THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
KRISTOPHER SMITH,	)	
Employee	)	OEA Matter No. 1601-0020-17
	)	OEA Matter No. 1601-0051-17
	)	
v.	)	Date of Issuance: February 13, 2018
	)	
METROPOLITAN POLICE DEPARTMENT,	)	
Agency	)	Eric T. Robinson, Esq.
	)	Senior Administrative Judge
	)	

Kristopher Smith, Employee *Pro-Se*
Ronald Harris, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On December 14, 2016, Kristopher Smith ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the Metropolitan Police Department's ("MPD" or the "Agency") adverse action of imposing a 20 day suspension with 15 days held in abeyance.[1] Employee's position of record is Patrol Officer. This matter was initially assigned to the Undersigned on or about March 6, 2017. Thereafter, a Prehearing Conference was held on March 13, 2017. After an initial review of the documents of record, the Undersigned initially determined that there was a salient question as to whether the OEA may exercise jurisdiction over this matter. On April 18, 2017, the Undersigned issued an Order requiring the parties to address whether the OEA may exercise jurisdiction. Generally, speaking, with respect to suspensions, the OEA may only exercise jurisdiction if the affected employee has served a suspension of ten days or more. Initially, the Employee had only served a five day suspension with the remainder held in abeyance for one year provided he abstained from committing any other misconduct during that period of time. Such was not the case for the above referenced Employee. On May 23, 2017, Employee filed another petition

[1] OEA Matter No. 1601-0020-17.

for appeal for a separate adverse action taken by the Agency.[2] The penalty imposed by MPD included the fifteen unserved days in abeyance specifically for OEA Matter No. 1601-0020-17 and seven days solely for OEA Matter No. 1601-0051-17.

On September 12, 2017, another Prehearing/Status Conference was held in order to determine how both of these matters may be decided upon given that the circumstances of each are intertwined. On September 18, 2017, the Undersigned issued two separate orders. For OEA Matter No. 1601-0020-17, the Undersigned issued a Post Status Conference Order that required the parties to address the merits of this matter by providing legal briefs. For OEA Matter No. 1601-0051-17, the parties were required to address whether the OEA may exercise jurisdiction over this matter since the only punishment that Employee seemingly endured for this matter was a seven day suspension. All parties have submitted their written briefs for OEA Matter No. 1601-0020-17 as ordered. To date, the OEA has not received Employee's brief regarding jurisdiction for OEA Matter No. 1601-0051-17.[3]

According to OEA Rule 611.1,[4] if an employee has two or more appeals pending before the Office, the Administrative Judge may consolidate the appeals and adjudicate them as one action. Furthermore, pursuant to OEA Rule 611.3, a presiding official may consolidate or join cases on his or her own motion, or on the motion of a party, if to do so would:

(a) Expedite processing of the cases; and
(b) Not adversely affect the interests of the parties.

I find that both tenets of OEA Rule 611.3 apply in the instant matters. After reviewing the documents of record, I further find that no further proceedings are necessary. The record is now closed.

JURISDICTION

The Office has jurisdiction in first captioned matter pursuant to D.C. Official Code § 1-606.03 (2001).[5] However, as will be explained below, OEA lacks jurisdiction to adjudicate the second captioned matter. [6]

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:

[2] OEA Matter No. 1601-0051-17.
[3] According to the Undersigned's Order dated September 18, 2017, Employee was required to file his brief on or before October 6, 2017.
[4] 59 DCR 2129 (March 16, 2012).
[5] OEA Matter No. 1601-0020-17.
[6] OEA Matter No. 1601-0051-17

> "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."

ISSUE

Whether Agency's action of suspending Employee from service was done in accordance with all applicable, laws, rules and regulations.[7] Whether the above captioned matter should be dismissed due to lack of jurisdiction.[8]

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

The following findings of facts, analysis and conclusions of law are based on the documentary evidence as presented by the parties during the course of the Employee's appeal process with this Office.

OEA Matter No. 1601-0020-17

Agency found Employee to have committed the following charge and specifications:

1. **Conduct Unbecoming**

> Specification No. 1: In that on April 6, 2016, you (Employee) were at a 7-11 Convenience Store located at 4854 Nannie Helen Burroughs Avenue, Northeast. Moreover, while on duty, and in full uniform, you were recorded obtaining energy drink beverage(s) from the refrigerator, pouring the contents in a "courtesy cup," and leaving the store without making payment. When questioned regarding your actions, you acknowledged that it was your responsibility to make payment, or attempt to make payment for the item, and failed to do so.
>
> Specification No. 2: In that on April 14, 2016, you (Employee) were at a 7-11 Convenience Store located at 4854 Nannie Helen Burroughs Avenue, Northeast. Moreover, while on duty, and in full uniform, you were recorded obtaining energy drink beverage(s) from the refrigerator, pouring the contents in a "courtesy cup," and leaving the store without making

[7] OEA Matter No. 1601-0020-17.
[8] OEA Matter No. 1601-0051-17.

> payment. When questioned regarding your actions, you acknowledged that it was your responsibility to make payment, or attempt to make payment for the item, and failed to do so.[9]

Moreover, Agency noted the following in its brief in this matter:

> On June 23, 2016, Agent Jones-Warren interviewed Officer Smith. (FIR, Attachment 18). FOP Representative Jonathan Branch accompanied Officer Sharp to the interview. **Officer Smith admitted that on April 6, 2016, and on April 14, 2016, that he entered the 7-11, proceeded to get an empty coffee cup, retrieved a Red Bull from the cooler, and emptied the contents of the Red Bull into the coffee cup. He then threw the Red Bull can in the trash.**
>
> Officer Smith stated that he did not try to conceal or hide the Red Bull. Officer Smith stated that it was not his intention to deprive the store from any product or money. He explained that he was under the presumption that it was a complimentary beverage. Office Smith related that he had just arrived at the Sixth District in February 2016, but it was his understanding that for the officers that are on duty and in uniform, all beverages were complimentary.
>
> Officer Smith stated that while he was in the store, at no time did an employee or the manager ever tell him that the beverages in the freezer or the ones in the cooler were not complimentary for uniformed police. **However, Officer Smith acknowledged that he never asked any of the employees if the beverages in the cooler were complimentary to uniformed officers or if he had to purchase the items.**[10]

As part of the instant appeal before the OEA, Employee did not materially alter the rendition of events as noted by MPD. Accordingly, I find that Employee admitted to the salient facts that gave rise to the instant cause of action as part of the MPD's investigation into his misconduct. Employee self-serving explanation that his action of getting a "drink for free" was condoned by his colleague who was following an alleged unwritten agreement is wholly unpersuasive. Generally speaking, taking an item without first proffering payment is unlawful and is in violation of Agency's General Orders. What is most telling in this matter is the fact that the store owner was the victim and witness to this act. Her report to MPD is what instigated the investigation that has embroiled Employee for over a year. Moreover, since it is the store owner who filed the complaint with the MPD, any alleged (unwritten) agreement with respect to the taking of drinks (or any other item) must fail. The only thing that Employee's admission proves is that Employee was not the only person who should have been penalized as part of the MPD's investigation. The Board of the OEA has previously held that an employee's admission is

[9] Agency's Brief at 1-2 (October 6, 2017).
[10] *Id*. at 3-4. (Emphasis Added).

sufficient to meet Agency's burden of proof.[11] Accordingly, I find that Agency's adverse action was taken for cause. Considering as much, I find that the Agency has met its burden of proof in this matter.

The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.[12] The Agency's decision will not be disturbed if it flows rationally from the facts which are supported by substantial evidence in the record. The Agency's legal conclusions must be sustained unless they are arbitrary, an abuse of discretion, or otherwise not in accordance with the law.[13] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that managerial discretion has been legitimately invoked and properly exercised.[14] 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.[15] I find that based on the preceding findings of facts and resulting conclusion thereof that the penalty of suspension was within managerial discretion and otherwise within the range allowed by law.

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According to the MPD's Prehearing Statement (September 1, 2017), Employee herein violated General Order 201.26, V, C, 12 which mandates that MPD members "constantly patrol their assigned area unless otherwise directed and shall not return to the station except on official business and approval by an official." Consequently, Employee was charged with a violation of General Order Series 120.21 Attachment A, part A-16 for "Neglect of Duty" and "Failure to obey orders or directives issued by the Chief of Police."[16] The instant charges stemmed from an incident that occurred on October 26, 2016, where Employee failed to report to his assigned duty station working the Full Stride unit (foot patrol) on the Minnesota Avenue corridor. As part of the internal investigation into this incident, it was determined that Employee and his partner never went into service and had not obtained permission to alter their tour of duty on the date in question. MPD opted to suspend Employee for seven days for this infraction.[17] After review, the Undersigned determined that an issue with respect to the OEA having the authority to exercise jurisdiction over this matter. The parties were given an opportunity to address the jurisdictional issue. Employee did not provide a response to my Order Regarding Jurisdiction

[11] *See Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987).
[12] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).
[13] *Smallwood v. District of Columbia Metropolitan Police Dept.*, 956 A.2d 705 (D.C. 2008); *Davis-Dodson v. District of Columbia Dept. of Employment Svcs.*, 697 A.2d 1214 (D.C. 1997); *Butler v. Dept. 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).
[14] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).
[15] *Id*.
[16] *See* Prehearing Statement at 2 (September 1, 2017).
[17] Of note, MPD also imposed the days that had been held in abeyance for OEA Matter No. 1601-0020-17. While served consecutively, I find that the days in question were properly delineated and separate from one another for the purpose of determining the penalty imposed for each matter.

dated September 18, 2017, but rather focused his efforts on OEA Matter No. 1601-0020-17.

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Protections Act (hereinafter "CMPA"), sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") states in pertinent part that:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. Any appeal shall be filed within 30 days of the effective date of the appealed agency action.

The above referenced career service rights conferred by the CMPA may be exercised by aggrieved career and educational service employees of the District of Columbia government. It is well-settled that OEA lacks jurisdiction over suspensions less than ten days. *Burton v. D.C. Fire & Emergency Services Department*, OEA Matter No. 1601-0156-09 (November 7, 2011); (OEA lacked jurisdiction over employee's six-day suspension); *Osekre v. Department of Human Services*, OEA Matter No. J-0080-00 (February 13, 2002) (OEA did not have jurisdiction over employee's five-day suspension). I find that Employee served only seven days of suspension for this particular infraction. I further find that the OEA lacks the authority to adjudicate an appeal of a suspension that is less than 10 days.

Failure to Prosecute

OEA Rule 621.3, *id.*, states as follows:

> If a party fails to take reasonable steps to prosecute or defend an appeal, the Administrative Judge, in the exercise of sound discretion, may dismiss the action or rule for the appellant. Failure of a party to prosecute or defend an appeal includes, but is not limited to, a failure to:
>
> (a) Appear at a scheduled proceeding after receiving notice;
>
> (b) Submit required documents after being provided with a deadline for such submission; or
>
> (c) Inform this Office of a change of address which results in correspondence being returned.

This Office has held that a matter may be dismissed for failure to prosecute when a party fails to submit required documents. *See David Bailey Jr. v. Metropolitan Police Department*, OEA Matter No. 1601-0007-16 (April 14, 2016). Here Employee did not file his response to the Undersigned's Order dated September 18, 2017, despite being provided with ample time to do so. I find that Employee has not exercised the diligence expected of an appellant pursuing an appeal before this Office. I further find that Employee's inaction presents another valid basis for dismissing the instant matter.[18]

Conclusion

Taking into account the discussion above, I find that with respect to OEA Matter No. 1601-0020-17, Agency has met its burden of proof in this matter and that its adverse action of suspending Employee should be upheld.[19] Further, with respect to OEA Matter No. 1601-0051-17, Employee has failed to establish that the OEA may exercise jurisdiction over his seven day suspension. Accordingly, I further find that I must dismiss this matter for lack of jurisdiction. Additionally, it is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals.[20] Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate the above captioned actions were improperly conducted or implemented. Employee's numerous ancillary arguments are best characterized as grievances and outside of the OEA's jurisdiction to adjudicate.

ORDER

Based on the foregoing, it is hereby **ORDERED** that for OEA Matter No. 1601-0020-17, Agency's action of suspending Employee for a total of twenty (20) days is **UPHELD**. Further, it is also **ORDERED** that OEA Matter No. 1601-0051-17 be **DISMISSED** for lack of jurisdiction.

FOR THE OFFICE:

_____
ERIC T. ROBINSON, Esq.
Senior Administrative Judge

[18] Specifically, OEA Matter No. 1601-0051-17.

[19] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

[20] Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.