THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No. 1601-0128-11
Melvin Evans	)	
Employee	)	Date of Issuance: March 31, 2014
v.	)	
	)	Joseph E. Lim, Esq.
Metropolitan Police Department	)	Senior Administrative Judge
Agency	)	

Melvin Evans, Employee *pro se*
Ronald Harris, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Melvin Evans ("Employee") was a Crime Scene Technician for the Metropolitan Police Department ("MPD" or "the Agency"). He was suspended for 25 days with 10 days held in abeyance from the MPD in 2011 for Neglect of Duty and Insubordination he allegedly committed in July 2010 and February 17, 2011. According to MPD, Employee neglected his duty to preserve latent prints at a crime scene and insubordinately failed to answer four questions during an administrative investigation.

Employee timely filed an appeal with the Office of Employee Appeals ("OEA" or "the Office"). On March 18, 2013, this matter was assigned to the Undersigned. The Undersigned determined that it would be necessary to conduct an evidentiary hearing in order to make findings of fact and conclusions of law. Accordingly, an evidentiary hearing was held in this matter on September 13, 2013. 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 629.1, 46 D.C. Reg. 9317 (1999) 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 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUES

1. Whether Agency violated D.C. Official Code § 5-1031 (a) (2001), otherwise known as the "90-day rule" in suspending Employee.

2. Whether Agency's action of suspending the Employee from service was done in accordance with applicable law, rule, or regulation.

Whether Agency violated D.C. Official Code § 5-1031 (a) (2001), otherwise known as the "90-day rule" in suspending Employee.

Findings of Fact, Analysis and Conclusion on Issue 1.

Undisputed Findings of Fact

1. Employee is a Crime Scene Technician for the Agency.

2. On July 19, 2010, Employee was sent to a burglary crime scene to collect latent prints as evidence. At some point, Employee discarded those prints after he concluded that they were not usable.

3. On December 29, 2010, the Forensic Science Services Division ("FSSD") received a PD 860 (Request for Latent Fingerprint Examination) from the Seventh District Detectives Office in relation to a burglary offense that had occurred on July 19, 2010. FSSD staff checked the log book and determined that Employee had processed the crime scene and indicated that he had obtained prints in the case. However, a review of the PD 668 (Evidence Report) showed that Employee processed the scene for prints with negative results.

4. Once Agency learned that Employee had possibly discarded print evidence, it launched an investigation. Lt. Michelle Milam started her investigation of Employee on December 29, 2010, by obtaining Employee's statement in which he admitted that he had destroyed a print that he recovered from the crime scene. *See* Employee's statement listed as Attachment #4 of investigative report that is attached to the Notice of Proposed Adverse Action at Agency Exhibit 1-A.

5. On February 25, 2011, the Forensic Science Services Division issued a memorandum summarizing its findings entitled "Investigative Report Regarding Allegation of Misconduct by Technician Melvin Evans, Forensic Science Services Division (IS #11-0021). Agency Exhibit 1-A.

6. On April 5, 2011, Agency issued a notice of proposed adverse action in which it proposed to suspend Employee for twenty-five days. Agency Exhibit 1-B. He was charged, in pertinent part, as follows:

> Charge No. 1: Violation of General Order 120.21, Part A-14, which states "Neglect of Duty to which assigned, or required by rules and regulations adopted by the Department." This conduct is further enumerated in the FSSD Standard Operating Procedure Manual Section IX, D-9, which states, "Latent Prints recovered will be submitted in a PD Form 307 (Latent Print Envelope). Each latent print will be listed individually on the technicians report."
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> Specification No. 1: In that, Technician Melvin Evans indicted [sic] on the MCL Book that he recovered prints. However, on the PD 668 (Evidence Report) he stated that the crime scene was processed for latent prints with negative results. He later admitted that he determined the prints to be of no value and discarded the prints evidence.
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> Charge No.2: Violation of General Order 120.21, Part A-5, which states, "Willfully disobeying orders or insubordination."
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> Specification No. 1: In that, during his statement on February 17, 2011, Technician Melvin Evans failed to answer four (4) questions when questioned during an administrative investigation.

7. Employee submitted his response to the proposed notice on April 27, 2011. Employee challenged the proposed action by citing several problems with Agency's action.

8. Agency issued its final notice on May 9, 2011, sustaining the charges. Management refuted each of Employee's contentions and upheld the twenty-five day suspension. Agency Exhibit 1-C.

9. On or about May 19, 2011, Employee appealed the suspension to the Chief of Police, who denied the appeal on June 9, 2011. Agency Exhibit 1-D.

The first challenge raised by Employee is that Agency violated D.C. Code Section 5-1031(a), which requires Agency to initiate an adverse action against a sworn member of the police force no later than 90 days from the date Agency "knew or should have known of the act or occurrence allegedly constituting cause." Employee argues that the matter should be dismissed because MPD failed to propose his suspension in a timely manner, in that it failed to propose the adverse action within 90 days of when it knew or should have known of the charged conduct. MPD contends that it did act within the 90 day period.

§ 5-1031. Commencement of corrective or adverse action states as follows:

> (a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.
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> (b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of Corporation Counsel, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

In *D.C. Fire and Medical Services Department vs. D.C. Office of Employee Appeals*, No. 08-CV-1557, 986 A.2d 419 (January 7, 2010), the D.C. Court of Appeals held that 90-day period for Agency to propose removal of technician began to run on the date that a panel of Agency leaders interviewed technician in an investigation of the incident.

Attachments 2 and 5 of the investigative report, Agency Exhibit 1-A, revealed that Agency first knew of Employee's conduct which constituted cause for imposing discipline on December 29, 2010. There is no evidence in the record that Agency should have known of Employee's misconduct before December 29, 2010.

The ninety day clock began to tick when Lt. Milam interviewed Employee on December 29, 2010. That is exactly the situation presented in the instant case. Agency's first knowledge that Employee might have engaged in misconduct was on December 29, 2010, when a detective submitted a request to examine prints that were listed by Employee as having been retained. Agency had sufficient cause to impose discipline when Employee's statement was obtained in which he admitted to having destroyed evidence. Employee asserts that since Agency performs a monthly audit of crime scene reports, it should have caught his discrepancy on the prints much earlier than it did. However, no evidence was ever introduced that would show a monthly audit was a mandated procedure instead of a mere idealized wish.

Ninety days from December 29, 2010, not including weekends or holidays, is May 9, 2011. As set forth above, Agency commenced adverse action against Employee on April 5, 2011, well within the ninety day period mandated by the 90-day rule.

After carefully reviewing the record and the arguments of the parties, the Administrative Judge concludes that Agency did initiate the adverse action in a timely manner.

Whether Agency's action of suspending the Employee from service was done in accordance with

applicable law, rule, or regulation.

Summary of Relevant Testimony

Agency's Case in Chief

Lt. Michelle Milam, Transcript ("Tr.") pgs. 63-120.

Lt. Michelle Milam ("Milam") testified in relevant part that: she has been a Detective Lieutenant at the Forensic Science Division for four years where she managed crime scene investigation technicians such as Employee. Sergeant Frank Grosso informed her that Employee had discarded print evidence that could have been used to link a suspect to a particular crime. Milam's investigation revealed that while Employee logged in his report that he obtained latent prints, none were submitted to the crime lab. When questioned, Employee admitted to Milam that he had discarded them.

Milam testified that even a smudge print would be considered evidence and that it was up to the certified fingerprint examiners at the crime lab to determine whether such prints were usable. She clarified that Employee was not a certified fingerprint examiner. Milam testified that technicians may discard a smudge print at the actual crime scene but not, after they have inputted the evidence into the system. She described Agency's Standard Operating Procedure ("SOP") in collecting latent prints from a crime scene. Milam stated that technicians had some discretion at the crime scene to determine if a lifted print was usable or not, but that once they inputted it into the computer log, they were not allowed to discard or destroy the prints before sending their evidence packet to the lab.

Milam indicated that Employee's demeanor during the questioning was cocky but pleasant and calm. She indicated that police officers are ordered to answer truthfully and fully to any questioning by superiors and that she did not consider Employee's "no comment" answer to be responsive.

Inspector Michael Eldridge , Tr. pgs. 122-154.

Inspector Michael Eldridge ("Eldridge") of the Disciplinary Review Branch testified that he reviews and sustains misconduct investigations for Agency. He explained that there are two types of misconduct investigations: 1) Chain of Command, whereby an official of the unit in which a member is assigned performs the investigation in house and, 2) Internal Affairs, which assigns an agent to investigation an allegation of misconduct by an employee. The result of all investigations is ultimately reported to the assistant chief of the Internal Affairs Bureau. The evidence gathered is then weighed based on a preponderance of the evidence, compared against the table of charges and potential penalties. Eldridge's office then prepares the notice of proposed adverse action.

In the instant matter, it was determined that Employee neglected his duty and was insubordinate. Employee neglected his duty when he improperly disposed print evidence from a crime scene and was deemed insubordinate for failing to properly answer questions during the investigation. Eldridge testified that since Employee is not trained in finger prints, he has no

discretion in discarding any print evidence and must submit all prints to the laboratory technicians. However, he conceded that Lt. Milam of the Forensic Science Division may have a different policy of allowing a technician to have some discretion at the crime scene. All aggravating and mitigating factors listed in the *Douglas* factors are summarized and considered in coming up with a proposed penalty. Chief of Police Lanier receives Employee's final appeal and makes the final determination.

Based on Agency's corrective versus punitive policy on discipline, errant members are given an opportunity to serve a shorter suspension than the meted discipline provided they stay out of trouble for 12 months. Thus, part of the suspension is held in abeyance for a year and then dismissed if no other infraction is committed. Otherwise, if the member sustains another offense, then he or she will have to serve the full penalty for their prior offense in addition to the penalty in the new offense.

Employee's Case in Chief

Officer Kevin Brittingham, Tr. pgs. 12-62.

Officer Kevin Brittingham ("Brittingham") testified in relevant part that he is a Master Patrol Officer with the Second District and a union shop steward. He was present as the union representative during Lt. Milam's questioning of Employee regarding Employee's alleged mishandling of a loaded weapon and latent prints. As a certified crime scene officer, Brittingham testified that he attended a one-week course in the obtaining or "lifting" of a latent print from a crime scene to be submitted to the Mobile Crime Laboratory. Brittingham would take photos of the crime scene before lifting prints from relevant areas of a crime scene. After going back to the police station, he would review these prints, number them, place them inside an PD-307 envelope card and discard those that had no pattern at all. The numbers, called Mobile Crime Log ("MCL") numbers, were obtained from a computer after logging them into the system. Later questioning revealed that he discarded what he deemed unusable prints at the crime scene before sending them to the crime lab.

Brittingham admitted that his training was abbreviated and limited, and that he had no training in the analysis of latent prints. He was not familiar with the forensic division standard operating procedure. Brittingham stated that once he has logged in a print, he never destroys or discards it, nor does he know anyone who has done so.

Brittingham said that Employee was never disrespectful or refused to answer questions during Milam's questioning. However, he admitted that Employee answered several questions with, "No comment." Brittingham stated that officers were trained to give full, honest answers when questioned by a superior officer. He admitted that an answer of "no comment" would not be responsive to a question.

Officer Martin Fosso, Tr. Pgs. 155-173

Martin Fosso ("Fosso") testified in relevant part that he has been assigned to the Forensic Science Division and has extensive experience as a crime scene technician. His trainers explained to him that he should discard unusable prints at the crime scene and send in only

workable prints. Fosso boasted that he was named crime scene officer of the year. He admitted that he had no training as a fingerprint examiner. Once the print evidence is logged into the log book and recorded in his crime scene report, Fosse said that it would be improper to destroy any of the prints collected.

Officer Jerome Williams, Tr. Pgs. 173-180

Jerome Williams ("Williams") testified in relevant part that he was an evidence technician from June 1999 until September 2012. Williams classified useful prints as code 1 and unusable prints as code 2. After examining them at the office, he discards code 2 prints and logs into the system the code 1 prints. Williams admitted that once the prints are logged into the system, they are considered official evidence and cannot be destroyed.

Officer Gregory Johnson, Tr. Pgs. 180 – 183.

Officer Gregory Johnson ("Johnson") testified in relevant part that he is currently employed as a crime scene technician and has worked as one since 2008. He described how he collected print evidence and how he would discard unusable prints and not include them in his crime scene report.

Findings of Fact, Analysis and Conclusion on Issue 2.

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

Neglect of Duty

One of the cited causes for suspending Employee was neglect of duty; specifically, that Employee neglected his duty to submit print evidence that he had collected at a crime scene and logged into the database system.

The evidence shows that Employee discarded the print evidence that he collected after he had already logged it into the database system. Employee does not deny doing so. Instead, Employee argues that he always had the authority to discard print evidence that, in his discretion, he deemed to be unusable.

Although the witnesses varied on the amount of discretion Employee had to determine and discard unusable prints, all the witnesses, including Employee's own witnesses, were unanimous in testifying that once print evidence was already logged into the database system, a crime scene technician no longer has any authority to destroy or discard the collected print evidence. In addition, the Forensic Science Service Division ("FSSD") Standard Operating Procedure Section IX, D-9, states, "Latent prints recovered will be submitted in a P.D. Form 307 (Latent Print Envelope). Each latent print will be listed individually on the technicians report." The failure to obey the FSSD standard operating procedure is described as a punishable offense in Agency's General Order Series 120.21, Attachment A, Part A-5, which states: "Willfully

disobeying orders, or insubordination."

Based on the evidence presented and the above orders regarding the recovery of prints, I find that Employee willfully neglected his duty in failing to preserve print evidence.

Insubordination

The testimony in this case demonstrated that when Employee was questioned by his superior, Lt. Milam, during an administrative investigation, he answered several of the question with, "No comment." Employee does not deny this. Instead, he insists that this non-responsive reply is responsive and respectful.

All of the witnesses, including those of Employee's, were unanimous that police officers are under orders to cooperate and answer fully and truthfully to any questions posed during an administrative investigation. Even Employee's witnesses, Officer Brittingham, admitted that an answer of "No comment" is non-responsive and insubordinate. I therefore find that Employee was insubordinate whenever he answered "No comment" to Lt. Milam's questions.

Appropriateness of the Penalty

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised."[1] OEA has previously held that the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.[2] 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.[3] 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.[4]

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[1] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

[2] *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

[3] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011); *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (February 1, 1996); and *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995).

[4] *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

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[5] The evidence did not establish that the penalty of a 25-day suspension with 10 days held in abeyance plus seven days held in abeyance in a prior adverse action constituted an abuse of discretion. Agency's thorough discussion of the relevant factors as outlined in *Douglas* when arriving at its decision to suspend Employee is evidenced in its advance notice of adverse action.[6] Agency Exhibit 1-B.

Agency gave great weight to the nature and seriousness of the offense; Employee's job level and type of employment; and the effects of the offense upon Employee's ability to perform as a satisfactory level.[7] There was no evidence presented that Agency was prohibited by law, regulation, or guidelines from imposing the penalty of suspension.

Based on the aforementioned, there is no clear error in judgment by Agency. Suspension was a valid penalty under the circumstances. The penalty was based on a consideration of the relevant factors as outlined in *Douglas*. Based on a preponderance of the evidence, I conclude that given the aforementioned findings of facts and conclusions of law, Agency's action of suspending Employee from service should be upheld.

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a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).

[5] *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).

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

(1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
(2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
(3) the employee's past disciplinary record;
(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
(7) consistency of the penalty with any applicable agency table of penalties;
(8) the notoriety of the offense or its impact upon the reputation of the agency;
(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
(10) potential for the employee's rehabilitation;
(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[7] *Ibid.*

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of suspending the Employee from service is **UPHELD.**

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge