provides that conduct unbecoming an officer is one of the offenses for an adverse action claim against Employee.[15] Use of coarse and profane language was prohibited conduct. Therefore, Agency was justified in bringing the adverse action against Employee.

In determining the appropriateness of Agency's penalty, OEA has consistently relied on

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[13] *OEA Hearing Transcript,* p. 602 (November 15, 2006).
[14] The Court in *Metropolitan Police Department v. Ronald Baker,* 564 A.2d 1155 (D.C. 1989) provided that great deference to any witness credibility determinations are given to the administrative fact finder. Similarly, the Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), found 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. See *Ernest Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007), ___ D.C. Reg. ___ ( ); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007), ___ D.C. Reg. ___ ( ); *Paul Holmes v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0014-07 , *Opinion and Order on Petition for Review* (November 23, 2009), __ D.C. Reg. __ ( ); and *Anthony Jones v. D.C. Department of Transportation,* OEA Matter No. 1601-0084-08, *Opinion and Order on Petition for Review* (July 23, 2010), __ D.C. Reg. ___ ( ).
[15] *Id.*, Agency Exhibit #7 (November 1, 2006).

Stokes v. District of Columbia, 502 A.2d 1006 (D.C. 1985).[16] The factors that we must consider are whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency.

Employee's 30-day suspension was within the range of penalty allowed by regulation. Agency's General Order 1202.1 outlines the Table of Penalties for various causes of actions. The General Order clearly lists that the penalties for conduct unbecoming an officer ranges from a 3-day suspension to removal.[17]

In assessing whether the penalty is based on a consideration of relevant factors, OEA relies on *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).[18] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

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[16] *Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008), __ D.C. Reg. __ ( ); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009) __ D.C. Reg. __ ( ); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007), ___ D.C. Reg. ___ ( ); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007), ___ D.C. Reg. ___ ( ); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009) __ D.C. Reg. __ ( ); *Markus Jahr v. D.C. Emergency and Fire Medical Services*, OEA Matter No. 1601-0180-99, *Opinion and Order on Petition for Review* (February 27, 2007), __ D.C. Reg. __ ( ); and *William McRae v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0004-04R98, *Opinion and Order on Petition for Review* (April 2, 2007) __ D.C. Reg. __ ( ).

[17] *OEA Hearing Transcript*, Exhibit #7 (November 1, 2006).

[18] *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009) __ D.C. Reg. __ ( ); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007), ___ D.C. Reg. ___ ( ); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007), ___ D.C. Reg. ___ ( ); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009) __ D.C. Reg. __ ( ); *Markus Jahr v. D.C. Emergency and Fire Medical Services*, OEA Matter No. 1601-0180-99, *Opinion and Order on Petition for Review* (February 27, 2007), __ D.C. Reg. __ ( ); and *William McRae v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0004-04R98, *Opinion and Order on Petition for Review* (April 2, 2007) __ D.C. Reg. __ ( ).

(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.

During the OEA hearing, Inspector Porter, Agency's Director of Agency's Disciplinary Review Division, testified that Agency considered the *Douglas* factors when determining Employee's penalty. She provided that the seriousness and frequency of the offense were considered. Additionally, consideration was given to the consistency of the penalty imposed on other employees for similar offenses and the consistency of the penalty as outlined on the applicable Agency Table of Penalties.[19] Inspector Porter also testified that mitigating factors were also considered.[20]

[19] *OEA Hearing Transcript,* p.117-120, 163-169 (November 1, 2006).
[20] *Id.* at 170.

Inspector Porter's testimony is corroborated by Agency's Findings of Facts and Conclusions of Law. When considering Employee's ultimate penalty, Agency addressed each of the *Douglas* factors individually.[21] This information was also considered by the Chief of Police who reduced Employee's penalty from the recommended termination to a 30-day suspension.[22] Moreover, and contrary to Employee's argument, OEA's Administrative Judge considered the *Douglas* factors when she issued her Initial Decision.[23] Therefore, Agency and the AJ properly considered all relevant factors outlined in *Douglas* when determining Employee's penalty.

Based on the aforementioned, there is no clear error in judgment by Agency. It followed its regulations in suspending Employee. Accordingly, Employee's Petition for Review is **DENIED**.

[21] *Id.,* Agency Exhibit #4 (November 1, 2006).
[22] *Id.,* Agency Exhibit #6 (November 1, 2006).
[23] *Initial Decision,* p. 20-22 (September 12, 2007).

ORDER

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

FOR THE BOARD:

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Clarence Labor, Chair

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Barbara D. Morgan

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Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.