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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0042-15
SHANAE WALKER,)	
Employee)	
)	Date of Issuance: October 5, 2015
v.)	
)	
DEPARTMENT OF)	
PUBLIC WORKS,)	
)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
Gina Walton , Employee Representative		
Milena Mikailova, Esq., Agency Representative		

ERRATA AND ADDENDUM TO THE INITIAL DECISION¹

INTRODUCTION AND PROCEDURAL HISTORY

On February 12, 2015, Shanae Walker (“Employee”), filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the D.C. Department of Public Works’ (“Agency” or “DPW”) action of suspending her for twenty (20) days as a Parking Enforcement Officer. Employee was charged with: 1) Any on-duty of employment related act or omission that interferes with the efficiency and integrity of government operations—Unreasonable failure to Give Assistance to the Public, which includes discourteous treatment of the public; violation of department customer service standards; failure to return calls; failure to offer assistance when requested, etc.; 2) Any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious—Use of abusive or offensive language; making an obscene hand gesture to the public; and 3) Violation of the Department’s Employee Conduct on the Job Memo: Item #5—Discourteous treatment of the public, a supervisor, or other employee. Employee’s suspension was split into two separate time periods: February 9, 2015 through February 20, 2015, and March 16, 2015 through March 27, 2015.

¹ No substantive changes have been made to this Initial Decision. The ID was inadvertently sent to Employee’s representative’s incorrect address. October 5, 2015 is the official date of publication for the purpose of filing a Petition for Review with appeal with OEA’s Board or D.C. Superior Court.

I was assigned this matter in April of 2015. On May 11, 2015, I issued an Order convening a Prehearing Conference for the purpose of assessing the parties' arguments. During the June 11, 2015 conference, it was determined that there were no material facts in dispute that would warrant an Evidentiary Hearing. I subsequently ordered the parties to submit written briefs addressing the issues discussed *infra*. Both parties responded to the Order. The record is now closed.

JURISDICTION

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

ISSUES

Whether Employee's suspension should be upheld.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *Id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

Uncontested Facts

1. Employee began working as a Parking Enforcement Officer ("PEO") in March of 2008.
2. On October 2, 2014 at approximately 9:05 a.m., Employee, who was on duty, had a verbal confrontation with a citizen at 2000 18th Street, N.W. Washington, D.C.
3. As a result of the confrontation, the Metropolitan Police Department was called. When Employee's supervisor, Aubrey Williams, reported to the scene, the citizen produced a cell phone video in which Employee was seen leaning against a pole, in work uniform, in front of his child's school. The video also depicted Employee "flipping off" the citizen

with her middle index finger. When confronted by Williams, Employee stated “yeah, I know, suspend me.”²

4. On November 20, 2014, Agency issued Employee an Advance Written Notice of Proposed Suspension of Thirty Days. Employee was charged with the following:
 - a. Any on-duty of employment related act or omission that interferes with the efficiency and integrity of government operations—Unreasonable failure to Give Assistance to the Public, which includes discourteous treatment of the public; violation of department customer service standards; failure to return calls; failure to offer assistance when requested, etc.;
 - b. Any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious—Use of abusive or offensive language; making an obscene hand gesture to the public; and
 - c. Violation of the Department’s Employee Conduct on the Job Memo: Item #5—Discourteous treatment of the public, a supervisor, or other employee.³
5. Employee was given the opportunity to respond to the proposed charges in writing within six (6) days of receiving the notice. On December 16, 2014, Employee’s union representative, Gina Walton (AFGE Local 1975) provided a response to the proposed charges on her behalf.⁴
6. On January 22, 2015, the Deciding Official, Frank Pacifico (“Pacifico”), issued a Final Decision on Proposed Thirty Day Suspension, finding that there was sufficient evidence to sustain Charge 1 and Charge 2 against Employee. However, Pacifico held that the evidence did not support Charge 3. Based on a review of the facts and circumstances, Pacifico decided to reduce the proposed suspension of thirty (30) work days to a suspension of twenty (20) work days. The suspension was split into two separate time periods: February 9, 2015 through February 20, 2015, and March 16, 2015 through March 27, 2015.⁵
7. Employee subsequently filed a Petition for Appeal with OEA on February 12, 2015.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

² Agency Exhibit 11 (March 23, 2015).

³ *Id.*

⁴ Agency Exhibit 11.

⁵ Agency Exhibit 13.

(a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

In accordance with Section 1651 (1) of the CMPA (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. Section 1603 of the DPM defines cause to include “Any on-duty of employment related act or omission that interferes with the efficiency and integrity of government operations” and “Any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious.”

On the morning of October 2, 2014, Employee contacted her supervisor, Aubrey Williams (“Williams”), regarding a citizen’s complaint against her. At the time, Employee was on duty as a PEO at 2000 18th Street, N.W. When Williams arrived, the citizen told him that Employee was “very rude” and “was smoking in front of the school where his child attend[s].”⁶ The citizen produced a video that he recorded wherein Employee was smoking in front of the school and “flicking” off the citizen with her middle index finger.⁷ Williams subsequently spoke with Employee about the seriousness of her behavior. Employee responded by telling Williams “I know go ahead and suspend me.”⁸ Employee then stated that the citizen harassed her two weeks prior to the October 2, 2014 incident.⁹ According to William’s Incident Report, the citizen declined to identify himself by name and refused to forward Agency a copy of the video.¹⁰

PEO, Pamela Pearson (“Pearson”), was on duty that day, and witnessed the exchange between Employee and the citizen. In her Incident Report, Pearson stated that an irate citizen approached Employee at around 9:05 a.m., yelling at her and began to videotape the confrontation.¹¹ According to Pearson, Employee told the citizen to leave her alone and gave him the “middle finger.”¹² Employee also completed an Incident Report, stating that a citizen, with whom she had previous contact, approached her and began yelling obscenities.¹³ Employee asked the citizen to leave her alone; however, he took out his cellphone and began videotaping the encounter. Employee stated that she asked the citizen to leave her alone several times.¹⁴ She subsequently “flicked” her middle index finger at the citizen and proceeded to walk away. While

⁶ DPW Initial/Incident Report, Agency Exhibit 8 (March 23, 2015).

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at Exhibit 9.

¹² *Id.*

¹³ *Id.* at Exhibit 10.

¹⁴ *Id.*

Employee was walking away, the citizen allegedly stated “I hope you die, bitch.”¹⁵ The police were called, and Employee contacted Williams to request that he respond to the scene of the incident.

Employee argues that Agency lacked sufficient cause to support the charges against her because the citizen did not provide a written statement to DPW and failed to produce a copy of the cellphone footage that he recorded during the confrontation. Employee also submits that Agency’s Advance Written Notice of Proposed Suspension is deficient because it is only supported by her own alleged admissions, and not the statement of the other person involved in the confrontation. According to Employee, Agency’s imposition of a twenty (20) day suspension constituted disparate treatment because no other DPW employees have been disciplined as a result of an uncorroborated citizen complaint. Lastly, Employee contends that Agency violated Article 8 §L the Collective Bargaining Agreement between DPW and AFGE Local 1975 based on its failure to notify employees of their right to union representation during investigatory questioning that was likely to lead to discipline.

In response, Agency argues that Employee was properly suspended for cause pursuant to Chapter 16, Section 1603.3 of the District Personnel Manual (“DPM”). According to Agency, Employee’s suspension was imposed because she raised her middle finger to a citizen while on duty, and in uniform. Moreover, Agency believes that a twenty (20) day suspension without pay was the appropriate penalty based on an analysis of the *Douglas Factors*, as discussed below.

Charge 1: Any on-duty of employment related act or omission that interferes with the efficiency and integrity of government operations—Unreasonable failure to Give Assistance to the Public, which includes discourteous treatment of the public; violation of department customer service standards; failure to return calls; failure to offer assistance when requested, etc.

In this case, I find that there is substantial evidence in the record to sustain Charge 1 against Employee. It is undisputed that Employee was on duty and in uniform on October 2, 2014, when she was involved in a confrontation with an unidentified citizen. During the confrontation, Employee admittedly raised her middle finger towards a citizen in front of his child’s school. The confrontation was captured by the citizen via cell phone video. While it is true that the citizen did not provide his name or a copy of the video to DPW, Employee’s supervisor (Williams) personally viewed the footage and verified that Employee did in fact raise her middle index finger during the confrontation. Williams’ account of what he viewed on the citizen’s cellphone was memorialized in an October 2, 2014 Incident Report.

Employee argues that the citizen’s account of the incident should be inadmissible hearsay because he did not provide a written statement or a copy of his cellphone footage to Agency. However, “[i]t is settled that hearsay evidence may be admitted in administrative hearings. Administrative tribunals are not required to disregard evidence merely because it is hearsay. In fact, hearsay evidence can serve under some circumstances as ‘substantial evidence’ on which to base a finding of fact.”¹⁶ “The decision to permit administrative agencies to admit hearsay

¹⁵ *Id.*

¹⁶ *Hutchinson v. D.C. Office of Employee Appeals*, 710 A.2d 227, 232-233 (D.C.1998). (citations omitted).

evidence reflects a recognition that the reliability and probative value of evidence does not always turn simply on whether or not it falls within the legal definition of hearsay evidence, and that, unlike juries, ‘[Administrative Judges] are . . . capable of properly assessing the reliability and weight of evidence’ that is hearsay in nature.”¹⁷ The weight to be accorded hearsay evidence is determined by the item’s ‘truthfulness, reasonability, and credibility.’¹⁸

The Undersigned concedes that the citizen’s verbal statements and the video of Employee raising her middle index finger towards him constitute traditional hearsay. However, the probative value of this information is integral to the charges which form the basis of the adverse action against Employee. Employee does not argue that Williams provided inaccurate information regarding the footage that he viewed on the unidentified citizen’s cell phone. Employee also fails to challenge the veracity of any of the witnesses’ version of events. Pearson and Williams provided consistent accounts of what occurred on the morning of October 2, 2014. Their statements also corroborate the citizen’s version of events. As a PEO, Employee is required to engage in professional interactions with members of the public at all times. Employee’s failure to exercise good judgment by raising her middle finger to a member of the public is repugnant to her duty as a District Government employee. Based on a review of the evidence, I find that Employee’s actions interfered with the integrity of government operations, and that her actions constituted discourteous treatment of a member of the public. Accordingly, there is substantial evidence in the record to support a finding that Charge 1 against employee was taken for cause as required under Section 1603.3 of the DPM.

Charge 2: Any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious—Use of abusive or offensive language; making an obscene hand gesture to the public.

I further find that there is substantial evidence in the record to support Charge 2 against Employee. As stated above, Employee does not deny that she made an obscene hand gesture towards a citizen on the morning of October 2, 2014. Employee simply defends her actions by stating that the citizen initiated the confrontation by yelling obscenities at her, and that the two have had a less than desirable exchange in the past. Although the citizen’s actions may have been unprovoked and unwarranted, Employee is not absolved of her duty to maintain a professional disposition while on duty. I therefore find that Employee’s act of raising her middle finger towards a citizen during the course of her tour of duty constituted an obscene hand gesture. Thus, there is substantial evidence in the record to support a finding that Charge 2 against Employee was taken for cause and should be upheld.

Collective Bargaining Agreement

With respect to the CBA, Employee argues that Agency violated Article 8 §L, which states that “During investigatory questioning that is likely to lead to discipline, Management will

¹⁷ *Jadallah v. D.C. Department of Employment Services*, 476A.2d 671, 676 (D.C. 1984), citing *Kopff v. D.C. Alcoholic Beverage Control Board*, 381 A.2d 1372, 1385 (D.C. 1977).

¹⁸ *Wisconsin Avenue Nursing Home v. D.C. Commission on Human Rights*, 527 A.2d 282, 288 (D.C. 1987), citing *Johnson v. United States*, 628 F.2d 187, 190-191 (D.C. Cir. 1980).

notify employees of their right to Union representation.”¹⁹ I find that this argument constitutes a grievance, which falls outside the purview of OEA’s jurisdiction, thus I am unable to discuss the merits, if any, of Employee’s protestations.²⁰

Disparate Treatment

Employee’s final argument is that Agency engaged in disparate treatment because no other DPW employee has been disciplined for an uncorroborated citizen complaint. In *O’Donnell v. Associated General Contractors of America*, the D.C. Court of Appeals held that to present a prima facie case for disparate treatment, an employee must show that he or she worked in the same organizational unit as the comparison employees and that both the petitioner and the comparison employees were disciplined by the same supervisor within the same general time period.²¹

In this case, Employee only offers a statement that “...employees works in a position where complaints are made daily. However, unless the complainant is willing to provide their information and reduce the complaint in writing, no action is taken against the employee. Prior to this case, the agency has never taken disciplinary action against any employee where the citizen complaint was uncorroborated.”²² Employee has failed to provide any documentary evidence, such as affidavits or personnel forms, in support of her position. Employee has further failed to produce any evidence to support a finding that other similarly situated PEOs (e.g., same supervisor, grade, years of service, or disciplinary records) were involved in comparable incidents, but were not disciplined by Agency. As such, I find that Employee has failed to make a credible showing that Agency engaged in disparate treatment when it suspended Employee.

Whether the penalty was appropriate under the circumstances.

In *Douglas v. Veterans Administration*²³, the Merit Systems Protection Board, this Office's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Although not an exhaustive list, the factors are as follows:

1. The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;

¹⁹ Employee Brief at 6 (July 17, 2015).

²⁰ It is an established matter of public law that as of October 21, 1998, pursuant to the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, OEA no longer has jurisdiction over grievance appeals.

²¹ 645 A.2d 1084 (D.C. 1994).

²² Employee Brief at 8-9.

²³ 5 M.S.P.R. 280, 305-306 (1981).

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 the employee's ability to perform assigned duties;
6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7. Consistency of the penalty with any applicable agency table of penalties;
8. The notoriety of the offense or its impact upon the reputation of the agency;
9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10. Potential for the employee's rehabilitation;
11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

In considering the *Douglas Factors*, Deciding Official Pacifico found that Employee's actions were serious in nature and were directly related to the expectations of her position as a PEO. Pacifico stated that all DPW employees are expected to represent the District Government in a positive light, and that Employee failed meet the professional level of expectation required

of her position.²⁴ Pacifico further noted that Employee served a nine (9) day suspension in June of 2013 after falsely accusing a supervisor of workplace violence. While several of Employee's supervisors expressed approval in her ability to perform a wide range of duties, Pacifico determined that the October 2014 incident, coupled with Employee's previous disciplinary history, called into question her ability to maintain the temperament and integrity required of a PEO.²⁵ As a result, Pacifico stated that previous disciplinary measures did not appear to have helped Employee to refrain from "questionable workplace behavior." In determining a penalty, Pacifico acknowledged that the citizen may have acted in such a manner that would provoke a negative response from Employee.²⁶

With respect to Agency's decision to terminate Employee, any review by this Office of the agency decision 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.²⁷ 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."²⁸ 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."²⁹

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."³⁰ 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. As previously noted, Employee was disciplined in May of 2013 for "Any on-duty of employment related act or omission that interferes with the efficiency and integrity of government operations—*Misfeasance; providing misleading or inaccurate information to superiors, dishonesty.*"³¹ Thus, Charge 1 against Employee will be evaluated under the "second offense" category of the Table of Appropriate Penalties. A second offense for Discourteous Treatment may result in a penalty of suspension from fifteen (15) to twenty-five (25) days.

Regarding Charge 2, a first offense of "Any on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious—*Use of abusive or offensive language; making an obscene hand gesture to the public*" is only punishable by reprimand to suspension for up to fifteen (15) days. The Undersigned notes that a first offense for this particular charge cannot exceed a suspension of more than fifteen (15) days under the Table of

²⁴ Agency Exhibit 13.

²⁵ *Id.*

²⁶ *Id.*

²⁷ 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).

²⁸ *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

²⁹ *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).

³⁰ See *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985).

³¹ Agency Exhibit 5.

Appropriate Penalties. However, Charge 1 (Discourteous Treatment) is supported by substantial evidence in the record, thus the twenty (20) day suspension imposed upon Employee does not exceed what is allowable under DPM and is nonetheless sufficient to sustain Agency's adverse action. Accordingly, I find that Agency did not abuse its discretion in analyzing the *Douglas Factors*, and that imposing a twenty (20) day suspension upon Employee fell reasonably within the parameters as provided in the Table of Penalties. Based on the foregoing, I conclude that Agency's decision to suspend Employee was taken for cause and that suspension was the appropriate penalty for her actions.

ORDER

It is hereby **ORDERED** that Agency's action of suspending Employee is **UPHELD**.

FOR THE OFFICE:

SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE