THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0014-21
[redacted]	
Employee	
	Date of Issuance: August 22, 2022
v.	
	ARIEN P. CANNON, ESQ.
METROPOLITAN POLICE DEPARTMENT,	Administrative Judge
Agency	

Employee, *Pro se*
Nicole L. Lynch, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Employee filed a Petition for Appeal on February 2, 2021, with the Office of Employee Appeals ("OEA") challenging the Metropolitan Police Department's ("Agency" or "MPD") decision to suspend her from her position for fifteen (15) days with five (5) days held in abeyance. Following a letter from OEA dated March 21, 2021, requesting an Answer, Agency filed its Answer on April 1, 2021. I was assigned this matter on July 1, 2021.

After initially being rescheduled, a virtual Prehearing Conference was ultimately convened via WebEx on October 15, 2021, with both parties present. A Post Prehearing Conference Order was issued the same day which required the parties to submit briefs addressing the issues set forth therein. Employee's brief was due on or before November 15, 2021, and Agency was ordered to submit its response by December 15, 2021.[1] Employee submitted her response to the Post Prehearing Conference Order on November 13, 2021. Agency submitted a Motion for Summary Disposition on December 15, 2021.[2] The record is now closed.

[1] Because the burden is on the Agency, it would typically be required to submit its brief first. However, because a prehearing conference statement was not submitted by Employee, and for the sake of efficiency, Employee was required to submit her brief first.

[2] A courtesy copy of Agency's Motion for Summary disposition was emailed to the undersigned on December 15, 2021. A hard copy of this motion was not received at OEA until February 24, 2022.

JURISDICTION

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

ISSUES

1. Whether Agency violated the 90-day rule under D.C. Code § 5-1031;

2. Whether Agency had cause to take adverse action against Employee for the charges and specifications set forth below; and

3. If so, whether her 15-day suspension, with five (5) days held in abeyance was appropriate under the circumstances.

CHARGES [3]

Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-25, which states, "Any conduct not specifically set forth in the 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 February 20, 2020, you audio-recorded your conversation with Commander Guillermo Rivera with your personal cellular telephone while inside the headquarters of the Special Operations Division (SOD). You did not have permission from any supervisor or manager to make the aforementioned recording, and it was made for your own personal agenda and benefit.

Specification No. 2: In that, on an unknown date, you audio-recorded a team meeting involving officials and other members of the SOD without permission from any supervisor or manager to make the aforementioned recording, and it was made for your own personal agenda and benefit.

Specification No. 3: In that, on multiple occasions over the past two (2) years, you made surreptitious audio recordings of members of the Metropolitan Police Department (MPD), to include Inspector Robert Glover, without permission from any supervisor or manager to make the aforementioned recording, and it was made for your own personal agenda and benefit.

[3] Employee's adverse action was originally based on three separate charges. However, she appealed the original 25-workday suspension to the Chief of Police who ultimately reduced the penalty to fifteen (15) days with five (5) days held in abeyance for one year. The Chief also dismissed Charge No. 2; thus, it will not be addressed here.

Charge No. 3: Violation of General Order Series 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 multiple occasions over the past two (2) years, you made surreptitious audio recordings of members of the MPD using your personal cellular telephone, which was not registered with the Department on a PD 298 (Registration of Surveillance and Recording Equipment). This misconduct is further described in General Order 304.04 Part V, Section G, 1, m, which reads, "No privately owned surveillance or recording equipment, (other than tape recorders) may be brought into, kept or used on MPD premises or in connection with MPD business or investigations, unless it has been registered on a PD Form 298 (Registration of Surveillance and Recording Equipment) with an administrative official of the relevant organizational unit (e.g., Electronic Surveillance Unit or JAB)."

Specification No. 2: In that, on multiple occasions over the past two (2) years, you made surreptitious audio recordings of members of the MPD using your personal cellular telephone without approval from the Department, and which was not in connection with official MPD business or investigations. This misconduct is further described in General Order 304.04 Part V, Section G, 3, m, which reads, *"Privately owned surveillance and recording equipment shall only be used in connection with MPD business or investigations, by its registered owner, in accordance with this directive or with the explicit approval of the official in command of the relevant organizational unit. The approving official shall ensure that any use is consistent with the guidelines set forth in this order."*

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

MPD initiated an adverse action against Employee when it issued a Notice of Proposed Adverse Action, dated October 8, 2020, for the reasons set forth above. The underlying facts regarding Employee making audio recordings on her personal cell phone of other members within MPD is largely undisputed. However, Employee raises a 90-day violation argument under D.C. Code § 5-1031. In particular, Employee maintains that MPD became aware of her audio recordings of Lieutenant Margiotta when she informed Commander Rivera during a February 20, 2020 meeting.

The D.C. Official Code § 5-1031 ("90-day Rule") provides, in pertinent part:

(a-1)

(1) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police

> Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.
>
> **(2)** For the purposes of paragraph (1) of this subsection, the Metropolitan Police Department has Notice of the act or occurrence allegedly constituting cause on the date that the Metropolitan Police Department generates an internal investigation system tracking number for the act or occurrence.

MPD acknowledges and accepts the fact that Commander Rivera was informed of Employee's audio-recordings during a February 20, 2020, meeting.[4] However, there were several other audio-recordings made by Employee that were ostensibly not revealed to Commander Rivera during this meeting, including the meeting itself being audio-recorded by Employee. The other undated audio recordings and the recording of the February 20, 2020, meeting became known to MPD during an investigation by its Internal Affairs Bureau ("IAB") in a separate investigation. Specifically, MPD asserts that on May 19, 2020, MPD Officer Tabatha Knight, informed IAB that Employee possessed an audio recording of other MPD members; therefore, an investigation was initiated against Employee at that time with an incident summary ("IS") number being drawn on June 6, 2020. Employee admits recording the February 20, 2020, meeting with Commander Rivera.

Although MPD was made aware, through Commander Rivera, of at least one of Employee's audio recordings during the February 20, 2020, meeting, the record does not reflect that MPD was aware of the other audio recordings by Employee at the time. Had MPD relied solely upon the audio recording Employee reveal to Commander Rivera at the February 2020 meeting, then a more thorough analysis would be required of the 90-day rule.[5] However, the specifications set forth in the instant adverse action against Employee also include audio recordings that were not revealed to MPD until it was conducting an internal affairs investigation in a separate matter.

In Agency's Motion for Summary Disposition, it maintains that on May 19, 2020, its Internal Affairs Division interviewed Officer Tabatha Knight who revealed that Employee possessed an audio recording of other MPD members. However, a review of the summary associated with Officer Knight's May 19, 2020 statement, does not appear to indicate such a revelation regarding Employee possessing audio recordings.[6] A summary of Officer Knight's July 9, 2020 statement, however, indicates that Knight stated that Employee told Commander Rivera

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[4] *See* Final Investigative Report, at 34 (August 15, 2020).

[5] Had MPD solely relied upon the audio recording revealed by Employee during the February 20, 2020, meeting, as being improper under General Order 304.04, Part V, and did not generate an "IS Number until June 6, 2020, nearly four months after it was informed of the alleged misconduct, a more thorough discussion of the 90-Day rule would be warranted. While the 90-day rule provides that MPD has notice of the act or occurrence allegedly constituting cause on the date that the MPD generates an internal investigation system tracking number for the act or occurrence, it would violate the spirit of the statute to permit MPD to delay generating an IS number for several months despite clearly being aware of the alleged misconduct.

[6] *See* Agency's Motion for Summary Disposition, Final Investigative Report dated August 15, 2020, Attachment 1.

during the February 20, 2020, meeting that she (Employee) had an audio recording of other members within MPD.[7] Despite this discrepancy as to when Agency was made aware of Employee's audio recordings, it is uncontroverted the IS numbers were drawn for Employee's alleged misconduct regarding audio-recordings on June 6, 2020. Thus, it is reasonable to presume that Agency was made aware of at least one audio recording prior to June 6, 2020.

Employee acknowledged in a July 21, 2020, statement to IAD that she recorded the February 20, 2020, meeting with Commander Rivera.[8] Employee also admits as much in her response to the Post Prehearing Conference Order on November 13, 2021.

Four of the five specifications cited for Employee's discipline were the undated audio-recorded conversations she had with other members in various capacities within Agency. It is uncontroverted that MPD became aware of at least one audio recording when Employee revealed as much during a February 20, 2020, meeting with Commander Rivera. However, Agency did not become aware of the other audio recordings, including the recording of the February 2020 meeting, until a subsequent internal affairs investigation.

Thus, for purposes of a 90-day rule analysis of the audio recordings sets forth in the specifications above, I find that the clock began to run on June 6, 2020, when MPD became aware of the recordings by Employee which were alleged to be in violation of MPD General Order 304.04, Part V. Adverse Action was initiated on October 8, 2020, 87 business days later, within the 90-day time frame under D.C. Code § 5-1031. As such, I find no violation of the 90-day rule.

Disparate Treatment

An employee who raises an issue of disparate treatment bears the burden of making a *prima facie* showing that he or she was treated differently from other similarly-situated employees.[9] In proving a claim for disparate treatment, an agency must apply practical realism to each disciplinary situation to ensure that employees receive equitable treatment when genuinely similar cases are presented.[10] To establish disparate penalties, an employee must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to determine that the agency treated similarly-situated employees differently."[11] If a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue.[12]

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[7] *See Id.*, Attachment 3. Officer Knight was also in attendance at the February 20, 2020, meeting.
[8] *See Id*., Attachment 5.
[9] *Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-01190-90, Opinion and Order on Petition for Review (July 22, 1994).
[10] *Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15, Opinion and Order on Petition for Review (January 30, 2018), citing *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, Opinion and Order on Petition for Review (September 29, 1995) and *Lewis v. Department of Veteran Affairs*, 2010 M.S.P.B. 98.
[11] *Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15, Opinion and Order on Petition for Review (January 30, 2018) (citing *Boucher v. U.S. Postal Service*, 118 M.S.R.P. 640 (2012)).
[12] *Id*.

Here, Employee maintains that she was treated differently from similarly situated employees because Officer Tabatha Knight was also found to have audio-recordings in violation of General Order 304.04, Part V, but was not disciplined for her actions. Agency addresses the consistency of Employee's discipline in comparison to other similar cases in its *Douglas*[13] factor analysis in its Motion for Summary Disposition.[14] Agency seems to acknowledge similar misconduct by Officer Knight, however, it states that it missed the deadline to serve her with the proposed disciplinary action and was unable to impose any discipline upon Knight. Instead, Knight was issued a PD 62E, which is not considered discipline, but rather a form that supervisors may use to record observations of a subordinate's job-related behavior.[15] Based on the explanation provided by Agency, I find that despite the misstep by Agency in imposing discipline on a similarly situated employee, it has offered a legitimate reason for the discrepancy in discipline between Employee and Knight. As such, I do not find that Employee was subjected to disparate treatment regarding her discipline for her audio-recordings.

Appropriateness of Penalty

The undersigned may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.[16] When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.[17] As explained above, I find that Agency had cause to take adverse action against Employee for the causes and specifications set forth above.

MPD General Order 120. 21, Attachment A, is a Table of Offenses and Penalties, which addresses the charges against Employee here—Prejudicial Conduct and Failure to Obey Orders and Directives. According to the table of penalties as set for the in General Orders, the penalty range for Charge 1 is Reprimand to Removal and the penalty for Charge 3 is Suspension of three days to Removal. Thus, Employee's fifteen-day suspension, with five days held in abeyance, is within the range allowed under the appropriate Table of Offenses and Penalties and I find that the penalty imposed was not a clear error of judgment.

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[13] *Douglas v. Veterans Administration*, 5 M.S.P.B. 313, 5 M.S.R.P. 280 (1981).
[14] *See* Agency's Motion for Summary Disposition, at 13 (February 24, 2022). Douglas factor number 6 addresses the "Consistency of the penalty with those imposed upon other employees for the same or similar offenses." It appears that agency inverted *Douglas* factors 6 and 7, and addressed the consistency of the penalty imposed here under factor number 7, instead of factor 6.
[15] See MPD General Order 201.02.
[16] *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985)
[17] *See Id.*

ORDER

Accordingly, it is hereby **ORDERED** that Agency's action of suspending Employee for fifteen (15) days, with five days held in abeyance, is UPHELD.

FOR THE OFFICE:

/s/ Arien P. Cannon
ARIEN P. CANNON, ESQ.
Administrative Judge