

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:
JANET P. BOSWELL
Employee
vs.
D.C. FIRE AND EMERGENCY
MEDICAL SERVICES DEPARTMENT
Agency
OEA Matter No. 1601-0155-06
Date of Issuance: June 4, 2007
Joseph E. Lim, Esq.
Senior Administrative Judge

Thelma Brown, Esq., Agency Representative
Alan Lescht, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION

On September 26, 2006, Employee, a Paramedic, DS-699-9 in the Career Service, filed a petition for appeal from Agency's final decision removing her for inability to satisfactorily perform one or more major duties of her position. This matter was assigned to me on November 6, 2006. I conducted a Prehearing Conference on December 15, 2006, and a Status Conference on February 16, 2007. I held an evidentiary Hearing on April 18, 2007. The record is closed.

JURISDICTION

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

ISSUES

- 1. Whether Agency's action was taken for cause.
2. Whether the penalty was appropriate under the circumstances.

UNDISPUTED FACTS

The following facts are undisputed:

Employee's position as a Paramedic with the D.C. Fire and Emergency Medical Services

Department required her to perform emergency preliminary medical care for critically ill or injured patients in twelve-hour shifts. She is required to assess, evaluate and stabilize a patient's condition at the site of the emergency. Among other things, a paramedic may initiate advanced life support treatment, monitor an electrocardiogram, draw blood samples, administer medications, file verbal and written medical reports, drive a medic unit to the emergency site, and work twelve-hour shifts. The medical emergencies include automobile accidents, heart attacks, drowning, childbirth, gunshot wounds, drug overdose, and mentally unstable patients.

Employee suffers from diabetes and hepatitis C. After experiencing two documented episodes of hypoglycemia while in the performance of her duties as a paramedic, Agency placed Employee on limited duty on August 9, 2006.

Diabetes is a disease in which the body does not produce or properly use insulin. Insulin is a hormone that is needed to convert sugar, starches and other food into energy needed for daily life. The human body constantly monitors and maintains the blood glucose level by producing needed levels of insulin. In people suffering from diabetes, this natural function is impaired. Hypoglycemia, or abnormally low blood glucose, is a complication of several diabetes treatments. It may develop if the glucose intake does not cover the treatment.¹

The brain is dependent upon glucose to function. Without adequate blood glucose levels, the patient may become agitated, sweaty, and have many symptoms of sympathetic activation of the autonomic nervous system resulting in feelings similar to dread and immobilized panic. Consciousness can be altered, or even lost, in extreme cases, leading to coma and/or seizures, or even brain damage and death. In patients with diabetes, this can be caused by several factors, such as too much or incorrectly timed insulin, too much exercise or incorrectly timed exercise (exercise decreases insulin requirements) or not enough food (actually an insufficient amount of glucose producing carbohydrates in food). In most cases, hypoglycemia is treated with sugary drinks or food. In severe cases, an injection of glucagon (a hormone with the opposite effects of insulin) or an intravenous infusion of glucose is used for treatment, but usually only if the person is unconscious. In a hospital, intravenous dextrose is often used.²

Diabetics whose blood glucose gets too high suffer the symptoms of diabetic ketoacidosis and must seek medical attention or inject themselves with insulin. The process is not immediately incapacitating. But when the blood glucose gets too low, the person is immediately incapacitated.³

In accordance with Agency practice, employees with medical illnesses which interfere with

¹ National Center for Chronic Disease Prevention and Health Promotion.

² Ibid.

³ Transcript, p. 79.

the performance of their duties are placed in a limited duty assignment not to exceed 180 days. Prior to the conclusion of her limited duty assignment, employee requested reasonable accommodation for her illness under the Americans with Disabilities Act (ADA). Specifically, she requested a modified work schedule of eight hours a day. She submitted documentation from her treating physician, who prohibited her from working more than eight hours a day and required that she check her blood glucose without restriction because she takes insulin.

Employee's case was referred to the Agency's ADA panel. The Diversity/EEO (Equal Employment Opportunity) Manager, Detria Hutchison, issued a report stating that Employee's medical condition did not qualify her for reasonable accommodation under the ADA.

In addition, Agency found her medical condition incompatible with her duties as a paramedic. Dr. Rosenthal, Medical Director of the Police and Fire Clinic Associates, opined that Employee should not return to full duty status because the performance of her duties as a paramedic would impact her ability to check her insulin as needed in the course of a normal twelve-hour work shift. Rosenthal further opined that it would be unsafe for Employee to return to work with her history of two documented hypoglycemic episodes in the recent past.

Agency issued Employee a notice of proposed removal on July 10, 2006. A hearing officer found that the medical evidence substantiated that Employee could not perform the essential functions of her position and recommended removal. There are no light-duty positions within the Agency available to Employee. Employee was separated from service effective September 2, 2006.

Evidence on Disputed Issues

1. Chief Greg Blalock testified (Tr. p. 9 - 46) as follows.

Deputy Chief Blalock is in charge of Emergency Medical Services (EMS) in the Agency. When Employee's co-workers reported to him that Employee suffered a hypoglycemic episode where she appeared disoriented, Blalock ordered a fitness for duty physical. The results revealed that Employee suffered from insulin-dependent diabetes that rendered her unfit for paramedic duty. He explained that diabetics suffering from hypoglycemic episode become unresponsive and could lose consciousness. Thus a diabetic would not be able to provide emergency medical care to clients.

Blalock further stated that a paramedic had to be alert throughout her shift as she could be driving an ambulance or carrying a patient. A paramedic feeling ill due to low blood sugar levels would endanger herself and others. He added that if the replacement does not arrive, then paramedics would have to work beyond their shifts. Blalock testified that DC Personnel Regulation Chapter 20B, Section 2049.13 mandates removal of an employee who can no longer satisfactorily perform her job.

2. Michelle Smith-Jefferies testified (Tr. p. 46 - 97) as follows.

Dr. Michelle Smith-Jefferies is the Medical Director of the Police and Fire Clinic who replaced

Dr. Rosenthal. She testified that, like Dr. Rosenthal, she is board-certified in internal medicine and occupational medicine. As such, she is trained to disease process in the workplace. She also wrote the medical requirements for D.C. paramedics and emergency medical technicians (EMT) based on the NFPA (National Firefighters Professional Association) Standard 1582. This is the industry standard for their certification.

She concurs with Dr. Rosenthal's medical conclusion that Employee is medically unfit for duty. Based on the industry standard for paramedics, someone like Employee who suffers from diabetes mellitus with insulin or hypoglycemic agent and had at least one incapacitating episode of hypoglycemia in the past five years is unfit for paramedic duty. Analyzing Employee's medical records, Dr. Jefferies pointed out that Employee needed insulin to control her blood sugar, requiring her to check and monitor her sugar levels throughout the day. All these interfere with her duties as a paramedic and could jeopardize the medical treatment and safety of patients. She pointed out that Employee had at least two hypoglycemic episodes which proved that Employee's body is unable to control her blood sugar. Dr. Jefferies pointed out that it is a predictor for future hypoglycemic episodes and immediate incapacitation when that happens.

Asked to differentiate Employee's condition from that of a person suffering from allergies and migraine headaches, Dr. Jefferies testified that unlike the hypothetical person, Employee's hypoglycemic episodes come without warning and results in immediately passing out. Such episodes are life-threatening emergency situations needing immediate medical intervention. In addition, Employee's use of interferon to treat her Hepatitis C results in side effects such as nausea, vomiting, rashes, arthralgias, and joint pains.

Dr. Jefferies disagreed with Employee's treating endocrinologist, Dr. Argento, that Employee can return to work without restriction. She pointed out that even Dr. Argento warned that Employee needed to be able "to check her blood glucose without restriction when she feels the need to do so." Due to the nature of a paramedic's job, there would be inherent restrictions on being able to check ones glucose at any given time. She differentiated Employee from other diabetics who needed to monitor their blood glucose only twice a day, in the morning and in the evening, as their disease is mild.

3. Employee testified (Tr. p. 100 - 112) as follows.

Employee testified that every twelve hours, she draws blood and puts it in the glucose monitor machine. She hooks it up to her glucometer and injects a sensor into her abdomen. A glucometer is a device that measures a person's blood sugar by analyzing their blood sample. The machines continuously informs her what her blood sugar level is. With preset parameters, the device beeps to inform her when her blood sugar level exceeds the safe range so that she could take corrective action.

Employee also talked about the two incidents of hypoglycemia which occurred in 1999 and 2005. She indicated that when she started feeling woozy, she checked her blood sugar level, drank some juice, and within 15 minutes she felt fine. Employee also indicated that she has recovered from hepatitis. Dr. Argento is her current doctor.

4. Nicolas Argento testified (Mar. 28, 2007, deposition) as follows.

Dr. Nicolas Argento, board certified in endocrinology and diabetes, testified that he has been Employee's treating physician for type 1 insulin-dependent diabetes since October of 2005. He stated that because Employee's body does not produce any insulin, Employee has to continuously monitor her blood sugar and then inject herself with insulin five times a day. The usual way of monitoring was to do a finger stick to draw a blood sample and have a glucose meter read the patient's glucose level.

Employee was fitted with a continuous glucose monitor called Dexcom. A small sensor injected subcutaneously under the abdomen skin is attached to a transmitter which estimates Employee's glucose level every five minutes. Once the sugar level goes above or below the acceptable range, the device beeps an alarm to alert the patient. This minimizes the risk of hypoglycemia where the patient, or Employee, becomes incapacitated from performing her job as a paramedic. Finger stick monitoring is done only twice a day, essentially to calibrate the device for Employee. With this device, Dr. Argento opined that Employee should be able to perform her job. He also testified that this is an expensive new device and that few medical insurers cover its cost.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

1. Whether Agency's action was taken for cause.

D.C. Official Code § 1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority, to "issue rules and regulations to establish a disciplinary system that includes", *inter alia*, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The Agency herein is under the Mayor's personnel authority.

On September 1, 2000, the D.C. Office of Personnel (DCOP), the Mayor's designee for personnel matters, published regulations entitled "General Discipline and Grievances" that meet the mandate of § 1-616.51. *See* 47 D.C. Reg. 7094 *et seq.* (2000). Section 1600.1, *id.*, provides that the sections covering general discipline "apply to each employee of the District government in the Career Service who has completed a probationary period." It is undisputed that Employee falls within this statement of coverage.

Section 1603.3 of the regulations, 46 D.C. Reg. at 7096, sets forth the definitions of cause for which a disciplinary action may be taken.⁴ Here, Employee was removed for "Incompetence".

⁴The entire list of causes in § 1603.3 is as follows:

[A] conviction (including a plea of *nolo contendere*) of a felony at any time following submission of an employee's job application; a conviction (including a plea of *nolo contendere*) of another crime (regardless of

“Incompetence” is one of the causes set forth in § 1603.3. Incompetency is defined as the physical inability to satisfactorily perform the major duties of his or her position. It is well-settled that such an inability constitutes incompetency.⁵

In an adverse action, this Office’s Rules and Regulations provide that the agency must prove its case by a preponderance of the evidence. “Preponderance” is defined as “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 629.1, 46 D.C. Reg. 9317 (1999).

THE INCOMPETENCE CHARGE.

The legal issue that has to be decided here is whether Employee is incompetent to perform her paramedic job. The factual issue is whether Employee’s medical condition renders her incompetent. Of necessity, such an issue can only be answered by medical experts.

Here we have two competing expert testimonies. Employee’s treating doctor, an expert on diabetes, opines that with the Dexcom device, Employee should be able to monitor her glucose level reasonably well, and therefore, should be able to work as a paramedic.

Agency’s expert, an expert on occupational medicine, is of the firm opinion that Employee could not perform her paramedic duties without the risk of endangering herself and her patients. When asked if the existence of a glucometer device that automates the monitoring of a patient’s blood sugar could make a diabetic employee competent, Agency’s expert answered, “...she could

punishment) at any time following submission of an employee’s job application when the crime is relevant to the employee’s position, job duties, or job activities; any knowing or negligent material misrepresentation on an employment application or other document given to a government agency; any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law; any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious. This definition includes, without limitation, unauthorized absence, negligence, incompetence, insubordination, misfeasance, malfeasance, the unreasonable failure to assist a fellow government employee in performing his or her official duties, or the unreasonable failure to give assistance to a member of the public seeking services or information from the government.

⁵ See, e.g., *Employee v. Agency*, OEA Matter No. 1601-0207-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 4406, 4408 (1985); *Chara v. Department of Public Works*, OEA Matter No. 1601-0288-94 (December 22, 1994), _ D.C. Reg. __ (); *Wineglass v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0061-95 (September 18, 2001), _ D.C. Reg. __ ().

possibly, depending on the device.”⁶ But then she goes on to say that it takes time to get a blood sample and then obtain a reading of the blood glucose level. And because of the time requirements, her expert opinion is that Employee is incompetent. Her opinion is also backed up by occupational medicine industry standards.

Employee argues that because she now has this new device, she should now be allowed to work as a paramedic, driving an ambulance and treating or carrying critically sick or injured patients. However, there are two counts against her argument. First, her medical expert is not an expert in occupational medicine. Here the question is whether Employee’s medical condition renders her incompetent in the context of performing her occupation. The occupational medicine expert firmly says “yes!”; due to the time required not just to monitor Employee’s blood glucose level, but to bring it back to normal. Employee herself admits in her testimony that it takes at least 15 minutes to bring up her glucose level to safe levels after ingesting a source of glucose.

To allow Employee to work again as a paramedic would mean that she would require time to stop her work so that she could take steps to prevent or correct another highly probable instance of hypoglycemia. In short, Employee would have to stop driving her ambulance or drop a patient she was lifting or stop rendering emergency medical measures to a critically ill patient so that she could take care of her own uncontrolled blood sugar. Such a scenario poses serious medical and legal risks to herself, the Agency and the people she is supposed to assist. I therefore conclude that Employee’s medical condition rendered her incompetent as charged, and that Agency acted appropriately in taking adverse action against her for that charge.

2. Whether the penalty was appropriate under the circumstances.

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that “managerial discretion has been legitimately invoked and properly exercised.” *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). 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.” *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

Here, I have upheld the charge of Incompetence. While there is no specific penalty table or range of penalties, there is also no prohibition in law, regulation or guideline that bars Agency from removing Employee for the sustained charges. See *Buckman v. Department of Human Services*, OEA Matter No. 1601-0215-04 (March 14, 2006), ___ D.C. Reg. ___ ().

ORDER

It is hereby ORDERED that Agency’s action removing Employee is UPHeld.

⁶ Transcript, page 67.

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FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
Charles Brown	)	OEA Matter No. 1601-0058-07
Employee)	
v.	)	Date of Issuance: November 19, 2007
DEPARTMENT OF HUMAN SERVICES	)	Joseph E. Lim, Esq.
Agency	)	Senior Administrative Judge

Charles Brown, Employee pro se
Ross Buchholz, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On March 8, 2007, Employee appealed Agency's decision to remove him, effective November 27, 2006, for alleged public assistance fraud and food stamp trafficking. The matter was assigned to the undersigned judge on May 23, 2007. At the prehearing conference held on July 13, 2007, Employee made a motion to dismiss for Agency's violation of the 45-day provision contained in their collective bargaining agreement (CBA).

JURISDICTION

Jurisdiction over this appeal has not been established.

ISSUES

1. Whether Agency's failure to render a final decision on the adverse action within forty-five (45) days after it was proposed was a harmful procedural error.
2. Whether this appeal should be dismissed due to the provisions of Employee's CBA.

FINDINGS OF FACT

Based upon the documents submitted on the record, the following facts are undisputed:

1. Employee was a Social Service Representative, DS-187-9, Grade 9, Step 6, employed with the Agency since March 29, 1999.
2. Employee asserts, and Agency does not dispute, that a Collective Bargaining Agreement (CBA) between Agency and the American Federation of State, County and Municipal Employees, District Council 20, AFL-CIO (Union) governs the Agency's relations with its employees.
3. Article 7 of said CBA governs Agency's disciplinary actions against its employees. Article 7, Section 10 states, "The deciding official shall issue a written decision within forty-five (45) days from the date of receipt of the notice of proposed action which shall withdraw the notice of proposed action or sustain the proposed action in whole or in part. The forty-five (45) day period for issuing a final decision may be extended by agreement of the employee and the deciding official. If the proposed action is sustained in whole or in part, the written decision shall identify which causes have been sustained and which have been dismissed, describe whether the proposed penalty has been sustained or reduced and inform the employee of his or her right to appeal or grieve the decision, and the right to be represented. The final decision shall also specify the effective date of this action."
4. However, the CBA does not provide for any remedy for a violation of the 45-day provision.
5. On August 16, 2006, Agency notified Employee of a proposal to remove him from his position for public assistance fraud and food stamp trafficking.
6. On October 6, 2006, Agency amended its Advance Notice of Proposed Removal to charge Employee with "any on duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law."
7. Employee did not consent to the amendment of the Advance Notice of Proposed Removal.
8. On November 22, 2006, Agency issued its final decision to terminate Employee's employment effective November 27, 2006. The notice informed Employee of his choice of appealing this decision either with this Office or with his union.
9. The delivery of its final decision is more than 45 days from both the date the proposed action was issued and the date of the amended advance notice.

10. Employee did not provide any evidence that this delay harmed him in any way.
11. Pursuant to Article 7 Section 3 of the CBA, Employee and his union representative filed a step 4 grievance on December 18, 2006. Step 1 starts the process whereby Employee elects to file his grievance through the negotiated grievance procedure through the union instead of appealing to the Office of Employee Appeals.
12. Article 7, Section 13 of said CBA also states, "...employees may grieve actions through the negotiated grievance procedure, or appeal to the Office of Employee Appeals (OEA) in accordance with OEA regulations **but not both**. [Emphasis added.] Once the employee has selected the review procedure that choice shall be the exclusive method of review."
13. D.C. Office of Personnel Regulations state in pertinent part as follows:

1601.3 If an employee is authorized to choose between the negotiated grievance process set forth in a collective bargaining agreement and the grievance or appellate process provided in these rules, the employee may elect, at his or her discretion, to do one of the following:

- (a) Grieve through the negotiated grievance procedure; or
- (b) Appeal to the Office of Employee Appeals or file a disciplinary grievance, each as provided in these rules.

1601.4 An employee shall be deemed to have elected his or her remedy pursuant to § 1601.3 when he or she files a disciplinary grievance or an appeal under the provisions of this chapter or files a grievance in writing in accordance with the provisions of the negotiated grievance procedure applicable to the parties, whichever event occurs first. This section shall not be construed to toll any deadlines for filing.

14. D.C. Official Code (2001) § 1-616.52 reads in pertinent part as follows:

(d) Any system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures of this subchapter [providing appeal rights

to this Office] for employees in a bargaining unit represented by a labor organization.

(e) Matters covered under this subchapter that also fall within the coverage of a negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either pursuant to § 1-606.03, or the negotiated grievance procedure, **but not both.** [Emphasis added.]

(f) An employee shall be deemed to have exercised their option pursuant to subsection (e) of this section to raise a matter either under the applicable statutory procedures or under the negotiated grievance procedure at such time as the employee timely files an appeal under this section or timely files a grievance in writing in accordance with the provision of the negotiated grievance procedure applicable to the parties, whichever event occurs first.

15. On February 2, 2007, Agency rejected Employee's grievance and informed him that it would not reconsider its decision to remove him from his position.
16. Following Agency's rejection of his grievance, Employee took the next step in the grievance procedure by asking his union to invoke arbitration of this matter.
17. On February 22, 2007, Employee's union informed him that it will not seek arbitration of his grievance and that he may file an appeal to the Office of Employee Appeals.
18. On March 8, 2007, Employee filed a Petition for Appeal with the OEA.

ANALYSIS AND CONCLUSION

Whether Agency's failure to render a final decision on the adverse action within forty-five (45) days after it was proposed was a harmful procedural error.

Employee contends that, by removing him more than 3 months after the initial advance notice, Agency violated Article 7, Section 10 of their CBA which states:

The deciding official shall issue a written decision within forty-five (45) days from the date of receipt of the notice of proposed action

which shall withdraw the notice of proposed action or sustain the proposed action in whole or in part...

The CBA contained no remedy for a violation of the 45-day provision.

OEA Rule § 632.4, 46 D.C. Reg. 9297 to 9322 (1999) states as follows:

Notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless.

Harmless error, shall mean:

Error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action.

However, Employee offered no evidence that would show that he was harmed by this procedural error or that the agency's final decision would have been significantly affected by this delay. In fact, the delay rebounded to Employee's benefit as it gave him additional time to fight his announced termination. Thus, I conclude that the error was not harmful as defined by the applicable rules.

Whether this appeal should be dismissed due to the provisions of Employee's CBA.

An employee has the burden of proof as to issues of jurisdiction. *See* OEA Rule 629.2, 46 D.C. Reg. 9317 (1999). Agency alleges that Employee had already chosen the negotiated grievance process set forth in their collective bargaining agreement with Employee's union. Employee does not deny this, but counters that he relied on the representation of his union that he may still appeal to this Office.

The terms of the CBA and the D.C. Official Code (2001) § 1-616.52(e) as stated above gives Employee the choice to ignore the limitations of his union negotiated Agreement and either choose the union-negotiated arbitration process or appeal directly to this Office. Once Employee has made his choice, then D.C. Official Code (2001) § 1-616.52(f) limits him to that choice.

Here, Employee had definitely chosen the route of filing his grievance through the said negotiated arbitration process, going all the way to step 4. Therefore, I conclude that Employee was prevented by the terms of the Agreement from appealing the final Agency decision to this Office. Thus, he has failed to meet his jurisdictional burden of proof. I conclude that this matter must be dismissed for lack of jurisdiction. Although it appears that his own union misled him by telling him that he could still file an appeal to this Office, Employee's remedy is to seek redress from his union.

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ORDER

It is hereby ORDERED that this matter is DISMISSED.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Robert Drake	)	OEA Matter No. 1601-0070-07
Employee)	
	)	Date of Issuance: October 24, 2007
v.)	
	)	Joseph E. Lim, Esq.
DEPARTMENT OF PUBLIC WORKS	)	Senior Administrative Judge
_____)	
Agency)	

Thelma Brown, Esq., Agency Representative
Robert Drake, Employee Pro se

INITIAL DECISION

INTRODUCTION

On April 23, 2007, Employee, a Sanitation Worker, TG-3502-04, in the Career Service, filed a petition for appeal from Agency’s final decision removing him for inability to satisfactorily perform one or more major duties of his position. This matter was assigned to me on July 3, 2007. I conducted a Prehearing Conference on July 27, 2007, and ordered the parties to submit legal briefs. Although Employee was granted two requested postponements, he still failed to make a submission. Agency submitted its brief by the deadline. The record is closed.

JURISDICTION

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

ISSUES

1. Whether Agency’s action was taken for cause.
2. Whether the penalty was appropriate under the circumstances.

FINDINGS OF FACT

The following facts are undisputed:

Employee’s position as a Sanitation Worker with the Department of Public Works required

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him to be part of a waste collection crew as well as street cleaning services. His duties required him to pick up large, full trash cans and to deposit the trash in the hopper at the rear of the truck. He had to collect any trash that spilled from the point of collection as well as yard waste and small bulk trash items. He then opened the levers on the rear of the compactor and orally signaled the crew chief when the collection was complete and all crew members were clear of the truck. Employee's contract required him to perform his work regardless of inclement weather. As well, Employee was required to assist in clearing ice and snow from public space when necessary.

Employee's job description expressly notes that his position required "standing, walking, bending, and strenuous lifting and carrying of materials weighing in excess of 50 pounds." He was required to work "outdoors in all weather conditions. Subject to dust, sprains, bruises, cuts, etc. from handling refuse. Exposed to hazards from auto traffic. Exerts very heavy physical effort."¹

On January 14, 2003, Employee sustained an on-the-job injury and was disabled. He was placed on Disability Compensation, and Agency carried him on leave without pay status ever since. Employee was scheduled for surgery on November 2003, but he canceled the surgery and never rescheduled it. Instead, he began receiving disability compensation on July 23, 2004.

On March 15, 2006, the Office of Risk Management (ORM) notified Employee that it would terminate his disability payments on April 14, 2006. He had 30 days to request reconsideration. Employee filed his request for reconsideration more than 90 days later. ORM ruled that Employee's delay was unreasonable.

On August 25, 2006, more than three years after his date of injury, the District Office of Personnel (DCOP) sent Employee a letter asking about his intent to return to duty. The letter required Employee to respond within 15 calendar days and advised him that failure to respond could result in his employment being terminated. Employee failed to respond to the letter.

On November 15, 2006, Agency sent Employee a 15-day notice of termination for incompetency. Over a month later, Employee contacted Agency on December 20, 2006, and subsequently presented documents on January 19, 2007, January 31, 2007, and February 1, 2007. Finding that Employee had "chosen not to avail himself of the opportunities accorded him by the District to present his case and retain his employment status," Agency's hearing officer recommended removal. Employee was separated from service effective March 23, 2007.

At the July 27, 2007, Prehearing Conference, Employee admitted that his left shoulder injury had rendered him unable to perform his job. Nor does he foresee his being able to perform his duties in the future. The parties agree that Employee never recovered from his job-related injury, and is physically incapable of performing the duties of his former position or any equivalent position. There are no light-duty positions within the Agency available to Employee.

¹ Sanitation Worker job description of working conditions.

ANALYSIS AND CONCLUSIONS

1. Whether Agency's action was taken for cause.

D.C. Official Code § 1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority, to “issue rules and regulations to establish a disciplinary system that includes”, *inter alia*, “1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken.” The Agency herein is under the Mayor's personnel authority.

On September 1, 2000, the D.C. Office of Personnel (DCOP), the Mayor's designee for personnel matters, published regulations entitled “General Discipline and Grievances” that meet the mandate of § 1-616.51. *See* 47 D.C. Reg. 7094 *et seq.* (2000). Section 1600.1, *id.*, provides that the sections covering general discipline “apply to each employee of the District government in the Career Service who has completed a probationary period.” It is undisputed that Employee falls within this statement of coverage.

Section 1603.3 of the regulations, 46 D.C. Reg. at 7096, sets forth the definitions of cause for which a disciplinary action may be taken.² Here, Employee was removed for “Incompetence”. “Incompetence” is one of the causes set forth in § 1603.3. Incompetence is defined as the physical inability to satisfactorily perform the major duties of his or her position.

² The entire list of causes in § 1603.3 is as follows:

[A] conviction (including a plea of *nolo contendere*) of a felony at any time following submission of an employee's job application; a conviction (including a plea of *nolo contendere*) of another crime (regardless of punishment) at any time following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or job activities; any knowing or negligent material misrepresentation on an employment application or other document given to a government agency; any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law; any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious. This definition includes, without limitation, unauthorized absence, negligence, incompetence, insubordination, misfeasance, malfeasance, the unreasonable failure to assist a fellow government employee in performing his or her official duties, or the unreasonable failure to give assistance to a member of the public seeking services or information from the government.

In an adverse action, this Office's Rules and Regulations provide that the agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "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 629.1, 46 D.C. Reg. 9317 (1999).

Employee admits he is unable to perform his job as a sanitation worker. Despite several opportunities to do so, Employee failed to submit any medical reports or other documents that establish his capacity to work. Indeed, Employee admits that he has nothing to show that he could still perform his former job.

Here, it is undisputed that as a result of his job-related injury, Employee is physically incapable of performing the duties of his former position or any equivalent position. He has never recovered from his injury, and is unable to satisfactorily perform the major duties of his position. It is well-settled that such an inability constitutes incompetence.³

Based on the above discussion, I conclude that Agency has established cause for taking adverse action against Employee for incompetence.

2. Whether the penalty was appropriate under the circumstances.

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). 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." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

Here, I have upheld the charge of Incompetence. While there is no specific penalty table or range of penalties, there is also no prohibition in law, regulation or guideline that bars Agency from removing Employee for the sustained charges. See *Buckman v. Department of Human Services*, OEA Matter No. 1601-0215-04 (March 14, 2006), __ D.C. Reg. ____ ().

ORDER

It is hereby ORDERED that Agency's action removing Employee is UPHeld.

³ See, e.g., *Employee v. Agency*, OEA Matter No. 1601-0207-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 4406, 4408 (1985); *Chara v. Department of Public Works*, OEA Matter No. 1601-0288-94 (December 22, 1994), _ D.C. Reg. __ (); *Wineglass v. Department of Consumer and Regulatory Affairs*, OEA Matter No. 1601-0061-95 (September 18, 2001), _ D.C. Reg. __ ().

1601-0070-07
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FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

 In the Matter of:)
)
 ARMELL GAINES)
 Employee)
)
 v.)
)
 DEPARTMENT OF TRANSPORTATION)
 Agency)

OEA Matter No. 1601-0138-06
 Date of Issuance: March 12, 2007
 Joseph E. Lim, Esq.
 Senior Administrative Judge

Kevin Turner, Esq., Agency Representative
 David Kelly, Esq., Employee Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On August 16, 2006, Employee, an Asphalt Worker assigned to the Street and Bridge Maintenance Division of the Agency, filed a petition for appeal with this Office challenging Agency's final decision to terminate him from employment effective August 14, 2006 for drunkenness on duty.

The matter was assigned to the undersigned judge on October 10, 2006. I held a prehearing conference on October 30, 2006 and a hearing on January 19, 2007. 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).

ISSUES

1. Whether Agency's action to terminate Employee was taken for "cause", as that term is defined by the D.C. Office of Personnel (DCOP) Rule 1603.3, 47 D.C. Reg. 7094, 7096 (2000).
2. If so, whether Agency's penalty was appropriate under the circumstances.

Contentions of the Parties

The agency contends that Employee was guilty of drunkenness on duty. Specifically, Employee was charged with sitting in a government vehicle with an open container of beer as well as exhibiting drunken behavior at work. Employee denies the charges.

EVIDENCE

1. Robert Morris testified as follows: (Transcript pgs. 8 – 65)

Mr. Morris is employed by the DC Government as an asphalt worker foreman. Although they had never worked together before, he was Employee's supervisor on May 13, 2006. The members of Morris' crew were Michael Jackson, Antoinette Burno, Douglas Young, and Employee. That morning, Morris instructed his crew to meet him at Georgia Avenue for breakfast before proceeding to their work site. The crew loaded into the truck after obtaining their carryout food. Mr. Morris noticed Employee with a paper bag with what appeared to be a green beer bottle in it. Aware of Employee's past record of drinking on the job, Morris asked Employee to step out of the truck and follow him. Employee immediately poured out the bottle on the ground. Because of Employee's unsteady gait and the smell of alcohol on his breath and clothes, Morris suspected that Employee was probably under the influence of alcohol and ordered him off the job.

Morris told Employee that he suspected him of drinking on the job. However, he never asked or saw what was in the bottle as he thought the best course was to take Employee back to see his supervisors, Charles Stewart and Nathaniel Jones. Management had trained him to get the opinion of other supervisors if he suspects drug or alcohol use among the crew. Mr. Morris then prepared a memorandum regarding the event (Agency Exhibit 2) and a Reasonable Suspicions Checklist (Agency Exhibit 1) and gave them to his supervisor, Charles Stewart. However, his separate handwritten report (Employee Exhibit 1) made no mention of any physical sign of drunkenness of Employee other than the presence of a beer bottle.

2. Employee testified as follows: (Transcript pgs. 65 - 104.)

Employee was an asphalt worker with Agency since 2001. On the morning of May 13, 2006, he found out that his supervisor for that day was Mr. Morris. He called Morris and asked if he could first buy a t-shirt from the market. Morris refused, and the two of them had words. Although his regular foreman was Mr. Bryant, Employee had worked under Morris on several other occasions.

Employee denied drinking or drugging on the job or of even holding a beer bottle that day. When Morris summoned him, he asked both Morris and his fellow co-workers, "What did I do?" He never received an answer. He began arguing with Morris when he was told to go home. Employee also said he could not get an answer from Mr. Jones as to why he was being sent home.

Employee believes that Morris was mad at him because he had two daughters with a fellow worker that Morris used to date. When asked about "priors," Employee said he had previously settled for a reduced 3-day suspension for being under the influence of alcohol while at work. Although he admitted that several supervisors had smelled alcohol on him, Employee insisted he was innocent.

3. Antoinette Burno testified as follows: (Transcript pgs. 105-119.)

Asphalt Laborer Burno corroborated Employee's account that Supervisor Morris simply ordered Employee out of the truck to take him out of the crew. She denied seeing a bottle in Employee's hand or of smelling alcohol on Employee. Bruno said she and the rest of the crew were surprised that Morris was sending Employee home. However, Bruno admitted that Employee's breath stunk that day.

4. Douglas Young testified as follows: (Transcript pgs. 119-128.)

Asphalt Laborer Young also claimed that he did not smell alcohol on Employee nor did he witness any beer bottle. Together with the rest of the crew, he did not understand why Morris took Employee out of the job assignment.

5. Michael Jackson II testified as follows: (Transcript pgs. 129-135.)

Truck Driver Jackson also denied smelling alcohol or seeing Employee with a beer bottle. He likewise was puzzled as to why Morris took Employee out of the truck.

6. Nathaniel Jones testified as follows: (Transcript pgs. 138-169.)

Assistant Street Supervisor Jones testified that on May 13, 2006, Employee came to him complaining about being taken off the job by Mr. Morris on suspicion of drinking. Jones corroborated Employee's account of wanting to discuss the matter further, but he ordered Employee to wait until the next working day as he was busy at the time. He described Employee as talking faster than usual and leaning back and forth. He did not consider Employee to be fit for work that morning and suspected he might be under the influence of alcohol. However, when pressed as to whether he personally would have put Employee to work that morning, Jones said yes.

FINDINGS OF FACT

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."¹

Agency's charge against Employee rests mainly on the testimony of Mr. Morris. Agency's other witness, Mr. Jones, wasn't positive that Employee was intoxicated. In fact, he testified that he himself would have put Employee back to work that morning. Agency regulations mandate that another supervisor verify the condition of an employee suspected to have been drinking. Jones failed to do that or to take the concerns of either Morris or Employee seriously.

¹ OEA Rule 629.1, 46 D.C. Reg. 9317 (1999).

As for Mr. Morris, he failed to ascertain that his suspicions regarding Employee's suspected intoxication were accurate. He never questioned Employee as to whether he actually had a beer bottle in his hand. He never directly asked Employee if he was drunk. He failed to demand that Employee hand to him the beer bottle or to visually check the alleged bottle. He failed to fully document his observations of Employee's condition in his handwritten statement other than to say he believed he saw a bottle in Employee's hand. His suspicion that Employee had been drinking stemmed mostly from his knowledge that Employee had a history of being drunk on the job.

Arrayed against the weak evidence of the Agency are the three fellow workers of Employee who all testified credibly that Employee was not drunk or acting suspiciously. One witness even stated that Employee had bad breath that morning but did not smell of alcohol.

I therefore find that Agency failed to meet its burden of proof by a preponderance of the evidence that Employee was intoxicated or drunk on the job. Because of my finding, Agency's action against Employee was not taken for cause and must be reversed.

ORDER

It is hereby ORDERED that:

- 1) Agency's action removing Employee is REVERSED;
- 2) Agency reinstate Employee and reimburse him all pay and benefits lost as a result of the removal; and
- 3) Agency file with this Office documents showing compliance with the terms of this Order within thirty (30) days of the date on which this decision becomes final.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
VENDORA GREEN	)	OEA Matter No. 1601-0137-06
Employee)	
	)	Date of Issuance: February 26, 2007
v.)	
	)	Joseph E. Lim, Esq.
DEPARTMENT OF TRANSPORTATION	)	Senior Administrative Judge
Agency)	

Andrea Comentale, Esq., Agency Representative
H. David Kelly, Esq., Employee Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On August 16, 2006, Employee, a Motor Vehicle Operator with the District Department of Transportation (DDOT), Street and Bridge Maintenance Division, filed a petition appealing her August 14, 2006 removal by the agency for inexcusable absence without leave (AWOL) and insubordination. A disinterested designee reviewed the case and recommended removal, despite dropping a discourteous treatment charge.

The matter was assigned to the undersigned judge on October 10, 2006. I held a prehearing conference on October 30, 2006 and a hearing on December 11, 2006. I closed the record at the conclusion of the hearing.

JURISDICTION

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

ISSUES

1. Whether Employee was guilty of the acts with which she was charged.
2. Whether these acts, if proven, constitute cause for taking an adverse action.
3. 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 inexcusable absence without leave. Agency alleges that on May 22, 2006, Employee exhibited odd behavior, nodding off

while driving, cursed her supervisor, disobeyed orders, and abandoned her post. Then from May 30 through June 2, 2006, Employee was absent without leave (AWOL). Agency also alleges that Employee failed to follow proper procedures for approval of leave.

Employee denies the agency's charges and alleges that the penalty was unwarranted.

EVIDENCE

1. Roland Thompson (transcript pages 9 - 99)

Roland Thompson, an asphalt foreman, was Employee's supervisor in 2006. Employee was the motor vehicle operator in the DDOT. Thompson described Employee as disrespectful and uncooperative and her work attendance as unsatisfactory, as evidenced by the letter of warning (Agency Exhibit 2) and leave restriction memo (Agency Exhibit 3) handed to Employee in 2006.

On the morning of May 22, 2006, he ordered Employee to back up her asphalt laden truck to the paver for dumping. Thompson noticed as he was signaling to guide Employee that Employee had trouble driving her 10-wheel truck, and thought he observed her asleep at one point. When he opened her truck door and asked Employee if she was alright, Employee uttered profanities at him, told him to get away from her, and drove off without dumping her load of asphalt. Thompson described Employee's appearance as unkempt.

Thompson notified Superintendent Romanus who informed him that Employee will be back with her load of asphalt. Employee came back around 45 minutes later but parked two city blocks away. Thompson used hand signals and his radio to order Employee to dump her asphalt. However, Employee simply drove away again. He informed his boss, Romanus, of the incident.

Later that afternoon, Thompson saw Employee back at the work yard. When he asked Employee for the truck keys so that he could dump the asphalt, Employee refused. Thompson then told Employee she was off the clock, to which Employee responded with profanities and refused to turn in her radio. The next day, Thompson observed Employee refusing to follow Superintendent Charles Stewart's order.

Thompson also indicated that Employee was AWOL for seven hours on May 25, 2006 and for eight hours on May 26, 2006. Employee was also AWOL for a whole week from May 29 through June 2, 2006. (Agency Exhibit 4). At no time did Employee ask for leave or inform anyone about her absence. Later when he tried to serve those documents, Employee refused to sign for them.

Previously, Thompson had recalled Employee reporting she was ill but then showing up on the job site. Employee also asked for a different supervisor as she told Thompson she did not like him. Thompson had suspicions that Employee abused drugs but admitted that he did not report his suspicions to management.

2. Michelle Pourciau (transcript pages 99 - 104)

Agency Director Michelle Pourciau was the deciding official who endorsed Employee's removal for insubordination and unexcused absences. She believed that this sort of behavior cannot

be tolerated in a public service agency. In view of the inherent dangers in operating heavy machinery, Pourciau felt that removal was appropriate for an employee who handles equipment recklessly.

3. Romanus Onyeama (transcript pages 105 - 126)

Superintendent Romanus confirmed Thompson's account of May 22, 2006. Thompson had complained to him about Employee's behavior and he had ordered Employee to go back to the job site to dump her load of asphalt. Romanus found out later that Employee still had her now useless asphalt in her truck. He explained that once the heated asphalt had cooled off before being used, it becomes worthless.

4. Charles Stewart (transcript pages 127 - 144)

Roadway Maintenance Superintendent Stewart testified that on May 25, 2006, he ordered Employee to drive for a particular crew. Employee balked and said she only drove ten-wheel trucks. Stewart tried to explain to her that her job description states that her duties extended to more than just driving ten-wheel trucks and again Employee refused the order and rudely began walking away. Stewart informed her that she would be placed on AWOL but Employee retorted that the union had said that she should get leave without pay.

Stewart confirmed Thompson's account that Employee was AWOL for several days and that Employee never requested leave. He added that when Employee came back she never explained her absences.

5. John Deatrick (transcript pages 144 - 152)

John Deatrick, deputy director and chief engineer of Agency, was the proposing official who requested Employee's removal from her position after consulting with his team. He testified that he chose that penalty because he considered Employee's offenses to be serious.

6. Employee (transcript pages 153-220)

Employee asserted that on May 22, 2006, Thompson told her to sit with her asphalt for about 3-4 hours. After Thompson ordered her to back up her truck, he jumped to the side of her truck and complained that she was backing up incorrectly. They got into an argument and she yelled at Thompson to "get the hell off" her truck as he was obstructing her view. Employee claimed that Thompson then ordered her to "get the f__ out" of the job site. Employee then reported the incident to Romanus who ordered her to return to the job site. When she returned, Thompson again ordered her away.

Employee said she turned the truck key over only to Jones instead of to Thompson because she was responsible for them. She admitted that she simply walked out on Thompson when he tried to talk to her. Employee said she told Jones and Romanus that Thompson had ordered her away the first time. She admitted that she did not report the second incident when Thompson ordered her to leave the second time.

Employee confirmed Superintendent Stewart's testimony that she had disobeyed an order to drive a truck for a different crew. She explained her action by saying she felt driving a truck smaller than a ten-wheeler was a demotion. Employee added that she thought it was just a request, not an order.

On May 25, 2006, she also requested sick leave or leave without pay from Stewart. Stewart replied that the only way Employee could get leave without pay was to go AWOL. They argued a bit before Employee went home. Employee said she was paid for that day.

The next day on May 26, 2006, without informing anyone, Employee drove to North Carolina to see her ailing brother. Employee also confirmed that she was AWOL from May 29 through June 2, 2006 as she was attending to her brother. When she went back to work for Mr. Ferrell's crew, Employee said she did not tell anyone why she was absent. (transcript p. 187, 206)

Employee explained her poor attendance record by testifying that she suffered several deaths in her family and that her prior supervisor allowed her to take as much leave as she wanted. As for her alleged pattern of absences and leave abuse, Employee attributed this to Thompson's animus towards her because she had reported him for harassment on May 17, 2006. However, she was later informed that the charge was improperly filed.

To the AWOL charges, Employee explained that she was ill and that her brother was dying. She had tried to call several officials to ask for leave but couldn't reach any of them. However, on cross-examination, Employee said the one person she reached, Mr. Jones, told her he had nothing to do with her leave. She then added that she did not attempt to call anyone else because she believed she had no supervisor. Employee also claimed she was never made aware that she was under a leave restriction. She also insisted that the regular practice for requesting leave was to either submit a leave request or simply call in or even inform them after her return to work. On cross-examination, Employee conceded that the practice was to ask for leave in advance or on the first day of absence. (Transcript p. 215)

Employee also claimed Thompson never presented her with the AWOL papers nor did anyone inform her that she would be charged AWOL. When questioned about the January 30, 2006 letter of warning (Agency Exhibit 2) that she signed for, Employee claimed she only got the second page. (Transcript p. 209). When queried as to why she would sign a document that was so obviously incomplete, Employee testified that she did not bother reading it as she trusted Mr. Jones. No one ever told her Thompson suspected her of illegal drug use or that there was a problem with her work performance. Employee denied ever being a danger to anyone while she was driving the truck. Lastly, Employee claimed both Thompson and Stewart lied on the stand when they testified that she was insubordinate and discourteous.

6. Chris Hawthorne (transcript pages 220 - 236)

Motor Vehicle Operator Hawthorne testified that on May 22, 2006, he witnessed the interaction between Employee and Mr. Thompson. Thompson jumped on the side of Employee's truck and accused her of being high on drugs or drunk. The two then cursed each other. According to Hawthorne, Thompson twice told Employee to leave the job site without unloading her load of asphalt. He overheard Thompson telling Romanus over the radio that he did not want Employee there at the job site. Hawthorne did not notice Employee being incapacitated.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The following findings of fact are based on the witnesses' demeanor during testimony and on the documentary evidence of record. In general, I find Agency's witnesses to be far more credible than Employee. Agency's witnesses all testified in a forthright and direct manner. Employee presented nothing to show that they had any reason to lie. At times, Employee contradicted herself with her answers under cross-examination.

1. Whether Employee was guilty of the acts with which she was charged.

Insubordination: Failure or refusal to comply with written instructions or direct orders by a superior.

Employee is accused of twice disobeying Thompson's lawful orders to dislodge her load of asphalt. It is undisputed that Employee never dumped her asphalt at the job site. Employee claims that it was Thompson who ordered her to leave without dumping the asphalt on both instances. However, this does not make sense since Thompson called Superintendent Romanus to help him deal with Employee. Romanus confirms Thompson's account that he was called to order Employee to return to the work site. On the other hand, fellow crewmember Hawthorne supports Employee's account that it was Thompson who ordered Employee not to unload her asphalt. On this point, I find Hawthorne to be more credible than Thompson and therefore find that Agency failed to prove by a preponderance of the evidence that Employee was insubordinate to Thompson.

Next, Employee is accused of disobeying Stewart's order to drive a smaller truck. For this charge of insubordination, Employee freely admits to such behavior. She excuses her refusal by claiming she thought it was a mere "request" as opposed to an order by her superior. However, I find that the real reason was her second rationale, which was that she thought it was a demotion for her to drive anything less than a ten-wheeler.

The testimony and documentary evidence establishes that Employee had a duty to obey Stewart's lawful order, that the duty was a major duty of her position, that she purposefully and defiantly failed to obey the order, and that her failure constitutes insubordination.

Inexcusable absence without leave.

For the charge of inexcusable absence without leave, Employee admits that she failed to obtain authorization from any of her superiors for any of her absences. For this failure, she offers a variety of excuses: that she couldn't reach any one; that the one person she did reach, Mr. Jones, told her he did not want to be involved; that she had family emergencies; that it was common practice for employees to ask permission only after their return from their absence. However, she later contradicts herself by admitting that she had to get permission first before being absent. She also did not present Mr. Jones or anyone else to support her version. I therefore find that Employee was inexcusably absent without leave for almost seven days.

2. Whether Employee's acts constitute cause for taking an adverse action.

D.C. Official Code § 1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority, to "issue rules and regulations to establish a disciplinary system that includes", *inter alia*, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The agency herein is under the Mayor's personnel authority.

On September 1, 2000, the D.C. Office of Personnel (DCOP), the Mayor's designee for personnel matters, published regulations entitled "General Discipline and Grievances" that meet the mandate of § 1-616.51. *See* 47 D.C. Reg. 7094 *et seq.* (2000). Section 1600.1, *id*, provides that the sections covering general discipline "apply to each employee of the District government in the Career Service who has completed a probationary period." It is uncontroverted that Employee falls within this statement of coverage.

Section 1603.3 of the regulations, 46 D.C. Reg. at 7096, sets forth the definitions of cause for which a disciplinary action may be taken.¹ Here, Employee was removed for "insubordination and inexcusable absence without leave (AWOL)." Unauthorized absence and insubordination are causes set forth in § 1603.3. The dishonesty charge is subsumed under the "any knowing or negligent material misrepresentation on a... document given to a government agency;" while the discourteous treatment charge is included under the "any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations" causes set forth in § 1603.3.

In an adverse action, this Office's Rules and Regulations provide that the agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "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 629.1, 46 D.C. Reg. 9317 (1999).

¹ The entire list of causes in § 1603.3 is as follows:

[A] conviction (including a plea of *nolo contendere*) of a felony at any time following submission of an employee's job application; a conviction (including a plea of *nolo contendere*) of another crime (regardless of punishment) at any time following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or job activities; any knowing or negligent material misrepresentation on an employment application or other document given to a government agency; any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law; any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious. This definition includes, without limitation, unauthorized absence, negligence, incompetence, insubordination, misfeasance, malfeasance, the unreasonable failure to assist a fellow government employee in performing his or her official duties, or the unreasonable failure to give assistance to a member of the public seeking services or information from the government.

The testimony and documentary evidence establishes that Employee's actions constitute insubordination and unauthorized absence. Accordingly, I conclude that the agency has met its burden of establishing cause for taking adverse action.

3. Whether Agency's penalty was appropriate under the circumstances.

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."² 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."³

Here the sustained charges are based on several instances of inexcusable absence without leave and an instance of insubordination. All point to the appropriateness of Agency's penalty of removal. Furthermore, the penalty is not clearly an error of judgment. Accordingly, I conclude that Agency's action should be upheld.

ORDER

It is hereby ORDERED that Agency's action is upheld.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge

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

³ *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:
RICHARD HAIRSTON
Employee
v.
DEPARTMENT OF CORRECTIONS
Agency
OEA Matter No. 1601-0059-07
Date of Issuance: October 24, 2007
Joseph E. Lim, Esq.
Senior Administrative Judge
Alan Banov, Esq., Employee Representative
Fred Staten, Jr., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On March 9, 2007, Employee appealed Agency's decision to place him on enforced leave for malfeasance. Agency had earlier placed him on enforced leave for being arrested for a crime. Agency then served Employee an advance notice of termination for being arrested and/or convicted of a crime. Subsequently, Agency withdrew this proposal after Employee's conviction was expunged. Instead, Agency substituted a new advance notice of termination, this time for malfeasance. Agency continued to maintain Employee on enforced leave, a status Employee has been on since August 2005.

The matter was assigned to the undersigned judge on May 23, 2007. At the prehearing conference held on July 20, 2007, Agency made a motion to dismiss for lack of jurisdiction. The parties submitted their legal briefs on this issue, and I issued an order denying Agency's motion to dismiss. I then issued an order asking the parties to submit their legal briefs on remedy. Employee did so; but Agency renewed its motion to dismiss, this time, arguing that Employee's appeal was untimely.

JURISDICTION

The jurisdiction of this Office has not been established.

ISSUE

Whether Employee's appeal should be dismissed for lack of jurisdiction.

FINDINGS OF FACT

Based upon the documents submitted on the record, the following facts are undisputed:

1. Employee was a Correctional Officer, DS 8, Step 10, with the Agency since November 1986.
2. On April 6, 2005, Employee was arrested for marijuana-related possession and distribution offenses while on duty at the D.C. Jail. His vehicle was searched and found to contain marijuana.
3. On April 14, 2005, Employee was placed on paid Administrative Leave pending an Internal Affairs Investigation.
4. On July 21, 2005, Employee was found guilty in D.C. Superior Court for misdemeanor marijuana possession.
5. On August 10, 2005, Employee received a proposed notice to place him on enforced leave, pursuant to provisions set forth in DPM Chapter 16, Section 1619.1 (c).
6. On August 16, 2005, Employee was issued a Final Notice of Decision to place him on enforced leave for being convicted for a crime. The notice indicated that the enforced leave was to commence on August 18, 2005. He was advised of his right to appeal to the Office of Employee Appeals (OEA).
7. On September 2, 2005, the D.C. Superior Court placed Employee on probation for nine months and ordered him to pay a \$500.00 fine.
8. On September 30, 2005, Employee was issued an advance notice to terminate him for the cause of "A conviction (including a plea of nolo contendere) of another crime regardless of punishment at any time following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or job activities." The notice informed Employee of his due process rights and that Keith Godwin had been assigned as his administrative review Hearing Officer.
9. Effective October 5, 2005, the D.C. Superior Court discharged Employee from probation.
10. On November 1, 2005, Hearing Officer Godwin submitted a report recommending to the Deciding Official S. Elwood York that Employee be

returned to duty and any action to terminate him be stayed until one of the following conditions has been met: (1) Successful appeal; (2) Adjudication of guilty; (3) Discharge of dismissal of order.

11. On November 21, 2005, Deciding Official York concurred with Godwin's recommendation and stayed action on Employee's termination pending final action by the Superior Court.
12. In February 2006, Devon Brown was appointed as Director for Agency.
13. On March 16, 2006, Appellant successfully completed his probation and the D.C. Superior Court expunged Employee's conviction record in accordance with D.C. Official Code §48-904.01(e)(2). The statute provides as follows:

The effect of such [an expungement] order shall be to restore such person, in the contemplation of this law, to the status he or she occupied before such arrest or indictment or information. No person to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest or indictment, or trial in response to inquiry made of him or her for any purpose.
14. On December 13, 2006, Agency withdrew Employee's September 30, 2005, advance notice of termination for the cause of "conviction of another crime..."
15. On the same day of December 13, 2006, Agency replaced its September 30, 2005, notice with a new 20-day advance notice of termination for the cause of "malfeasance." The notice indicated that Segum Obebe has been appointed the Hearing Officer who will conduct the administrative review of the proposed removal action. It also indicated that Employee's enforced leave since 2005 remained in force.
16. To date, Agency's administrative review has not occurred.
17. Because Employee did not notify Agency of his change in address, the new advance notice was returned by the post office with a note that there was no forwarding address. Employee claims he never received the December 13, 2006, advance notice until after he filed his appeal.
18. On March 9, 2007, Employee filed his appeal at the Office of Employee Appeals.

ANALYSIS AND CONCLUSION

Agency argues that Employee's appeal is untimely, as there has been no final Agency decision on the proposed termination based on malfeasance. Conversely, Employee argues that the Agency had constructively removed him from his position for a criminal conviction that has since been expunged, that Agency violated D.C. law, that Agency was guilty of undue delay, and others. However, the first issue that must always be settled is whether this Office has jurisdiction over this appeal.

This case is complicated by a convoluted set of facts entangled by three adverse actions: the enforced leave which has been in place since 2005; the proposed termination for a criminal conviction; and the proposed termination for malfeasance. Since this Office can only take jurisdiction over an actual adverse action, an analysis of jurisdiction requires examining whether this Office has jurisdiction over any of these adverse actions.

Whether this Office has jurisdiction over Employee's enforced leave.

On March 18, 2004, the D.C. Council enacted D.C. Act 15-397, also known as the "Enforced Leave Amendment Act of 2004". Section 2 states:

The District of Columbia Government Comprehensive Merit Personnel Act of 1978, effective March 3, 1979 (D.C. Law 2-139; D.C. Official Code § 1-601.01 *et seq.*), is amended as follows:

(a) Section 603(a) (D.C. Official Code § 1-606.03(a)) by striking the phrase "reduction in grade," and inserting the phrase "reduction in grade, placement on enforced leave," in its place.

(b) Section 1654(f) (D.C. Official Code § 1-616.54(f)) is amended to read as follows: "(f) If a determination is made to place the employee on annual leave or leave without pay, the decision letter shall inform him or her of the placement on enforced leave, the date the leave is to commence, his or her right to grieve the action within 10 days of receipt of the written decision letter, and if the enforced leave lasts 10 or more days, his or her right to file an appeal with the Office of Employee Appeals within 30 days of the effective date of the appealed agency action."

Thus, contrary to Agency's original assertion, this Office does have jurisdiction over enforced leaves of 10 days or more. 16 DCMR 1619.10 (DCR 7958) (2004) spells out the notice requirements for placing an employee on enforced leave:

1619.10 If a determination is made to place the employee on enforced leave, the written final decision shall inform the employee of the following:

(a) The placement on enforced leave as provided in § 1619.12;

(b) The date the enforced leave is to commence; and

(c) The right to grieve the action under the procedure set forth in § 1636, and that if the enforced leave lasts ten (10) days or more, the employee has the right to file an appeal with the Office of Employee Appeals within thirty (30) days of the final decision.

Thus, pursuant to Section 1619.10(c), Employee is entitled to appeal the final decision regarding his enforced leave. Here, Agency gave proper notice to Employee on August 16, 2005, of his right to appeal to OEA. Agency informed Employee in writing that he had thirty days to file his appeal. His enforced leave started on August 18, 2005. Employee filed his appeal on March 9, 2007, almost 19 months after the effective date of his enforced leave.

The Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124 which became effective on October 22, 1998, provides a statutory time limit for filing an appeal with this Office. The relevant section states that an "appeal shall be filed within 30 days of the effective date of the appealed agency action". D.C. Official Code Section 1-606.03 (a) (2001). OEA's Rules and Regulations have been amended to reflect this requirement. OEA Rule 604.2, 46 D.C. Reg. at 9299 reflects the requirement, stating that an appeal must be filed "within thirty (30) days of the effective date of the appealed agency action".

The District of Columbia Court of Appeals has held that the time limit for filing an appeal with an administrative adjudicatory agency such as OEA is mandatory and jurisdictional in nature. *See, e.g., District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991) and *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162 (D.C. 1985). This Board has consistently held that the statutory 30 day time limit is mandatory and jurisdictional in nature. *See, e.g., King v. Department of Corrections*, OEA Matter No. T-0031-01, *Opinion and Order on Petition for Review* (October 16, 2002), ____ D.C. Reg. ____ (). Employee filed his petition on March 9, 2007, approximately 19 months after the effective date. It was not filed in a timely manner.

The only exception that this Board has established is that it will excuse a late filing if an agency has failed to provide the employee with "adequate notice of its decision and the right to contest the decision through an appeal". *McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003), ____ D.C. Reg. ____ (). In this matter, Agency informed Employee of the filing deadline. Having been afforded the appropriate notice, this petition does not fall within the exception discussed above.

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999) states that the employee filing the petition has the "burden of proof as to issues of jurisdiction, including timeliness of filing". According to OEA Rule 629.1, *id*, the burden must be met by a "preponderance of the evidence" which is defined as "[t]hat 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". The time limit is mandatory and jurisdictional. The Administrative Judge concludes that Employee did not meet the burden of proof on this issue and therefore he did not establish that this Office has jurisdiction of his appeal. Although Employee has legitimate grievances over the length of his continuing enforced leave, this Administrative Judge has no choice but to conclude that the petition regarding his enforced leave was untimely and should be dismissed for lack of jurisdiction.

Whether this Office have jurisdiction over Employee's proposed termination for a criminal conviction.

On December 13, 2006, Agency withdrew Employee's September 30, 2005, advance notice of termination for the cause of "conviction of another crime..." Since the termination was never implemented and was withdrawn, there is no termination or adverse action to appeal.

There is no requirement that this Office adjudicate a matter which is moot. *See Culver v. D.C. Fire Department*, OEA Matter No. 1601-0121-90, *Opinion and Order on Petition for Review* (January 16, 1991), _ D.C. Reg. __ (). It is well established that an appeal that is based on a personnel action which has been rescinded is moot. *See, e.g., Champion v. Department of Human Services*, OEA Matter No. 2401-0136-96 (July 2, 1998), _ D.C. Reg. __ (); *Britt et al. v. Department of Human Services*, OEA Matter No. 2401-0135-96 (August 12, 1997), _ D.C. Reg. (); *Mason v. D.C. Public Schools*, OEA Matter No. 1601-0347-96 (October 19, 1999), _ D.C. Reg. __ (). I therefore conclude that the petition regarding the withdrawn termination should be dismissed for lack of jurisdiction.

Whether this Office have jurisdiction over Employee's proposed termination for malfeasance.

On December 13, 2006, Agency issued to Employee its advance notice of termination for the cause of "malfeasance." To date, Agency has not issued its final decision.

The Office of Employee Appeals (OEA) is an independent agency of the District of Columbia government created by the DC Government Comprehensive Merit Personnel Act (CMPA) of 1978, DC Official Code 1-601.01 et seq. The authority to hear appeals of District of Columbia employees is defined in DC Official Code 1-606.03, which states in part:

- (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 grade, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter), or a reduction-in-force (pursuant to subchapter XXIV of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. [Emphasis added.]

In addition, DC Personnel Regulations, Chapter 16, Part I. General Discipline and Grievances §1618 Appeals to the Office of Employee Appeals govern appeals. Section 1618.1 states:

Unless otherwise authorized or required as provided in §§ 1601.2 through 1601.5, an employee shall be entitled to appeal the following **final agency actions** to the Office of Employee Appeals (OEA):

- (a) Any **final decision** regarding an adverse action; or
- (b) Any **final decision** placing an employee on enforced leave that lasts ten (10) days or more. [Emphasis added.]

It is clear that this Office has jurisdiction only over final agency decisions. The only final agency decision in this matter over which jurisdiction exists is Employee's enforced leave. Unfortunately, his appeal is untimely. It is unfortunate but understandable that Employee waited until his criminal conviction was expunged before filing his appeal over his enforced leave. However, the facts and the law leave me no choice but to dismiss his appeal for lack of jurisdiction. Employee may still file an appeal once he receives a final agency action regarding his termination for the cause of malfeasance.

ORDER

It is hereby ORDERED that Employee's appeal is DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
Robin Hoey	)	OEA Matter No. 1601-0074-07
Employee)	
	)	Date of Issuance: December 14, 2007
v.)	
	)	Joseph E. Lim, Esq.
Metropolitan Police Department	)	Senior Administrative Judge
Agency)	
)	

Theresa Quon Hyden, Esq., Agency Representative
J. Michael Hannon, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION

On May 16, 2007, Employee, a former Commander in the Police force, filed a petition for appeal from Agency’s final decision removing him from his position as Commander and demoting him to Captain. This matter was assigned to me on July 2, 2007. I conducted a Prehearing Conference on August 29, 2007, and Employee filed a motion for summary judgment. Agency submitted its response. The record is closed.

JURISDICTION

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

ISSUES

1. Whether this Office has jurisdiction over this matter.
2. If so, should Agency’s action demoting Employee be upheld?

FINDINGS OF FACT

The following facts are undisputed:

1. Employee was a policeman for more than 22 years. He was first appointed as a police officer in the Career Service on December 16, 1985.
2. Effective January 16, 2000, Employee was promoted from the rank of Lieutenant to the rank of Captain. His personnel record DC Form 52 (Request for Personnel Action) indicated that he was in the Career Service.
3. Effective April 22, 2001, Employee was promoted from the rank of Captain to the rank of Inspector. Once again, his DC Form 52 indicated that he was in the Career Service.
4. On August 1, 2004, Employee was promoted from the rank of Inspector to the rank of Commander. As before, his personnel records DC Form 52 and DC Form 1 (Personnel Action) each indicated that he was in the Career Service. Although the Form 1 was barely legible, it clearly indicated that Employee was still in the Career Service. The Personnel Form 1 which documents this change under "Nature of Action/Code" states "Promotion," and not "Appointment." Likewise, the Request for Personnel Action, DC Standard Form 52, also states "Promotion" in the "Kind of Action Requested" field. Employee took command of the Sixth District.
5. Mayor-elect Adrian Fenty appointed Cathy Lanier as Chief of Police and the Council of the District of Columbia confirmed her appointment on April 3, 2007.
6. On April 19, 2007, Chief Lanier informed Employee that she was transferring him from the Sixth District to the D.C. Central Cellblock and reducing his rank from Commander to Captain. No reason was given. Instead, Chief Lanier informed Employee that he was an "at will" employee.
7. Agency cannot produce any documents, nor does it claim it possesses any documents that would show Employee was ever appointed into an Excepted Service position.
8. In all its communications to Employee, Agency never asserts that Employee was demoted for cause.
9. Employee appealed his demotion to the Office of Employee Appeals on May 16, 2007.

ANALYSIS AND CONCLUSIONS

Whether this Office has jurisdiction over this matter.

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999) provides as follows: "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." The jurisdiction of this Office is established by statute. *D.C. Official Code* § 1-606.03 (a) (2001) describes the jurisdiction of this Office. It states in relevant part:

An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . . [or] an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . . or a reduction in force.

Additionally, D.C. Code § 1-617.1(b) states, in pertinent part:

A permanent employee in the Career or Educational Service who is not serving a probationary period or an employee appointed under the authority of § 1-610.4(2) and serving for at least 1 year with average performance may be suspended from service for more than 30 days, reduced in rank or pay, or removed from the Service only for cause and only in accordance with the provisions of this subchapter and subchapter VI of this chapter.

Thus, members of the Career Service have a statutory right to be discharged only for cause.

Indeed, the above provision is amplified in Chapter 16 of the District Personnel Manual (DPM), which contains rules and regulations implementing the system of general discipline and grievances in the District government. At § 1600.1, the DPM states “[These provisions] apply to each employee of the District government *in the Career Service*.” (Emphasis added.) Furthermore, at § 1601.1, the DPM further provides that:

An employee covered by § 1600.1 may not be officially reprimanded, suspended, reduced in grade, removed, or placed on enforced leave, except as provided in this chapter or in Chapter 24 of these regulations. Except as otherwise required by law, an employee not covered by § 1600.1 is an *at-will employee* and may be subjected to any or all of the foregoing measures at the sole discretion of the appointing personnel authority. (Emphasis added.)

The City Council has created through legislation various categories of employees to serve the needs of the citizens. Among the various categories established are those of Excepted Service employees and Career Service employees.

Career Service employees make up the bulk of the City’s work force. In order to achieve organizational effectiveness, the City Council has instituted a positive approach toward employee discipline within the Career Service. This approach is codified, and requires that discipline be taken only for cause, after prior written notice, and with an opportunity to be heard. See D.C. Code § 1-616.51. Hence, employees in the Career Service are afforded due process rights in recognition that their employment is a property right. These protections include assurances that disciplinary actions

may only be taken for cause. Prior written notice is required for any adverse action, and an opportunity to be heard within a reasonable time after any action is proposed. See D.C. Code § 1-616.52.

All officers employed in the Metropolitan Police Department are Career Service employees unless they are specifically appointed to the Excepted Service.

Excepted Service appointments are also created by statute. D.C. Code § 1-609.01 states:

The qualifications for each Excepted Service position shall be developed and issued by the appropriate personnel authority in consultation with the Mayor. Each employee appointed in the Excepted Service (except those included in § 1-609.08) must meet the minimum standards prescribed for the position to which he or she is appointed. Each personnel authority may fill positions in the Excepted Service as provided in this subchapter. Excepted Service employees may be hired noncompetitively. Persons appointed to the Excepted Service are not in the Career, Educational, Executive, Management Supervisory or Legal Service.

These Excepted Service appointments are “intended to be an individual whose primary duties are of a policy determining, confidential, or policy advocacy character and who reports directly to the head of an agency.” D.C. Code § 1-609.02. These employees have no tenure because they are intended to serve at the discretion of the executive.

With respect to the Metropolitan Police Department, the City Council provides that “the Chief of Police may designate up to 1% of the total number of authorized positions within the Metropolitan Police Department as Excepted Service policy positions, no more than 10 of which may be filled with sworn members or officers.” D.C. Code § 1-609.03 (a) (2).

This distinction between a Career Service employee versus an Excepted Service employee is important because the removal of excepted service employees is governed by D.C. Code Ann. § 1-610.5 (1999 *Repl.*). Section 1-610.5 states:

Employees in the Excepted Service (other than those appointed under the authority of § 1-610.4) do not have any job tenure or protection. After 1 year of average or above average performance as determined under subchapter XV of this chapter, persons appointed under the authority of this subchapter shall be entitled to a notice of at least 15 days when termination of service prior to the expiration date of appointment is contemplated, explaining the reason therefore. *The employee does not have any right to appeal the termination . . .* (Emphasis supplied.)

See e.g. Leonard et al. v. Office of the Chief Financial Officer, OEA Matter Nos. 1601-0241-

96 *et al.* (February 5, 1997), ___ D.C. Reg. ___ ().

Thus, based on the above statutes, there are significant differences between these two classifications and the protections afforded employees. Employees in the Excepted Service do not have any job tenure or protection, nor do they have any right to appeal a demotion. They are at-will employees and may be removed from their position without cause or warning. *Also see* D.C. Code § 1-609.04. Additionally, Excepted Service employees do not have a “property interest protected by the Fourteenth Amendment.” *See Mulhall v. District of Columbia*, 747 F. Supp. 15 (D.D.C. 1990).

Thus, “Career Service” employees in general are distinguished from “at-will” employees. If Employee is determined to be in the Excepted Service and therefore, an at-will employee, Agency can remove Employee without cause. This Office has no jurisdiction over removals or demotions without cause and thus this case would be dismissed for lack of jurisdiction.

Conversely, if Employee never ceased to be in the Career Service, then this Office does have jurisdiction over this appeal. Thus, Employee has the burden of proving that he is still a Career Service employee and not an excepted service employee.

At issue in this case is whether Employee’s status changed from a Career Service employee to an “at-will” employee when he was promoted to the Commander position. This Judge is not persuaded that plaintiff underwent such a change in status.

The best evidence regarding Employee’s status is his official personnel record. Agency’s own official records indicate that in every instance of Employee’s promotion from Captain to Inspector to Commander, his position status remained Career Service. Indeed, Agency does not deny that Employee’s latest DC Form 1 indicated that he was promoted to a Career Service Commander position. Agency itself admits it has nothing to show that Employee was ever appointed into an Excepted Service position. “An appointment is not made until the last act required by the person vested with the appointment power is performed.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803); *Goutos v. United States*, 552 F.2d 922 (Ct. Cl. 1976).

It is undisputed that Agency never performed any act required to transform Employee’s position into an Excepted Service one. But having failed to do so, Agency cannot now claim that Employee is no longer a Career Service employee, as the record establishes that Employee was never appointed to an Excepted Service position.

Accordingly, I conclude that since Employee was at all times in the Career Service, this Office has jurisdiction over his appeal of his demotion.

If so, should Agency’s action demoting Employee be upheld?

Employee asserts that he is a Career Service employee of the District of Columbia who achieved the rank of Captain on January 16, 2000. There is no disagreement among the parties that

the rank of Captain is a Career Service position. There is, however, disagreement as to whether his subsequent promotions to Inspector and then Commander were Career Service or Excepted Service positions. Crucial to Employee's Complaint is that Career Service employees cannot be demoted without cause. Employee insists that his promotions still retained him in a Career Service posture, and hence, he cannot be demoted from Commander all the way back to Captain without cause.

Agency argues that despite personnel records to the contrary, Employee's promotions to Inspector and then Commander were Excepted Service appointments, and thus, his demotion back to Captain without cause was expressly sanctioned by D.C. Official Code § 5-105.01 (a) and D.C. Official Code § 1-608.01 (d-1).

For the Metropolitan police force, there are additional statutes that govern the promotion and appointment of its members. D.C. Official Code §§ D.C. Official Code § 1-608.01 (d-1) and (d-2) (2001) states in pertinent part that:

§ 1-608.01. Creation of Career Service [Formerly § 1-608.1]
(d-1) For members of the Metropolitan Police Department and notwithstanding § 1-632.03(1)(B) or any other law or regulation, the **Assistant and Deputy Chiefs of Police and Inspectors shall be selected from among the captains of the force and shall be returned to the rank of captain when the Mayor so determines.**

(d-2) (1) The Chief of Police shall recommend to the Director of Personnel criteria for **Career Service promotions and Excepted Service appointments to the positions of Inspector, Commander, and Assistant Chief of Police** that address the areas of education, experience, physical fitness, and psychological fitness. The recommended criteria shall be the same for Career Service promotions and Excepted Service appointments to these positions. When establishing the criteria, the Chief of Police shall review national standards, such as the Commission on Accreditation for Law Enforcement Agencies. . . .

(Emphasis added).

This language is repeated in D.C. Official Code § 5-105.01 (2007):

§ 5-105.01. Appointments; assignments; promotions; applicable civil service provisions; vacancies [Formerly § 4-104]

(a) The Mayor of said District shall appoint to office, assign to such duty or duties as he may prescribe, and promote all officers and members of said Metropolitan Police force; . . . provided further, that **the Assistant and Deputy Chiefs of Police and Inspectors shall be**

selected from among the captains of the force and shall be returned to the rank of captain when the Mayor so determines.

(b) (1) The Chief of Police shall recommend to the Director of Personnel criteria for **Career Service promotions and Excepted Service appointments to the positions of Inspector, Commander, and Assistant Chief of Police** that address the areas of education, experience, physical fitness, and psychological fitness. . . . The recommended criteria shall be the same for Career Service promotions and Excepted Service appointments to these positions.

(Emphasis added).

To support its position that all Commander positions are Excepted Service, Agency also cites the District Personnel Manual or Code of D.C. Municipal Regulations at 6 DCMR § 872 [Appointment to Inspector, Commander and Assistant Chief of Police] which provides that:

872.1 The Chief of the Metropolitan Police Department is vested with the authority to assign to duty and to appoint all officers and members of the Metropolitan Police Department.

(a) Consistent with the duty to maintain a force of the highest possible quality, **the Chief of Police may appoint qualified candidates** from within the Department, as well as seek and appoint qualified candidates from outside the Department, **to positions of Assistant Chief of Police, Commander, and Inspector.** (Emphasis added.)

872.5 Assistant Chiefs of Police, Commanders, and Inspectors are excepted service employees, who serve at the pleasure of the Chief of Police. The Chief of Police has the discretion to return Assistant Chiefs of Police, Commanders, and Inspectors to their previous rank/position. (Emphasis added.)

STATUTORY AUTHORITY: D.C. Code §§ 1-608.01 et. seq., -608.81 (2003); 2-139; 5-402, -801 et. seq.; Mayor's Orders 80-78, 97-88, 2000-83

The above regulation, however, does not necessarily conflict with the D.C. Code. In both D.C. Official Code § 1-608.01 (d-1) and § 5-105.01, the City Council has expressly provided that Inspectors and Commanders of the MPD may either be Career Service or Excepted Service employees. 6 DCMR § 872 simply reiterates that appointed Commanders serve at the pleasure of the Police Chief. Read in conjunction with the Code, it confirms that higher positions such as Commanders may either be Career Service positions or Excepted Service ones. Notable is the fact that the regulation § 872 .5 does not insist that *all* Commanders are excepted service employees. Following on the heels of §872.1, which deals with appointed positions, it merely confirms that some Commander positions are appointed.

But even if the above regulation actually meant to include *all* commanders, then this regulation clearly conflicts with the enabling statute, which provided, at the time of plaintiff's demotion, "The Chief of Police shall recommend to the Director of Personnel criteria for Career Service promotions and Excepted Service appointments to the positions of Inspector, Commander, and Assistant Chief of Police." *D.C. Code § 1-608.01 (d-2) (1)* (2003). When a regulation conflicts with its authorizing statute, the regulation is null and void. *See Davis v. Univ. of District of Columbia*, 603 A.2d 849, 853 (D.C. App. 1992); *Tenants v. D.C. Rental Housing Comm's*, 575 A.2d 1205, 1213 (D.C. App. 1990) ("a statute defines the rights of the [parties] and fixes the standard by which the rights are measured.")(internal quotations omitted). A statute that lists a specific position or makes specific exceptions is a "classic example of a legislative action that, by its very nature, purports to be exclusive and thus clearly suggests that the legislature has thought about the particular matter omitted." *In re M.M.D.*, 662 A.2d 837, 852 (D.C. 1995).

In his Motion for Summary Disposition, Employee argues that because the position of Commander is "notably absent" from the list of the positions which may be returned to the rank of Captain in sections 1-601.01(d-1) and 5-105.01(a), he could not be demoted without cause.

Although D.C. Official Code § 1-608.01 (d-1) and D.C. Official Code § 5-105.01 does not specifically mention the position of "Commander," MPD General Order 101.9 clarifies that District Commanders are of the rank of Deputy Chief. The General Order, which was first promulgated in 1979 and continues in effect to the present, states that: "**District Commanders shall be of the rank of Deputy Chief**" (emphasis added). Thus, contrary to Employee's contention, some Commanders may indeed be returned to the rank of Captain at the Police Chief's discretion.

In the alternative, Agency argues that even if some Commanders are Career Service employees as Employee contends in his Motion for Summary Disposition, the Chief of Police¹ is nevertheless authorized to return District Commanders to the rank of Captain at his or her discretion, without cause, under the above cited Codes.

Agency's final argument is that a literal reading of §§ 1-608.01 and 5-105.01 would produce absurd results. Agency states that an interpretation whereby some Commander positions are "at-will" and others are not would greatly reduce any flexibility the Chief of Police has in shaping her command staff to reflect her policy preferences and priorities. Since the Deputy Chief position was renamed "Commander" in 1997, Commanders have made up anywhere between 48-55% of the

¹ On May 16, 1997, the Mayor delegated his discretionary authority over MPD officials above the rank of captain to the Chief of Police. See Mayor's Order 97-88 (5/9/97), 44 D.C. Reg. 2959-2960 (5/16/97), attached as Exhibit G. Mayor's 97-88 provides in relevant part that:

The Chief of Police is also delegated * * * [a]uthority under [D.C. Official Code, §5-105.01 (2001)] to appoint to office, assign to duty and promote all officers and members of the Metropolitan Police Department as provided in that section.

command staff.² Agency points out that if *D.C. Official Code* §§ 1-608.01 and 5-105.01 are strictly construed to mean that some Commanders are not discretionary positions and only subject to demotion after an adverse action proceeding, then any incoming Police Chief would be unable to remove half of his/her predecessor's command staff, without significant loss of time and money, or to bring in Commanders of his/her own choosing to implement his/her vision of the Department. Such a daunting roadblock to change is absurd and completely unworkable.

Although that may be so, to adopt Agency's position that Police Chief should have the power to demote any of her staff, whether or not they are Career Service, would be to render the distinction between Career Service employees and "at-will" employees meaningless. Agency's absurd argument attacks the entire rationale for the existence of the CMPA. The CMPA was instituted precisely so that Career Service government employees are promoted or punished based solely on merit, insulated from a superior's political whim and caprice.

The *Fifth Amendment of the United States Constitution* prohibits the federal government from depriving its citizens of property without due process of law. *U.S. CONST. amend. V*. Under certain circumstances, an individual's employment with a state or local government constitutes a property interest. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985); *Board of Regents v. Roth*, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). An individual has a property interest in his or her employment when that person has a legitimate claim of entitlement to the job. *Roth*, 408 U.S. at 577. The legitimate claim of entitlement of employment is not created by the United States Constitution, but by independent sources such as state statutes, agency rules or policies, or agreements. *Roth*, 408 U.S. at 577-78. At will employees are not vested with a protected property interest. See *O'Donnell v. Barry*, 331 U.S. App. D.C. 272, 148 F.3d 1126, 1139 (D.C. Cir. 1998).

It is undisputed that the Comprehensive Merit Protection Act ("CMPA") creates a property interest for employees governed by it. The CMPA establishes a Career Service for employees in which they are guaranteed to be promoted based on merit and cannot be terminated without cause. *D.C. Code* §§ 1-608 & 1-616.51. The Career Service includes employees who serve as sworn officers with the MPD. *D.C. Code* § 1-608.01. Under CMPA, employees can only be disciplined for cause and prior notice must be given. *Id.* Discipline specifically includes reduction in grade or demotions. *D.C. Code* § 1-616.52(b).

To reiterate, Career Service Inspectors and Commanders are promoted to their positions, while Excepted Service Inspectors and Commanders are appointed to their positions. The former may not be demoted by the Chief of Police without cause. The latter may be demoted without cause.

² Under Chief Ramsey, the command staff consisted of: 1 Executive Assistant Chief, 5 Assistant Chiefs, 16 Commanders, and 7 Inspectors. Avis Thomas Lester, *Recent Promotions Anger Some on D.C. Force; Police Chief Departs From Tradition and Tenure to Fill Leadership Posts*, Wash. Post, Apr. 8, 1999, at J01, attached as Exhibit W. Chief Lanier's command staff currently consists of: 7 Assistant Chiefs, 14 Commanders, and 9 Inspectors.

Here, I find that Employee was demoted without cause, and under the mistaken assumption by Agency that he was an "at-will" Excepted Service employee. Thus I conclude that Agency's action must be reversed and I thereby grant Employee's motion for summary judgment.

ORDER

It is hereby ORDERED that:

- 1) Agency's action demoting Employee from his position is REVERSED, and
- 2) Agency reinstate Employee to his Career Service position of record, and reimburse him all pay and benefits lost as a result of the demotion; and
- 3) Agency file with this Office documents showing compliance with the terms of this Order within thirty (30) days of the date on which this decision becomes final.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge

Title listing the purchase price of her 1994 Honda Accord that she bought at the police vehicle auction as \$1,800.00 instead of the \$3,000.00 that she actually paid. Agency also contends that Employee presented falsified documents such as a fraudulent MPD receipt misstating the purchase price to the State of Maryland in obtaining her Maryland registration.

For these actions, Agency charged Employee as follows:

1. Violation of General Order Series 1202, Number 1, part I-B-7, which provides: Conviction of any member of the force in any court of competent jurisdiction of any criminal or quasi-criminal offense or of any offense in which the member either pleads guilty, receives a verdict of guilty or a conviction following a plea of *nolo contendere* or *is deemed to have been involved in the commission of any act which would constitute a crime whether or not a court record reflects a conviction* (emphasis added.) Members who are accused of criminal or quasi-criminal offenses shall promptly report or have reported to their commanding officers their involvement. This misconduct is further defined as cause in Section 1603 of the D.C. Personnel Manual.

2. Violation of General Order Series 1202, number 1, Part I-B-12, which provides: Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively, or violations of any law of the United States or any law, municipal ordinance, or regulation of the District of Columbia. This misconduct is defined as cause in §1603 of the D.C. Personnel Manual.

3. Violation of General Order Series 1202, number 1, Part I-B-17, which provides: Fraud in securing appointment or falsification of official records or reports. This misconduct is defined as cause in §1603 of the D.C. Personnel Manual.

4. Violation of General Order Series 1202, number 1, Part I-B-20, which provides: Misuse of official position or unlawful coercion by an employee for personal gain or benefit. This misconduct is defined as cause in §1603 of the D.C. Personnel Manual.

Agency further contends that Employee ordered the destruction of auction records from September 1998 and before due to space concerns, although Agency policies state that auction records shall be retained in the department for three years or until after audit, whichever is sooner, then destroyed.

For this action, Agency charged Employee with: Violation of General Order Series 1202, number 1, Part I-B-19, which provides: Willful misuse or mutilation or willful or neglectful destruction of District of Columbia property or funds. This misconduct is defined as cause in §1603 of the D.C. Personnel Manual.

Employee denies all allegations and asserts that her destruction of auction records was proper and in accordance with Agency policies.