

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Jason Gulley)	OEA Matter No. 1601-0025-17
Employee)	
)	Date of Issuance: November 15, 2017
v.)	
)	Joseph E. Lim, Esq.
Metropolitan Police Department)	Senior Administrative Judge
Agency)	
_____)	
Jason Gulley, Employee <i>pro se</i>)	
Brenda Wilmore, Esq., Agency Representative)	

INITIAL DECISION

PROCEDURAL BACKGROUND

On January 30, 2017, Employee, a Police Sergeant at the Metropolitan Police Department (MPD or Agency), filed a Petition for Appeal with this Office challenging Agency’s final decision to suspend him from employment for thirty (30) days, and demote him from lieutenant to sergeant for insubordination and conduct prejudicial to the reputation and good order of the police force.

The matter was assigned to the undersigned administrative judge on May 5, 2017. I held a Prehearing Conference on May 24, 2017, and an Evidentiary Hearing on October 4, 2017. I closed the record at the conclusion of the hearing.

JURISDICTION

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

ISSUE

Whether Agency’s action to terminate Employee was taken for “cause”, and if so, whether Agency's penalty was appropriate under the circumstances.

Contentions of the Parties

The Agency contends that Employee was guilty of insubordination and conduct prejudicial to the reputation and good order of the police force. Specifically, Employee was charged with making verbal statements that offended his fellow police officer who was African-American. Employee denies the charges and states that his statements did not violate any Agency General Orders.

UNCONTROVERTED FACTS¹

1. Employee was first appointed to the Agency as a Patrol Officer on March 27, 2000. He rose through the ranks and attained the rank of Lieutenant.
2. On June 27, 2016, Employee, Lieutenant Jason Gulley, was serving as the Sixth District (6D) Watch Commander and was in the 6D sergeant's office having a conversation with Sergeant Gerthaline Pollock. Sergeant Pollock asked Employee about his recent promotion and how he liked his assignment. Several other sergeants were present in the sergeant's office, including Sergeant Kimberly Carter.
3. During his conversation with Sergeant Pollock, Employee stated that it bothered him when citizens say that "they pay his salary," because half of the Sixth District's citizens are on welfare. He also stated that citizen complaint investigations are a waste of time.
4. Sergeant Carter overheard these comments and, after a brief conversation, told Employee that she was offended by them. The other sergeants who overheard the exchange substantially corroborated the facts above. There were additional sergeants in the office who did not hear the conversation.
5. On June 28, 2016, Employee provided a PD 119 (statement) which was supplemented by a PD 119 Question and Answer statement. Agency's investigation concluded that he falsely denied making the statement that all citizen complaints he receives are a waste of time.
6. On September 16, 2016, Employee was served with the Notice of Proposed Adverse Action, charging him with one specification of Failure to Obey Orders or Directives and one specification of Prejudicial Conduct. A demotion to the rank of sergeant and a 30-day suspension were proposed.
7. The Notice of Proposed Adverse Action charged Employee with the following misconduct:²

Charge No. 1: Violation of General Order 120.21, Attachment A, Part A-16, which states, "Failure to obey orders or directives issued by the Chief of Police."

Specification No. 1: In that, on July 27, 2016, while on-duty and in the Sixth District Sergeants' office, you had a conversation with Sergeant Gerthaline Pollock, which was overheard by other members in the office. During the conversation, you made disparaging remarks regarding residents of the Sixth District. Your comments offended at least one of the members who heard them, who interpreted them as derogatory. This misconduct is further described in General Order 201.09, Part VIII, Section B-1, which reads, "Employees shall be courteous, civil and respectful to persons when on duty."

¹ Derived from the parties' joint stipulations of facts and uncontested documents and exhibits of record.

² Agency Exhibit 14, Tab 2.

Employees of the MPD shall not use terms or resort to name-calling that might be interpreted as derogatory, disrespectful, or offensive to the dignity of 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.”

Charge No. 2: Violation of General Order 120.21, Attachment A, Part A-25, which states, “Any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force.”

Specification No. 1: In that, on July 28, 2016, you submitted a written statement in reference to the above-mentioned incident. In that statement, you denied declaring that citizen complaints were a “waste of time.” The statements of several members indicate that you did, in fact, make that comment, as such your statement in this matter was less than fully forthright.”

8. Employee’s prior disciplinary record included insubordination, and three instances of violating orders and directives. Agency considered both mitigating and aggravating factors in coming up with its penalty.
9. On December 6, 2016, Agency issued its Final Notice of Adverse Action, which demoted Employee’s rank from Lieutenant to Sergeant and suspended him for thirty (30) days with five (5) days held in abeyance.³
10. Employee’s written statement dated July 28, 2016, states in relevant part:⁴

I said that I got a lot of...citizen complaints. ...but one of the things that bother me the most is when citizens say to me, “You have to do this or that because I pay your salary.” I then said, “That’s not the case here in 6D, because half the people I deal with are on some sort of welfare, so they are not paying my salary.” Sergeant Carter was sitting a distance away and interjected herself into the conversation I was having with Sergeant Pollack. Sergeant Carter stated, “I’m personally offended by that.” ...So I said, “What are you offended by?” Sergeant Carter stated, “My brother works for housing in 2D and there are people there on welfare too.” I said, “I’m sure there are. I’m sorry you are offended. I was merely stating a fact. This is 6D and half the people here are on some form of welfare. I even have people in my PSA that can’t read or write.” I stopped the conversation I was having and left the office shortly after.

3 Agency Exhibit 17.

4 Agency Exhibit 7.

EVIDENCE

1. Michael Gottert (Gottert) testified as follows: (Transcript pgs. 11 - 75.)

Inspector Gottert is the Director of the Disciplinary Review Division in charge of reviewing all disciplinary investigations and recommending the appropriate charges and penalties. Gottert testified that based on the investigation, Employee used disrespectful, derogatory, and offensive comments which was prejudicial towards Agency, and that Employee was less than forthright with his superiors. The penalty imposed on Employee was a demotion and a thirty (30) day suspension, which was consistent with Employee's disciplinary record, and the table of penalties outlined in Agency's General Order 120.21. He also pointed out that Employee had three (3) prior offenses of insubordination or failure to obey orders/directives within the last three (3) years.⁵ Under cross-examination, Gottert admitted that a demotion was not a penalty listed in the table of penalties. However, he pointed out that the termination, which was a more severe penalty than a demotion, was listed.

When asked what he meant by Charge 2 where Employee was accused of being less than fully forthright, Gottert did not elaborate other than to say that it was the same as lying. Later, he testified that Employee lied when he denied saying citizen complaints were a waste of time. However, Gottert admitted that was not in Employee's written statement. Gottert opined that Employee's statements to his fellow officer on June 27, 2016, were derogatory, disrespectful and offensive to the dignity of any person. On cross-examination, Gottert admitted that even a statement that was objectively non-offensive but found by somebody to be offensive would be, in Agency's view, a violation of the General Order.

2. Commander Guillermo Rivera (Rivera) testified as follows: (Transcript pgs. 75 - 84.)

Rivera was the Captain of the 6th District and was Employee's direct supervisor. He testified that Employee was the Patrol Service Area (PSA) lieutenant and watch commander for the police district. As the watch commander, Employee was in charge of all operations for the entire district in the absence of the District Commander. Rivera recounted that on July 28, 2016, he received a call from Commander David Taylor reporting that Sergeant Kimberly Carter had complained about disparaging statements made by Employee. He then made an investigative report.⁶

3. Sergeant Kimberly Carter (Carter) testified as follows: (Transcript pgs. 84 – 94)

Carter testified that on July 27, 2016, she was preparing the roll call for the redeployment unit when she overheard Employee's conversation with Sergeants Pollock and Holland regarding the types of investigations they had done. Carter said Employee liked doing the use of force investigations to help his officers out, but not the citizen complaint investigations, because most of the citizens making those complaints had arrest records. She testified that:

“Then he went on to say how they always complaining (sic) and how they pay his

⁵ Agency Exhibit 6.

⁶ Agency Exhibit 1.

salary and most of them, I mean all of them are on welfare.”⁷

Carter testified that Employee did not stop even after she informed Employee that what he said was offensive as the implication was that they were on welfare because they are black. Carter said she felt offended by Employee’s generalization of the D.C. residents of the 6th District and that Employee was not giving these people a fair evaluation of their citizen’s complaints on account of their arrest record or criminal background. Carter then left to report Employee’s comments to Commander Rivera. On cross-examination, Carter emphasized that Employee had said all of the complainers were on welfare or had criminal backgrounds.

4. Employee testified as follows: (Transcript pgs. 98 – 94)

Employee recounted his conversation with Sergeant Pollock, an African-American cop who was on redeployment at the 6th District. He confirmed the gist of their conversation as conforming to Agency’s specification against him, but denied having any derogatory intent or racial animus. Employee also stressed that as soon as Sergeant Kim Carter, who overheard the conversation, told him that she was offended, he apologized and stopped his conversation. Employee states that he is not a racist and clarified the statements that he made. The “waste of time” comment that he made referred to the follow-ups to the complaints, not to his investigation of use of force and citizen complaints.

As for his assertion that approximately half to three-quarters of the people in the 6th District are on welfare, and almost one in seven are convicted felons, Employee based these on statistics provided by community coordinators at community meetings. Employee said that when he investigated citizen complaints regarding police use of force, his background checks using the Washington Area Law Enforcement System (WALEs) revealed that some of these complainants have arrest records. Often these people do not follow up on their complaints after he asks them about their background or shows them a printout of their record. When these people are honest about their background, then he finds their allegations to be more credible and legitimate, instead of just a means of retaliation against a police officer. Employee asserts that he never lied and answered all questions from his superiors and investigator as honestly as he could.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Whether Agency’s action was taken for cause.

This Office's Rules and Regulations provide that an agency's action must be supported by 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."⁸

The only eyewitness testimony in this matter came from Sergeant Kimberly Carter and Employee. Their testimony essentially corroborated each other’s version. They differed only in that Carter claimed Employee said ALL the people in 6D were on welfare or had criminal records, and

⁷ Transcript, pg. 86.

⁸ OEA Rule 628.1, 59 D.C. Reg. 2129 (2012).

that Employee did not stop his remarks when she indicated that she was offended. (Emphasis added). Based on their demeanor and consistency, I find Employee to be more credible than Carter on this matter. Employee was consistent, forthright, and answered clearly. I therefore make the following findings of fact with regards to the following charges:

1. Violation of General Order 120.21, Attachment A, Part A-16, Insubordination, with the specification of violating General Order 201.09, Part VIII, Section B-1, which reads, “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 the dignity of 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...”

Based on my assessment of their credibility at the evidentiary hearing, I find that Employee said that many, but not all, of the complainants in 6D either were on welfare or had a criminal record. Nonetheless, even if we were to credit Agency’s version, I still find that Employee did not violate General Order 120.21, Attachment A, Part A-16, or General Order 201.09, Part VIII, Section B-1. None of Employee’s statements on June 27, 2016, were, objectively speaking, name-calling, derogatory, disrespectful, or offensive to the dignity of any person. Employee did 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. Employee was merely stating what he believed to be factual statements. I also note that on the incident in question, Employee was addressing an African-American officer, thus I give credence to Employee’s assertion that his remarks were non-racial nor meant to be disrespectful.

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 biases or sensitivity of whoever happens to hear them.⁹ Anything less would violate the First Amendment by imposing an impermissible prior restraint on free speech. I therefore find that Employee was not insubordinate to the aforementioned Agency’s general orders.

2. Violation of General Order 120.21, Attachment A, Part A-25, which states, “Any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force.” For this charge, Agency’s specification is that, on July 28, 2016, Employee was less than forthright when he submitted a written statement denying that he declared that citizen complaints were a “waste of time.”

As I wrote above, on this score, I found Employee to be more credible than Agency’s sole eyewitness, Sergeant Kimberly Carter. Agency submitted a written statement by Officer Pollock which would have supported Agency’s position.¹⁰ However, Agency failed to produce Pollock as a

⁹ See *In re S.W.*, 45 A.3d 151 (D.C. 2012) for a discussion of the imperative for an objective, non-subjective, standard for evaluating even threatening speech. Also see Meredith Blake Martin, *Anatomy of A First Amendment Retaliation Claim*, 41-DEC Md. B.J. 52, November/December 2008, that states that the First Amendment right of free speech includes the right to be protected from retaliation by a public official for the exercise of that right.

¹⁰ Agency Exhibit 10.

witness at the hearing. Thus, Pollock's statement is hearsay without its credibility being tested by cross-examination. As such, I give greater weight to Employee's testimony and find that Employee did not lie on his written statement but sought to write his most accurate recollection of his July 26, 2016, conversation.

Based on the above, I find that Agency failed to meet its burden of proof on its charges against Employee by a preponderance of the evidence. Accordingly, I conclude that Agency's action must be overturned.

ORDER

It is hereby ORDERED:

1. Agency's decision to demote Employee from his position and suspend him from his job for thirty (30) days is REVERSED.

2. Agency is directed to reinstate Employee to his last position of record, issue him the back pay to which he is entitled and restore any benefits he lost as a result of the demotion, no later than thirty (30) calendar days from the date this Decision becomes final.

3. Agency is directed to document its compliance by filing with OEA a Statement of Compliance Report no later than forty-five (45) calendar days from the date this Decision becomes final.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge