THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Jason Gulley,	)	OEA Matter No. 1601-0025-17R18
Employee	)	
	)	Date of Issuance: October 29, 2018
v.	)	
	)	Joseph E. Lim, Esq.
Metropolitan Police Department,	)	Senior Administrative Judge
Agency	)	

Jason Gulley, Employee *pro se*
Brenda Wilmore, Esq., Agency Representative

INITIAL DECISION ON REMAND

PROCEDURAL BACKGROUND

On January 30, 2017, Employee, a Police Sergeant at the Metropolitan Police Department ("MPD" or "Agency"), filed a Petition for Appeal with the Office of Employee Appeals ("OEA") challenging Agency's final decision to suspend him from employment for thirty (30) days, and demote him from Lieutenant to Sergeant for insubordination and conduct prejudicial to the reputation and good order of the police force.

I held an Evidentiary Hearing on October 4, 2017, and issued an Initial Decision ("ID") on November 15, 2017, reversing Agency's action on its two charges against Employee.[1] Agency appealed, and on June 5, 2018, the OEA Board upheld the ID on the second charge but held that the conclusions of law with respect to first charge (Failure to obey orders) were not supported by the record.[2] Therefore, this matter was remanded for the purpose of applying the correct legal standard to the facts of this case and to determine whether Agency's General Order ("GO") 201.09 is usurped by the First Amendment right to free speech.

On June 22, 2018, I ordered the parties to submit briefs based on the remand and they have fully complied. The record is closed.

JURISDICTION

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

ISSUES

1. Whether Employee was guilty of the specifications in Charge 1.
2. Whether Agency's GO is usurped by the First Amendment right to free speech.

1 *Gulley v. Metropolitan Police Department*, OEA Matter No. 1601-0025-17 Initial Decision (November 15, 2017).
2 *Gulley v. Metropolitan Police Department*, OEA Matter No. 1601-0025-17, *Opinion and Order on Petition for Review* (June 5, 2018).

3. Whether Agency's penalty was appropriate under the circumstances.

ADDITIONAL FINDINGS OF FACT[3]

The remand concerns only Charge 1 against Employee, which is the violation of General Order 120.21, Attachment A, Part A-16, Insubordination, with the specification of violating General Order 201.09, Part VIII, Section B-1, which reads, "Employees shall be courteous, civil and respectful to persons when on duty. Employees of the MPD shall not use terms or resort to name-calling that might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person. Employees shall not engage in idle conversation, tell jokes, or make comments that relate to the race, color, national origin, sex, age, religion, disability or sexual orientation of any individual…"

Sergeant Kimberly Carter (Carter) testified as follows:

> "…Lieutenant Gulley was basically telling Sergeant Pollock that he liked doing the use of force investigations to help his officers out, and that the citizen complaint investigations he didn't like doing, because most of the citizens who made those complaints had arrest records. Then he went on to say how they always complaining and how they pay his salary and most of them, I mean all of them are on welfare…I told him that what he was saying was offensive, and that I was offended." [sic]. P. 85-86

> "I was offended by how he picks and chooses how he does his investigations, and then especially about generalizing everybody in a community, which specifically the 6th District, that they're all on welfare. It was very offensive to me." [sic]. P. 92

Employee testified as follows: (Transcript pgs. 98 – 126)

> "I was merely stating a fact, because approximately three-quarters of the people in 6D are on welfare. According to the statistics, almost one in seven are convicted felons. I did not mean it in a derogatory term." [sic]. P. 100

> "I said half of them were on welfare." P. 125

In her testimony, Carter said that she was offended by Employee's remarks that said everybody in the 6th District was on welfare, and that most of the citizens who make use of force complaints have arrest records, and how Employee conducts his use of force investigations.

Although Employee believed many of these District residents were either on welfare or had criminal records, he did not produce any documentary evidence to support his beliefs. Apart from his insistence that he only said half, not all, of the people in the 6th District were on welfare, Employee did not deny Carter's allegations. On this score, I find Employee to be credible.

I therefore make the following additional findings of fact: I find that Employee said that half of the people in the 6th District were on welfare, and that most of the citizens who make use

3 The following findings of fact are in addition to the findings of fact listed in the November 15, 2017, ID which are incorporated herein.

of force complaints have arrest records. I also find that Carter was offended by Employee's remarks and how Employee conducts his use of force investigations. Lastly, I find that Employee's remarks did not touch on matters of public concern, as it concerned only his personal opinions of many of the 6th District residents.

Agency also stipulates that the specific section of General Order 201.09, Part VIII, Section B-1, that relates to Employee's misconduct states as follows:

> Employees shall be courteous, civil and respectful to persons when on duty. Employees of the MPD *shall not* use *terms* or resort to name-calling *that might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person.* [Emphasis added.]

Contentions of the Parties

The Agency contends that Employee was guilty of insubordination for disobeying the above-mentioned General Order 201.09, Part VIII, Section B-1. Specifically, Employee was charged with making verbal statements that were derogatory, disrespectful, and offended his fellow police officer who was African-American. Agency points out that Employee's offensive statements were not only offensive, but inaccurate. Agency asserts that Employee's disparaging statements were not the sort that would be protected by the First Amendment right to free speech.

Employee states that his statements did not violate Agency General Order 201.09, Part VIII, Section B-1. He denies any racist intent and points out that he made no remarks concerning race, religion, gender, or any protected class. Nor did he resort to name calling, and none of his statements can be interpreted as derogatory, disrespectful, or offensive. Employee also argues that none of his statements disrupted or hindered Agency's daily operations, and thus, his statements were protected under the First Amendment.

ANALYSIS AND CONCLUSION

Whether Agency's action was taken for cause and analysis of First Amendment argument

While public employees do not surrender their First Amendment right to free speech by reason of their employment, a government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations. *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

The seminal court decision that explored the First Amendment rights of public employees is *Marvin Pickering vs. Board of Education of Township High School District 205*, 391 U.S. 563 (1968), 88 S.Ct. 1731 (1968). In *Pickering*, a teacher was fired for a letter he sent to the local newspaper that was critical of the way in which the school board had handled past bond proposals and had allocated financial resources between the schools' educational and athletic programs. The letter was also critical of the superintendent's alleged attempts to prevent teachers from opposing or criticizing the proposed bond issue.

The Court explained that the possibility that the letter would foment controversy and conflict did not justify the teacher's firing because there was no evidence that the letter had that

effect.[4] The Court also held that the letter could not be found to be somehow "*per se* harmful to the operation of the schools" because the criticism that too much money was being allocated to athletics merely "reflect[ed] ... a difference of opinion between [the teacher] and the Board as to the preferable manner of operating the school system, a difference of opinion that clearly concerns an issue of general public interest."[5]

Pickering provides a useful starting point in explaining the Court's doctrine. In this case, the relevant speech was a teacher's letter to a local newspaper addressing issues including the funding policies of his school board.[6] "The problem in any case," the Court stated, "is to arrive at a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[7] The Court found the teacher's speech "neither [was] shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties in the classroom or to have interfered with the regular operation of the schools generally."[8] Thus, the Court concluded that "the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[9]

Pickering and the cases decided in its wake identify two inquiries to guide interpretation of the constitutional protections accorded to public employee speech. The first requires determining whether the employee spoke as a citizen on a matter of public concern.[10] If the answer is no, the employee has no First Amendment cause of action based on his or her employer's reaction to the speech. See *Connick v. Meyers*, 461 U.S. 138, at 147, 103 S.Ct. 1684 (1983). If the answer is yes, then the possibility of a First Amendment claim arises. The question becomes whether the relevant government entity had an adequate justification for treating the employee differently from any other member of the general public.[11] This consideration reflects the importance of the relationship between the speaker's expressions and employment. A government entity has broader discretion to restrict speech when it acts in its role as employer, but the restrictions it imposes must be directed at speech that has some potential to affect the entity's operations.

The threshold inquiry in assessing a free speech claim of a disciplined government employee is whether the employee has spoken as a citizen upon matters of public concern or merely as an employee upon matters only of personal interest. Whether public employee's speech addresses matter of public concern, for purpose of free speech claim, depends on content, form, and context of statements and whether speech can be fairly considered as relating to any matter of political, social, or other concern to the community.

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4 *See id.* at 570, 88 S.Ct. 1731.
5 *Id.* at 571, 88 S.Ct. 1731.
6 391 U.S., at 566, 88 S.Ct. 1731.
7 *Id.*, at 568, 88 S.Ct. 1731.
8 *Id.*, at 572–573, 88 S.Ct. 1731 (footnote omitted).
9 *Id.*, at 573, 88 S.Ct. 1731.
10 See *id.*, at 568, 88 S.Ct. 1731.
11 See *Pickering*, 391 U.S., at 568, 88 S.Ct. 1731.

For purposes of the First Amendment's Speech Clause, there are some rights and freedoms so fundamental to liberty that they cannot be bargained away in a contract for public employment, and the Court's responsibility is to ensure that citizens are not deprived of these fundamental rights by virtue of working for the government; however, a citizen who accepts public employment must accept certain limitations on his or her freedom.[12]

Here, Employee expressed his opinions on the quality and credibility of the citizens who make use of force complaints, and what he thinks of many of the people in the 6th District of Washington, D.C. As Employee's personal opinions were not on matters of public concern, his statements do not enjoy First Amendment protection.

Even if a public employee speaks as a citizen on a matter of public concern when suing his or her employer, his or her speech is not automatically privileged, since the First Amendment interest of the employee must be balanced against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. *Borough of Duryea, Pa. v. Guarnieri*, 564 U.S. 379 (2011)

Thus, even assuming for the sake of argument, Employee's statements touched on matters on public concern, as a public employee and as a police officer specifically, his statements would still not enjoy First Amendment protection.

In *Garcetti v. Ceballos*, 547 U.S. 410 (2006), a U.S. Supreme Court decision involving First Amendment free speech protections for government employees, the respondent in the case was a district attorney who claimed that he had been passed up for a promotion for criticizing the legitimacy of a warrant. The Court ruled, in a 5-4 decision, that because his statements were made pursuant to his position as a public employee, rather than as a private citizen, his speech had no First Amendment protection.

Further, in the majority opinion, the Court found that Ceballos did not act as a citizen when he wrote the memo that addressed the proper disposition of a pending criminal case; he acted as a government employee. The Court wrote that its "precedents do not support the existence of a constitutional cause of action behind every statement a public employee makes in the course of doing his or her job." Instead, public employees are not speaking as citizens when they are speaking to fulfill a responsibility of their job. The Court found a reason for limiting First Amendment protection to public statements made outside the scope of official duties "because that is the kind of activity engaged in by citizens who do not work for the government." The Court determined that a supervisor may take corrective action against inflammatory or misguided speech. Therefore, speech made by a government employee in an official capacity does not receive First Amendment protections.

If a public employee petitions as an employee on a matter of purely private concern, his First Amendment interest must give way, as it does in speech cases. *San Diego v. Roe*, 543 U.S. 77, 82–83, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004). When public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer

12 *Id*.

discipline.[13]

In *Donald Johnson v. Department of Justice,* 65 M.S.P.R. 46 (1994), "Employee petitioned for review of the initial decision sustaining agency's demotion action. The Merit Systems Protection Board ("MSPB") held that demotion and reassignment was appropriate penalty for racially derogatory comments about a coworker in violation of regulation prohibiting obscene, abusive, or insulting language."

In *Johnson*, agency demoted the appellant from the GS-11, Step 5 position of Supervisory Correctional Officer, Lieutenant, to GS-9, Step 10 position of Correctional Officer, Correctional Counselor. The agency charged the appellant with: (1) Disrespectful conduct; use of insulting, abusive, or obscene language to or about others, and (2) Falsification of facts during an official investigation. In *Johnson*, the appellant used racially derogatory and other insulting language about a coworker while on duty and in the presence of other staff. His comments included "dumb nigger," "porch monkey…" The appellant asserted that agency's charge violated his constitutional right to free speech.

The *Johnson* MSPB Board stated that "even assuming arguendo that appellant's statements did address a matter of public concern, we find that the disruptive effect of the appellant's racially derogatory comments, which were made in the presence of other agency personnel while on duty, outweighs any public interest in such comments."[14] Finally, the Board stated that disrespectful conduct as manifested by the use of abusive language was unacceptable and not conducive to a stable working atmosphere. Therefore, an agency was entitled to expect employees to deport themselves in conformance with accepted standards. Therefore, it found that as a correctional officer and supervisor, the appellant occupied a position of trust and responsibility, such that the agency is entitled to hold him to a higher standard of conduct than non-law enforcement employees and non-supervisors.[15]

Although in the instant matter, Employee's statements were not as egregious as those in *Johnson,* I find that Employee's statements that many, but not all, of the complainants in his district either were on welfare or had a criminal record were indeed derogatory, disrespectful, and offensive to the dignity of people as it generalizes negative attributes to people in the 6th District. Employee made these statements at his workplace concerning the actions he took in the course of doing his job. Thus, I find that his statements have no First Amendment protection. I also conclude that based on their authority as armed law enforcement personnel, police officers are subject to a higher standard of behavior.

In conclusion, I find that Employee did violate General Order 120.21, Attachment A, Part A-16, or General Order 201.09, Part VIII, Section B-1, and thus, Agency had cause for adverse action against Employee.

Additionally, the *Johnson* court stated in its analysis that appellant's arguments that the charge was vague and overbroad and violates his rights of free speech lack merit. The court

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13 *Garcetti, supra.*
14 *Id.*
15 *See Jackson v. U.S. Postal Service,* 48 M.S.P.R. 472, 476 (1991); *Beamer v. Department of Justice,* 25 M.S.P.R. 483, 486 (1984).

opined that agency specifically identified the insulting, abusive, or obscene language contained in its charge. It stated that agency provided specific reasons for the proposed action, and in sufficient detail to allow him to make an informed reply.

In the instant matter, the General Order is not so vague as to be void as the specifications specifically identified the derogatory and disrespectful comments Employee admitted making. In *Gary Investment Corporation v. District of Columbia Department of Health,* 896 A.2d 193 (D.C. 2006), the D.C. Court of Appeals considered a challenge to a DOH regulation based upon the claim that it was overly vague. The Court stated: The 'void for vagueness' doctrine requires only that statutes and regulations be sufficiently definite so that ordinary people can understand what conduct is prohibited. Here, the General Order is sufficiently clear that Employee knew or should have known what conduct was prohibited by the General Order.

Whether Agency's penalty was appropriate under the circumstances.

The only remaining issue is whether the discipline imposed by Agency was an abuse of discretion. Any review by this Office of the agency decision of selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[16] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."[17] When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[18]

The range of penalties for a first offense of insubordination ranges from a ten-day suspension to removal.[19] The record shows that Agency's decision was based on a full and thorough consideration of the nature and seriousness of the offense, as well as any mitigating factors present.

For the foregoing reasons, I conclude that Agency's decision to demote Employee to the rank of Sergeant and suspend him for thirty days as the appropriate penalty was not an abuse of discretion and should be upheld.

ORDER

16 *See Huntley v. Metropolitan Police Dep't,* OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't,* OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

17 *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

18 *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

19 Agency General Order 120-21, Disciplinary Procedures and Processes, effective April 13, 2006.

It is hereby ORDERED that the agency action suspending Employee for thirty days and demoting him to a lower rank is UPHELD.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge