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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ANTHONY PAYNE	)	OEA Matter No. 1601-0054-01
Employee	)	
	)	Date of Issuance: May 10, 2005
v.	)	
	)	Blanca E. Torres, Esq.
METROPOLITAN POLICE	)	Administrative Judge
DEPARTMENT	)	
Agency	)	

Anthony Payne, *Pro Se*  
Mark Vichmeyer, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND FINDINGS OF FACT

On June 6, 2001, Employee, a Sergeant, Grade 1, Step 5, filed a petition for appeal with this Office. He appealed a ten-day suspension for alleged neglect of duty. This case was originally assigned to Administrative Judge King. It was reassigned to me on June 30, 2003. A hearing was conducted on August 19, 2003. The record closed upon receipt of transcripts on September 5, 2003.

## JURISDICTION

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

## ISSUES

1. Whether Employee committed the acts with which he was charged.
2. If so, whether his acts constitute cause for adverse action.
3. If so, whether the penalty was appropriate.

## UNDISPUTED FACTS

On March 2, 2001, Employee received a notice of proposed adverse action concerning his actions on January 10 and 11, 2000. The notice stated *inter alia*:

As a result of your actions as described in the attached investigative report, the department hereby charges you with the following misconduct:

**Charge No. 1:** Violation of General Order Series 1202, Number 1, Part I-B-14, which provides: "Neglect of any duty to which assigned or required by the rules and regulations adopted from time to time by the Department." This misconduct is defined as cause in section 1603 of the District of Columbia Personnel Manual.

**Specification No. 1:** In that on January 10, 2000, you and another officer were dispatched to handle a burglar alarm at 1724 Franklin Street, Northeast. You failed to locate a point of entry that should have been apparent. A burglary was later reported by the owner.

For the aforementioned violation, the department proposes to suspend you for ten (10) workdays.

On April 23, 2001, Agency issued a final decision, suspending Employee for ten (10) work days.

### FINDINGS OF FACT

Agency produced as witnesses Supervisor of the Communications Division Debra Dunn. Ms. Dunn testified that an alarm rang in the rear section of the home located at 1724 Franklin Street, N.E. at 7:08 p.m. on January 10, 2000. The alarm rang a second time at 7:20 p.m., again in the rear section of the home. At 7:21 p.m., Employee was called by the Communications Division to respond to the alarm at 1724 Franklin Street. At 7:29 p.m. the alarm in the inside rear section of the home and at 7:30 p.m. the alarm in the front inside section of the house rang.

ADT Security Services Sales Representative Brian VerPlank testified that the alarm at 1724 Franklin Street is set off by human body temperature and movement. Animals do not have the same body temperature as a person. Also, the beam that registers movement is set at the height of a person, too high for it to be activated by an animal. Finally, both conditions - human body temperature and movement, must exist simultaneously for the alarm to ring. Thus, the fact that the alarm was going off between 7:08 p.m. and 7:30 p.m. indicated that there was movement inside the house and that the movement was most likely created by a person. Therefore, it is likely that there was a person inside the house between 7:08 p.m. and 7:30 p.m., while the alarm was being activated. The other alarms in the home were not activated. Therefore, the person would have had to enter the home through a window in the back of the house.

It is undisputed that police officers are allotted ten (10) minutes to report to the scene after receiving the call from a dispatcher. Once an officer arrives at the scene, he must report his arrival to the dispatcher and enter the time of his arrival into his "Daily Vehicle Inspection & Activity Report". He must then wait for a second officer to arrive and assist him in detecting any sign of someone breaking into the home.

Employee entered the time of the dispatcher's radio call on his Daily Activity Report, but he did not enter his time of arrival to the location. Employee testified that he did not enter his arrival time on his Daily Activity Report because he did not want his record to reflect that he had arrived beyond the allotted ten (10) minutes to respond to a call. Employee also testified that he did not contact the dispatcher upon arriving at the Franklin Street location. Further, Employee did not wait for the second officer to arrive, even though the dispatcher instructed him to wait. According to Employee, he checked the exterior of the entire house,

including the doors and windows, and found everything to be on order. He cleared the property and stated his Daily Activity Report that the ground level was secure.

Employee's Daily Activity Report reflects that he received a call to go to 1724 Franklin Street at 7:20 p.m. and that he "cleared the property" at 7:40 p.m. Thus, twenty (20) minutes expired between the call from the dispatcher and his departure from the property. Employee was late arriving to the Franklin Street address. Therefore he spent less than ten (10) minutes checking the premises. Employee has given no explanation for his late arrival at 1724 Franklin Street. However, he has plainly stated that he failed to log his arrival time to avoid documenting his late arrival. I find that Employee violated Agency policy when he failed to log the time of his arrival in his report and when he failed to contact the dispatcher upon his arrival.

In addition, Employee's failure to contact the dispatcher upon arriving at the scene and his failure to make an entry in his log as to the time of his arrival, make it impossible to tell exactly when he arrived at the 1724 Franklin Street address or how much time he actually spent checking the premises. However, based on his testimony, it is clear that he spent less than ten (10) minutes investigating the cause of the alarm. Employee testified that the house was in disrepair and that the wind or an animal might have set off the alarm. However, there is nothing in the record to support this conjecture. The alarm in question is activated by human body temperature and movement, *simultaneously*.

Absent any concrete evidence to the contrary, neither the wind nor the movement of an animal could have activated the alarm. First, there is no showing that the homeowner kept any animals in her home or that Employee detected any animals on the premises. Further, even if an animal's movements could be detected by the alarm system, animals do not have the same body temperature as a person and thus the alarm would not be activated. Similarly, there is no evidence to support the claim that the wind could have triggered the alarm. As a result, I find that Employee's argument is without merit.

It is undisputed that burglaries are two-officer assignments. Thus, a second officer was called by the dispatcher to respond to the same alarm as Employee at 1724 Franklin Street. Employee's report dated May 2001, indicated that he and the second unit, or officer, had checked out the premises. Nonetheless, here, Employee testified that the second officer did not arrive at the property and that he did not wait for his arrival, even though the dispatcher told him to wait. When asked about this discrepancy, Employee stated that he has since spoken to Officer Levey who informed him that he did not go to the 1724 Franklin Street address on January 10, 2000. I find that while this explains why Employee changed his version of the incident, it does not explain why he reported in the first instance that Officer Levey assisted him on January 10, 2000. In view of the other omissions by Employee that violated Agency

policy, I find that his report that a second officer assisted him in responding to the burglar alarm at the Franklin Street address was false.

The record shows that around 1:00 a.m., the homeowner returned from work and discovered that a thief broke into her home and stole a watch from the second floor, which has no alarms. She called the alarm company who informed her that they had called the police earlier in the evening. The homeowner then called the police and reported that no one had responded to the burglar alarm. Officer James Sulla went to her home and investigated the incident. Officer Sulla testified that he determined “unknown suspect(s) entered from the rear [by] breaking the glass in the window and then a door window and a lock.” Tr. p. 60.

Employee argues that Agency has not shown that the windows in question were broken before he reported to the location. I find this argument unconvincing. The facts dictate that someone was in the home between 7:09 p.m. and 7:31 p.m. and entered from the rear of the house. This means there was a rear entry by breaking the glass on a window and then a door, as determined by Officer Sulla.

Lieutenant Pamela Wheeler Taylor also made an investigation of the entire January 10, 2000 incident. She determined that neither Officer Levey nor Employee had reported to the Franklin Street location that night. When asked why she made this determination, she stated, “I concluded that even in a scout car it was possible to see the area that was burglarized and the point of entry.” Tr. p. 45. This means that even if Employee did not get out of his car to check the premises, he still could have detected the point of entry by merely looking out of his police car.

Based on the totality of the record, I find that Employee is not a credible witness. He did not make entries in his log in order to avoid documenting his late arrival to the scene and did not call the dispatcher to report his arrival. Further, Employee first informed Agency that a second officer had arrived at the scene to assist him and later admitted that this was not true. I find that Employee violated Agency policy by being negligent in the performance of his duties when failed to detect a broken window that was in plain view.

I am not persuaded by Employee’s argument that Agency has not established the exact regulations which pertain to making entries in his log, reporting to the dispatcher upon arrival at the scene and waiting for a second officer when responding to a burglary alarm. He has not disputed that these were his duties pursuant to Agency policy.

## ANALYSIS AND CONCLUSION

### Whether Employee committed the acts with which he was charged.

Agency charged Employee with "Neglect of any duty to which assigned or required by the rules and regulations adopted from time to time by the Department." Thus, Agency must establish that Employee neglected his duty and/or violated rules which resulted in neglect of duty. Employee failed to detect a broken window which was in plain view. Agency argues that this resulted from his failure to perform his duties, or, from the negligent performance of his duties, when responding to a house alarm

I have found that Employee failed to enter his time of arrival in order to avoid a record of his late arrival on the scene. Thus, Employee violated his duty to make an entry in his log indicating his arrival time. He also failed to notify the dispatcher when he arrived at the scene. Employee has not disputed that it was his duty to log his arrival time and notify the dispatcher. He compounded this failure to follow procedure by failing to wait for a second officer to arrive at the location to assist him on a two-man assignment. Finally, when Employee allegedly checked the premises in question, he failed to detect a broken window in the rear of the home that was the point of entry for the burglar.

### Whether the acts constitute cause for adverse action.

In any adverse disciplinary action the government shall bear the burden of proving by a preponderance of the evidence that the adverse action was taken for cause. *See* Agency's General Order 1202.1, Neglect of Duty.

Here, Agency has shown that Employee failed to perform his duty to log in his time of arrival at the scene, failed to inform the dispatcher of his arrival, and failed to wait for the assistance of another officer. Employee also failed to detect the point of entry where a burglary was in progress. I find that these failures constitute negligence under DPM §§ 1603.2 and 1603.3, 47 D.C. Reg. 7096 (2000), which define "negligence" as cause for adverse action.

### Whether the penalty was appropriate.


Agency's regulations allow discipline from a reprimand to a removal as a penalty for neglect of duty. Inspector Glenn Shearod testified that when considering the penalty in this case, he took into consideration the seriousness of the offense and also the fact that Employee had no prior discipline. The role of this Office, when reviewing the penalty imposed by an agency, is to ensure that "managerial authority has been legitimately invoked and properly exercised." *See*

*Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). Employee's various defenses have not held up to scrutiny and cannot serve as a basis to mitigate the penalty in this instance. I find no basis for concluding that Agency has exceeded its managerial authority when considering the penalty in this case, a ten-day suspension.

ORDER

It is hereby ORDERED that Agency's action of suspending Employee for ten days is upheld.

FOR THE OFFICE:

  
BLANCA E. TORRES, Esq.  
Administrative Judge