Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,	)	
Employee	)	OEA Matter No. 1601-0021-20
	)	
v.	)	Date of Issuance: March 1, 2022
	)	
METROPOLITAN POLICE DEPARTMENT,	)	
Agency	)	ERIC T. ROBINSON, ESQ.
	)	Senior Administrative Judge
	)	

Employee, *Pro-Se*
Nicole L. Lynch, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL HISTORY

On December 13, 2019, 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 suspending him from service for 20 days.[1] The cause of action that gave rise to the instant matter involved an alleged egregious use of force perpetrated by Employee against a then nine-year-old child.[2] A full statement of the charge and specifications levied against Employee may be found below.

On December 18, 2019, OEA sent a request to MPD requiring it to provide an Answer to Employee's Petition for Appeal no later than January 17, 2020. Agency submitted its Answer on January 13, 2020. Thereafter, this matter was referred to the OEA's Mediation Department. Regrettably, settlement talks were unsuccessful. On February 5, 2020, this matter was assigned to the Undersigned. A Prehearing/Status Conference was held. Afterwards, the parties submitted briefs that outlined their respective positions. After considering the parties' arguments as presented

[1] Employee was subjected to a 25-day suspension. Five days of the time served came from a separate matter that was held in abeyance pending a one-year grace period.
[2] The name of the child that is the alleged victim of the use of force will be redacted in this Initial Decision. This child will be referenced as "Child 1."

in their submissions to this Office, I have decided that an Evidentiary Hearing is not warranted. The record is now closed.

JURISDICTION

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

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.

ISSUES

Whether the Agency's adverse action was taken for cause. If so, whether the penalty was appropriate given the circumstances.

STATEMENT OF THE CHARGES

The following statement of the charges are excerpted from the Notice of Proposed Adverse Action dated August 27, 2019.

> Charge No. 1: Violation of General Order 120.21, Part VIII, Attachment A, 16, which reads: "Failure to obey orders and directives issued by the Chief of Police."
>
> Specification No. 1: Violation of General Order 120.21, Part VIII, Attachment A, 16, which reads: "Failure to obey orders and directives issued by the Chief of Police." In that, at approximately 1848 hours, on April 22, 2019, while at or near 1432 Girard Street, N. W. Washington, D. C., after chasing [Child 1] (juvenile) on foot, you grabbed [Child 1] by the back of his jacket and jerked him backwards, causing him to fall to the pavement and landing on his buttocks. Any threat posed by [Child 1] was significantly minimized when he fled the scene. Your actions to pursue

constituted a failure to de-escalate the situation. The Use of Force (Solo Tactical Takedown) utilized by you was classified as Not Justified, Not Within Departmental Policy by Use of Force Review Board (UFRB). This misconduct is further specified in General Order 901.07, Part IV, A. which states, "All members who encounter a situation where the possibility of violence or resistance to lawful arrest is present, shall, if possible, first attempt to diffuse the situation through advice, warning, verbal persuasion, tactical communication, or other de-escalation techniques. Members shall attempt to defuse use of force situations with de-escalation techniques whenever feasible." B. which states, "When using force, members must be able to articulate the facts and circumstances surrounding their tactics, decision making, and the extent of force used in any given situation."
Your misconduct is also described under General Order 901.07, Part IV, E (2). In response to a perceived threat, members shall apply the proportionate and objectively reasonable force response, as outlined in the use of force framework. To ensure the force response is objectively reasonable and proportionate to the perceived threat, members shall: A. Continuously assess the threat and develop strategies, consider their authority and Department policies, identify options and contingencies, take action and review, and gather information. This approach requires members to; (1) Consider the seriousness of the crime, the level of threat or resistance presented by the suspect, the imminence of danger, the suspect's mental capacity, his or her access to weapons, agency policies, and available options (e.g., calling upon members with specialized training for assistance). (2) Initiate the proportionate and objectively reasonable force response, when feasible, to overcome resistance. (3) Modify their level of force in relation to the amount of resistance offered by a suspect. As the subject offers less resistance, the member shall lower the amount or type of force used. Conversely, if resistance escalates, members are authorized to respond in an objectively reasonable manner.

Specification No. 2: In that, at approximately 1848 hours, on April 22, 2019, while at or near 1432 Girard Street, N. W. Washington, D. C., you grabbed [Child 1] (juvenile) by the left forearm and quickly brought him to his feet after he was taken to the ground. [Child 1] actively resisted by pulling his arms away from you and moving his body. Your decision to bring [Child 1] to his feet before he was handcuffed was deemed tactically unsound. The Use of Force (Hand Controls) was classified as Not Justified, Not Within Departmental Policy by the Use of Force Review Board (UFRB). This misconduct is further specified in General Order 901.07, Part FV, A. which states, "All members who encounter a situation where the possibility of violence or resistance to lawful arrest is present, shall, if possible, first attempt to diffuse the situation through advice, warning, verbal persuasion, tactical communication, or other de-escalation techniques. Members shall attempt to defuse use of force situations with de-escalation techniques whenever feasible." B. which states, "When using force, members must be

able to articulate the facts and circumstances surrounding their tactics, decision making, and the extent of force used in any given situation." Your misconduct is also described under General Order 901.07, Part IV, E (2). In response to a perceived threat, members shall apply the proportionate and objectively reasonable force response, as outlined in the use of force framework. To ensure the force response is objectively reasonable and proportionate to the perceived threat, members shall: A. Continuously assess the threat and develop strategies, consider their authority and Department policies, identify options and contingencies, take action and review, and gather information. This approach requires members to: (1) Consider the seriousness of the crime, the level of threat or resistance presented by the suspect, the imminence of danger, the suspect's mental capacity, his or her access to weapons, agency policies, and available options (e.g., calling upon members with specialized training for assistance). (2) Initiate the proportionate and objectively reasonable force response, when feasible, to overcome resistance escalates, members are authorized to respond in an objectively reasonable manner.

Specification No. 3: In that, on April 22, 2019, after you forcibly grabbed [Child 1] by the back of his jacket and jerked him backwards, you failed to check and ascertain if he was injured or needed medical care. This misconduct is further described in General Order 901.07, Part IV, C, 1, which states, "When any force response is employed, members shall: 1. Conduct a visual and verbal check of the subject to ascertain whether the subject is in need of medical care."

Specification No. 4: In that, on April 22, 2019, you failed to complete the Reportable Incident Form, documenting your incident with [Child 1] in which you conducted a solo takedown to stop him from running away from you. It was later determined that [Child 1] complained of pain to his arm on the scene of this incident, therefore, changing the use of force classification from a "reportable force incident" to a "reportable use of force." This misconduct is further specified in General Order 901.07, Part IV, P, 1, which states, "All incidents involving a reportable use of force, as defined in Part III. 13.A of this order, shall be reported in accordance with SO-10-14 [Instructions for Completing the Use of Force Incident Report (UFIR: PD Forms 901-e and 901-f)]. All reportable force incidents shall be reported in accordance with SO-06-06 [Instructions for Completing the Reportable Incident Form (RIF: PD Forms 901-g and 901-h)]." General Order 901.07, Part III, 13,b, (1), states, "The following actions are designated 'reportable force incidents' as long as the use of force does not result in injury or a complaint of injury or pain: All solo or team takedowns, where there is no complaint of pain or injury."

Specification No. 5: In that, on April 22, 2019, you conducted a solo takedown on [Child 1] but failed to report this or notify a supervisor that

force had been used. This misconduct is further specified in General Order 201.26, Part V, A, 17, which states, "Members shall: Immediately report each instance of their use of force and/or a use of force committed by another member to a superior officer consistent with GO-RAR 901.08 (Use of Force Investigations)."

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

The following statement of facts, analysis, and conclusions are based on the documents of record as submitted by the parties. The following is excerpted from the parties Stipulated Facts that were jointly filed on August 14, 2020:

1. On April 22, 2019, Officers [Employee] and Dalentina Costello were working the evening tour of duty in the Third District.

2. Officer [Employee] was in full MPD uniform and equipped with Body Worn Camera (BWC), an outer ballistic vest, and duty belt with radio, ammunition pouch, handcuffs, flashlight, ASP, and a Glock-17 Semi-Automatic pistol.

3. At approximately 1848 hours, Officers [Employee] and Dalentia Costello, who were in separate MPD patrol vehicles, received a radio assignment from the Third District dispatcher to respond to a call for service as a group of juveniles were attempting to gain entry into a building located at 1432 Girard Street, N.W., Washington, D.C.

4. Officer Costello arrived on-scene first, and immediately advised the dispatcher that the group of juveniles were sitting outside the apartment building. She then requested that the Office of Unified Communications (OUC) attempt to contact the initial complainant in reference to the call for service.

5. A short time later, the OUC dispatcher advised Officer Costello that there was no answer on the telephone number provided. Officer Costello cleared the assignment with a disposition of "Nothing Found" and returned to service.

6. [Employee] remained on the scene after Officer Costello departed.

7. Officer Wilfredo Flete-Sosa, who was on a foot beat in the area, joined Officer [Employee] after Officer Costello departed.

8. At that time, a group of male juveniles were leaning against a vehicle and standing on the sidewalk in front of 1432 Girard Street, N.W.

9. Officer [Employee] approached the group of juveniles, which included nine-year old Child 1, and asked the juveniles if they owned the vehicle that they were leaning against. After the juveniles responded in the negative, Officer [Employee] told them not to lean on the vehicle. The juveniles complied and stopped leaning on the car.

10. A few minutes later, Child 1 leaned against the same vehicle. Officer [Employee] approached Child 1 and stated: "If I just told your friends not to sit on the car, why would you." Child 1 then stated to Officer [Employee]: "I'm not a kid. I'll smack the shit out of you."

11. In response to Child 1's statement, Officer [Employee] immediately walked towards Child 1 and Child 1 immediately ran off. Thereafter, Officer [Employee] chased Child 1 who ran into the street, on the sidewalk, around a minivan that was in the street, and back and forth in circles until Officer [Employee] finally caught up to Child 1.

12. This foot pursuit lasted approximately 50 seconds.

13. Once [Employee] caught Child 1, he grabbed him by the back of the jacket. Officer [Employee]'s body worn camera depicts how Child 1 came to be seated on the pavement.

14. [Employee] held Child 1's jacket with his right hand and used his left hand to grasp Child 1's left forearm to pull him up to a standing position.

15. Once in a standing position, [Employee] handcuffed Child 1 and walked him from the middle of the street to the sidewalk. During this time, Child 1 struggled with [Employee], crying, and cursing at [Employee].

16. Once on the sidewalk, [Employee] unhandcuffed Child 1 after he provided his information and his parents' information after several minutes of trying to get his information but being cursed out and insulted by Child 1.

17. A young woman who stated she was Child 1's older sister arrive on the scene after Child 1 was unhandcuffed.

18. Child 1's older sister replied to Child 1, "Your arm is hurt? You need to go to the hospital?" Child 1 held up his arm to his sister. (BWC-[Employee])

19. Child 1's cousin instructed Child 1 to bend his wrist in a circular motion, and said, "Do this." (BWC-[Employee])

20. Child 1's older sister stated, "No, for real, because if you can't do that, then you need to go to the hospital." She demonstrated bending her wrist in a circular motion while saying, "do that." (BWC-[Employee])

21. Child 1's older sister then asked Child 1, "Does it hurt when you do that?" Child 1 nodded in response. (BWC-[Employee])

22. Officer [Employee] did not comment on the above conversation, and proceeded to ask Child 1's older sister questions about when the mother of Child 1 would be responding to the scene.

23. Officer [Employee] requested Central Complaint Number (CCN) 19-068-458 for a "Stop" report.

24. Officer [Employee] did not ask Child 1 if he was hurt or needed medical care as in his view no use of force or takedown occurred.

25. Officer [Employee] did not complete a Reportable Incident Form regarding this incident.

26. Officer [Employee] informed Sergeant Keirn of the "stop" of Child 1 but did not notify him that force was used as Officer [Employee] did not believe he had used force on Child 1.

27. Officer [Employee] spoke with Child 1's parents on the scene who then left with their son.

28. When Child 1s's parents were on scene they did not ask if their son was hurt or injured and made their son apologize to Officer [Employee].

29. Later that evening, Child 1's parents took him to United Medical Center and complained that Child 1 was injured by Officer [Employee].

30. On April 22, 2019, Officer [Employee] was a 25-year old male who was approximately 6'1" in height and weighed 190-200 pounds.

31. On April 22, 2019, Child 1 was a 9-year old boy.

MPD asserts that Employee's actions during the incident in question were in direct contravention to its General Orders. More specifically, the crux of Employee's act that violated policy centered around the stop that Employee attempted to effectuate on Child 1. Given the stipulation of facts that the parties agreed upon along with the Body Worn Camera footage from the incident, it is uncontroverted that the original situation that gave rise to Employee's presence at the Girard Street building was resolved when the original group of juveniles dispersed. Employee's continued presence, after the initial crowd vacated, during which he subsequently

encountered Child,1 was wholly avoidable. This fact is belied by his partners' action of immediately leaving the scene when the original crowd left the scene; thereby avoiding the conflict in question leaving Employee as the sole member subject to adverse action in this situation. Employee's other acts were also not in keeping with the General orders including attempting to detain a nine-year-old child; chasing said child for almost a minute; utilizing unnecessary force in detaining Child 1; not inquiring about Child 1's wellbeing after the chase ended; and, not soliciting medical assistance on Child 1's behalf. I find that all these acts were in direct violation of the General Orders utilized by MPD management when it opted to discipline Employee herein.

Employee, for his part, attempts to explain his actions in this situation by noting that Child 1 levied a threat against him during the encounter. However, what Employee's point fails to comprehend is that a threat from Child 1 is not something that, given the circumstance, should have been given serious consideration. Employee was approximately a foot taller and otherwise significantly larger, heavier and stronger than Child 1. Moreover, he was equipped with his full armament including sidearm and bulletproof vest. After the threat was levied, there was no genuine reasonable suspicion that explains the extended chase of Child 1. The encounter with Child 1 should not have occurred, similar to his partner who had vacated the scene by the time Child 1 and others had started to congregate in the location recently occupied by the first group. The Undersigned finds that Employee took personal offense to this erstwhile threat and sought to have the full panoply of his police powers impressed on a nine-year-old juvenile.

The force used to subdue Child 1 was not in line with the General Orders ideal of having a steadying, lawful police presence in the community MPD serves. Given the circumstances, the attempted initial detention, ensuing chase and takedown of Child 1 was far afield from the appropriate response expected of members of the MPD. The takedown of Child 1 ultimately resulted in the child seeking out medical assistance. I find that the General Orders, as noted above, required Employee to at least ask Child 1 (or his family as they appeared) if he needed medical attention; he failed to ask Child 1 (or his family) if he need medical attention. This specification could have been easily avoided by Employee by simply asking the question.

Overall, I find that Employee's explanations of his actions in this matter are self-serving. Moreover, given that he admitted to the *actus rea* that gave rise to the instant sanction, I do not have to look behind the circumstances to arrive at this determination. Notwithstanding his explanation to the contrary, I find that Employee admitted to the salient facts that are the subject of the instant adverse action.[3] The Board of the OEA has previously held that an employee's admission is sufficient to meet Agency's burden of proof. *See*, *Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987). I find that Employee did not credibly argue that Agency's action was not done in accordance with applicable laws or regulations. I do note that Employee took personal issue with the fact that he was suspended from service. My examination of the record reveals that Agency's action was proper. Given the gravity of the conduct and the proper procedural safeguards of due process that Agency undertook, I find that Agency proved by a preponderance of the evidence that it had cause to Suspend Employee from service.

[3] *See*, Stipulation of Facts *supra*.

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. *See Stokes*, *supra*; *Hutchinson*, *supra*; *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995). I conclude that given the totality of the circumstances as enunciated in the instant decision, the Agency's action of suspending Employee from service should be Upheld. [4]

ORDER

Based on the foregoing, it is ORDERED that the Agency's action of SUSPENDING Employee for 20 days is hereby UPHELD.

FOR THE OFFICE:

/s/ *Eric T. Robinson*
ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

[4] 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").