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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:	)	
	)	
DWAYNE REDMOND,	)	
Employee	)	
	)	OEA Matter No.: 2401-0203-12R14
v.	)	
	)	Date of Issuance: June 21, 2016
DEPARTMENT OF	)	
GENERAL SERVICES,	)	
Agency	)	
	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

Dewayne Redmond (“Employee”) worked as a Protective Services Officer with the Department of General Services (“Agency”). On July 18, 2012, Agency issued a final decision suspending Employee for ten business days, with five days held in abeyance. Employee was charged with “any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations.” Specifically, he was suspended for neglect of duty, insubordination, misfeasance (providing inaccurate and misleading information), and unreasonable failure to assist a fellow government employee in carrying out assigned duties.<sup>1</sup> The facts which formed the basis of this appeal stemmed from an incident on November 23, 2011, wherein Employee allegedly disregarded a direct order to respond to a Priority 1 radio call;

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<sup>1</sup> *Petition for Appeal*, p. 5-7 (August 15, 2012).

failed to promptly respond or arrive for an assignment at Wilson High School, located at 3950 Chesapeake Street, NW; and refused to assist a fellow employee by not providing back up to security officers on the scene.<sup>2</sup>

Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on August 15, 2012, arguing that he was wrongfully suspended. Agency filed its answer to Employee’s appeal on September 19, 2012, asserting that Employee was suspended in accordance with the District Personnel Manual (“DPM”). In addition, Agency stated that it properly considered the factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981).

An OEA Administrative Judge (“AJ”) was assigned to this matter in November of 2013. On February 5, 2014, the AJ issued an Initial Decision dismissing Employee’s Petition for Appeal based on his failure to appear at a scheduled Status Conference and his subsequent failure to respond to her Order for Statement of Good Cause. Both orders were returned to sender as undeliverable. His appeal was, therefore, dismissed for failure to prosecute.<sup>3</sup>

On June 9, 2014, Employee filed a Motion to Reinstate Petition For Appeal. He argued that his appeal included a signed Designation of Employee Representative Form and that his attorney was never served with the Status Conference order or the Order for Statement of Good Cause. On July 24, 2014, OEA’s Board issued an *Opinion and Order on Petition for Review*. The Board granted Employee’s petition in the interest of justice and remanded it to the AJ to consider the merits of the case.<sup>4</sup>

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<sup>2</sup> *Agency’s Reply to Brief Regarding Employee’s Appeal* (December 10, 2014).

<sup>3</sup> *Initial Decision* (February 5, 2014).

<sup>4</sup> *Redmond v. Department of General Services*, OEA Matter No. 1601-0203-12 *Opinion and Order on Petition for Review*, p. 5 (July 24, 2014).

A Status/Prehearing Conference was held on October 8, 2014. On October 20, 2014, the parties were ordered to submit written legal briefs that addressed whether Employee was suspended for cause and whether the penalty was appropriate under the circumstances.<sup>5</sup>

On December 23, 2014, the AJ issued an Initial Decision on Remand. She held that Agency established that it had cause to suspend Employee based on the charges of insubordination and misfeasance.<sup>6</sup> She also determined that there was cause to support the charge of unreasonable failure to assist a fellow government employee in carrying out assigned duties, as well as unreasonable failure to give assistance to the public.<sup>7</sup> Lastly, the AJ found that a suspension of ten days, with five days held in abeyance, was an appropriate penalty under the circumstances.

Employee subsequently filed a second Petition for Review with OEA's Board on January 26, 2015. He argues that the Initial Decision is based on an erroneous interpretation of statute and that the AJ did not address all of the issues of law and fact. Employee also argues that that AJ's decision is not supported by substantial evidence.<sup>8</sup> He, therefore, asks this Board to reverse the Initial Decision and reinstate him with back pay and benefits.

Agency filed its Answer to the Petition for Review on March 2, 2015. It contends that each of the charges was supported by substantial evidence in the record. According to Agency, Employee was disciplined for disobeying a lawful order by his supervisor. In addition, it asserts that Employee possessed the legal authority to take police action as directed.<sup>9</sup> In addition, Agency states that Employee was, in fact, authorized to carry his service weapon at all times

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<sup>5</sup> *Post Status/Prehearing Conference Order* (October 20, 2014).

<sup>6</sup> *Initial Decision*, p. 4 (December 23, 2014).

<sup>7</sup> *Id.* at 6.

<sup>8</sup> *Petition for Review* (January 26, 2015).

<sup>9</sup> *Id.* at 5.

while on duty.<sup>10</sup> Agency believes that a ten day suspension, with five days held in abeyance was the appropriate penalty and requests that the OEA's Board to uphold the Initial Decision.<sup>11</sup>

In accordance with OEA Rule 633.3, a Petition for Review must present one of the following arguments for it to be granted. Specifically, the rule provides:

The petition for review shall set forth objections to the initial decision supported by reference to the record. The Board may grant a Petition for Review when the petition establishes that:

- (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
- (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
- (c) The findings of the Administrative Judge are not based on substantial evidence; or
- (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

#### Neglect of Duty, Insubordination, and Misfeasance

D.C. Official Code §1-616.51 (2001) provides that disciplinary actions may only be taken for cause. District Personnel Manual ("DPM") §1603.3 defines cause to include any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations.<sup>12</sup> On November 23, 2011, Employee was on patrol as a Protective Services Officer with Agency's Protective Services Police Department ("PSPD"). His supervisor, Sergeant Charles Marshall ("Marshall"), directed Employee to take a Priority 1 radio assignment for an "Open Door" call at Wilson High School at approximately 4:08 a.m. Employee told Marshall that he was scheduled to be on assignment at the D.C. General Hospital.

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<sup>10</sup> *Id.* at 10.

<sup>11</sup> *Id.* at 14.

<sup>12</sup> 16 DPM § 1603.3.

However, Marshall ordered to him to take the Priority 1 (Code 1) assignment anyway.<sup>13</sup> According to Agency, Employee disregarded his supervisor's order, and instead proceeded to D.C. General Hospital. In addition, Agency states that Employee offered misleading information by submitting a vehicle trip sheet that included times indicating that he was assigned to the Wilson High School location at 5:00 a.m. However, the Global Positioning System ("GPS") assigned to Employee's cruiser reflected that he did not arrive to Wilson until well after that time.<sup>14</sup>

Employee first argues that insubordination, misfeasance, and neglect of duty each require a lawful order which must be obeyed. According to Employee, Sergeant Marshall lacked the authority to dispatch Employee to a Priority 1 assignment. He also posits that no police dispatcher authorized any Protective Services Officer to respond to the call at Wilson because there were already at least eight Metropolitan Police Department units at the scene by approximately 2:33 a.m. However, these arguments do not directly address the actual charges that were levied against him by Agency.

The District's personnel regulations provide, in part, that there is a neglect of duty in the following instances: (1) failure to follow instructions or observe precautions regarding safety; (2) failure to carry out assigned tasks; or (3) careless or negligent work habits.<sup>15</sup> Notwithstanding Employee's protestations to the contrary, Sergeant Marshall was authorized to order him to respond to certain calls. Agency is tasked with providing security services for District

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<sup>13</sup> *Initial Decision* at 1. MPD General Order 302.01, Part I. B provides that all radio assignments voiced over the air may be classified as either Code 1 or Code 2. A Code 1 classification are assigned to requests for police services which report a felony or misdemeanor in progress; where the violator is armed; and any other requests alleging an immediate threat to the safety of a person.

<sup>14</sup> *Agency's Response to Petition for Review*, p. 2 (March 2, 2015).

<sup>15</sup> *Table of Appropriate Penalties*.

government facilities through the use of Special Police Officers (“SPO”).<sup>16</sup> As a Protective Service Officer, CS-083-06, Employee’s position description includes responding to calls from employees on routine and emergency situations, responding to, and investigating security alarms, in addition to performing other duties as assigned.<sup>17</sup>

When Marshall ordered Employee to respond to a burglary alarm at Wilson High School, he did not depart for the call until approximately thirty minutes after being ordered to do so. Employee’s delayed response was a neglect of his duties as a Protective Services Officer. Employee willfully disobeyed a direct order to respond to a Priority 1 call as directed by his supervisor. The AJ provided an in-depth analysis of the documentary evidence and legal briefs provided by the parties. She also considered the written statements of Employee and other SPO who had personal knowledge of the November 23, 2011 incident. Therefore, there is substantial evidence in the record to show that Employee neglected his duty by failing to carry out an assigned task given by a direct supervisor.<sup>18</sup>

Under DPM § 1603.3(f)(8), unreasonable failure to assist a fellow government employee in carrying out assigned duties and unreasonable failure to give assistance to the public may also serve as a basis for adverse action. This Board rejects Employee’s argument that the alarm at Wilson High School was already two hours old at the time he purportedly disobeyed Sergeant Marshall’s order. This has no bearing on his duty to follow an order from a direct supervisor. Furthermore, the AJ correctly concluded that Employee’s delayed arrival in responding to the burglary alarm at Wilson resulted in other officers being denied assistance on the scene of the incident.

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<sup>16</sup> D.C. Official Code § 10-551.06(6) (2012 Repl.).

<sup>17</sup> *Agency Brief*, Exhibit 1 (October 31, 2014).

<sup>18</sup> A charge of insubordination includes refusal to comply with direct orders, accept an assignment or detail, and carry out assigned duties and responsibilities. *See Table of Appropriate Penalties*. There is also significant evidence in the record to support this charge.

Lastly, a charge of misfeasance includes failure to investigate a complaint or providing misleading or inaccurate information to superiors. The record includes a copy of Employee's vehicle trip sheet (PD775), which states that he was assigned to the Wilson High School location at 5:00 a.m. However, the Global Positioning System assigned to Employee's service cruiser reflected location data that was inconsistent with the information that he provided on the trip sheet that was submitted to Agency. Employee's failure to appear at an assigned location for back-up duty was a blatant disregard of his job duties. It also interfered with Agency's ability to perform its duty to protect the public. Based on a review of the record, there is substantial evidence in the record to support a finding that Agency established cause to take adverse action against Employee.<sup>19</sup>

#### Appropriateness of Penalty

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). According to the holding in *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties. 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."<sup>20</sup> As a result, OEA has consistently held that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.<sup>21</sup>

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<sup>19</sup> Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

<sup>20</sup> *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). Additionally, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that although selection of a penalty is a management prerogative, the penalty cannot exceed the parameters of reasonableness. Moreover, the Merit Systems Protection Board ("MSPB") in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981), provided the following:

Agency has the discretion to impose a penalty, which cannot be reversed unless “OEA finds that the agency failed to weigh relevant factors or that the agency’s judgment clearly exceed the limits of reasonableness.”<sup>22</sup> The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. The penalty for a first offense of any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations (neglect of duty) is reprimand to removal. A first offense for a charge of insubordination is reprimand to suspension to ten days. The first offense for a charge of misfeasance carries a charge of a fifteen day suspension. Lastly, a first offense of unreasonable failure to assist a fellow government employee in carrying out assigned duties may result in a penalty of remand to a ten-day suspension. Therefore, a ten-day suspension, with five days held in abeyance, was an appropriate penalty in this case.

The Board finds that Employee’s failure to follow the directive of his supervisor while on duty constituted an employment-related act or omission that interfered with the efficiency and integrity of government operations. We further find Agency acted reasonably within the parameters established in the Table of Penalties, and that it did not abuse its discretion in

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[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.

<sup>21</sup> *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).

<sup>22</sup> See *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985).

choosing the penalty of a ten-day suspension, with five days held in abeyance. Accordingly, Employee's Petition for Review must be denied.

### Police Powers

Employee argues that he was not authorized to carry his service weapon while on mobile duty patrol. This Board finds his argument to be unpersuasive. 6A D.C. Municipal Regulation ("DCMR") § 1103.4 states the following in pertinent part:

Firearms or other dangerous weapons carried by special police officers whose commissions extend to more than one person's or corporation's property, or more than one premises owned by one person or corporation, may be carried only when that special police officer is on actual duty in the area thereof or while traveling, without deviation, immediately before and immediately after the period of actual duty, between that area and the residence of that special police officer.<sup>23</sup>

In this case, Employee was a commissioned SPO appointed pursuant to D.C. Official Code § 4-114 on November 23, 2011. Accordingly, he was authorized to carry his service weapon and to take police action during the performance of his duties. Employee also maintained the authority to respond to emergency calls as directed by his supervisors. Under D.C. Official Code § 23-582(a), "a special policeman shall have the same powers as a law enforcement officer to arrest without warrant for offenses committed within premises to which his jurisdiction extends, and may arrest outside the premises on fresh pursuit for offenses committed on the premises." Thus, Employee was authorized to respond to a call at Wilson High because it is a District of Columbia public school.

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<sup>23</sup> Effective October 1, 2011, all functions assigned, authorities delegated, positions, personnel, property, records, and unexpended balances of appropriations, allocations, and other funds available or to be made available to the DRES and the Office of Public Education Facilities Modernization were merged pursuant to the Department of General Services Establishment Act of 2011.<sup>23</sup> DGS acquired DRES' Protective Services Police Department; however, the authority of the PSPD was modified in December of 2013. Under the newly adopted rules, PSPD's name was changed to the Protective Services Division, which is responsible for providing security services for District government facilities by utilizing Special Police Officers and Security Officers.

Conclusion

This Board finds that there was cause to take adverse action against Employee for neglect of duty, insubordination, misfeasance, and unreasonable failure to assist a fellow government employee in carrying out assigned duties. We further find that the penalty of a ten-day suspension, with five days held in abeyance was not an abuse of discretion and was appropriate under the circumstances.

**ORDER**

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

FOR THE BOARD:

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Sheree L. Price, Interim Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.