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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
CHRISTOPHER MICCICHE,)	
Employee)	OEA Matter No. 1601-0019-18
)	
v.)	
)	Date of Issuance: June 30, 2020
)	
METROPOLITAN POLICE)	
DEPARTMENT,)	
Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Christopher Micciche (“Employee”) worked as a Police Officer with the Metropolitan Police Department (“Agency” or “MPD”). Agency issued its Notice of Proposed Adverse Action on September 11, 2017. Employee was charged with the following:

Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-12, which states, conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee’s or the agency’s ability to perform effectively, or violations of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia.

Specification No. 1: In that, on March 28, 2017, while assigned as the Deputy Director of the Medical Services Division, you accessed your

Protected Health Information (PHI) in PFC's¹ Centricity EMR² system. You did this in spite of having signed an Acceptable Use Agreement that stated it was unlawful for you to view your own PHI.

Charge No. 2: Violation of General Order Series 120.21, Attachment A, Part A-20, which states, misuse of official position, or unlawful coercion of an employee for personal gain or benefit.

Specification No. 1: In that, on various dates in 2016 and 2017, in your role as the Deputy Director of the Medical Services Division, you accessed the PHI of multiple members of the Department. On May 8, 2017, you attempted to use information you had gained from viewing members' PHI to influence the treatment you received from the PFC.

Charge No. 3: Violation of General Order Series 120.21, Attachment A, Part A-25, which states any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force.

Specification No. 1: In that, on May 11, 2017, agents of the Internal Affairs Division located printed PHI documents of two MPD members in an unsecured location inside of your office at the Medical Service Division. As such, you failed to properly safeguard the PHI of the involved members.³

On October 27, 2017, Agency issued a Final Notice of Adverse Action against Employee.⁴ It found Employee guilty of all of the charges and specifications and imposed a penalty of a twenty-day suspension without pay and a demotion to the rank of Lieutenant.⁵

Employee filed his Petition for Appeal with the Office of Employee Appeals ("OEA") on December 29, 2017. He asserted that Agency conducted an improper and biased investigation. Additionally, Employee argued that the penalty imposed was not consistent with similarly situated

¹ PFC is an abbreviation for Police and Fire Clinic.

² EMR is an abbreviation for Electronic Medical Records.

³ *Petition for Appeal*, p. 1, 7-11 (December 29, 2017).

⁴ Employee appealed the decision to the Chief of Police, and the Chief's final decision was issued on November 30, 2017.

⁵ *Petition for Appeal*, p. 1, 7-24 (December 29, 2017).

employees. Moreover, he opined that Agency's allegations did not support his demotion from the rank of Captain to Lieutenant and a twenty-day suspension without pay. Therefore, Employee requested that OEA rescind the adverse action; restore his rank, pay, and benefits; and remove all references of the actions from his personnel file.⁶ In its response to the Petition for Appeal, Agency denied Employee's allegations and requested that a hearing be conducted.⁷

On April 26, 2018, Agency filed its Pre-hearing Statement. In it, it alleged that Employee disclosed confidential, sensitive patient information to a doctor to influence the medical treatment he was receiving from the clinic. Additionally, Agency found that Employee accessed medical records for department employees, including his own records and those of high-ranking officials, which violated the Acceptable Use Agreement and the Employee Confidentiality Agreement that he signed. Finally, Agency determined that Employee printed medical records without having the custodian of record's signature, as required by clinic procedures. According to Agency, Employee "accepted partial responsibility for his actions and was given a 20[-]day suspension and demotion from Captain to Lieutenant."⁸

The OEA Administrative Judge ("AJ") held an evidentiary hearing on August 28, 2018. After considering the testimonies and documentary evidence provided, the AJ issued an Initial Decision on January 10, 2020. He ruled that Agency had cause to impose the adverse actions against Employee. The AJ found that Agency's charge of conduct unbecoming was appropriate because Employee admitted to signing the PFC Acceptable Use Agreement on August 16, 2016. The agreement provided, *inter alia*, that in accordance with federal HIPAA, state, and local law, it was unlawful for him to view or modify his own electronic Patient Health Information ("ePHI").

⁶ *Id.* at. 2.

⁷ *Metropolitan Police Department's Answer to the Petition*, p. 1-2 (February 2, 2018).

⁸ *Agency's Pre-hearing Statement* (April 26, 2018).

The AJ found that the signed agreement bore a direct relation to Employee being authorized to carry out central functions of his position. Thus, he held that Agency proved the conduct unbecoming charge. As it related to the misuse of official position charge, the AJ reasoned that Employee's prohibited sharing of other member's health/medical information was done in an attempt to avoid taking the required Fitness for Duty examination. Finally, with regard to the charge of prejudicial conduct, the AJ opined that Employee failed to provide a credible reason for printing the other members' information. He found that Employee was lax in securing confidential medical documents and failed to take additional measures to safeguard the documents in a secure locked cabinet. Consequently, the AJ held that Agency's actions were taken for cause and that the demotion and twenty-day suspension were appropriate.⁹

Employee filed his Petition for Review on February 14, 2020. He argues that there was no regulation, guidelines, directives, or General Orders that required Agency personnel to adhere to PFC policies. Specifically, Employee asserts that Agency did not charge him with violating the Acceptable Use Agreement but that he violated the law. It is his position that the Acceptable Use Agreement did not apply to him and that he was not bound by a PFC policy because PFC had no authority over MPD employees. Employee admits to signing the agreement which he claims he did not completely read; however, he explained that he had no knowledge that his action was a violation of the agreement. As for the second charge, Employee contends that there was no personal benefit or gain as it relates to him submitting to a Fitness for Duty examination. He provides that Agency offered no evidence that the members, whose information he disclosed, did not submit to the Fitness for Duty exam. Moreover, Employee submits that he accessed the members' medical records while performing his administrative duties related to their potential

⁹ *Initial Decision*, p. 10-14 (January 10, 2020).

misconduct. Employee provides that he mentioned the other members' treatment protocol with Dr. Cottrell in an effort to improve screening and treatment of members with potential alcohol abuse, and not as an effort to avoid a Fitness for Duty exam. Finally, Employee argues that Agency incorrectly asserted that he violated any law or policy by leaving members' PHI in his locked office. He provides that Agency's witness, Dr. Molomo, testified that leaving medical records behind a locked door is HIPAA compliant. It is Employee's position that Agency is contractually responsible for office furnishings, and he asserts that he was never provided with a locked cabinet or drawer. Accordingly, Employee requests that the Board grant his petition and reverse the Initial Decision.¹⁰

On March 31, 2020, Agency filed its Opposition to Employee's Petition for Review. As it relates to the first charge, Agency contends that Employee violated the Acceptable Use Agreement regarding his access to PHI in the Centricity database. It asserts that the charge did not provide that he violated a law. Additionally, Agency argues that Employee's assertion that he was not an employee of the clinic is immaterial because he admitted to signing the agreement, and thereby, agreed to comply with the clinic's confidentiality rules. Moreover, Agency opines that there was no requirement that Employee actually reap a benefit as a basis for the second charge. It claims that Employee admitted that he shared two other members' medical information during his treatment session with Dr. Cottrell, when he disagreed with his treatment plan. Agency provides that the Fitness for Duty exam is irrelevant because there was substantial evidence to support that Employee used the medical information, he gained through Centricity about the other members, to influence his own personal treatment that he was receiving at the clinic. Finally, Agency asserts that Employee did not proffer a credible reason for printing members' documents. Agency argues

¹⁰ *Employee's Petition for Review*, p. 3-13 (February 14, 2020).

that Employee was only authorized to research members' sick leave history and medical status. Therefore, he was not authorized to access the PHI of members, print out the PHI, and leave it in an unsecured location. Finally, it contends that Employee violated the rules of the Clinic, not the HIPAA laws. Thus, Agency requests that the Initial Decision be upheld.¹¹

Substantial Evidence

According to OEA Rule 633.3, the Board may grant a Petition for Review when the AJ's decisions are not based on substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.¹²

Charge One

Agency provided the following charge and specification:

Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-12, which states, conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia.

Specification No. 1: In that, on March 28, 2017, while assigned as the Deputy Director of the Medical Services Division, you accessed your Protected Health Information (PHI) in PFC's Centricity EMR system. You did this in spite of having signed an Acceptable Use Agreement that stated it was unlawful for you to view your own PHI.

In his Petition for Review, Employee incorrectly alleged that Agency did not charge him with

¹¹ *Agency's Opposition to Employee's Petition for Review of Initial Decision*, p. 7-11 (March 31, 2020).

¹² *Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

violating the Acceptable Use Agreement; he claimed that they charged him with a violation of law. This argument is clearly misplaced. Agency's specification makes no allegations that Employee violated any laws or regulations; it provides that per the Acceptable Use Agreement, Employee improperly accessed his own PHI in PFC's system. Despite Employee's suggestion, the conduct unbecoming charge does not solely require a violation of law. The charge could also include acts detrimental to good discipline or conduct that adversely affects an employee's or agency's ability to perform effectively. A review of Agency's Final Notice of Adverse Action described Employee's misconduct as egregious. Agency determined that "greater supervision is necessary for rehabilitation and to help prevent future similar misconduct."¹³ It reasoned that Employee's misconduct was serious and directly related to his rank and position. Therefore, it believed that while Employee could be rehabilitated, it could not occur without an increased level of supervision that would not have been possible in his rank as Captain.¹⁴ Thus, it is evident that Agency considered Employee's act detrimental to good discipline and that his conduct impacted his ability to perform his job effectively.

Employee's next argument is that the Acceptable Use Agreement did not apply to him because PFC had no authority over MPD employees.¹⁵ The relevant sections of the Acceptable Use Agreement provide the following:

I, C. Micciche, . . . agree to the following, as a non-employee user of PFC's computer hardware and/or software:

1. I understand that the use of computers and related hardware and software provided by PFC Associates, LLC ("PFC") are restricted to business use only.

¹³ *Metropolitan Police Department's Answer to the Petition*, Tab #5, p. 98 (February 2, 2018).

¹⁴ *Id.*, Tab #3, p. 154.

¹⁵ In considering Employee's argument, this Board found the testimony of Dr. Olusola Maloma helpful. Dr. Maloma explained the organizational structure of PFC with Agency and testified that PFC had a contract with Agency to provide occupational medical services. As a result, Agency had offices in PFC's building where it would assign eight to ten police officers. The officers and an Agency medical services director would act as a liaison between PFC and the members/patients who were receiving care. *OEA Evidentiary Hearing*, p. 11-12 (August 28, 2018).

2. I am accessing a corporate network to perform the duties for which I was hired. All my activities on this network are monitored. All my activities must conform with, and be related to, my work at PFC.
3. I am accessing electronic Patient Health Information (ePHI). In accordance with Federal (HIPAA), state and local law, I am required to protect the confidentiality, integrity and availability of ePHI. If I fail to protect ePHI, I will be subject to criminal and civil penalties under Federal, state and local laws. I also understand that it is unlawful to view and/or modify my own ePHI information.¹⁶

On its face, the Acceptable Use Agreement acknowledged that Employee is not a PFC employee. Moreover, in its Answer to Employee's Petition for Appeal, Agency explained that as a non-employee of PFC (and an employee of Agency), PFC required Employee to sign an Acceptable Use Agreement, which clarified his obligations regarding confidential information and the unlawful act of viewing and/or modifying his own ePHI.¹⁷ Agency's explanation is consistent with the terms of the Acceptable Use Agreement. Employee's job duties required him to have access to PFC's computers. Consequently, he was required to adhere to the terms of the agreement required by PFC.

According to Agency, Employee viewing his records without prior approval was an unlawful HIPAA violation, per PFC's policies to comply with state and federal HIPAA laws.¹⁸ This is consistent with the Acceptable Use Agreement terms which clearly provide it is unlawful for Employee to view and/or modify his own ePHI. During the evidentiary hearing, Dr. Malomo explained that it is standard healthcare practice that an employee is not allowed to review their own medical records.¹⁹ Furthermore, Mr. John Hendrick testified that Employee admitted that he

¹⁶ *Id.*, Attachment #4, p. 296 (February 2, 2018).

¹⁷ *Metropolitan Police Department's Answer to the Petition*, Tab #5, p. 96 (February 2, 2018).

¹⁸ *Id.*

¹⁹ Dr. Malomo provided that the proper process that Employee should have used to obtain his medical record, would

accessed his own medical records because he was attending a treatment facility out of town and no one else could assist him in securing his records.²⁰ Moreover, Employee admitted during the hearing that while attempting to secure treatment in a residential program in Boston, he learned that the program needed recent medical documents. Employee alleged that in his attempt to secure the documents as soon as possible, he went into the system, printed the documents, and scanned and emailed them to the Boston hospital. Employee further conceded that although he understood “the appearance of impropriety, . . . this was a hurdle [he] needed to get past” for treatment.²¹

Considering the testimonies provided, including Employee’s own admission, and Employee’s signed Acceptable Use Agreement, Agency proved that Employee violated the Acceptable Use Agreement by accessing his own PHI. Thus, there is substantial evidence to support the charge that he did engage in conduct unbecoming an officer.

Charge Two

Agency’s charge two proposed the following:

Charge No. 2: Violation of General Order Series 120.21, Attachment A, Part A-20, which states, misuse of official position, or unlawful coercion of an employee for personal gain or benefit.

Specification No. 1: In that, on various dates in 2016 and 2017, in your role as the Deputy Director of the Medical Services Division, you accessed the PHI of multiple members of the Department. On May 8, 2017, you attempted to use information you had gained from viewing members’ PHI to influence the treatment you received from the PFC.

Employee contends that there was no personal benefit or gain as it related to him submitting to a Fitness for Duty examination. Contrary to Employee’s allegations, General Order Series 120.21,

have been for him to submit a signed records request form, indicating the purpose for the request and the date ranges for the records requested. The request would go to the department, where the forms would be printed. Dr. Malomo and the emergency director would sign off on the record before providing it to Employee. *OEA Evidentiary Hearing*, p. 36-41 (August 28, 2018).

²⁰ *Id.* at 200.

²¹ *Id.*, 292-294.

Attachment A, Part A-20 encompasses misuse of official position *or* unlawful coercion of an employee for personal gain or benefit (emphasis added). In its answer to Employee's Petition for Appeal, Agency provided that Employee's disclosure of other members' PHI was a misuse of his official position, a violation of HIPAA laws, and a violation of PFC policy to disclose their PHI without proper approvals.²² Thus, Agency relied on the misuse of official position charge and did not have to prove that there was any personal gain or benefit to Employee.

Employee also argued that Agency offered no evidence that the members whose medical information he disclosed did not submit to the Fitness for Duty exam. However, Agency's specification made no mention of the Fitness for Duty examination. The specification provides that Employee attempted to use information he gained from viewing other members' PHI to influence the treatment he received from PFC. In its final notice of adverse action, Agency explained that the basic premise for this charge was that the Employee accessed and disclosed to Dr. Cottrell, the PHI of other members while he compared and questioned his treatment plan to theirs.²³

During the evidentiary hearing Dr. Cottrell testified that Employee mentioned the two members' PHI after a discussion they had about Employee having to undergo a Fitness for Duty exam. Dr. Cottrell described that Employee became "argumentative" because he did not want to go through the Fitness for Duty exam and this is when he "mentioned information from the two other patients['] . . . medical records to bolster his case of why he should not have to go through the evaluation."²⁴ Moreover, Employee admitted in his Petition for Review that he mentioned the other members' treatment protocol with Dr. Cottrell, but he claimed that it was in an effort to

²² *Metropolitan Police Department's Answer to the Petition*, Tab #5, p. 96-97 (February 2, 2018).

²³ *Id.* at 96.

²⁴ *Id.* at 60.

improve screening and treatment of members with potential alcohol abuse.²⁵ It is this Board's holding that Agency proved that Employee misused his position by accessing the PHI of members of the Department and by attempting to use information he gained to influence his treatment.

Charge Three

Agency offered the following for the third charge against Employee:

Charge No. 3: Violation of General Order Series 120.21, Attachment A, Part A-25, which states any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force.

Specification No. 1: In that, on May 11, 2017, agents of the Internal Affairs Division located printed PHI documents of two MPD members in an unsecured location inside of your office at the Medical Service Division. As such, you failed to properly safeguard the PHI of the involved members.

Employee argues that Agency incorrectly asserted that he violated any law or policy by leaving members' PHI in his locked office. In its Final Notice on Adverse Action, Agency claimed that there was evidence provided which offered the policies for printing PHI and other records. Agency provided that it relied on the statements of PFC employees regarding the request, approval, printing, and storing of medical documents.²⁶ After a thorough review of the record, this Board does not believe that there is substantial evidence to support the Agency's contention. Agency did not provide any written PFC policy to substantiate its claim regarding the request, approval, printing, and storage of medical documents.

Moreover, Agency did not provide a policy or regulation that required that medical documents be secured in a locked cabinet. In his Initial Decision, the AJ held that Employee failed

²⁵ *Employee's Petition for Review*, p. 8 (February 14, 2020).

²⁶ *Metropolitan Police Department's Answer to the Petition*, Tab #5, p. 97 (February 2, 2018).

to provide a credible reason for printing the other members' information; that he was lax in securing confidential medical documents; and that he failed to take additional measures to safeguard the documents in a secure locked cabinet. However, the data safeguards section of the HIPAA regulations provides the following:

A covered entity must maintain reasonable and appropriate administrative, technical, and physical safeguards to prevent intentional or unintentional use or disclosure of protected health information in violation of the Privacy Rule and to limit its incidental use and disclosure pursuant to otherwise permitted or required use or disclosure. For example, such safeguards might include shredding documents containing protected health information before discarding them, securing medical records with lock and key or pass code, and limiting access to key or pass codes.

During the evidentiary hearing, two of Agency's witnesses provided that they considered the medical documents found in Employee's to be secure. Dr. Malomo testified that they "generally discourage people from keeping the medical records in their offices. But all offices are secure. They are under lock and key." Additionally, she provided that there was no PFC or MPD policy that required employees to keep files in a locked filing cabinet.²⁷ Moreover, Mr. Hendrick testified that given the HIPAA regulation safeguards, he also considered the documents in Employee's office under lock and key.²⁸ Thus, in the absence of documentary proof of a policy or regulation, and in light of Agency's own witnesses' testimonies, there is not substantial evidence to support Agency's charge that Employee failed to secure or safeguard medical documents.

Cause

General Order 120.21 defines an adverse action as "any fine, suspension, removal from services, or any reduction in rank or pay of any member who is not serving a probationary period." In accordance with General Order 120.21, Attachment A, prohibited conduct shall serve as a basis

²⁷ *OEA Evidentiary Hearing*, p. 41-42 and 53 (August 28, 2018).

²⁸ *Id.*, 213-214.

for adverse action. This Board believes that there is substantial evidence to support Agency's adverse actions for the conduct unbecoming and the misuse of official position charges. However, we do not believe that there is substantial evidence to support the charge that Employee's conduct was prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force.

Penalty within the Range Allowed by Law, Regulation, or Applicable Table of Penalties

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).²⁹ According to the *Stokes* Court, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on relevant factors; and whether there is clear error of judgment by the agency. The Court in *Stokes* reasoned that 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." OEA has previously held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.³⁰

Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-

²⁹ *Anthony Payne v. D.C. Metropolitan*, OEA Matter No. 1601-00540-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter 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).

³⁰ *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).

08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office. *Love* went on to provide the following:

[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, it is 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)).

General Order 120.21 Table of Offenses and Penalties outlines the various prohibited conduct for the MPD. The General Order also provides that the table shall be mandatory as applicable. In accordance with the Table of Offenses and Penalties, the penalty for the first offense of conduct unbecoming is suspension for three days to removal. The penalty for the first offense of misuse of position is removal. Therefore, even though there was not substantial evidence to support the third charge, Agency's penalties of a twenty-day suspension and demotion in rank were within the range of penalties for the adverse actions outlined in charges one and two.³¹

³¹ The court in *Douglas* held 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

Conclusion

There is substantial evidence in the record to uphold the AJ's ruling that Agency had cause to suspend and demote Employee for violating General Order 120.21, Attachment A, Parts A-12 and A-20. However, there is not substantial evidence in the record to show that Agency had cause for the adverse action outlined in General Order 120.21, Attachment A, Part A-25. The twenty-day suspension and demotion in rank were within the range of penalties for General Order 120.21, Attachment A, Parts A-12 and A-20. Additionally, the penalties were based on relevant factors, and there was no clear error of judgment by Agency. Accordingly, this Board must deny Employee's Petition for Review.

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.

Moreover, the OEA Board held in *Holland v. Department of Corrections*, OEA Matter No. 1601-0062-08, *Opinion and Order on Petition for Review* (September 17, 2012), that an Agency's decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion. This reasoning was also presented in *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). Agency presented evidence that it considered each factor outlined in *Douglas* when arriving at its decision to suspend and demote Employee. *Metropolitan Police Department's Answer to the Petition*, Tab #3, p. 151-155 (February 2, 2018).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

Clarence Labor, Jr., Chair

Patricia Hobson Wilson

Jelani Freeman

Peter Rosenstein

Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.