THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
JASON GULLEY, Employee	OEA Matter No.: 1601-0025-17
v.	Date of Issuance: June 5, 2018
METROPOLITAN POLICE DEPARTMENT, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Jason Gulley ("Employee") worked as a Lieutenant with the Metropolitan Police Department ("Agency"). On September 16, 2016, Agency issued a Notice of Proposed Adverse Action to Employee. The notice proposed to demote Employee to the rank of Sergeant and a suspension of thirty days. Employee was charged with violation of General Order ("GO") 120.21, Attachment A, Part A-16 for "failure to obey orders or directives issued by the Chief of Police" and violation of GO, Attachment A, Part A-25 "any conduct not specifically set forth in this order which is prejudicial to the reputation and good order of the police force." According to Agency, on July 27, 2016, while on duty, Employee was overheard by other officers making disparaging remarks regarding the residents of the Sixth District. It also alleged that Employee was "less than fully forthright" when he submitted a written statement on July 28, 2016, wherein

he denied stating that citizen complaints were a "waste of time." On December 6, 2016, Agency issued a Final Notice of Adverse Action, demoting Employee's rank from Lieutenant to Sergeant and suspending him for thirty days with five days held in abeyance.[1]

On January 30, 2017, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). In his appeal, Employee argued that Agency failed to provide him with due process. He also stated that the penalty of a demotion and suspension was overly harsh in relation to the misconduct. Employee further opined that Agency's adverse action was racially motivated. As a result, he requested that the suspension and demotion be reversed.[2] Agency filed an answer on March 1, 2017. It denied Employee's substantive claims and requested that OEA conduct an evidentiary hearing.[3]

An OEA Administrative Judge ("AJ") was assigned to the matter in May of 2017. On October 4, 2017, the AJ held an evidentiary hearing in which both parties presented documentary and testimonial evidence in support of their positions.[4] The AJ issued an Initial Decision on November 15, 2017. He first highlighted that the standard of proof required in this case was a preponderance of the evidence, which is defined as "that degree of relevant evidence which a reasonable mind, considering the matter as a whole, would accept as sufficient to find a contested fact more probably true than untrue." With respect to whether Agency met its burden of proof for Charge No. 1, the AJ concluded that Employee stated that many, but not all, of the citizen complaints in the Sixth District were either on welfare or had a criminal record. Accordingly, he did not opine that Employee violated Agency's GO. According to the AJ, none

[1] *Agency Answer to Petition for Appeal*, Tab 4 (March 1, 2017).
[2] *Petition for Appeal* (January 30, 2017).
[3] *Agency Answer to Petition for Appeal*.
[4] On November 6, 2017, Agency filed a *Motion to Strike for Any Relief as Deemed Appropriate*. It requested that sanctions be imposed based on Employee's *ex parte* communication with the AJ on October 31, 2017. Agency claimed that Employee emailed the presiding AJ after the hearing about the testimony of one of the witnesses, in violation of OEA's rules. Consequently, it requested that the email be stricken from the record and that action be taken against Employee as deemed appropriate.

of Employee's statements on June 27, 2016 constituted name-calling, derogatory, disrespectful, or offensive speech. The AJ provided that Employee did not engage in idle conversation, tell jokes, or make comments that related to the race, color, national origin, sex, age, religion, disability, or sexual orientation of any individual. According to the AJ, Employee's remarks were not racially motivated or disrespectful because he was addressing an African-American officer during the event in question. Additionally, citing the holding in *In re S.W.*, 45 A.3d 151 (D.C. 2012), the AJ stated that the standard of review for what is proper speech and conduct for police officers must be based on an objective standard and is not based on the subjective biases or sensitivity of the person(s) who happen to hear them. Consequently, the AJ concluded that Employee's actions did not violate Agency rules.

As it related to Charge No. 2, the AJ found Employee's testimony to be more credible than Agency's sole witness, Sergeant Kimberly Carter. He noted that Agency could have strengthened its position by having Officer Gerthaline Pollock ("Pollock") testify during the OEA hearing. However, in failing to do so, the AJ believed that Pollock's written statement constituted hearsay that was not able to be tested on cross-examination. Therefore, the AJ accorded a greater weight of evidence to Employee's testimony, and held that he did not lie on his written statement regarding the incident. Based on the foregoing, the AJ found that Agency did not meet its burden of proof for the charges levied against Employee. Accordingly, Agency was ordered to reverse Employee's demotion and suspension, with back pay and benefits.[5]

Agency disagreed with the Initial Decision and filed a Petition for Review with OEA's Board on December 20, 2017. It first argues that the evidence is sufficient to support a finding that Employee made comments that might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person. Agency clarifies that Employee's comments are not

[5] *Initial Decision* (November 15, 2017).

protected by the First Amendment because in the employment context, speech is only protected if it addresses a matter of public concern. According to Agency, the AJ erroneously relied on the holding in *In re S.W.* by finding that Employee's comments were protected by the First Amendment.

Next, Agency argues that the AJ applied the wrong legal standard in his analysis of Employee's conduct. It asserts that the correct standard to apply under GO 201.09 is whether a person might have interpreted Employee's speech as derogatory, disrespectful, or offensive, and does not require a showing that any particular person was actually offended by the comments. Agency also opines that the AJ's findings were incomplete and did not address each of Employee's allegedly offensive statements. Additionally, it states that Employee's comments violated GO 201.09 as a matter of law. Lastly, Agency believes that there is sufficient evidence in the record to show that Employee was less than forthright when he denied declaring that citizen complaints were a waste of time. Therefore, it requests that the Board grant the Petition for Review and reverse the AJ's findings. In the alternative, Agency asks that the matter be remanded to the AJ to issue new findings of fact based on the correct legal standard for each charge.[6]

In response, Employee argues that the case law relied upon by Agency lacks merit and is irrelevant to the issues presented before OEA. He further contends that contrary to Agency's position, General Orders cannot be violated as a matter of law. According to Employee, Agency has a pattern of discrimination and harassment and has violated his right to free speech under the Constitution. He also states that Agency violated its own GO 120.23 by allegedly using race and

[6] *Petition for Review* (December 20, 2017).

gender as a basis for investigating misconduct. Accordingly, Employee asks that the Board deny Agency's Petition for Review and uphold the Initial Decision.[7]

Substantial Evidence

On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987), held 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. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[8]

Charge No. 1: Failure to Obey Orders

Employee was first charged with violating GO Series 120.21, Attachment A, Part A-16 for "Failure to obey orders or directives issued by the Chief of Police." Specifically, Agency cited to GO 201.09, Part VIII, Section B-1, in support of its adverse action. The GO provides the following:

> Employees shall be courteous, civil and respectful to persons when on duty. Employees of the MPD shall not use terms or resort to name-calling that might be interpreted as derogatory, disrespectful, or offensive to any person. Employees shall not engage in idle conversation, tell jokes, or make comments that relate to the race, color, national origin, sex, age, religion, disability or sexual orientation of any individual. A member can also be held accountable for this behavior while off duty.

In his Initial Decision, the AJ, citing the holding in *In re S.W.*, *supra*, determined that "the standard of review for what is proper speech and conduct for police officers must be based on an objective standard, not subject to the subjective biased or sensitivity of whoever happens to

[7] *Motion to Deny Petition for Review* (December 27, 2017)..
[8] *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).

hear them."[9] First, this Board finds that the AJ incorrectly relied on the holding in *In re S.W.* because this case addresses the right to free speech as it relates to the law regarding criminal threats. The D.C. Court of Appeals in *In re S.W.*, explaining that the First Amendment generally "bars the government from dictating what we see or read or speak or hear,"[10] recognized that "true threats" are an exception to this rule and can be criminalized without violating the First Amendment. However, the Court's ruling did not address whether a police officer's on-duty speech is protected by the First Amendment. As a result, we find that the AJ's case law is not on point in this matter.

Secondly, this Board notes that the language utilized by Agency in support of its adverse action under GO 201.09 was inherently subjective, not objective, in nature. In its Final Notice of Adverse Action, Agency made several findings of fact pertaining to Employee's statements on June 27, 2016. Of note, it made the following conclusions in pertinent part:

> 1. While on-duty and in the Sixth District Sergeant's office, [Employee] had a conversation with Sergeant Gerthaline Pollock, which was overheard by other members in the office…Your comments offended at least one of the members who heard them, who interpreted them as derogatory.
>
> 2. The statements [Employee] made, whether meant for general consumption or specifically Sergeant Pollock, were, in fact, overheard by Sergeant Carter. Sergeant Carter took offense to your commentary and expressed this offense to you directly.

Thus, Agency relied upon Sergeant Carter's personal, subjective interpretation in determining that Employee's statements violated GO 201.09 because she construed them as offensive and derogatory. Moreover, we note that the language of Agency's GO is not based on the speaker's interpretation, as it prohibits employees from making comments that "might be interpreted as derogatory, disrespectful, or offensive to the dignity of any person." Contrary to the AJ's belief,

[9] *Initial Decision* at 6.
[10] *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 245, 122 S.Ct. 1389, 152 L.Ed.2d 403 (2002).

whether or not Employee's comments were made to an African-American officer is irrelevant in this case. To determine whether Agency's adverse action is based on substantial evidence, the AJ was required to make findings of fact and conclusions of law relevant to whether each of Employee's statements on June 27, 2016 *might have been interpreted* as derogatory or disrespectful, or offensive to the dignity of any person, not whether Employee actually meant for them to be. Because the AJ did not use applicable case law, and failed to properly evaluate Employee's statements based on the explicit language of GO 201.09, Part VIII, Section B-1, this matter must be remanded for the purpose of applying the correct legal standard to the facts of this case. Moreover, it is unclear from the Initial Decision whether Agency's GO is nonetheless usurped by the First Amendment right to free speech. Consequently, this Board must remand the matter to the AJ address the foregoing with respect to Agency's Charge No. 1.

Charge No. 2: Prejudicial Conduct

Concerning Charge No. 2, Agency states that Employee submitted a written statement on July 28, 2016, wherein he denied declaring that citizen complaints were a "waste of time." Agency further explains that several other officers indicated that Employee did, in fact, make the aforementioned comments, and concluded that his statement was "less than fully forthright." In his analysis, the AJ found Employee to be more credible than Agency's sole eye witness, Sergeant Kimberly Carter. He noted that Agency failed to produce Officer Pollock during the evidentiary hearing; therefore, her written statement constituted hearsay that lacked the ability to be challenged on cross-examination.

We agree with the AJ's conclusion that Agency failed to meet its burden of proof with respect to this charge. The OEA Administrative Judge was the fact finder in this matter. In assessing witness testimony, the AJ accorded a greater amount of weight to Employee's

recitation of events, finding that he did not lie on his written statement to Agency. Thus, as this Board has consistently ruled, we will not second guess the AJ's credibility determinations.[11] Moreover, even when construed in a light most favorable to Agency, Charge No. 2 lacks specificity and is ambiguous, at best.[12] Agency provides no legal standard for assessing misconduct as it relates to Employee being "less than forthright." Consequently, this Board cannot soundly conclude that Charge No. 2 is supported by the evidence. Hence, we will leave the AJ's finding regarding such undisturbed.

Conclusion

Based on the foregoing, Charge No. 2 is supported by substantial evidence. However, the AJ's conclusions of law with respect to Charge No. 1 are not supported by the record. Therefore, this matter must be remanded to the AJ to make further determinations.

[11] *Ernest H. Taylor v D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 31, 2007); *Larry L. Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Paul D. Holmes v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0014-07, *Opinion and Order on Petition for Review* (November 23, 2009); *Derrick Jones v. Department of Transportation*, OEA Matter No. 1601-0192-09, *Opinion and Order on Petition for Review* (March 5, 2012); *C. Dion Henderson v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0050-09, *Opinion and Order on Petition for Review* (July 16, 2012); *Ronald Wilkins v. Metropolitan Police Department*, OEA Matter No. 1601-0251-09, *Opinion and Order on Petition for Review* (September 18, 2013); and *Theodore Powell v. D.C. Public Schools*, OEA Matter Nos. 1601-0281-10 and 1601-0029-11, *Opinion and Order on Petition for Review* (June 9, 2015).

[12] *See Skelly v. Metropolitan Police Department*, OEA Matter No. 1601-0001-16, *Opinion and Order on Petition for Review* (March 13, 2018).

ORDER

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** to the Administrative Judge for further findings.

FOR THE BOARD**:**

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Sheree L. Price, Chair

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Vera M. Abbott

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Patricia Hobson Wilson

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Jelani Freeman

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.