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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
EMPLOYEE ¹ ,)	OEA Matter No. 1601-0040-23
)	
v.)	Date of Issuance: March 28, 2024
)	
METROPOLITAN POLICE DEPARTMENT,)	MONICA DOHNJI, Esq.
Agency)	Senior Administrative Judge
_____)	
Frank Hill, Esq., Employee’s Representative)	
Tricia Brissett, Esq., Agency’s Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On April 14, 2023, Employee filed a 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 him from his position as a Police Officer for twenty (20) days without pay, effective April 3 to April 27, 2023. Employee was charged with: (1) violation of General Order 120.21- Attachment A, Part A-14,² and (2) violation of General Order 120.21, Attachment A, Part A-16.³ On April 14, 2023, OEA issued a Request for Agency Answer to Employee’s Petition for Appeal. Thereafter, on May 17, 2023, Agency filed its Answer to Employee’s Petition for Appeal.

This matter was assigned to the undersigned on May 17, 2023. On May 23, 2023, the undersigned issued an Order scheduling a Status/Prehearing Conference for June 20, 2023. On June 16, 2023, Agency filed an Objection to Petitioner’s Allegation regarding the Effective Date of Final Agency Action and Motion to Dismiss for Untimeliness. A Status/Prehearing Conference was held on June 20, 2023. Subsequently, Employee submitted a Response to Agency’s Motion to Dismiss for Untimeliness on July 3, 2023. On July 7, 2023, the undersigned issued an Order Regarding Jurisdiction, noting that this Office had jurisdiction over this matter. The Order also directed the parties to submit Prehearing Statements by August 4, 2023, and attend a Prehearing Conference scheduled for August 16, 2023. Both parties attended the scheduled Prehearing Conference.

¹ Employee’s name was removed from this decision for the purposes of publication on the Office of Employee Appeals’ website.
² Which states, “Neglect of Duty to which assigned, or required by rules and regulations adopted by the Department”.
³ Which states, “Failure to obey Order and Directives issued by the Chief of Police.”

Thereafter, on October 10, 2023, the undersigned issued an Order Convening an Evidentiary Hearing in this matter. The Evidentiary Hearing was held on October 25, 2023, and November 2, 2023, with both parties in attendance. On December 6, 2023, the undersigned issued an Order requiring the parties to submit written closing arguments. In an email dated January 6, 2024, the parties requested an extension of time to file their closing arguments. This request was granted in an Order dated January 8, 2024, with the written closing arguments due on or before February 2, 2024. Both parties have now filed their respective closing arguments. The record is now closed.

JURISDICTION

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

ISSUES

- 1) Whether Agency had cause to charge Employee with (1) Neglect of Duty and (2) Failure to follow orders and directives issued by the Chief of Police; and if so,
- 2) Whether the penalty of twenty (20) days suspension without pay is appropriate under applicable District laws, rules, regulations and the Table of Illustrative Action.

SUMMARY OF MATERIAL TESTIMONY

The following represents a summary of the relevant testimony given during the Evidentiary Hearing as provided in the transcript (hereinafter denoted as “Tr.”) which was generated following the conclusion of the proceeding.⁴

Agency’s Case in Chief

Curtis Miller (“Lt. Miller”) Tr. Vol. I. pgs. 27-95.

Lieutenant Curtis Miller (“Lt. Miller) has been employed by Agency for about 20 years. He is currently assigned to the Third District (“3D”). Prior to becoming a Lieutenant at Agency, he held several other positions including officer, detective, master patrol officer, and Sergeant. His duties as a Lieutenant include Watch Commander duties, running the day work shift, internal investigations, misconduct, use of force investigations, chain of command investigations, and any other duties as requested by the commander. Tr. Vol I. pgs. 27-28. Lt. Miller testified that he has conducted between 80-100 investigations while with the department. Tr. Vol. I. pgs. 33-34.

Lt. Miller testified that he learned about Employee’s misconduct after his shift in August. He noted that while at the police station, he was approached by Sergeant Hiller (“Sgt. Hiller”) who informed him that there was a man at the front desk who wanted to file a complaint about not receiving a report on the scene following an incident that occurred earlier that day. Per Sgt. Hiller, Mr. Yihdego stated that he came to the station because his nose was broken by two (2) women, and he did not understand why he had not gotten a report. He did not recall if he was informed by Sgt. Hiller that Employee was the officer in question. Lt. Miller stated that he advised Sgt. Hiller to

⁴ Wednesday, October 25, 2023 – Vol. I. and Transcript Vol II – November 2, 2023.

consult the evening watch commander and that she should provide the man with the OPC form if that was what he wanted. Tr. Vol. I. pgs. 28 -30, 79-81.

Lt. Miller stated that about a month later, Agency's administrative office assigned Employee's case to him to investigate. He averred that he was assigned the case for about a week before it was later reassigned to Captain Riley Hong ("Cpt. Hong") because of Commander Boteler's policy that required all investigations involving officers that could lead to adverse action be conducted by captains. Lt. Miller cited that he and Cpt. Hong conducted a 'chain of command' investigation into Employee's case. He explained that a 'chain of command' investigation is an investigation handled at the district level and does not involve Internal Affairs ("IA"). Tr. Vol. I. pgs. 31- 33.

Lt. Miller identified Agency's Exhibit 1, as the cover page/memo page of the investigation. Lt. Miller testified that when he was assigned to the case, he was provided with a written synopsis. He then went to the Giant grocery store where the incident occurred and conducted a 'canvas' to determine if there were any witnesses to the event, obtain any written statements or interviews, and check for the presence of any store closed circuit television video ("CCTV") that captured the incident. Lt. Miller stated that he talked to the store manager, and he requested CCTV footage of the incident. He explained that because there was about a one (1) month delay from when the incident occurred and when he made the request for the CCTV footage, it was not on site. Thus, he was no longer handling the case when the CCTV footage was provided to Agency. Lt. Miller also affirmed that he located a Tyonne Benning ("Ms. Benning"), a Giant employee who witnessed the incident. Lt. Miller stated that Ms. Benning provided a written citizen statement ("PD 119"). Lt. Miller testified that Ms. Benning's statement noted that she witnessed two (2) black females engaged with the complainant (Mr. Yihdego), and one (1) of the females punched the complainant in his face. Vol. I. pgs. 34 – 37, 43-44.

Lt. Miller acknowledged that he had his Body Worn Camera ("BWC") on both times that he went to Giant to conduct his investigation into Employee's matter. While reviewing Agency's Exhibit 9A, the September 9, 2022, BWC, Lt. Miller explained that there's no audio at the beginning because Agency always has a two (2) minutes buffer for BWC footage. He identified the store manager on the BWC at the 3 minute and 39 seconds time stamp. He noted that September 9, 2022, was the first day he went to the Giant store to investigate the current matter. Tr. Vol. I. pgs. 38 – 39, 41, 43 – 44.

Lt. Miller affirmed that he reviewed Employee's video as part of his investigation into the current incident and he concluded that Employee conducted an inadequate preliminary investigation. He explained that the only effort Employee made was to walk up to the initial group of managers at the Giant store who said they heard a commotion but did not see anything. He did not ask any further questions to obtain any kind of witnesses. Tr. Vol. I. pgs. 45 – 48.

Lt. Miller noted that Employee missed some steps in his preliminary investigation. He explained that Employee's first misstep was his failure to overcome the interpretation obstacle. Lt. Miller explained that because English was the complainant's second language, Agency policy required that if they cannot communicate clearly, then an interpreter should be called. Lt. Miller testified that the complainant was Ethiopian who spoke Amharic, so Employee should have obtained someone who spoke Amharic to clarify what the complainant was saying. Secondly, he noted that the complainant said, 'customers hit him', he was injured, and already receiving care, which meant this

was an assault. Lt. Miller noted that because the scene was safe, Employee should have made an extensive attempt to find witnesses to the incident. Lt. Miller did not recall Employee doing a witness canvas from watching Employee's BWC. Thirdly, Lt. Miller testified that Employee should have requested CCTV footage from the store manager or at least see if any video was available. Fourthly, Employee did not bother to interview the three (3) other Giant store employees (two store managers and a gentleman) who were present. Instead, the two (2) managers corroborated the gentleman's version of what happened. Lt. Miller stated that Employee did not ask the three (3) employees if they saw anything. Additionally, Lt. Miller stated that Ms. Benning walked away, and Employee did not ask Ms. Benning any questions. He expressed that it was not uncommon for people to not volunteer information to the police unless asked. Lastly, Lt. Miller asserted that Employee should have done a police report of the incident because the complainant was an assault victim which was clear from his injuries. In addition, two (2) witnesses corroborated that there was an altercation, and the complainant was punched. He also noted that as part of a preliminary investigation, a report could be generated based on the complainant's injuries and his statements, even in the absence of any witness corroboration, and that the incident could be investigated further by a detective in the future. Tr. Vol. I. pgs. 49 – 54.

Lt. Miller testified that it was within the officer's discretion to generate a report, based on what is presented to the officer in the preliminary investigation. He stated that people ask for reports all the time, even when it does not meet the standard for generating a report. According to Lt. Miller, the officer must have probable cause for a crime to generate a report and he testified that he believed probable cause existed in the current incident based on the complainant's injuries consistent with someone being punched in the face and statement from two (2) other people who heard a commotion and said the complainant was punched in the face. There was no reason not to believe the complainant was attacked and assaulted. Lt. Miller stated that the BWC footage shows the complainant, Mr. Yihdego, being treated by D.C. Fire and Emergency Medical Services ("FEMS") staff. Tr. Vol. I. pgs. 54 – 55.

Lt. Miller explained that as Employee's supervisor at the time, he presented his video of Employee's investigation to the managers because he believed Employee's misconduct warranted adverse action. Tr. Vol. I. pgs. 57 – 59. Lt. Miller asserted that there was a consensus at the 'Wednesday meeting' that Employee's action in this matter should result in a 'neglect of duty' and 'failure to take police action' adverse action. Tr. Vol. I. pgs. 64-65.

Lt. Miller affirmed that he was involved in previous investigations regarding Employee within the past three (3) years, wherein a crime was reported to Employee, and he failed to act. Adverse action was recommended for that misconduct. Tr. Vol. I. pgs. 61 – 62. Lt. Miller concluded that the previous misconduct against Employee and the current one showed a pattern in Employee's conduct. Tr. Vol. I. pg. 64.

Lt. Miller mentioned he received and read the completed Office of Police Complaint ("OPC") form as part of the investigation package. He could not recall what language the OPC form was completed in. Lt. Miller noted he did not speak any language other than English. He did not recall what happened with the OPC form Sgt. Hiller gave Mr. Yihdego. Tr. Vol. I. pgs. 66-67.

Lt. Miller affirmed that the fact that Mr. Yihdego was hit by a woman meant that he was assaulted by that woman. When asked about Mr. Yihdego's right to self-defense, Lt. Miller stated that because the woman had left the scene, she was not there to refute Mr. Yihdego's narrative of

what happened. Referencing Ms. Benning's written statement, Lt. Miller affirmed that a self-defense claim could be raised in court based on Ms. Benning's statement. Referencing Employee's Q&A submitted to Agency, Lt. Miller asserted that based on his experience as a police officer, it was more likely that Mr. Yihdego was the victim of the crime because it was more reasonable to believe the victim who stayed on the scene with injuries as opposed to two (2) supposed suspects who fled the scene. He reiterated that Employee had to generate a report based on the information he had at the time from Mr. Yihdego and then let a detective follow-up and uncover what actually happened. Tr. Vol. I. pgs. 67 – 72.

Lt. Miller acknowledged that there is more than one type of police report. He explained that they have offense and incident reports. An offense report is used to report offenses that have probable cause that a crime has been committed, whereas an incident report is used to document any incident. Lt. Miller provided examples of when an incident report is required. He affirmed that an incident report is a form of documenting that a unit responded to the scene because an incident occurred. Irrespective of whether the unit has the full details of the incident. Lt. Miller cited that an offense or incident report should have been created for the current event, which Employee failed to do. Tr. Vol. I. pgs. 90 – 93.

Riley Hong (“Cpt. Hong”) Tr. pgs. 102 – 233

Riley Hong (“Cpt. Hong”) is a Captain with Agency's 3D. He has been employed by Agency for about 17 years. Prior to his current position, he was an officer, sergeant, detective sergeant, and lieutenant. As captain at the 3D, Cpt. Hong managed one of Agency's three (3) sectors. He was responsible for managing crime in that sector, the day-to-day administrative tasks, conducting investigations under his chain of command, and assisting the commander as needed. Cpt. Hong stated that he has conducted over a hundred (100) investigations throughout his career. Tr. Vol. I. pgs. 102 – 103, 106.

Cpt. Hong testified that he was the lead investigating official for the current matter alongside Lt. Miller. He explained that the investigation was initially assigned to Lt. Miller. However, upon review of the initial facts of the investigation, he realized that some of the misconduct allegations were like a previous investigation which was sustained with adverse action against Employee. So, because of the progressive discipline policy, it was expected that the current incident would elevate to an adverse action as well. Cpt. Hong noted that the investigation he conducted alongside Lt. Miller in this matter was a misconduct – neglect of duty and order violations. Tr. Vol. I. pgs. 104 – 106.

Cpt. Hong testified that when he became the lead investigator in the current matter, he reviewed the BWC footage of the incident, collected statements from involved parties, as well as reviewed the security footage from inside the Giant store. He identified Agency's Exhibit 12 as the CCTV video from the store. Tr. Vol. I. pgs. 107-109. Cpt. Hong stated that Lt. Miller spoke to the store manager and asked if the CCTV video was available. The store manager informed Lt. Miller that she could make a request for the CCTV video, and it was obtained in a short period of time (a few days). Tr. Vol. I. pgs. 110 – 112.

Cpt. Hong asserted that the CCTV video also showed the physical altercation that led to the injury and bloody nose sustained by Mr. Yihdego. He noted that the CCTV video footage and statements collected from different involved parties were all part of his final investigative report. Cpt. Hong cited that Attachment 4 of Agency's Exhibit 1, was Employee's statement collected in

reference to the current matter; Attachment 5 was a written statement of Lt. Miller; and Attachment 6 was Sgt. Hiller's statement. He also affirmed reviewing Lt. Miller's BWC interviews with the Giant store employees regarding the current matter. Cpt. Hong cited that he also reviewed the general orders ("GO") and attempted to interview witnesses as part of his investigation of this matter. Upon refreshing his recollection with Agency's Exhibit 13, Cpt. Hong cited that he reviewed General Order 120.21, in preparing his report. He affirmed that this GO was generally used by Agency for misconduct, and when he conducted investigations. Tr. Vol. I. pgs. 112 – 114, 118-120.

Referencing Agency's Exhibit 8A and 8B, Cpt. Hong affirmed that the Exhibits contained his BWC for this matter. He explained that he is seen in the BWC video (Agency's Exhibit 8A) speaking with an employee of the language line who was going to act as an Amharic interpreter, and he and the interpreter called Mr. Yihdego and they had a phone conversation with assistance from the language translator. He identified Agency's Exhibit 8B as a BWC of his call to Mr. Leonard Smith ("Mr. Smith"), a Giant store employee. He noted that he was not able to speak with Mr. Smith, but he left him a message. Tr. Vol. I. pgs. 114 -118.

Cpt. Hong stated that Agency's Exhibit 14 contained GO 401.01 – Field Reporting System. He testified that this GO provided policies on police reporting in reference to different scenes and investigations. Tr. Vol. I. pgs. 120 – 121. Cpt. Hong further noted that Agency's Exhibit 16, contained GO 304.18 – Language Access Program. He asserted that this GO referenced the policies involving non-English speaking and limited English proficient, not-English proficient or limited English proficient individuals Agency's employees may encounter, and the procedures to follow. Cpt. Hong testified that upon review of the BWC from the day of the incident and speaking with Mr. Yihdego, it was apparent that he was a limited English-proficient subject, and different services could have been offered to him when interacting with him. He reiterated that based on his experience, a reasonably prudent officer who encountered Mr. Yihdego would have requested language services provided by Agency and available to officers. Cpt. Hong explained that the request could be done by (1) requesting a qualified, certified interpreter to respond to the scene and assist with interpretation or (2) contact the language line services and have an interpreter on the phone to interpret the entire conversation. Tr. Vol. I. pgs. 121 – 131.

Cpt. Hong acknowledged reviewing the BWCs of the members that interacted with Mr. Yihdego at the 3D. Referencing Agency's Exhibit 10, Cpt. Hong affirmed that he reviewed the BWC between Sgt. Hiller and Mr. Yihdego. He affirmed that Sgt. Hiller immediately asked Mr. Yihdego if he needed translation and a gentleman seen in the BWC immediately came to assist when Sgt. Hiller asked if Mr. Yihdego needed interpretation. Cpt. Hong noted that utilizing the gentleman violated the GO regarding the Language Access Program because they are not allowed to use bystanders in interpreting. He stated that Sgt. Hiller was counseled for not using a certified translator when interacting with Mr. Yihdego. Cpt. Hong explained that the goal for counseling/verbal warning instead of discipline was to improve service. He further noted that even with Sgt. Hiller's policy violation, they were still able to create a police report for simple assault and enabled Agency to provide Mr. Yihdego with a form in the language he spoke. He concluded that by using the bystander to interpret, it was clear that Sgt. Hiller intended on providing good police services and these were all mitigating factors. Tr. Vol. I. pgs. 131 – 134, 137-138.

Cpt. Hong cited that he was familiar with the OPC complaint form that Sgt. Hiller gave Mr. Yihdego. He explained that the OPC complaint form is used by civilians to file police complaints.

Cpt. Hong stated that the OPC complaint form is in different languages to provide services to people, regardless of their abilities to read and speak English. Tr. Vol. I. pgs. 135-136.

Referencing Agency's Exhibit 11, Cpt. Hong affirmed that Officer Edelin ("Ofc. Edelin") did not use an interpreter during her limited interaction with Mr. Yihdego at the police station. He affirmed that her interaction with Mr. Yihdego was a violation of Agency policy, and she was verbally counseled to improve future performance. He explained that Ofc. Edelin assisted Mr. Yihdego to complete the police report which he had been seeking from the night before. Tr. Vol. I. pgs. 139 – 142.

Cpt. Hong testified Employee received a different discipline than Sgt. Hiller and Ofc. Edelin for not getting an interpreter for Mr. Yihdego because he had other instances of misconduct which were all leading up to an adverse action against Employee. Cpt. Hong affirmed that the consequences of Employee's violation of the Agency language Access policy were aggravating in Employee's case. Tr. Vol. I. pgs. 142 – 145.

Cpt. Hong identified Agency's Exhibit 15 as GO 304.08 – Crime Scene Response and Evidence Collection and affirms that this GO provides directives on how officers handle crime scenes. Tr. Vol. I. pgs. 146-147. Cpt. Hong identified Agency's Exhibit 17, as Special Order 1222, Witness Canvases. He explained that a witness canvas is when there's an incident or offense and they are trying to identify witnesses that could add details to the investigation. Tr. Vol. I. pgs. 147 – 148.

On the issue of witness canvas, Cpt. Hong opined that, based on his experience and being the investigator in this matter, when Employee identified a group of potential witnesses crowded together at the Giant store, ideally, he should have separated the witnesses and interviewed them individually so that one witness's account does not influence another witness's account. Cpt. Hong also explained that the store has video cameras and its procedure for the officer to ask if they could see the video cameras, although oftentimes, they cannot because the person with access to the video cameras is not available or the equipment may be down. Nonetheless, the proper procedure is to ask to see the video cameras. If it's not accessible, the officer can get the information for a contact person that they could contact to access the videos for the officer or the assigned detective. He also noted that if the officer generated a report, oftentimes, the contact person's information is noted in the internal narrative. Cpt. Hong explained that cases, especially criminal cases, are generally assigned to a detective, and because the detective is not on the scene, they rely on what is documented in the report and any video footage. Tr. Vol. I. pgs. 149 – 153.

Cpt. Hong noted that an incident police report should have been generated in the current situation. If the officer determined that there was probable cause that a crime had occurred, a report for simple assault should have been created and Mr. Yihdego provided a report number. The case would then be assigned to a detective for a thorough investigation into the matter. However, if the initial officer did not find probable cause for a crime, the matter would still be documented on 'miscellaneous', especially since Mr. Yihdego was requesting a report, or a 'pending investigation' because video camera footage was available, and the detective could have followed up to obtain the video camera to determine if it corroborates with the witnesses' or complainant's account of what happened. Cpt. Hong explained that 'miscellaneous' reports are sometimes used just for documenting the circumstances officers find when no follow-up is needed and can be used for hospital, insurance etc. purposes by Mr. Yihdego or anyone involved. Tr. Vol. I. pgs. 154- 156.

Cpt. Hong testified that although it was not the primary way to document, the information captured on the BWC could be used as evidence and referenced by investigators or officials. He explained that when an officer arrives at a scene and starts investigating an assault allegation, the first step is for the officer to take out the police notebook and start gathering information about the victim, witnesses, the presence of the emergency medical team etc. This is important because even if it is not documented in a police report, it is in the police notebook, and this could be useful to detectives as opposed to just relying on the BWC. Tr. Vol. I. pgs. 157– 158. Cpt. Hong cited that because Employee had a prior similar incident, his actions in the current incident were considered aggravating factors, leading up to an adverse action. Tr. Vol. I. pgs. 158 – 159.

Cpt. Hong asserted that he discussed the current incident briefly with Employee, specifically about using an interpreter or the language line in future cases. He affirmed that his conversation with Employee on the use of an interpreter was similar to the conversation he had with Sgt. Hiller and Ofc. Edelin. He acknowledged that he verbally counselled Employee with regards to using an interpreter but could not recall the specific date of the counseling. Tr. Vol. I. pgs. 160, 162 – 163.

Cpt. Hong averred that based on his recollection, Mr. Yihdego did not initiate a police complaint against Employee. When asked why Sgt. Hiller initiated the police complaint against Employee, Cpt. Hong explained that there are situations when an official is made aware of a potential misconduct and the official will initiate the complaint process, and that appeared to be the case in the current matter. When asked if he saw the OPC form completed by Mr. Yihdego in this matter, Cpt. Hong noted that he may not have had possession of the OPC complaint form since it was not listed as an attachment. He did not recall ever seeing the OPC complaint form. Tr. Vol. I. pgs. 163, 165 – 166.

Referencing Agency's Exhibit 13, Cpt. Hong acknowledged that GO 120.2 was the general order regarding discipline in effect at the time he did his investigation. While referencing Attachment A – Table of Offenses and Penalties, number 16 – failure to obey orders or directives issued by chief of police, Cpt. Hong affirmed that GO 302.18 regarding calling an interpreter falls under the cause of action described in number - failure to obey orders or directives issued by chief of police. He further affirmed that failure to abide by GO 302.18 constituted a failure to obey orders or directives. Cpt. Hong affirmed that pursuant to Agency's directives, the use of the table of offenses and penalties was mandatory as applicable. Tr. Vol. I. pgs. 170 -173.

Cpt. Hong explained that the charge of failure to obey orders and directives is used for any sort of policy violation, from minor to egregious, not otherwise specified in the table of offenses and penalties, to include the violation of the Language Access Program policy. Cpt. Hong testified that the penalty for the first offense for the charge of failure to obey orders and directives ranges from an official 'reprimand to removal' which includes verbal counseling. Cpt. Hong reiterated that the reason Employee received an adverse action in the current matter and not verbal counseling like Sgt. Hiller and Ofc. Edelin was because the current investigation was Employee's second incident of a similar misconduct that had previously resulted in an adverse action. He also averred that while he did not believe that the charge for failing to use an interpreter rose to the level of discipline, the only reason why he listed that charge with the other charges was because the entire investigation fell under adverse action. Cpt. Hong noted that Employee did not warrant a suspension for the charge of failure to call an interpreter as an independent charge. Cpt. Hong cited that he discussed Employee's misconduct and the circumstances surrounding the incident with Commander Boteler and they had a pre-write-up conversation and they concluded that they would list all the misconduct under one finding of adverse action instead of multiple charges and penalties. Tr. Vol. I. pgs. 176 – 178, 212-

214, 218 -219. Cpt. Hong stated that he did not check Sgt. Hiller and Ofc. Edelin's prior disciplinary history when he counseled them for not using an interpreter or any prior instance of orders and directives violation. Tr. Vol. I. pgs. 180 – 183.

For Charge 1, Specification 1, Cpt. Hong testified that the Giant store had operational security cameras within the store. He stated that CCTV video footage was not available for Employee to review on the date of the incident because the monitors had sustained water damage. He however stated that Employee could have made a request for the CCTV footage. Tr. Vol. I. pgs. 184, 186. Referencing Charge 2, Specification 1 – failure to obey orders and directive, Cpt. Hong testified that the crime scene consisted of the locations in the store with Mr. Yigdego's blood, and the shopping cart Mr. Yihdego said had been touched by the suspects. He averred that while they have some sort of evidence of the scene on Employee's BWC, the quality was not great, compared to that of an actual photo. He maintained that the possibility of retrieving videos from the BWC does not excuse Employee for not documenting. Cpt. Hong affirmed that based on video footage, the Giant store employees were already cleaning up Mr. Yihdego's blood prior to Employee's arrival at the scene. He explained that while Employee was not responsible for the blood that had been cleaned prior to his arrival, he noted that Employee could have still documented his interview with Mr. Yihdego about him leaving a blood trail as he ran towards the front store screaming for security. Cpt. Hong also stated that Employee could have taken a quick photograph, taped off part of the store until they got more information. Tr. Vol. I. pgs. 186 – 190.

For Charge 2, Specification 2 – failure to secure and/or request CCTV video, Cpt. Hong testified that although he did not recall the exact timeline, he recalled that Employee at some point stated to him that he knew the cameras at the Giant store did not work because he had been at the store many years and the Giant system did not work. Cpt. Hong noted that Agency does not have any evidence of Employee requesting the CCTV video footage. He asserted that everything else was captured on Employee's BWC, but his BWC was turned off prior to any conversation with the Giant store manager about the CCTV video. Tr. Vol. I. pgs. 190 – 192.

Cpt. Hong testified that Employee should have created a 'pending investigation' report if he felt that there was not enough probable cause at the time. He explained that the pending investigation report would have allowed Agency to document everyone present in case the video later corroborated that an assault occurred. Cpt. Hong asserted that based off his recollection, there's no specific policy on taking a pending investigation report. He however affirmed that GO 401.01 Section II lays out Agency's policies and section V.A. lays out the procedures of what an officer is responsible for if they are the first to report on the scene. He also acknowledged that Employee was the first officer on the scene in this matter and he should have documented the evidence in his field notebook. Tr. Vol. I. pgs. 198 – 200, 208 -211. 216, 219 -220. Cpt. Hong acknowledged that the GO governing his investigation in the current matter was from 2006 and that the current GO fundamentally changes the table of penalties. Tr Vol. I. pgs. 200 -203.

Woldeab Yihdego (“Mr. Yihdego”) Tr. pgs. 235 – 244

Woldeab Yihdego (“Mr. Yihdego”) is a 73-year-old male, whose native language is Tigrinya, and he also speaks Amharic. Mr. Yihdego affirmed being involved in an incident at Giant supermarket in 2022. Tr. Vol. I. pg. 236.

Mr. Yihdego testified that he was shopping at the Giant supermarket, when two (2) ladies behind him pushed him. When he turned around to look at them, one (1) of the ladies asked him why he was looking at her friend, and they tried to push his cart. When he tried to stop them, the lady hit the left side of his nose with her elbow. Mr. Yihdego stated that his nose started bleeding a lot and everywhere was covered in blood. He asserted that he looked for the store security and alerted him that he was bleeding. Mr. Yihdego explained that he told the police about what happened, but he was told they could not apprehend the lady who hit him, so he cleaned himself, finished his shopping and went home. When asked if he requested a police report, Mr. Yihdego stated that he asked the police officer on scene for a police report, but he was again told that the person who attacked him was not apprehended so the police officer could not do anything. Mr. Yihdego stated that he later went to the hospital and had x-ray done. Tr. Vol. I. pgs. 237 -238.

According to Mr. Yihdego, after he left the hospital, he went home and slept, then went to the police station the next morning to file a complaint so he could take his case to a lawyer and have the person who attacked him apprehended. He explained that he got the police report at the police station, but he failed to file any charges, so he trashed everything. Tr. Vol. I. pgs. 239. When asked if he filed a police complaint against any police officer, Mr. Yihdego stated that “The police officer didn't did [sic]anything to me. The only thing he said was they are not apprehended; I cannot do anything. So, oh, I don't complain, make a complaint against any police officer.” When asked if he filed a complaint against any officer with the OCP, Mr. Yihdego said ‘no’. Tr. Vol. I. pgs. 240 - 241.

When asked why he gave Employee’s badge number to Sgt. Hiller when he went to the police station, Mr. Yihdego stated that Sgt. Hiller asked him if a police officer was present at the scene of the incident at Giant superstore and he said yes, then provided Employee’s badge number to Sgt. Hiller. He noted that he had problems remembering things so he could not remember his conversation at the police station the day after the incident. Tr. Vol. I. pgs. 242-243.

Winkle “Hobie” Hong (“Director Hong”) Tr. Vol. I. pgs. 245 – 338 and Tr. Vol. II. pgs. 9 - 100

Winkle Hobie Hong (“Director Hong”) works at Agency as the Director of Disciplinary Review Division (“DRD”). Director Hong has a bachelor’s in criminal justice, and a law degree. Prior to joining Agency, he was an advisor with the Seattle Police Department Office of Inspector General. He has also worked as a Civilian Manager for Internal Affairs with the Oakland Police Department, an attorney with the Civilian Oversight Group for the Chicago Police Department and he has engaged in the private practice of law. Director Hong testified that in his current role as Director of DRD, he is responsible for overseeing all aspects of the disciplinary process for Agency’s sworn and civilian members. This includes the receipt of all sustained investigations on misconducts, and he determines what discipline is appropriate. Director Hong asserted that he also oversees the adverse action hearing process for cases where members are being recommended for termination, and he serves as the custodian for all disciplinary records. Tr. Vol. I. pgs. 245 – 247.

Director Hong affirmed that he was the DRD Director when the current incident occurred. He identified Agency’s Exhibit 1, Tab 1, as the investigation report completed in the current matter involving Employee and he noted that he reviewed the final report. He testified that there was a sustained finding of misconduct against Employee. Director Hong explained that based on the charges cited in the investigation report, his office conducted a review of the investigation and issued a Notice of Adverse Action which included the appropriate administrative charges, as well as the associated specifications for the misconduct. He also stated that the Notice of Adverse Action

included the disciplinary recommendation. Director Hong identified Agency's Exhibit 1, Tab 2, as the Notice of Proposed Adverse Action ("NOP") issued by his office to Employee. He noted that he signed the NOP and affirmed that the charges and specifications in the NOP were supported by evidence. Tr. Vol. I. pgs. 248 – 251, 275.

Director Hong affirmed that the NOP had two (2) charges. Charge No. 1 was for Neglect of Duty and Charge No. 2 was for failure to obey orders and directives from the Chief of Police. He explained that these charges and the range of penalties are found in GO 120.21, Attachment B, under Table of Penalties and Offenses. Director Hong also asserted that GO 120.21 Attachment A provides a definition of each specific charge. Tr. Vol. I. pgs. 254 – 259.

Director Hong testified that Employee was charged with Neglect of Duty because, based on his review of the investigation report and the supporting documentation, it was determined that Employee failed to take police action or investigation as it related to the call for service at the Giant store which he responded to. He asserted that the penalty for the first offense for this charge is 'reprimand to removal'; the penalty for a second offense is 'fifteen (15) days suspension to removal' and the penalty for a third offense is 'removal. Tr. Vol. I. pgs. 260 – 263.

Director Hong identified Agency's Exhibit 19 as an NOP issued by his office to Employee on April 1, 2021, and the Final Agency Action issued in that matter on November 8, 2021, by the Chief of Police, upholding the penalty of a fifteen (15) days suspension. The Final Agency Action also directed Employee to attend training on the importance of community relations and interacting with the public. Director Hong testified that because the 2021 charge of Neglect of Duty against Employee was upheld, the charge of Neglect of Duty in the current matter was considered a second offense of Neglect of Duty against Employee, and this charge alone warranted a penalty of at least a 15-day suspension. Tr. Vol. I. pgs. 263 - 266.

For Charge No. 2 – failure to obey orders and directives issued by the Chief of Police, Director Hong explained that this was a broad administrative charge, more like a 'catchall'. He asserted that a violation of any issued GO would fall under Charge No. 2. He affirmed that Charge No. 2, had two (2) specifications in the instant matter. Director Hong averred that under Specification No. 1, Employee violated GO 401.01, which outlined what the requirements are for members while on the scene. For Charge 2, Specification No. 2 Director Hong testified that Employee violated GO 304.18 the language access requirement. He cited that the penalty for the first offense for failure to obey orders and directives alone ranges from a 'reprimand to removal'; the penalty for a second offense ranges from a 'one (1) day suspension to removal' and the penalty for a third offense is a 'fifteen (15) day suspension to removal'. Director Hong stated that this was Employee's second order and directives violation and therefore, the penalty range for this offense alone, was at least a 'one (1) day suspension to removal.' Tr. Vol. I. pgs. 267-273.

Director Hong testified that because there were two (2) separate charges levied against Employee in the current matter, the minimum penalty he would have received for the second Neglect of Duty offense would be a fifteen (15) day suspension, and the minimum penalty he would have received for the second offense for failure to obey orders and directives would be a one (1) day suspension. Put together, the minimum penalty Employee would receive for both charges was a sixteen (16) days suspension. Tr. Vol. I. pgs. 274 – 275.

Director Hong testified that when members are disciplined, the *Douglas* factors are a group of factors that are applied to the facts of their cases to determine the range of penalty to impose, based on whether a specific factor is deemed ‘aggravating’, ‘mitigating’ or ‘neutral’. Tr. Vol. I. pgs. 276-284; 289 – 296; and Tr. Vol. II. pgs. 11-38; 50-58.

Director Hong reiterated that he also considered comparable cases in determining Employee’s penalty. He identified Agency’s Exhibits 18A, B, C, and D as the comparable cases he considered and highlighted the differences and similarities between the comparable cases and the current case. Tr. Vol. I. pgs. 296 – 307; Tr. Vol. II. pgs. 70 -89.

Director Hong affirmed that the April 13, 2006, version of the GO was the governing GO for the current matter. He also testified that the fact that Employee had sustained findings not only for his failure to call an interpreter, but also for failure to take police action, that taken in the aggregate warrant the discipline he received. Director Hong explained that contrary to Employee’s matter that had a sustained IS number, Ofc. Edelin and Sgt. Hiller did not have IS numbers drawn and his office did not receive a sustained investigation. Therefore, his office did not have to take any action in their matters. Tr. Vol. I. pgs. 322-323, 326 – 327, 336; Tr. Vol. II. pgs. 25-26; 65-68.

Director Hong testified that Employee was charged with two (2) charges – Neglect of duty and failure to obey orders and directives of the chief. He reiterated that the penalty for a second offense for neglect of duty alone was fifteen (15) days suspension to removal. He affirmed that this was Employee’s second charge for neglect of duty in less than three (3) years and that based on the charge of neglect of duty alone, the minimum penalty Employee would have received was fifteen (15) days suspension. Tr. Vol. II. pgs. 59 – 61.

Director Hong also stated that for the charge of failure to obey orders and directives of the chief, this was Employee’s second offense in less than three (3) years. He noted that the penalty range for a second offense for failure to obey orders and directives of the chief was a one (1) day suspension to removal. He affirmed that the minimum penalty Employee would have received for this charge was a one (1) day suspension. Director Hong also noted that there were two (2) specifications under this charge. Specification No. 1 was for failure to take photographs at the scene, collecting evidence, and not requesting CCTV footage. He averred that Charge No. 1, Specification 1; and Charge No. 2, Specification 1, alone could support a penalty of more than 16 of the 20 days Employee was charged with. Tr. Vol. II. pgs. 61 -64.

Employee’s Case in Chief

Employee – Tr. Vol. II. pgs. 102-159

Employee has been an officer with Agency for approximately 22 years. He affirmed that most of his time with Agency was in the role of an officer at the Third District (“3D”). Tr. Vol. II. pgs. 122 – 123. Employee testified that he sees Cpt. Hong a few times a week, and Cpt. Hong never talked to him about the current case. He cited that it was not fair that Sgt. Hiller and Ofc. Edelin received verbal counseling for not calling an interpreter, whereas he received a charge and specification for the same conduct. Tr. Vol. II. pg. 103. Employee stated that he did not know why Sgt. Hiller encouraged Mr. Yihdego to file a complaint with OPC against Employee, and Sgt. Hiller eventually filed a complaint against him when Mr. Yihdego was not there. He noted that Lt. Miller never mentioned the current case to him although Lt. Miller was one of the investigators in the

matter. Tr. Vol. II. pgs. 106 -107, 116-117. Employee affirmed that the only commonality between him and Sgt. Hiller was the fact that they both did not call an interpreter for Mr. Yihdego. Tr. Vol. II. pg. 138.

Employee asserted that he handled the scene at the Giant store the way he did because he determined that there was no probable cause for a crime. He explained that after speaking with witnesses, they stated that they heard Mr. Yihdego being warned by the women not to touch them and based on the witness testimonies, Employee concluded that Mr. Yihdego was not a victim of a crime. Employee cited that a witness by the name of Thomas who stated that he saw and heard a lady in the aisle telling Mr. Yihdego not to touch her again, but Mr. Yihdego touched the lady's shopping cart and the lady defended herself. Employee asserted that he had discretion in how he handled the situation, as well as deciding if there were factors that supported the presence of a crime. Tr. Vol. II. pgs. 108 – 109.

According to Employee, there's always someone who believes that a crime has been committed and wants a police report, but not everyone gets one because there are no factors supporting the presence of a crime. Thus, it is the officer's responsibility to determine if a crime was committed. Tr. Vol. II. pg. 110. Employee asserted that he was able to understand Mr. Yihdego when he spoke to him at the Giant store, and he did not fit the definition of a limited English proficient person. Employee noted that he believed Mr. Yihdego understood all his questions at the Giant store. Tr. Vol. II. pgs. 111 – 112.

Referencing Charge 1, Specification 1, Employee testified that he spoke to the Giant store manager about the video and based on his experience from the Giant store, he knew that the video would not be available at the time of the incident because they had nobody present at the store who could operate the cameras and review the videos. He cited that he has been to the Giant store on a regular basis, and he was familiar with the store's security camera setup. He noted that a request had to be made to get the video footage. Tr. Vol. II. pgs. 112 – 113.

For Charge 2, Specification 1, Employee testified that before he got to the scene at the Giant store, the Giant employees were already mopping the floor. Employee explained that the incident at the Giant store was not a Part I offense⁵ that required a crime scene to collect evidence such as Mr. Yihdego's blood. He reiterated that there was no crime scene, no evidence to collect and they would not close the store or put-up crime scene tapes. Employee cited that his BWC would have captured everything to include Mr. Yihdego's injuries and whatever was on the ground. If it was later determined that there was a crime committed, then these would be gotten from the BWC. Employee stated that the drops of blood from Mr. Yihdego's nose had zero evidentiary value and that Agency would never call an evidence technician or the Department of Forensic Science to come to the scene and collect any evidence. He concluded that the incident at the Giant store was not a simple assault against Mr. Yihdego. However, if he had determined that a crime was committed against Mr. Yihdego, it would have been a simple assault misdemeanor. Tr. Vol. II. pgs. 113 - 115.

For Charge No. 2, Specification No. 2, Employee noted that he could clearly understand Mr. Yihdego as well as the witnesses' account of what happened at the scene. He concluded that Mr.

⁵ Employee stated that a 'Part I offense' would involve a murder, a violent crime, a robbery, a stabbing, robbery of an establishment, use of a weapon and these cases are tracked by the FBI for national crime reporting.

Yihdego was the aggressor and the lady who struck him in the face was defending herself. Tr. Vol. II. pgs. 115 – 116.

Employee disputed Agency's assertion that he did not conduct an appropriate investigation on the scene. He cited that he made sure Mr. Yihdego received medical attention, he asked Mr. Yihdego several times if he wanted to go to the hospital, he asked for his ID and 'notebooked' the ID, and he had everything recorded on his BWC. Employee testified that it does not take a veteran and experienced officer hours to figure out if a crime had been committed. Employee reiterated that he conducted an appropriate investigation and based on his interview with Mr. Yihdego and the witnesses, he believed there was no probable cause at the time to determine that Mr. Yihdego was a victim, but rather that he was the aggressor. Employee testified that he did not do a report because of the witness factors (witness stories were corroborated), and the absence of a complaint since the two (2) ladies who could have been the victims had left. He explained that suspects often stay on the scene and play victims and based on his experience, Mr. Yihdego's body language, his untruthful responses to Employee's questions, Employee concluded that Mr. Yihdego could be the aggressor and there was no probable cause that a crime was committed. He stated that he provided Mr. Yihdego with the assistance he needed. Tr. Vol. II. pgs. 117 – 119, 157.

Employee testified that the 20 day suspension disciplined action cost him between \$8,000 to \$9,000 in base pay, as well as the opportunity to be placed in any special assignments and hinder his ability to advance in the department whereas a sergeant was not disciplined. He stated that this was not fair to him. Tr. Vol. II. pg. 120.

Employee acknowledged that an assault occurred on the scene based on the testimonies of Mr. Yihdego and the witness who stated that there was 'hitting' by at least one person. He affirmed that he had to decide whether there was probable cause for a crime based on the totality of the circumstances. Employee highlighted that he looked at all the factors present at the scene and as the officer present on the scene, he had to determine if there was a crime committed or had a reasonable belief that a crime was about to be committed. Tr. Vol. II. pgs. 126-129.

Employee noted that he believed he collected Mr. Thomas'(witness) contact information while he was at the scene, but later stated that he could not recall if he did. He stated that it should be on his BWC. Tr. Vol. II. pg. 129. Employee affirmed that Mr. Yihdego provided his badge number to Sgt. Hiller when he came to the police station the next day. Tr. Vol. II. pg. 136.

Referencing Agency's Exhibit 16 – GO 308.14: Language Access Program, Employee affirmed that he was familiar with this GO. Tr. Vol. II. pgs. 140 -142. Employee acknowledged that he did not call for assistance while at the Giant store and he noted that his BWC took pictures of the scene. He affirmed that pictures could be taken off his BWC if they were needed but he never made any effort to capture pictures from his BWC after he left the scene. He explained that if there was an investigation into this matter, his BWC could have been used as evidence. Tr. Vol. II. pgs. 144-146.

Employee testified that he did ask the store manager about the CCTV video footage while he was at the scene. He does not recall if this conversation with the manager about the CCTV video footage was captured on his BWC. He affirmed that he was aware of the GO that required them to have their BWC on throughout an investigation. Tr. Vol. II. pgs. 147 - 150.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW⁶

As part of the appeal process within this Office, I held an Evidentiary Hearing on the issue of whether Agency's action of suspending Employee for twenty (20) days was in accordance with applicable law, rules, or regulations. During the Evidentiary Hearing, I had the opportunity to observe the poise, demeanor and credibility of the witnesses. As a result, I was able to determine the credibility of the witnesses. The following findings of fact, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of Employee's appeal process with this Office.

1) Whether Agency had cause to charge Employee with (1) Neglect of Duty and (2) Failure to follow orders and directives issued by the Chief of Police

Pursuant to OEA Rule § 631.2, Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. The District Personnel Manual ("DPM") regulates the manner in which agencies in the District of Columbia administer adverse and corrective actions. DPM § 1602.1 provides that disciplinary action against an employee may only be taken for cause. Agency suspended Employee for 20 days for neglect of duty and failure to obey orders and directive from the Chief of Police, pursuant to General Order 120.21- Attachment A, Part A-14 and Part A-16 respectively.

Pursuant to OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021), Agency has the burden of proving the charges that resulted in the suspension. Agency must meet this burden by a preponderance of the evidence. "Preponderance of the evidence" shall mean: the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.⁷ Employee was suspended for:⁸

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

Specification No. 1: In that on August 25, 2022, you were advised by a complainant that he was assaulted when he had been struck by a female suspect, causing injury. Witness statements obtained by you on the scene indicated that the female suspect had struck the victim in response to his touching or hitting the suspect with this shopping cart. Video surveillance from the location was present, but you failed to review it. You also failed to take a police report, while failing to make further investigative efforts to determine the veracity of the victim's account and confirm if an offense occurred.

⁶ 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").

⁷ OEA Rule § 699.1.

⁸ Agency's Answer to Petition for Appeal at Tab 2 (May 17, 2023).

Charge No. 2: Violation of General Order 120.21, Attachment A, Part A-16, which states, "Failure to obey orders or directives issued by the Chief of Police."

Specification No. 1: In that on August 25, 2022, you were the first officer on the scene to investigate an assault. You failed to secure the crime scene and take any photos of the reported injuries and arrange for the collection of evidence. Employees cleaned up the crime scene in your presence and no photos were ever obtained as a result. Additionally, you failed to request and or secure CCTV from the location to aid in this investigation. Footage recovered later did support the victim's allegation that an assault occurred. This misconduct is described in General Order 401.01. V. A., 1., b., and h., which states in part, "the first member on scene shall secure the crime scene to prevent evidence from being lost or contaminated...Arrangement for collection of evidence."

Specification No. 2: In that on August 25, 2022, you made contact with the victim on the scene, who was Limited English Proficient (LEP), which was further supported by his use of an interpreter the following day when he filed a complaint at the Third District. You failed to recognize that the victim was an LEP, and you failed to offer required translation services. Your misconduct is defined in the General order 304.18, II, A., and B., 1., which state in part, "Members who encounter a person who is LEP/NEP shall take necessary and appropriate steps, consistent with their obligation, to establish and maintain timely and effective communication with the LEP/NEP person to include but not limited to asking if they need assistance in a language other than English ... If an LEP/NEP person appears to be able to communicate in English, MPD members must keep in mind the fact that LEP/NEP persons may be competent in certain types of communication, but still be LEP/NEP for other purposes. Similarly, members must also keep in mind the fact that LEP/NEP designations are context-specific, that is an individual may possess sufficient language skills to function in one setting, but these skills may be insufficient in other situations."

Neglect of Duty:

In the instant matter, Agency charged Employee with Neglect of Duty (Charge No. 1), with one (1) specification. Under Charge No. 1, Specification No. 1, Agency contends that Employee failed to review the video surveillance that was present at the location. Agency also stated that Employee failed to take a police report and he failed to make further investigative efforts to determine the veracity of the victim's account and confirm if an offense occurred.

Pursuant to GO 401.01, Part II, the purpose of Agency's Field Reporting System is to "ensure that members file a report for all reported offenses and specified incidents brought to their attention." This provision further provides that "[s]elf-initiated police action taken and calls for police service shall be accurately and thoroughly documented to ensure that a follow-up investigation can be conducted for potential adjudication."⁹

Here, Employee offered multiple reasons why he did not create a report for this incident. However, the fact remains that Employee did not comply with GO 401.01, Part II which provides that Agency's Field Reporting System is to "ensure *that members file a report for all reported offenses and specified incidents brought to their attention.*" (Emphasis added). Cpt. Hong testified that the police report is used to document anything the member comes across such as witness information and phone numbers. Tr. Vol. I. pg. 150. Cpt. Hong explained that if a member does not find probable cause for a crime, they could create a 'miscellaneous' report and in this situation, the more appropriate report would have been a 'pending investigation' report because the CCTV video footage was pending. Tr. Vol. I. pg. 156. Further, Cpt. Hong affirmed that pursuant to GO 401.01, Part II, members are required to take reports. Tr. Vol. II. pg. 224. Employee was the first member on the scene, and he was informed by Mr. Yihdego that he was struck by two (2) females. Employee saw the injuries sustained by Mr. Yihdego, yet he decided not to create a police report, claiming he did not have probable cause that a crime had been committed. Lt. Miller also asserted that if Employee could not create an offense report because he did not have probable cause that a crime had been committed, Employee could have done an incident report. He explained that an incident report documents an incident such as the one Mr. Yihdego reported. Lt. Miller noted that Employee did not create any report of the August 25, 2022, incident. Tr. Vol. I. pgs. 90-93. Moreover, pursuant to GO 401.01, Part II, a member does not require probable cause for a crime to create a police report. All that is required is a reported offense and specified incident brought to the member's attention. In this instance, Mr. Yihdego reported the assault incident at the Giant store to Employee and this incident was supported by the visible injury on Mr. Yihdego's face, yet Employee did not create a police report. Consequently, I conclude that Agency was within its rights to discipline Employee for failing to take a report.

In addition, Agency also noted that Employee failed to review the video surveillance that was present at the location. Employee does not dispute the allegation that he failed to review the video surveillance while he was at the Giant store. Instead, Employee testified that he spoke to the Giant store manager about the video recording on the day of the incident and that based on his experience with the Giant store, he knew that the video recording would not be available at that time because the Giant store had nobody at the store to operate the cameras for him to review. Tr. Vol. II. pgs. 113, 127. Contrary to Employee's assertion, nothing on Employee's BWC of the incident proves that Employee asked the store manager about the CCTV footage while he was at the scene.¹⁰ When asked during the Evidentiary Hearing if the reason his conversation with the store manager about the CCTV video footage was not captured by his BWC was because he turned off his BWC during the conversation, Employee stated that he did not recall. Employee acknowledged that Agency requires members to keep their BWC video on throughout the duration of their investigation, including when they are requesting actual evidence such as CCTV video footage. He, however, explained that he was probably done with the scene when he asked the Giant store manager about the CCTV video footage. Tr. Vol. II. pg. 148. Lt. Miller was able to request and eventually obtained the CCTV footage of the

⁹ See Agency's Exhibit 14.

¹⁰ Agency's Exhibit 7 - Employee's BWC footage.

incident which proves that there was video surveillance of the incident on August 25, 2022. Therefore, absent any evidence from Employee to prove that the CCTV footage was not available or accessible for Employee to review on August 25, 2022, I find that Agency was within its rights to cite Employee with failing to review the video surveillance at the Giant store. Accordingly, I conclude that because Agency met its burden of proof with regards to Charge No. 1., Specification No. 1., Agency had cause to discipline Employee for Neglect of Duty.

Failure to obey orders or directives issued by the Chief of Police:

In the instant matter, Agency charged Employee with failure to obey orders or directives issued by the Chief of Police (Charge No. 2), with two (2) specifications. Under Charge No. 2., Specification No. 1., Agency argued that Employee failed to secure the crime scene and take any photos of the reported injuries and arrange for the collection of evidence in violation of General Order 401.01, Part V. A., 1., b., and h. Agency also noted that Giant store employees cleaned up the crime scene in Employee's presence and no photos were ever obtained as a result. Agency further averred that Employee failed to request and or secure CCTV from the location to aid in this investigation.

Cpt. Hong testified that it was Employee's responsibility to complete the tasks listed in GO 401.01, Part V.A.1(a- i) and not the responsibility of other members after the fact. Tr. Vol. I. pg. 220. Cpt. Hong testified that pursuant to the applicable GO, the first member on scene shall secure the crime scene to prevent evidence from being lost or contaminated, and/or arrange for collection of evidence. – Tr. Vol. I. pg. 269. GO 401.01, Part V.A. – Preliminary Investigation highlights the procedures for conducting a preliminary investigation. GO 401.01, Part V.A.1(a- i), defines the preliminary investigation as the combination of those actions that the first member on the scene *must* carry out when they arrive on the scene. (Emphasis added). Specifically, GO 401.01, Part V.A.1. provides in pertinent parts that, “[t]he first member on the scene shall:

b. Secure the crime scene to prevent evidence from being lost or contaminated. ...

h. Arrange for the collection of evidence.

Cpt. Hong asserted that while Employee's BWC captured Mr. Yihdego's injuries, the quality is not as great as actual photos of the crime scene. He maintains that while it is possible to retrieve videos from BWC, this does not excuse members from documenting. Tr. Vol. I. pgs. 187- 188. He noted that Employee could have also taken photographs of the blood trail from Mr. Yihdego to corroborate Mr. Yihdego's account that he was bleeding and running towards the front of the store. Tr. Vol. I. pgs. 189-190.

Employee provided justifications for not taking photographs of the crime scene and for not securing the crime scene. When asked if he took actual pictures of the crime scene, Employee stated that while he could take pictures, he did not because his BWC could be turned into pictures. He however noted that he never made any effort to take pictures off his BWC video footage. Tr. Vol. II. pgs. 144-146. Based on Employee's own admission that he did not take actual pictures of the crime scene and that he did not make any effort to take pictures off his BWC video footage, I find that Agency was within its rights to cite Employee with this specification.

As previously noted above, because Employee's BWC did not capture the conversation he had with the store manager requesting the CCTV video footage, and there's no evidence in the record to support Employee's assertion that he requested the BWC on August 25, 2022, I conclude that Agency was justified to charge Employee for failing to request and or secure CCTV from the location to aid in this investigation.

Additionally, Employee explained that there was no crime scene to secure. He maintained that there was no evidence, so there was no need to close the store or put-up crime scene tape. He reiterated that his BWC captured the entire crime scene, including Mr. Yihdego's injuries. Tr. Vol. II. pg. 113 – 114. Cpt. Hong explained that Employee failed to secure where Mr. Yihdego's blood was at the Giant store, as well as the shopping cart that was touched by Mr. Yihdego and the suspects. Cpt. Hong stated that Employee could have taped off the areas past the cash register while allowing space for customers to go on and exit. Tr. Vol. II. pgs. 187-190. A review of Employee's BWC shows that while the Giant store staff had started cleaning up some of Mr. Yihdego's blood drops in the store, there were still areas within the store with Mr. Yihdego's blood as evidenced by Employee's BWC video footage.¹¹ Moreover, Employee's BWC footage captures a Giant store employee mopping blood from the floor. Employee informed the Giant store employee that there were more blood spots on the floor to be cleaned.¹² Further, Employee is seen on his BWC video footage handing over Mr. Yihdego's shopping cart to him, although he was informed by witnesses that the alleged suspects pushed the cart.¹³ However, Employee did not take any pictures of the blood droplets on the floor or make any attempt to recover evidence from the cart prior to handing it over to Mr. Yihdego. Accordingly, I conclude that Agency had cause to charge Employee with violating GO 401.01. V. a., 1., b., and h.

For Charge No. 2., Specification No. 2., Agency asserted that Employee made contact with a Limited English Proficient (LEP) victim on the scene on August 25, 2022, but Employee failed to recognize that the victim was an LEP, and he did not offer required translation services in compliance with General order 304.18, II, A., and B., 1. Pursuant to 304.18, II, A., and B., 1.,

“Members who encounter a person who is LEP/NEP shall take necessary and appropriate steps, consistent with their obligation, to establish and maintain timely and effective communication with the LEP/NEP person to include but not limited to asking if they need assistance in a language other than English ... If an LEP/NEP person appears to be able to communicate in English, MPD members must keep in mind the fact that LEP/NEP persons may be competent in certain types of communication, but still be LEP/NEP for other purposes. Similarly, members must also keep in mind the fact that LEP/NEP designations are context-specific, that is an individual may possess sufficient language skills to function in one setting, but these skills may be insufficient in other situations.

Here, despite Employee's assertion that he could understand Mr. Yihdego when he first met him at the Giant store, it is undisputed that Mr. Yihdego was a LEP. Mr. Yihdego needed a translator to interpret for him during the Evidentiary Hearing held at OEA on October 25, 2023. Moreover, the BWC video footage from Sgt. Hiller's and Ofc. Edelin's encounter with Mr. Yihdego at the 3D the

¹¹ Agency's Exhibit 7.

¹² *Id.*

¹³ *Id.*

day after the August 25, 2023, incident shows that a third party translated for Mr. Yihdego. Cpt. Hong testified that Employee was also verbally counseled for his failure to use an interpreter. Tr. Vol. I. pg. 162.

Q: *So would you say that you, in effect, verbally counseled Officer Rahman with regard to using an interpreter?*

A: Yes.

Q: Do you know when that would have been?

A: I don't recall a date specific.

(Emphasis added).

Because Sgt. Hiller and Ofc. Edelin received verbal counseling for violating GO 304.18, II, A., and B., 1, and Cpt. Hong admitted that he verbally counseled Employee in the current matter for violating 304.18, II, A., and B., 1, I conclude that Agency cannot discipline Employee a second time for the same misconduct. Therefore, I further find that Agency has not met its burden of proof with regards to Charge No.2, Specification No. 2.¹⁴

Based on the above, I conclude that because Agency met its burden of proof with regards to Charge No. 2., Specifications No. 1, Agency had cause to discipline Employee for Failure to obey orders or directives issued by the Chief of Police.

2) 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).¹⁵ 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 Illustrative Actions; 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 that Agency has met its burden of proof for the charge of "Neglect of Duty" and "Failure to obey

¹⁴ Employee asserted in his closing argument that Agency engaged in disparate treatment because it counseled Sgt. Hiller and Ofc. Edelin for not using an interpreter with Mr. Yihdego, but suspended Employee for the same misconduct. Because I have concluded that Agency did not have cause for Charge No. 2., Specification No. 2., I find that the issue of disparate treatment as raised by Employee is moot.

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).

orders or directives issued by the Chief of Police.” As such, Agency can discipline Employee under these charges.

Agency noted in its discussion of the *Douglas factors* that this was Employee’s second (2nd) offense for both “Neglect of Duty” and “Failure to obey orders or directives issued by the Chief of Police.” Agency cited to a previous offense that occurred in 2021, wherein, Employee received a fifteen (15) day suspension for the first offense for Neglect of Duty and Failure to obey orders or directives issued by the Chief of Police.¹⁶

In reviewing Agency’s decision to suspend Employee for twenty (20) days, OEA may look to Agency’s General Order 120.21, Attachment A.¹⁷ The penalty for the first offense of Neglect of Duty ranges from reprimand to removal; and the penalty for a second offense ranges from a fifteen (15) day suspension to removal. Additionally, the penalty for the first offense of failure to obey orders and directives ranges from reprimand to removal; and the penalty for the second offense ranges from a one (1) day suspension to removal. The record shows that this was the second time Employee violated this cause of action. Because I have concluded that Agency had cause to discipline Employee Neglect of duty and failure to obey orders and directives; and this is Employee’s second offense for both causes of actions, I find that the penalty of twenty (20) days suspension is within the range allowed by Agency’s Table of Offenses and Penalties.¹⁸

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.¹⁹ 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. Since one of the charges against Employee was reversed, I find that the penalty of twenty (20) days suspension should be modified.

Penalty 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.²⁰ Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in

¹⁶ Agency’s Exhibit 19.

¹⁷ See Agency’s Exhibit 13.

¹⁸ Because Employee was suspended for fifteen (15) days for his first violation of these causes of action, I find that a twenty (20) day suspension constitutes progressive discipline..

¹⁹ *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 (1981).

²⁰ *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).

reaching the decision to terminate Employee.²¹ The Douglas factor analysis included in the record demonstrates that Agency considered all factors in imposing the penalty in this matter. The penalty of twenty (20) days suspension was within the range allowed for a second offense. As noted above, the evidence does not establish that the penalty of twenty (20) days constituted an abuse of discretion. Accordingly, I further conclude that Agency's action should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of suspending Employee for twenty (20) days is **UPHELD**.

FOR THE OFFICE:

/s/ Monica N. Dohnji

MONICA DOHNJI, Esq.
Senior Administrative Judge

²¹ 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 its 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.