THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0019-17
STEPHEN SHARP, Employee	
	Date of Issuance: May 25, 2018
v.	
METROPOLITAN POLICE DEPARTMENT, Agency	Arien P. Cannon, Esq. Administrative Judge

Stephen Sharp, Employee, *Pro se*
Brenda Wilmore, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Stephen Sharp ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 14, 2016 challenging the Metropolitan Police Department's ("Agency" or "MPD") decision to suspend him for twenty (20) days.[1] Agency filed its Answer on January 17, 2017. Agency also filed a Motion for Summary Disposition on March 3, 2017. I was assigned this matter on April 5, 2017.

An Order was issued on May 17, 2017, for Employee to respond to Agency's Motion for Summary Disposition. Employee submitted his response on June 1, 2017. A telephonic status conference was convened on July 10, 2017, to address the jurisdiction issue raised in Agency's Motion for Summary Disposition. Subsequent to Agency's Motion for Summary Disposition, Employee was subjected to a different disciplinary action. As set forth in the Post Status

[1] Fifteen (15) days of this suspension were held in abeyance for one year. Because Employee was subjected to additional disciplinary action within one year, the fifteen (15) days held in abeyance were subsequently implemented, resulting in Employee serving a twenty (20) day suspension for the instant matter. *See Sharp v. MPD*, OEA Matter No. 1601-0047-17.

Conference Order, and Order on Agency's Motion for Summary Disposition issued on July 10, 2017, Agency's Motion for Summary Disposition was denied.

Based on the finding that this Office has jurisdiction over the instant appeal, the parties were ordered to submit written briefs. Agency submitted its brief on August 14, 2017. Employee submitted his brief on September 18, 2017. On March 22, 2018, an Order was issued which determined that Employee established a *prima facie* showing that he was treated differently from similarly-situated employees. As such, Agency was ordered to submit a brief for the limited purpose of addressing Employee's disparate treatment argument. Agency submitted its brief addressing disparate treatment on April 11, 2018. Upon consideration of the arguments raised by the parties, I determined that an evidentiary hearing was not warranted. The record is now closed.

JURISDICTION

Jurisdiction of this Office is established in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

(1) Whether Agency had cause to take adverse action against Employee for "Conduct Unbecoming an Officer?"

(2) If so, whether a twenty (20) day suspension was appropriate under the circumstances; and;

(3) Whether Employee was subjected to disparate treatment.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Agency charged Employee with violation of MPD General Order Series 120.21, which reads, "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia." The following specifications are associated with the charge levied against Employee:

> Specification No. 1: In that on April 6, 2016, you (Employee) were at a 7-11 Convenience Store located at 4854 Nannie Helen Burroughs Avenue, Northeast. Moreover, while on duty, and in full uniform, you were recorded obtaining energy drink beverage(s) from the refrigerator, pouring the contents in a "courtesy cup," and leaving the store without making payment. When questioned regarding your actions, you acknowledged that it

> was your responsibility to make payment, or attempt to make payment for the item, and failed to do so.
>
> Specification No. 2: In that on April 14, 2016, you (Employee) were at a 7-11 Convenience Store located at 4854 Nannie Helen Burroughs Avenue, Northeast. Moreover, while on duty, and in full uniform, you were recorded obtaining energy drink beverage(s) from the refrigerator, pouring the contents in a "courtesy cup," and leaving the store without making payment. When questioned regarding your actions, you acknowledged that it was your responsibility to make payment, or attempt to make payment for the item, and failed to do so.

Employee does not dispute that he drank a Red Bull energy drink and failed to make payment to the 7-11 store owners.[2] However, Employee asserts that the issue is that Agency incorrectly imposed a "Conduct Unbecoming an Officer" charge, instead of a more appropriate charge of "Accepting Gratuities for Consideration." The only basis that Employee argues as to why he should have been charged with "Accepting Gratuities for Consideration" rather than a "Conduct Unbecoming an Officer" charge is that other Officers with MPD engaged in similar conduct and were charged with "Accepting Gratuities."[3] Conduct Unbecoming an Officer is a broad charge that may encompass a wide range of conduct by an officer. Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the Administrative Judge.[4] Following this finding by the Court in *Stokes,* the undersigned reasons that an Agency also has the discretion in selecting the charge that it feels most appropriately fits the specifications of an employee's conduct. It is then up to Agency to satisfy its burden in proving the charge levied against an employee.

Agency defines "Conduct Unbecoming an officer" as acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia.[5] It is uncontroverted that 7-11 provides "courtesy cups" to officers. It is Agency's contention that the "courtesy cups" were intended for complimentary coffee and fountain drinks. However, Employee maintains that he was unaware that the canned Red Bull energy drinks were not considered complimentary. Agency further contends that Employee intended to deceive store employees by pouring the Red Bull canned drink into courtesy cups and then exiting the store. Despite Employee's belief that Red Bull energy drinks were complimentary, it is evident that the store owner of the 7-11 in this case did not share the same view. The taking of the canned Red Bull energy drink, rather than a fountain drink in the courtesy cup demonstrates acts detrimental to good discipline, notwithstanding Employee's mistaken belief. Accordingly, I find that Agency had cause to take adverse action against Employee for "Conduct Unbecoming an Officer."

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[2] *See* Employee's Brief, at 2 (September 18, 2017).
[3] *See Id*. This offense is listed as "Receiving Consideration/Gratuity" in the Table of Offenses and Penalties under General Order 120.21, Attachment A.
[4] *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).
[5] General Order 120.21, Section VIII, Attachment A.

Disparate Treatment

Employee raises the argument that he was subjected to disparate treatment by Agency when it charged him with "Conduct Unbecoming an Officer" and imposed a twenty (20) day suspension, although similarly situated employees were charged with "Receiving [Accepting] Consideration/Gratuity" and imposed corrective action, rather than adverse action, in the form of an official reprimand. In *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, Opinion and Order on Petition for Review (September 29, 1995), this Office's Board set forth the law regarding a claim of disparate treatment:

> [An Agency must] apply practical realism to each [disciplinary] situation to ensure that employees receive fair and equitable treatment where genuinely similar cases are presented. It is not sufficient for an employee to simply show that other employees engaged in misconduct and that the agency was aware of it, the employee must also show that the circumstances surrounding the misconduct are substantially similar to [his] own. Normally, in order to show disparate treatment, the employee must demonstrate that he or she worked in the same organizational unit as the comparison employees and that they were subject to [disparate] discipline by the same supervisor [for the same offense] within the same general time period.

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.[6] If such 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.[7] "In order to prove a disparate treatment, [Employee] must show that a similarly situated employee received a different penalty."[8]

To support Employee's disparate treatment claim, he references the misconduct of six First District officers and the resulting charges and penalties as comparators. Specifically, he identifies the disciplinary matters of Officers Jeffery Kopp, Len Cummings, Enrique Simmons, Daniel Hemmer, Frederick Lee, and Kemal Johnson. In those matters, the officers were charged with accepting discounts on merchandise purchased at two 7-11 convenience stores in the District of Columbia. The comparator officers all received an official reprimand or a one (1) day suspension for their misconduct.[9] The misconduct of these six officers occurred on or around September 5, 2012.

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[6] *See Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-01190-90, Opinion and Order on Petition for Review (July 22, 1994).
[7] *Id*.
[8] *Social Sec. Admin. v. Mills*, 73 M.S.P.B. 463 (1991).
[9] *See* Agency's Brief in Response to Disparate Treatment Order, at 3 (April 11, 2018).

In a March 22, 2018 Order, I found that Employee made a *prima facie* showing that he was subject to disparate treatment. The burden then shifted to Agency to produce evidence establishing a legitimate reason for imposing a different penalty on the comparator employees. Agency was ordered to submit a brief for the limited purpose of addressing Employee's disparate treatment argument. Agency submitted its brief arguing that it did not engage in disparate treatment. First, Agency asserts that Employee's partner engaged in identical misconduct as Employee and was also charged with "Conduct Unbecoming an Officer" and received a twenty day suspension, with fifteen days held in abeyance for year.[10]

Furthermore, Agency submits that the misconduct and penalties imposed in the matters relating to the comparator employees are different from those in the instant case for the following reasons: (1) the misconduct of the six officers identified by Employee occurred in September of 2012, nearly four years prior to the incident involving Employee; (2) the comparator employees were assigned to the First District, whereas in the instant case, Employee was assigned to the Sixth District. As such, there was a different chain of command, different supervisors, as well as a different Internal Affairs Division official investigating the misconduct in each incident; (3) Agency contends that the circumstances surrounding the misconduct in each instance are distinguishable. The investigation into the cases involving the identified comparator officers revealed that the officers received a discounted price for their merchandise, which they paid. Here, in the instant case, Employee failed to tender any payment for the Red Bull energy drinks on two separate occasions; and (4) The comparator officers were charged with "Failure to Obey Orders and Directives," whereas here, Employee was charged with "Conduct Unbecoming."[11]

Here, I find that Employee was not subjected to disparate treatment as contemplated by the OEA Board in *Jordan v. Metropolitan Police Department*. Employee was an officer within the command of the Sixth District, whereas the comparator officers were in the command of the First District. They were not in the same organizational unit. Furthermore, the incidents involving the comparator officers occurred nearly four years prior to the incident giving rise to the instant case. This lapse in time does not satisfy the "general time period" in which the comparator employees, and Employee in the instant matter, were subjected to discipline, as set forth by the OEA Board in weighing evidence of disparate treatment.

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 Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency. In the instant case, I find that Agency had cause to take adverse action against Employee. I further find that Employee was not subjected to disparate treatment as discussed above. Agency's General Order Series 120.21, Attachment A, also provides an applicable Table of Offenses and Penalties Guide. The guide

[10] *See Kristopher Smith v. MPD*, OEA Matter No. 1601-0051-17 (February 13, 2018).
[11] *See* Agency's Brief Response to Disparate Treatment Order, at 4 (April 11, 2018).

provides that a first time offense for "Conduct Unbecoming" ranges from a three (3) day suspension to removal.

Here, Agency initially imposed a twenty (20) day suspension, with fifteen (15) days held in abeyance, so long as Employee was not subjected to further discipline within the next year. However, because Employee was subjected to additional disciplinary action in a separate matter within one year, the fifteen (15) days held in abeyance were subsequently implemented, resulting in Employee serving a twenty (20) day suspension for the instant matter. Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the Administrative Judge.[12] The undersigned may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.[13] 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.[14] I find that Agency exercised its managerial discretion by holding fifteen (15) of the twenty (20) days of the adverse action in abeyance for one year. Unfortunately, Employee was involved in a separate disciplinary matter within that year, which triggered Agency's decision to tack on the additional fifteen (15) days held in abeyance to his suspension, for a total of a twenty (20) day suspension.

Here, in Agency's Notice of Proposed Adverse Action served on August 17, 2016, it thoroughly discussed and considered each *Douglas* factor.[15] Based upon the analysis of each *Douglas* factor and the totality of the circumstances, I find that Agency reasonably imposed a twenty (20) day suspension against Employee.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's decision to suspend Employee for twenty (20) days is **UPHELD**.

FOR THE OFFICE:

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Arien P. Cannon, Esq.
Administrative Judge

[12] *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).
[13] *See Id.*
[14] *Id.*
[15] *Douglas v. Veteran Administration*, 5 M.S.P.B. 313 (1981); Agency's Answer, Tab 5 (May 22, 2014).