

CITY COLLEGIATE PUBLIC CHARTER SCHOOL**REQUEST FOR PROPOSAL****Meals to Children for the 2007 – 2008 School Year**

City Collegiate Public Charter School will receive bids until July 10, 2007 at 5:00 p.m. for the delivery and service of meals to children enrolled in the school for the 2007-2008 school year with a possible extension of (4) years.

All meals must meet, but are not restricted to, minimum National School Breakfast, Lunch, and Snack meal pattern requirements.

Meal pattern requirements and all necessary forms may be obtained from:

Julia Westfall
Director of Financial Services
3265 S Street, NW
Washington, DC 20007
202-339-9494
jwestfall@citycollegiatepcs.org.

BOARD OF ELECTIONS AND ETHICS
CERTIFICATION OF ANC/SMD VACANCIES

The District of Columbia Board of Elections and Ethics hereby gives notice that there are three vacancies in Advisory Neighborhood Commission offices, certified pursuant to D.C. Official Code 1-309.06(d)(2); 2001 Ed.

VACANT: 2A04, 4B09

Petition Circulation Period: **Monday, June 4, 2007 thru Monday, June 25, 2007**
Petition Challenge Period: **Thursday, June 28, 2007 thru Thursday, July 5, 2007**

VACANT: 5C05

Petition Circulation Period: **Monday, June 18, 2007 thru Monday, July 9, 2007**
Petition Challenge Period: **Thursday, July 12, 2007 thru Wednesday, July 18, 2007**

Candidates seeking the Office of Advisory Neighborhood Commissioner, or their representatives, may pick up nominating petitions at the following location:

D.C. Board of Elections and Ethics
441 - 4th Street, NW, Room 250N
Washington, DC 20001

For more information, the public may call 727-2525.

OFFICE OF EMPLOYEE APPEALS

INITIAL DECISION

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

 In the Matter of:)
)
 MARK BROWNER)
 Employee)
)
 v.)
)
 D.C. TAXICAB COMMISSION)
 Agency)

OEA Matter No. 1601-0071-06

Date of Issuance: December 14, 2006

Sheryl Sears, Esq.
Administrative Judge

Clifford Lowery, Employee Representative
Doreen E. Thompson, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND UNDISPUTED FACTS

Employee was a Public Vehicle Enforcement Inspector (Hack Inspector) with the D.C. Taxicab Commission with about three years of tenure. On December 12, 2005, he was convicted of driving under the influence of alcohol pursuant to a plea of *nolo contendere*. Employee was sentenced to 90 days in jail (45 of which were suspended), 18 months probation and a fine of \$500.00. His driver's license was revoked for 6 months effective on December 30, 2005.

By letter dated February 22, 2006, R. Drummond-Jackson, Office Manager and Proposing Official, notified Employee of Agency's proposal to remove him from his position. In the specifications cited in support of the proposed action, Agency detailed the events of Employee's arrest and conviction as follows:

According to District of Columbia Superior Court records and documents, on April 17, 2004, you were arrested and subsequently charged with Negligent Homicide, Involuntary Manslaughter and Driving Under the Influence. At the time of your arrest for DUI it was deemed that your abilities to operate a motor vehicle were

affected by alcohol according to law of the District of Columbia. You were released on April 19, 2004. A trial was held and you were convicted of Driving Under the Influence on December 12, 2005[;] however, you did not notify your employer of this action until January 11, 2006 and you continued to drive a District government vehicle prior to notification. You were sentenced to ninety (90) days imprisonment, execution of sentence suspended to all but to forty-five (45) days in jail. Thereafter eighteen (18) months supervised probation, fine of \$500.00 to be paid by 2/6/06 (sentence to be served on weekends beginning 1/6/06, defendant to report to D.C. Jail at 6 pm on Fridays and released from jail on Sundays at 6 am until sentence is complete). According to a memo you submitted on January 11, 2006 you are on a six month suspension of driving privileges. Also, you were ordered to pay the aggregate amount of \$250.00 cash as costs assessed under the Victims of Violent Crime Compensation Act of 1981.

Agency cited the District Personnel Manual (DPM) § 1603.3 as the legal cause for the adverse action. It states, in relevant portion, as follows:

For the purpose of this chapter, "cause" means a . . . conviction (including a plea of *nolo contendere*) of . . .[a]. . . 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. . ."

Agency also charged Employee with violating DPM § 1803.1 which provides that "(a) An employee shall avoid action, whether or not specifically prohibited by this chapter, which might result in or create the appearance of the following. . .[a]ffecting adversely the confidence of the public in the integrity of government." According to Agency, Employee's actions also violated Article 39 (Corrective and Adverse Actions) of the Collective Bargaining Agreement between the American Federation of Government Employees (AFGE) Local 1975 and the D.C. Taxicab Commission.

Agency placed Employee on enforced leave on March 2, 2006, pursuant to the authority of § 1619.1 of the DPM. It states as follows:

Notwithstanding any other provision of this chapter, a personnel authority may authorize placing an employee on enforced leave if . . .(c) The employee has been indicted on, arrested for, or convicted of any crime (including conviction following a plea of *nolo contendere*) that bears a relationship to his or her position. . .

Sylvestre K. Yorrick, Hearing Officer, performed an administrative review of the matter and presented his findings and recommendations in a statement dated April 4, 2006. Yorrick found that Employee had not, as charged, driven an Agency vehicle after his license was revoked. He noted that the “last date on which Mr. Browner drove a District vehicle was December 20, 2005, ten days *before* his license was officially revoked.” (Emphasis added). However, he concluded that Employee was guilty of incompetence as a result of the “revocation or suspension of state or District of Columbia permit or license required to perform part or all of [his] duties.” Yorrick considered that “[i]t is highly conceivable that in the course of Mr. Browner’s duties i.e. providing daily on-street monitoring of for-hire driver conduct, the situation might arise where he might have to cite a for-hire driver for driving under the influence (DUI). Mr. Browner, being someone who had been convicted himself and on parole for the same conduct (DUI) could cause the public to question the government’s integrity.” Because Employee’s position description mandates that he have a driver’s license as a condition of his employment, Yorrick concluded that a penalty was warranted.

However, the hearing officer recommended a “less severe penalty” than removal “such as demotion to a lower grade and position where the possession of a valid District driver’s permit is not mandatory and where Mr. Browner will not have to enforce rules governing the conduct of for-hire drivers.” In suggesting this penalty, Yorrick highlighted that this was Employee’s “first offense, and throughout the period from the date of the infraction to the date of sentencing and beyond, Mr. Browner had attempted to keep his employer apprised of his situation, and did not hide or evade responsibility for his actions.”

By notice of final decision dated May 30, 2006, Agency advised Employee that he would be removed effective on Friday, June 16, 2007 [this is a typo – Employee was removed on June 16, 2006]. On June 19, 2006, Employee filed an appeal. The parties convened for a pre-hearing conference on October 18, 2006. As there were no disputes of fact, no hearing was convened. The parties were ordered to present written briefs stating their positions on the question of whether Agency abused its discretion in selecting the penalty of removal. Each party did so and their positions are set forth and considered in the “Analysis and Conclusion” section below.

JURISDICTION

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

ISSUE

Whether Agency abused its discretion in the selection of the penalty.

ANALYSIS AND CONCLUSIONS

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) provides that “[f]or appeals filed on or after

October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction." Accordingly, agency has the burden of proof in this adverse action appeal. There is no dispute that Employee was arrested and convicted and that, among other penalties, his driver's license is revoked. Agency's burden before this office, therefore, is to prove that the penalty was appropriate.

A penalty may not be imposed for a *de minimus* violation. D.C. Office of Personnel (DCOP) Rule 1603.5, 47 D.C. Reg. 7094, provides as follows, "No employee may be subject to a corrective or adverse action under this chapter for a *de minimus* violation of the cause standard contained in this section." Black's Law Dictionary defines a *de minimus* matter as a trifling or small matter. Employee has not argued and there is no basis for concluding that a conviction for drunk driving that results in the revocation of a license required to do one's job is a trifling or small matter. It is indeed significant. However, Employee contends that the penalty imposed was too severe.

In assessing the appropriateness of the 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). This Office has held that it will leave Agency's penalty "undisturbed" when the "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. 1915, 1916 (1985). The role of this Office is to ensure that "managerial authority has been legitimately invoked and properly exercised." See *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (DC 1985), and *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915 (1985). Therefore, the penalty chosen by Agency will only be modified or reversed if this Judge finds that Agency abused its discretion.

Employee contends that Agency abused its authority by failing to offer him a set of duties that did not require a driver's license for the period it was suspended. Employee further posits that, now that his license has been restored, he should be fully reinstated to his position and allowed to perform all of its duties. Agency maintains that there was no abuse of discretion in removing Employee once he was no longer competent to perform all of the duties of a Hack Inspector. Agency maintains that there was no duty, under the law, to provide Employee with a different position. As an aside, Agency avers that there were no positions available of the sort sought by Employee.

In describing Employee's professional responsibilities, the official who proposed his removal quoted from the official position description for the position of Public Vehicle Enforcement Inspector (DS-1801-07) and stated as follows:

In your position as a Hack Inspector you are required to provide "daily enforcement by on-street monitoring of individual public

vehicles for hire operations, for hire driver conduct, public vehicle for hire fleet operations, and other District public vehicle for hire rules and regulations. When assigned by the supervisor, the incumbent has the additional responsibility of inspecting public vehicle for hire companies and association facilities, to examine company records to ensure that policies, practices, and procedures are in compliance with all applicable regulations, when evidence indicates or would tend to either negligent or willful violations.”

The proposing official further described Employee’s duties as follows:

In the position of Public Vehicle Enforcement Inspector you are required to possess a valid driver’s permit, drive in heavy traffic and occasional bad weather, investigate public vehicle for hire fleet facilities (headquarters), and operations, for compliance with DCMR Title 31, prior to receiving or renewing operating authority. As directed, collaborates with agents of governments in neighboring local jurisdictions, the Immigration and Naturalization Service (INS), the Washington Metropolitan Area Transit Commission (WMATC), Metropolitan Police, Airport Police, and other local enforcement agencies relative to public vehicle for hire operations.

Employee described his position as “comparable with parking enforcement personnel.” He notes, however, that “Hack Inspectors are not armed or sworn officers and therefore do not have arrest powers.”

Employee urges that this Office consider that “[t]here has been a genuine effort on [his] behalf to make sure that any question or document requested by the Taxicab Commission has been submitted and full cooperation has been given to the Commission.” He notes also that, at the time he was separated, he had “been in the Government for 6 years and the Taxicab Commission for 3 and . . . never received a reprimand.” He also highlights that the “incident happened off the job.” He contends that “[a] driver’s license revocation and a first offense [this reference is to his conviction for DUI] should not be grounds for dismissal.

Employee’s primary duties required that he drive about the local and neighboring jurisdictions monitoring and evaluating the on-street and in-house activities of for-hire companies. Employee was required to interact with officials of several other transportation and law enforcement agencies. His was a position of great responsibility and trust. To withstand scrutiny, a penalty must be based upon a consideration of relevant factors. *See Employee v. Agency*, OEA Matter No. 1601-0012-82, 30 D.C. Reg. 352 (1983). Employee acted with a sense of responsibility by reporting the events to Agency officials and keeping them apprised as things developed. However, he acted irresponsibly and violated that trust when he committed the acts

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that led to his conviction and the suspension of his license. Further, the suspension of the license rendered him incapable of performing his primary professional responsibilities. His prior clean record and the fact that the incident happened while he was on duty do not mitigate that damage.

Employee's suggestion that Agency should have assigned him duties that did not require a driver's license presumes that he had a right to maintain the same employment even after his own actions rendered him incompetent to perform its duties. He did not. While it was Agency's right to assign Employee other duties for the period during which his license was suspended, it was not Agency's obligation. Agency acted with sound and reasonable managerial judgment in choosing to remove Employee from the position he was no longer competent to perform. The penalty reflects no abuse of discretion and will not be disturbed.

ORDER

It is hereby ORDERED that the removal of Employee is UPHeld.

FOR THE OFFICE:

SHERYL SEARS, ESQ., ADMINISTRATIVE JUDGE

On January 17, 2007, Employee filed a motion for award of attorney fees. Agency filed its opposition to the motion on February 12, 2007, pursuant to OEA Rule 635.1.¹ In its response, Agency did not question the legality of Employee's fee petition, only its specifics. Employee filed her reply to Agency's opposition on February 15, 2007. The record is closed.

JURISDICTION

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

ISSUE

Whether the attorney fee requested is reasonable.

ENTITLEMENT OF EMPLOYEE TO ATTORNEY FEES

D.C. Official Code § 1-606.08 provides that “[An Administrative Judge of this Office] may require payment by the agency of reasonable attorney fees if the appellant is the prevailing party and payment is warranted in the interest of justice.” See also OEA Rule 635.1, *supra* at n.1.

1. Prevailing Party

“[F]or an employee to be a prevailing party, he must obtain all or a significant part of the relief sought. . . .” *Zervas v. D.C. Office of Personnel*, OEA Matter No. 1602-0138-88AF92 (May 14, 1993), __ D.C. Reg. __ (). See also *Hodnick v. Federal Mediation and Conciliation Service*, 4 M.S.P.R. 371, 375 (1980). Employee filed a motion for an award of attorney's fees and a separate compliance motion pertaining to this AJ's determination that Employee was entitled to be placed into an ET-15 Teacher position pursuant to the provisions of Title 5, § 520 of DCMR. Agency conceded that Employee was so entitled, and never asserted that Employee was not in fact the prevailing party. Based on the record of this case, I conclude that Employee is a prevailing party.

2. Interest of Justice

In *Allen v. United States Postal Service*, 2 M.S.P.R. 420 (1980), the Merit System Protection Board (MSPB), this Office's federal counterpart, set out several circumstances to serve as “directional markers toward the ‘interest of justice’ (the “Allen Factors”) - a destination which, at best, can only be approximate.” *Id.* at 435. The circumstances to be considered are:

1. Where the agency engaged in a “prohibited personnel practice”;

¹ OEA Rule 635.1, 46 D.C. Reg. 9320 (1999). Reads as follows: “An employee shall be entitled to an award of reasonable attorney fees, if: (a) He or she is a prevailing party; and (b) The award is warranted in the interest of justice.”

2. Where the agency's action was "clearly without merit" or was "wholly unfounded", or the employee is "substantially innocent" of the charges brought by the agency;
3. Where the agency initiated the action against the employee in "bad faith", including:
 - a. Where the agency's action was brought to "harass" the employee;
 - b. Where the agency's action was brought to "exert pressure on the employee to act in certain ways";
4. Where the agency committed a "gross procedural error" which "prolonged the proceeding" or "severely prejudiced the employee";
5. Where the agency "knew or should have known that it would not prevail on the merits", when it brought the proceeding, *Id.* at 434-35.

This matter began on October 2002, with Employee's separation as a result of the expiration of her Assistant Principal contract. Agency was always aware that Employee was entitled to revert to an ET-15 Teacher position, but did nothing to effect this entitlement, which necessitated Employee filing her Petition for Appeal. Additionally, Agency has not argued that attorney fees are not warranted in the interest of justice. I conclude that Agency's delay in effecting the relief to which Employee was entitled is a manifestation of Allen Factor #4, above. Therefore, I further conclude that an award of reasonable attorney fees is warranted in the interest of justice.

REASONABLENESS OF ATTORNEY FEES

Counsel's submission was detailed and included the specifics of the services provided on Employee's behalf. Employee requested an award of \$74,432.00 in attorney fees for services performed from October 7, 2002 through December 27, 2006. Agency argued that the fee request is unjustified; that the fee petition includes work done before other tribunals and that Employee has not met her burden of proving that she is entitled to her fee request.

A. Hourly Rate

The burden is on the fee applicant to produce satisfactory evidence that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, or reputation. *Blum v. Stenson*, 465 U.S. 886 (1984). The best evidence of the prevailing hourly rate is ordinarily the hourly rate customarily charged in the community in which the attorney whose rate is in question practices. *Save Our Cumberland Mountains v. Hodel*,

857 F.2d 1516 (D.C. Cir. 1988).

The OEA Board has determined that the Administrative Judges of this Office may consider the so-called "Laffey Matrix" in determining the reasonableness of a claimed hourly rate.² The Laffey Matrix, used to compute reasonable attorney fees in the Washington, D.C.-Baltimore Metropolitan Area, was initially proposed in *Laffey v. Northwest Airlines, Inc.*, 572 F.Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4 (D.C. Cir. 1984), *cert. denied*, 472 U.S. 1021 (1985). It is an "x-y" matrix, with the x-axis being the years (from June 1 of year one to May 31 of year two, e.g. 92-93, 93-94, etc.) during which the legal services were performed; and the y-axis being the attorney's years of experience. The axes are cross-referenced, yielding a figure that is a reasonable hourly rate. The matrix also contains rates for paralegals and law clerks. The first time period found on the matrix is 1980-81. It is updated yearly by the Civil Division of the United States Attorney's Office for the District of Columbia, based on the change in the Consumer Price Index for All Urban Consumers (CPI-U) for Washington-Baltimore, DC-MD-VA-WV, as announced by the Bureau of Labor Statistics for May of each year.

The following discussion will focus on the reasonableness of the requested rates *vis a vis* the Laffey Matrix. Employee is asking that Attorney Mercer be compensated at hourly rate of \$370.00 for services rendered from October 7, 2002, through December 16, 2002; \$380.00 00 for services rendered from January 1, 2003, through November 8, 2004, \$390.00 for services rendered from February 15, 2005, through December 18, 2005; \$425.00 for services rendered from January 12, 2006, through December 27, 2006. Employee backs up his hourly rate request with an affidavit of the attorney's education and experience as well as a copy of the Laffey Matrix table for 2003-2007.

In his affidavit submitted with the attorney fees motion, Mr. Mercer states that he has been practicing law since 1974 and has represented clients before state and federal courts, including the Supreme Court, as well as before numerous administrative agencies over the past 33 years. The hours claimed in this matter were expended between October 7, 2002, and December 27, 2006.

According to the Laffey Matrix, a reasonable hourly rate for legal services performed in 2002 for an attorney with more than 20 years experience is \$380.00; while in 2006, it is \$425.00. Since Mr. Mercer's requested hourly rates correspond to those figures, I conclude that it is reasonable.

B. Number of hours expended

Employee lists the hours and the type of work he performed by month and year. Agency registers its opposition to the amounts claimed by listing each specific date and its basis for its objection. While the Agency did not deny that Employee was entitled to some attorney's fees for time expended incidental to this matter, Agency challenged whether the number of claimed hours of legal service time was excessive, in light of Employee's counsel's professional experience and the

² A copy of the Laffey Matrix, complete through June 1, 2002 - May 31, 2007, is attached to this addendum decision.

similarity to other pleadings that counsel has previously prepared and filed with the Office. In each instance, Agency suggested what it believed was a more reasonable legal service time.

I have reviewed the hours claimed, as well as Agency's objections to some of them, and have determined that some of the hours expended were excessive for the degree of difficulty and the amount of legal service time required in the instant matter. I base this determination in significant part upon my comparison of the professional services provided to other clients that counsel of similar experience has represented in this Office against the same Agency, frequently using very similar pleadings, making the same or nearly identical legal arguments which, although ultimately successful for each of their clients, were not unique. I also base my findings on the degree of legal complexity involved in the issues presented; as well as on my own years of experience as a plaintiff's attorney.

Employee's counsel has argued that questioning his charges impugns his integrity and "second-guesses" his legal strategy. However, this matter does not involve an attorney's integrity or his choice of legal strategy; rather, it evolves around the issue of whether counsel has met his burden of proof regarding the issue of whether the amount of attorney fee requested is proper and reasonable.

This Office's determination of whether Employee's attorney fees request is reasonable is based upon a consideration of the number of hours reasonably expended on the litigation, multiplied by a reasonable hourly rate. *Copeland v. Marshall*, 641 F.2d 880 (D.C. Cir. 1980). *See also Hensley v. Eckerhart*, 461 U.S. 424 (1983); *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 (D.C. Cir. 1982). Although it is not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted, the fee application must contain sufficient detail to permit an informed appraisal of the merits of the application. *Copeland, supra*. The number of hours reasonably expended is calculated by determining the total number of hours and *subtracting nonproductive, duplicative, and excessive hours*. [emphasis added] *Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985).

I also note that attorneys with more experience command a higher hourly rate on the reasonable assumption that they expend less time on their tasks as they gain experience and knowledge. Thus where the hours asked for seem excessive in light of the higher hourly rates allowed, I reduce those hours accordingly.

Based on the reasonable assumption that Agency has no objection to the parts of the fee petition it does not specifically mention, I will therefore deal only with the items highlighted by Agency.

October 2002 invoice: \$2,072.00. Amount approved: \$2,072.00.

Because Agency raised no objections, the entire amount is approved.

November 2002 invoice: \$1,572.50 Amount approved: \$1,202.50

Agency opposed the \$370.00 charge incurred on November 6, 2003, because it included drafting an EEOC (Equal Employment Opportunity Commission) complaint, a matter not covered under this Office's (OEA) jurisdiction.

Agency's point is well taken. In *Jenkins v. D.C. Public Schools*,³ this Office ruled that absent any statutory provision expressly granting such authority, this Office has no jurisdiction over the granting of attorney fees for work done before any court or tribunal other than this Office. Additionally, an attorney with more than five years experience should have done his legal research and should know better than to ask attorney fees for work performed in other tribunals.

Because employee's attorney failed to itemize and identify which portion of the charge was incurred for work done for this Office, I cannot decipher what portion of the attorney fee requested improperly includes time spent before other courts. In submitting his fee petition, Mr. Mercer has the duty to provide sufficiently detailed information about hours logged and work done. "Casual after-the-fact estimates of time expended on a case are insufficient to support an award of attorneys' fees. Attorneys who anticipate making a fee application must maintain contemporaneous, complete and standardized time records which accurately reflect the work done by each attorney."⁴ Due to this failure, I therefore deduct \$370.00 from the \$1,572.50 requested.

January 2003 invoice: \$198.00 Amount approved: \$38.00

Agency opposed the \$95.00 charge incurred on January 6, 2003, and the \$95.00 charge incurred on January 31, 2003, because it included EEOC work. Due to the same reasons stated for the November 2003 invoice, I hereby allow only the \$38 incurred for the telephone conference with an OEA judge.

February 2003 invoice: \$1,235.00 Amount approved: \$1,235.00

March 2003 invoice: \$1,178.00 + \$10 parking Amount approved: \$988.00 + \$10 parking

Agency opposed the \$380.00 charge incurred on March 19, 2003; asserting that it should only take 30 minutes, not one hour, to draft and fax a Motion of Enlargement of Time. I have looked at the said Motion and agree; therefore I reduce that particular charge to \$190.00.

April 2003 invoice: \$1,425.00 Amount approved: \$760.00

Agency opposed the April charges; asserting that it should only take at most two hours, not

³ OEA Matter No. J-0050-91AF92, *Opinion and Order* issued March 18, 1994, __D.C. Reg.__().

⁴ *National Association of Concerned Veterans v. Secretary of Defense*, 675 F.2d 1319 at 1327 (1982).

3.75 hours, to discuss and draft a settlement letter with opposing counsel and client. Neither party furnished a copy of the settlement letter. However, since Employee has the burden of proving his/her entitlement to the attorney fee requested and failed to do so, I reduce the time requested to two hours. $\$380.00/\text{hr} \times 2 \text{ hours} = \760.00 .

May 2003 invoice: \$6,175.00 Amount approved: \$5,795.00

Agency opposed the \$1,140.00 charge incurred on May 15, 2003; asserting that it should only take two hours, not three, to review the file and draft a Supplemental Statement of Facts. I have looked at the file and agree; therefore I reduce that particular charge to \$760.00.

June 2003 invoice: \$6,346.00 Amount approved: \$5,206.00

Agency opposed the \$760.00 charge incurred on June 2, 2003; asserting that it included tax issues not before this Office. In addition, the time spent was not itemized. I have looked at the file and agree. I disallowed that item because there is no way for me to determine how much time was devoted exclusively to OEA matters.

Agency opposed the \$380.00 charge incurred on June 12, 2003; asserting that an associate attorney should not be billing at the same rate as Mr. Mercer. Employee's attorney Mr. Mercer concedes that his associate should only be billing at \$170.00 per hour based on her position and experience. Unfortunately, Employee's counsel failed to support even the \$170.00 per hour rate of an associate. He provided no information as to his associate's background and experience. Since he failed to meet his burden, I disallow the June 12, 2003, charge.

July 2003 invoice: \$494.00 Amount approved: \$304.00

Agency's counsel opposed the \$380.00 charge incurred on July 18, 2003; asserting that her phone conversation with Employee's counsel was not extensive. She also asserted that the phone conversation with Tatum's attorney would also not be extensive because of the limited involvement of Tatum's attorney.⁵ I find it hard to believe the two phone calls regarding the back pay issue would take one hour. I therefore allow half an hour and reduce the invoice by \$190.00.

August 2003 invoice: \$475.00 Amount approved: \$475.00

January 2004 invoice: \$2,850.00 Amount approved: \$2,090.00

Agency's counsel opposed the \$760.00 charge incurred on January 5, 2004; asserting that drafting a letter regarding a request for information and settlement issues merits only an hour instead of two. I reviewed the file and agree that the time is excessive. I therefore reduce it to \$380.00.

⁵ This involved another matter that was before this Office.

Agency opposed the \$380.00 charge incurred on January 14, 2004; asserting that the phone conference regarding Record C involved a different legal matter not before OEA. Thus this charge is denied.

February 2004 invoice: \$665.00 Amount approved: \$665.00

April 2004 invoice: \$1,843.00 Amount approved: \$1,463.00

Agency's counsel opposed the \$760.00 charge incurred on April 18, 2004; asserting that two hours is excessive for drafting an invoice. I have reviewed the file and agree. The charge is reduced to one hour.

May 2004 invoice: \$190.00 Amount approved: \$190.00

June 2004 invoice: \$380.00 Amount approved: \$380.00

July 2004 invoice: \$38.00 Amount approved: \$38.00

August 2004 invoice: \$266.00 Amount approved: \$266.00

November 2004 invoice: \$190.00 Amount approved: \$190.00

February 2005 invoice: \$780.00 Amount approved: \$780.00

May 2005 invoice: \$877.50 Amount approved: \$0.00

Agency opposed the \$97.50 charge incurred on May 11, 2004, and the \$780.00 charge incurred on May 12, 2004. Agency asserts that the time claimed was before the D.C. Small Claims Court. Although Employee claims that the small claims is inextricably linked to her OEA appeal, I repeat that this Office does not have the statutory authority to award attorney fees for tribunals other than OEA. Thus this charge is denied.

June 2005 invoice: \$97.50 Amount approved: \$0.00

Agency opposed the \$97.50 charge because that time claimed was before the D.C. Board of Appellant Appeals. Thus this charge is denied.

July 2005 invoice: \$663.50 Amount approved: \$0.00

Agency opposed this charge because the time claimed was before other courts. Thus this charge is denied.

September 2005 invoice: \$1,170.00 Amount approved: \$975.00

Agency opposed the \$195.00 charge incurred on September 27, 2005, because the time claimed was regarding Social Security issues. Thus this charge is denied.

October 2005 invoice: \$3,744.00 Amount approved: \$2,632.50

Agency opposed the charges for October 10, 11, 18 of 2005, because the time claimed was before other courts. Thus those charges are denied.

November 2005 invoice: \$4,575.00 Amount approved: \$4,185.00

Agency opposed the \$390.00 charge incurred on November 18, 2005, because the issues worked upon on that date were irrelevant and immaterial. I reviewed the file and determined that Agency was correct. Thus that charge is denied.

December 2005 invoice: \$3,120.00 Amount approved: \$3,120.00

January 2006 invoice: \$2,528.75 Amount approved: \$510.00

Agency opposed the \$1,381.25 charge incurred on January 25, 2006, because simply drafting a pretrial settlement statement with no new information should not take 3.25 hours. I agreed and reduce it to one hour or \$425.00.

Agency also opposes the \$1,062.50 charge incurred on January 17, 2006, because it included work done regarding the loss of equity due to the forced conveyance of property. This is not an OEA matter and because there is no way for me to determine which portion is devoted to the OEA matter, the whole item is disallowed.

February 2006 invoice: \$1,827.50 Amount approved: \$191.25

Agency opposed the \$1,636.25 charges incurred on February 3, 6, 8, 13, 28 of 2006, because these are all unrelated to the OEA matter. Due to statutory constraints, I agree and disallowed them.

March 2006 invoice: \$2,845.00 Amount approved: \$2,051.25

Agency opposed the \$793.75 charges incurred on March 17 and 22 of 2006, because it commingled work done on outside matters. I agree and disallowed them.

April 2006 invoice: \$2,188.75 Amount approved: \$191.25

Agency opposed the \$1,062.50 charges incurred on April 26, 2006, because 2.5 hours is excessive for drafting a letter and a phone conference with Judge Jackson. I agree and cut it down to an hour or \$425.00.

May 2006 invoice: \$872.25 Amount approved: \$872.25

June 2006 invoice: \$11,623.75 Amount approved: \$9,588.75

Agency opposed the \$1,912.50 charges incurred on June 28, 2006, and the \$1,822.50 charges incurred on June 29, 2006, because 14.75 hours had already been expended in the drafting of the status hearing memo at this point. I agree and reduce the 4.5 hours of June 28, and 4.5 hours of June 29, to 2 hours for June 28, and 2 hours for June 29, 2006. This amounts to \$850.00 for each of those dates.

July 2006 invoice: \$1,338.75 Amount approved: \$807.50

Agency opposed the \$318.75 charge incurred on July 26, 2006, and the \$212.50 charge incurred on July 28, 2006, because they involved work outside OEA matters. I agree and disapprove them.

August 2006 invoice: \$555.25 Amount approved: \$555.25

September 2006 invoice: \$1,232.50 Amount approved: \$1,232.50

November 2006 invoice⁶: \$743.75 Amount approved: \$743.75

December 2006 invoice: \$6,056.25 Amount approved: \$2,231.25

Agency opposed the charges incurred on December 6, 7, 8 and 27 of 2006, because they involved non-OEA matters. Thus, \$2,550.00 is disallowed.

Agency also opposes the \$1,275.00 charge incurred on December 26, 2006 as excessive for the drafting of a letter regarding COBRA calculations and a motion for extension of time, as well as a phone conference with a creditor. The phone conference with a creditor is not an OEA matter, despite Employee's assertion that it is tied to her problems with Agency. Because there is no way for me to determine which portion is devoted to the OEA matter, the whole item is disallowed.

To summarize, I find that \$20,407.00 sought in attorney fees is not substantiated. In conclusion, I therefore find that Employee is entitled to the reduced grand total of allowable attorney fees of \$54,025.00 and the parking cost of \$10.00 incurred on March 2003.

⁶ Instead of totaling the November 2006 charges, Employee lumped together the charges for November and December to total \$6,800. For consistency, I divided the charges for those months.

ORDER

It is hereby ORDERED that Agency pay Employee, within thirty (30) days from the date on which this addendum decision becomes final, \$54,035.00 in attorney fees and costs.

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge

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 the performance of their duties are placed in a limited duty assignment not to exceed 180 days. Prior

¹ National Center for Chronic Disease Prevention and Health Promotion.

² Ibid.

³ Transcript, p. 79.

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".

⁴ 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

“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

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. ____ ().

⁶ Transcript, page 67.

ORDER

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

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)
In the Matter of:)
)
HERMAN HUNTER	) OEA Matter No. 1601-0050-05
Employee)
)
v	) Date of Issuance: June 1, 2007
)
D.C. DEPARTMENT OF	) Muriel A. Aikens-Arnold
TRANSPORTATION	) Administrative Judge
Agency)
_____)

Jonathan L. Gould, Esq., Employee’s Representative
 Ross Buchholz, Esq., Assistant Attorney General for the District of Columbia

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On March 12, 2005, Employee, a Risk Management Specialist, filed a Petition for Appeal of Agency’s action to remove him from his position effective April 15, 2005 for: 1) Failure to comply with reasonable and official instructions; and 2) Failure to assist and/or provide information during an ongoing investigation of misconduct. On May 23, 2005, this Office notified Agency regarding this appeal and instructed Agency to respond within thirty (30) days. After an extension was granted by this Office, Agency filed its Answer to Employee’s Petition For Appeal (PFA).

This matter was assigned to this Judge on October 4, 2005. On December 19, 2005, an Order Scheduling a Prehearing Conference on January 17, 2006 was issued.¹ On March 6, 2006, an Order Convening a Hearing was issued scheduling said hearing on April 14, 2006. The hearing was conducted as scheduled and completed on May 26, 2006. On August 29, 2006, an Order Closing the Record was issued giving both parties an opportunity to submit closing

¹ On 12/30/05, Employee requested a postponement to, among other things, seek new counsel as his representative withdrew from this matter. That request was granted and the prehearing conference was rescheduled and held on 2/21/06 with Jonathan L. Gould, Esq. representing Employee.

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statements no later than October 16, 2006.² Closing arguments were submitted and the record was closed effective at close of business on November 13, 2006.³

JURISDICTION

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

ISSUES

- 1) Whether the Agency action was taken for cause; and
- 2) If so, whether the penalty was appropriate under the circumstances.

FINDINGS OF FACT

Statement of the Charges

By memorandum dated March 14, 2005, Employee was notified of a proposal to remove him from his position of Risk Management Specialist in the District Department of Transportation (DDOT) for Insubordination. Employee, on two (2) occasions, failed to report to the Office of General Counsel, as instructed, for an interview regarding alleged misconduct of a DDOT employee and failed to provide proper certification/justification as to his failure to do so. He was further charged with failure to provide information or answer questions regarding said investigation. His actions were in violation of the District Personnel Manual (DPM), Chapter 18, § 1803.10 which states "An employee shall not interfere with, or obstruct an investigation by a District or federal agency of misconduct by another District employee or by a person dealing with the District." On April 8, 2005, a final decision was issued accepting the recommendation of removal from the Hearing Officer and, therefore, upholding the proposed removal action.⁴

Agency's Position.

Agency contends that it has met its burden of proof that "Employee was insubordinate in refusing to follow a lawful order to cooperate in an investigation into employee misconduct in

² The written transcripts were delayed approximately 3 months by the reporting service due to staffing shortages.

³ Agency filed several requests for additional time, for business reasons, which were granted.

⁴ See Joint Exhibits (hereinafter referred to as "JE") 1 and 2. The Hearing Officer conducted an administrative review and submitted a written report to the deciding official.

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the risk management area.” Employee’s initial refusal to be interviewed “at the advisement of his attorney . . . and his characterization of Agency’s investigation as . . . witch hunts to persecute another employee(s) demonstrate his willful and intentional disregard of Agency’s lawful order that he answer questions in the course of an investigation.”⁵

Agency further asserts that Employee’s claim that Agency’s order was illegal because he was on medical leave and physically unable to comply lacks merit. Employee never requested an accommodation for medical reasons; and was “only bedridden from mid to late April through mid May 2005” which “directly contradicts” his prior sworn statement contained in the Amended EEOC Charge (that he was released to return to work on March 14, 2005).⁶

Employee’s testimony that he relied upon his attorney to respond to Agency’s second request for an interview does not mitigate or excuse his failure to respond. Last, Employee’s testimony that his wife sent a letter on his behalf, to Mr. Tangherlini requesting an accommodation, is not supported by credible evidence that it was sent by certified mail or received by the addressee. In sum, Employee committed the charged acts of misconduct and Agency should be given proper deference in its choice of removal as the appropriate penalty.⁷

Employee’s Position.

Employee contends that, under the circumstances of this case, removal was “unreasonable and overly severe” as he was not insubordinate in failing to report to an interview while he was absent on medical leave. He was treated for anxiety and related complications, such as hypertension and aggravation of his arthritis and osteoporosis. “DDOT could not require him to come to work to be interviewed while he was physically unable to do so and was out on medical leave . . . [I]n the alternative, the Judge should mitigate the removal to a warning or, at worst, a short suspension.”⁸

Employee first argues that Agency failed to prove it had cause to remove Employee as he had legitimate medical documentation for his absences from work and the interview. “[U]nder these circumstances, DDOT’s charge of insubordination was equivalent to the charge of absenteeism without leave (AWOL) which can never constitute cause for removal when the employee has supplied medical justification for his absence.” *Hines v. D.C. Department of Transportation*, OEA Matter No. 1601-0116-05 (August 22, 2006).

Second, Employee contends that removal was an unreasonable and excessive punishment

⁵ See Agency’s Closing Brief (hereafter “ACB” at pp. 6-7 and JE 5.

⁶ See JE 5, Employee’s 2/14/05 response and ACB at p. 8.

⁷ See ACB at p.9.

⁸ See Employee’s Closing Statement and Post Hearing Memorandum (hereinafter referred to as “ECS”) at pp. 1-2.

in view of Employee's seventeen (17) years' service with no prior discipline, and his past record of participating and cooperating in other agency investigations. Further, Employee did not intentionally fail to respond to Ms. Gregory's second interview request based on his mistaken belief that the attorney who initially represented him, had contacted Ms. Gregory in a timely manner.⁹

Summary of Material Testimony

Daniel M. Tagherlini (former Director, DDOT)

Mr. Tagherlini, the deciding official, testified that he reviewed the Hearing Officer's report and the facts that had been presented and concluded that removal was the appropriate penalty based on the circumstances herein. Employee's unwillingness to participate in an investigation or make himself available to answer questions, after being given multiple opportunities to respond, sends the wrong message to other employees and makes it difficult to maintain the highest level of order (within the agency) and public trust. The Hearing Officer did not recommend alternative sanctions and there were no comments from Employee regarding the materials provided to him. Despite Employee's tenure, Mr. Tagherlini saw no rehabilitative potential in alternative discipline.¹⁰

On cross examination, Mr. Tagherlini testified that he didn't personally receive a letter, from Employee's attorney, responding to the issues in the proposed removal prior to issuing his decision; but, he now knows it exists. The ongoing investigation involved improper use of Government vehicles, improper use of overtime and allegations of harassment related to the staff and operation of Risk Management. However, Mr. Tagherlini was not free to publically discuss the details of said investigation.¹¹ Mr. Tagherlini testified that he did not recall being aware that Employee made a request for accommodation prior to the proposed removal or his return to work.¹²

On redirect, Mr. Tagherlini testified that Employee did not request any accommodation to attend the interview as requested. He further testified that there was no documentation reflecting Agency's willingness to accommodate Employee because he did not know that was an issue. Nevertheless, it was Agency's custom and practice to respond and address all needs if they are raised.

⁹ See ECS at pp. 8-9. The previous attorney is identified as Mindy Farber, who Employee assumed had contacted Brender Gregory, Chief of Staff, albeit late.

¹⁰ See Transcript of hearing held on 4/14/06 (hereinafter referred to as "TR-VOL.1") at pp. 36-40 and JE1.

¹¹ See TR-VOL.1 at pp. 43-46.

¹² See TR-VOL.1 at p. 58.

Natalie Jones-Best (Emergency Preparedness Risk Manager)

Ms. Jones-Best testified that she supervised Employee and initiated the removal action against him for failing to cooperate in an investigation when required to do so. Her review of related documentation reflected that Employee refused to come in to assist in the investigation and did not communicate a reason why he could not come in. Ms. Jones-Best next testified that, "I think towards the end, it may have been at the advice of his attorney . . ." ¹³

On cross-examination, Ms. Jones-Best testified that, at the time she proposed removal, she had reviewed letters "[N]ot necessarily in support of accommodation . . . either from the physician or his conversation with his physician . . . every couple of weeks or every month . . . a letter saying: I'm not able to come back to work based on my doctor's advice." ¹⁴

On redirect-examination, this witness testified that, there was nothing in Employee's file (relative to the interview) that "led me to believe or supported the fact that there needed to be a special accommodation . . . the letter . . . specifically just said that Mr. Hunter could not . . . come to work due to . . . medical reasons." There was no medical documentation in his file reflecting that he could not be interviewed. This witness further stated that Employee requested a medical accommodation on the job " . . . in his first letter, which would have been February 25th . . ." ¹⁵

Brender Gregory (Chief of Staff)

Ms. Gregory testified that she became aware of an investigation of misconduct in her area in the Fall of 2004, after which she sent Employee a letter (dated February 11, 2005) advising him to cooperate in that inquiry and to report for an interview on February 18, 2005. She received a response (dated February 14, 2005) from Employee refusing to cooperate with the official investigation under the advice of his attorney. Ms. Gregory next testified, "I didn't get from this letter that he had any physical malady that would prohibit him from speaking or answering questions . . . the response we got was that basically, I'm insulted and I'm perplexed and I'm not coming." ¹⁶ After sending the second letter (February 25, 2005) to Employee, advising him to appear for an interview in accordance with DPM regulations, no response was received. ¹⁷

¹³ See TR-VOL.1 at pp. 64-67 and JE 2.

¹⁴ See TR-VOL.1 at pp. 70-71.

¹⁵ See TR-VOL.1 at p. 76. There is no evidence in the record regarding said request and the witness was unsure of the date.

¹⁶ See TR-VOL.1 AT PP. 90, 92, 94; 100-101; JE 4; and JE 6, which reflects that Ms. Gregory received Employee's response on 2/17/05.

¹⁷ See TR-VOL.1 at pp. 107-108; and JE 6. DPM regulations in Chapter 18 prohibit an employee from interfering with an official investigation.

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On cross examination, Ms. Gregory testified that, prior to his medical leave, Employee assisted in other investigations involving employees in the Risk Management area. Prior to sending the two interview letters, she was aware Employee was on sick leave but, did not receive any request for medical accommodation. Nor did she recall reviewing any medical documentation or receiving any request for accommodation between February 25, 2005 and issuance of the proposed removal on March 14, 2005. Last, Ms. Gregory stated that she spoke with Employee's attorney [Mindy Farber] sometime between March 14 and April 15, after the specified time frame and referred her to the instruction in the letter [proposed removal] and advised that the response should have gone to the Disinterested Designee.¹⁸

Herman Hunter (Employee)

Employee testified that he received two (2) letters from Ms. Gregory, to attend interviews, on different dates, but was physically unable to attend either of those interviews due to medical complications for which he had been on medical leave since December 3, 2004. Specifically, he "had uncontrolled high blood pressure. [M]y rheumatoid arthritis, the joints were swelling and preventing me from -- I was pretty much bedridden during the entire time. I was not able to physically move around and to go to the interview."¹⁹ On February 25, 2005, Employee's doctor released him to return to work on March 14, 2005, with restrictions. However, based on further visits to his doctor, Employee's leave was extended until May 2, 2005.²⁰

Relative to his February 14, 2005 response regarding his failure to attend the interview on February 18, 2005, Employee testified (on cross examination) that he was bedridden when his previous attorney (Mr. Myers) came to his home and drafted said response for Employee's signature. Employee confirmed that said response reflects, *inter alia*, that he would not be interviewed regarding a DDOT employee due to a conflict of interest, *not* that he was bedridden ". . . but it does state that I was out [on leave]." Contrary to that testimony, Employee further testified there was no conflict of interest. Rather, his failure to participate in the interview was due to his belief that "DDOT did not have the authority to request me to do it, only the Office of

¹⁸ See TR-VOL.1 at pp. 113-114, 117-120; 131-133.

¹⁹ See Transcript of hearing on 5/26/06 (hereinafter referred to as "TR-VOL.2") at pp. 31, 47-49; JE 4; JE 5, and JE 6. JE 5 is Employee's 2/14/05 response stating that, on the advice of his attorney [who was Mr. Myers], he would not come in to answer any inquiries, regarding a DDOT employee, due to a conflict of interest in two complaints filed with Agency.

²⁰ See TR-VOL.2 at pp. 50-51; Employee Exhibit (hereinafter referred to as "EE") 5 includes a 3/15/05 request for advanced sick and annual leave from 3/14/05 until 3/28/05, which was disapproved on 3/29/05; a medical certificate dated 3/14/05 which states that Employee will be able to return on 3/28/05; and a 3/14/05 letter from Employee requesting leave without pay (LWOP) until he is able to return to work; EE 14 (medical certificate dated 3/25/05 extending his leave until 4/8/05); and EE 15, a medical certificate dated 4/7/05 extending his leave until 5/2/05).

Risk Management.”²¹

Nevertheless, Employee testified that he did not report to the second scheduled interview “[B]ecause I was still bedridden and still physically unable to do that . . . from December 2004 to May 2005.” When confronted with various documents regarding the expectation that he was able to return to work on March 14, 2005, Employee maintained his previous position, but confirmed that he had no medical documentation reflecting that he was bedridden and physically incapable of answering questions, specifically, on February 18, 2005 and March 7, 2005.²²

When questioned about the March 14, 2005 return to work date, Employee stated that his doctor asked him if he had someone to drive him to work “[B]ecause of the medications that I’m taking are narcotics . . .” Next, Employee abruptly changed his testimony stating “[H]e tells me don’t go to work. Don’t go to work” notwithstanding his prior testimony that his doctor gave him conditional clearance to return to work on March 14, 2005 and that he sent a letter to Mr. Tangherlini, in advance of his return, requesting reasonable accommodations.²³

ANALYSIS AND CONCLUSIONS

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 action herein is under the Mayor’s personnel authority. Said regulations were published by the D.C. Office of Personnel (DCOP) published at 47 D.C. Reg. 7094 *et seq.* (September 1, 2000).²⁴

In an adverse action, this Office’s Rules and Regulations provide that an agency must prove its case by a preponderance of the evidence. “Preponderance” is defined as “that degree of

²¹ See JE 5; TR-VOL.2 at pp. 76-87. Employee differentiates the DDOT and the Office of Risk Management; however, he admits (on cross examination) that he signed off on performance evaluations prepared by DDOT supervisors.

²² See TR-VOL.2 at pp. 99-108.

²³ See EE 4; and TR-VOL.2 at pp. 109- 113. Employee’s letter, dated 3/11/05, sought: 1) a low stress and light duty environment, including restricted or no driving responsibilities; 2) the use of handicapped parking; and 3) flexible work environment, ie. early and late arrivals as required by his medical condition.

²⁴ Section 1603.3 set forth the definition of cause which, in pertinent part, is as follows: [A]ny 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. Insubordination is included in the definition of cause.

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).

Based on a review of the entire record, this Judge concludes that Agency met its burden of proof by a preponderance of the evidence. Agency’s witnesses presented persuasive testimony that Employee was insubordinate in his failure to cooperate in the investigation of misconduct of another District employee. Conversely, Employee’s testimony and written submissions were full of inconsistencies and, therefore, untrustworthy.

First, Employee testified that he was “bedridden” and physically unable to attend either of the required interviews; whereas, his initial written response, dated February 14, 2005, reflected his refusal to be interviewed due to a conflict of interest. Contrary to that statement, Employee further testified there *was* no conflict of interest. Instead, he distinguished DDOT as “not having the authority” to direct him to be interviewed, even though he admitted signing off on performance evaluations prepared by DDOT supervisors.²⁵

Second, Employee did not present any evidence to support the fact that he was so physically ill, that he was unable to leave his bed, much less his home; or, in the alternative, to request an accommodation such as a telephonic interview. Moreover, in a letter dated May 12, 2005, Employee’s doctor stated that he (Employee) was “not bedridden until mid to late April” and that a previous medical note “was not meant to imply that the patient was bedridden for the course of time from 12/2004 until the present.”²⁶ That document was presented and admitted as Employee Exhibit 16.

Third, Employee’s initial response, referenced above, stated in part, “. . . upon my return to work, at my attorney’s counsel, I will not attend any meetings or interviews not directly related to the performance of my duties.” Yet, he testified (on cross-examination) that he was more concerned with his health problems than anything related to his job.²⁷

Fourth, more conflicting testimony occurred when Employee stated that his doctor gave him conditional clearance to return to work on March 14, 2005. Then, Employee abruptly changed his story and asserted that his doctor told him *not* to go to work. Nevertheless,

²⁵ Employee claimed that he worked under the Office of Risk Management, not DDOT. That assertion is not plausible considering a number of factors: (a) Employee’s letter of appointment, dated 9/18/02, to the Risk Management Specialist position; (b) his signed Appointment Affidavit dated 10/7/02; and (c) his Personnel Action Form 1, all of which reflect DDOT as the employing agency. Moreover, when he challenged his placement in the wrong evaluation system, DDOT corrected their mistake; and Employee testified that he was paid through DDOT (See TR-VOL.2 at p.62).

²⁶ See EE 16.

²⁷ See JE 5; and Tr-VOL. 2 at p. 92.

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Employee claimed to have sent a letter, dated March 11, 2005, to Mr. Tangherlini requesting reasonable accommodations, in expectation of his return to work.²⁸

Last, uncontested testimony by Ms. Gregory regarding Employee's prior cooperation in other investigations involving employees in the Risk Management area, puzzles the Judge as to why he refused to cooperate this time. Employee's assertion that he did not intentionally fail to respond to the second interview letter based on his assumption that his previous attorney already did so, in a timely manner, is not a valid excuse. Employee remains personally responsible for monitoring the progress of his case. As demonstrated by his behavior, he did not care enough to do.²⁹ Based on the record, this Judge finds that Employee's failure to comply with official instructions and failure to assist and/or provide information during an ongoing investigation was deliberate and cannot be tolerated.

Whether the Penalty Was Appropriate Under the Circumstances.

When assessing the appropriateness of the 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. 1915, 1916 (1985).

An agency is entitled to expect its employees to respect the authority of supervisors as well as rules and regulations. Employee's insubordinate attitude interfered with Agency's investigation and, therefore, violated DPM regulations for which he was warned of the possibility of further action. In spite of Employee's length of service and lack of prior discipline, a lesser penalty would send the wrong message to other employees who may choose to be uncooperative in Agency investigations or fail to otherwise follow official instructions. Moreover, Employee's inconsistent testimony was considered a significant factor.

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Based on the totality of circumstances, this Judge finds no reason to disturb the penalty which was within the parameters of reasonableness, was not an error of judgment, and should be upheld.

²⁸ See footnote #23.

²⁹ See footnote #9.

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ORDER

It is hereby ORDERED that Agency's removal is UPHELD.

FOR THE OFFICE:

MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:
NELSON VALDES
Employee
v
METROPOLITAN POLICE
DEPARTMENT
Agency
)
)
) OEA Matter No. 1601-0009-04
)
) Date of Issuance: May 25, 2007
)
) Muriel A. Aikens-Arnold
) Administrative Judge
)
)

Harold M. Vaught, Esq., Employee's Representative
Kevin J. Turner, Esq., Assistant Attorney General, D.C.

INITIAL DECISION

INTRODUCTION AND BACKGROUND

On November 12, 2003, Employee, a Detective, Grade II, filed a Petition for Appeal of Agency's action to remove him effective October 17, 2003 for: 1) Conduct Unbecoming an Officer; and 2) Conviction. On December 10, 2003, this Office notified Agency regarding this appeal and instructed Agency to respond thereto within thirty (30) days. Agency so responded.

This matter was assigned to this Judge on September 24, 2004. On December 6, 2004, an Order Scheduling a Prehearing Conference on January 18, 2005 was issued.1 On February 17, 2005, an Order to Stay Proceedings, in this matter, pending disposition of an appeal on Employee's criminal conviction before the U.S. Court of Appeals, D.C. Circuit, was issued.2 On November 15, 2005, this Judge issued an Order directing the parties to report the status of the appeal in order to update the record in this matter.3

On March 10, 2006, Employee's Counsel filed notice that the Federal Court had issued a

1 On 1/11/05, an Order to Continue Prehearing Conference was issued (pursuant to a joint request by the parties) rescheduling said conference on 2/18/05.

2 The parties represented that the instant adverse action was based, in part, on said criminal conviction.

3 On 11/23/05, the parties filed a joint statement advising that oral argument was heard on 11/1/05 in the U.S. Court of Appeals.

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decision which resolved the criminal conviction in Employee's favor; and requested placement of this matter back on the calendar of this Office. Pursuant to that request, this Judge scheduled a status conference on May 26, 2006 to discuss further proceedings in this matter.⁴ In response to the Judge's query regarding Employee's position, he advised: 1) that he desired a review of Agency's action based on the record; and 2) that Agency failed to comply with the "55-day rule."

On June 15, 2006, a Briefing Schedule was issued directing the parties to file their respective procedural arguments regarding the "55-day rule" no later than August 14, 2006.⁵ The parties, thereafter, filed their respective briefs and the record closed effective September 15, 2006.⁶ On February 5, 2007, an Order and Briefing Schedule was issued. Employee was directed to file his brief regarding the merits of Agency's action no later than March 9, 2007; while Agency was given an opportunity to respond no later than April 9, 2007.⁷ Employee did not file a Brief; nor did Agency. The record is closed.

JURISDICTION

This 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 just cause; and
- 2) If so, whether the penalty was appropriate under the circumstances.

⁴ Due to the unavailability of Employee's Counsel on 5/26/06, this Judge conducted a teleconference with the parties on 5/12/06 to inquire about Employee's current position in view of the Court decision. Employee previously requested a review of this matter based on the record. As a result of the teleconference discussion, Employee was directed to file a written response addressing three (3) issues: 1) whether or not Employee's prior request for a review of the record has changed; 2) if so, whether Employee requests an evidentiary hearing; and 3) if Employee requests an evidentiary hearing, the factual disputes must be identified, along with prospective witnesses and the relevancy of their testimony.

⁵ See Article 12, Discipline, Section 6 of the collective bargaining agreement between Agency (MPD) and the Fraternal Order of Police (FOP) which reads, in pertinent part, "[T]he employee shall be given a written decision and the reasons therefore no later than fifty-five (55) days after the date the employee is notified in writing of the charges or the date the employee elects to have a departmental hearing, where applicable . . ." The parties agreed to bifurcate the issues in order to initially resolve the procedural issue.

⁶ The Judge reopened the record, on 9/7/06, in accordance with OEA Rule 631.1 to grant Employee's request to file a reply to Agency's Opposition to Employee's Appeal since Agency's brief.

⁷ This Judge concluded that Agency did not violate the 55-day rule and directed the parties to file briefs regarding their respective positions.

PROCEDURAL HISTORY AND STATEMENT OF CHARGES

By memorandum (Amended Notice of Proposed Adverse Action) issued April 3, 2003, Employee was notified of a proposal to terminate his employment based on the following misconduct:

- Charge No. 1: 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 Section 1603 of the D.C. Personnel Manual.
- Specification No. 1: In that on July 2, 1999, you distributed powder cocaine to Sergeant Michael Thornton, an undercover agent for the Metropolitan Police Department, while inside the MCCXXVIII Club located at 1223 Connecticut Avenue, NW.
- Specification No. 2: In that on July 30, 1999, you distributed powder cocaine to Sergeant Michael Thornton, an undercover agent for the Metropolitan Police Department, while inside the MCCXXVIII Club located at 1223 Connecticut Avenue, NW.
- Specification No. 3: In that on March 24, 2001, you accepted \$200.00 from an FBI confidential source to obtain and disseminate confidential information from a restricted law enforcement database.
- Specification No. 4: In that on March 31, you accepted \$100.00 from an FBI confidential source to obtain and disseminate confidential information from a restricted law enforcement database. Your actions during the above dates were in violation of General Order Series 1202, Number 1, Part I-B-12, as well as in violation of your official duties as a Metropolitan Police Officer.
- Charge No. 2: 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 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. This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.

Specification No. 1: In that on May 2, 2001, you were indicted by the United States Court for the District of Columbia Grand Jury on three (3) Counts of "Bribery" with the lesser-included charge of "Gratuities", 18 U.S.C. Section 201 (b), in violation of General Order Series 1202, Number 1, Part I-B-7.

Specification No. 2: In that on October 11, 2002, you were found "Guilty of three (3) Counts of Felony Gratuities", U.S.C. Section 201 (b), in violation of General Order Series 1202, Number 1, Part I-B-7.⁸

On September 16, 2003, Assistant Chief Shannon P. Cockett issued a decision, based on consideration of the evidence of record, finding Employee guilty of all charges and specifications and imposing removal as the penalty for Employee's misconduct. Chief Cockett found that Employee chose a standard of behavior that was unacceptable and contrary to the expectations of the community, as well as showed disregard for the responsibilities and standards of conduct he accepted as a law enforcement officer. On October 6, 2003, Chief of Police Charles H. Ramsey affirmed the removal effective October 17, 2003, based, in part, on Article 12, Section 10 of the collective bargaining agreement which "allows the Department to take administrative action against a member even if he has been acquitted of a criminal charge." Further, "[T]he termination is warranted since a preponderance of the evidence supports the allegation that Detective Valdes engaged in criminal activity."⁹

ANALYSIS AND CONCLUSIONS

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 action herein is under the Mayor's personnel authority. Such regulations were published at 47 D.C. Reg. 7094 *et seq.* (September 1, 2000).¹⁰ Here, Employee engaged in criminal activity

⁸ See attachment to Employee's PFA. The remainder of the proposed notice provided Employee's right to request a departmental hearing, rights to representation, to offer evidence and witness names, and to submit any response to the Director, Human Services Section.

⁹ Chief Ramsey responded to a Step 2 grievance appeal filed 9/26/03 on Employee's behalf. See Agency Answer filed 1/8/04 (hereinafter referred to as "AA") at Tabs B and C.

¹⁰ Section 1603.3 set forth the new definition of cause which, in pertinent part, is as follows: "... cause means a conviction . . . of a felony . . . A conviction of another crime (regardless of punishment) at any time . . . when a crime is relevant to the employee's position, job duties, or job activities . . . any on-duty or employment-related act or omission that the employee knew or should have known is a violation of law; any on-duty or employment related act or omission that interferes with the efficiency or integrity of

which constituted cause to initiate adverse action.

In an adverse action, this Office's Rules and Regulations provide that an 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).

Based on the evidence of record, Employee violated General Order Series 1202, Number 1, Parts I-B-7 and I-B-12 of Agency's regulations (see preceding Charges numbered 1 and 2). Relative to Charge numbered 1, Employee disputes the distribution of powder cocaine and claims that his acquittal was based on the lack of credible witness testimony. Yet, credible testimony can only be properly weighed and evaluated, along with other evidence, by the trier of fact.¹¹ Since Employee withdrew his request for a Police Trial Board hearing, there was no opportunity for testimony to be heard and credibility determinations made at the agency level. Likewise, this Judge has not had an opportunity to hear witness testimony and to make credibility determinations. Moreover, Agency's internal investigation reflects that the two (2) drug transactions were monitored using concealed audio recording equipment as well as FBI undercover agents, in addition to Sergeant Thornton, who Employee claims was *not* a credible trial witness. Based on the preponderance of evidence standard, Agency officials asserted that Employee committed said offenses.¹² This Judge agrees and, therefore, concludes that Agency met its burden of proof regarding Charge No. 1.

Based on the evidence of record, this Judge concludes that Agency also met its burden of proof relative to Charge No. 2. Employee's belief that reversal of his conviction exonerates him is misplaced.¹³ Although Employee's conviction for "receipt of illegal gratuities" was reversed based on the lower court's erroneous interpretation of the statute, he does *not* dispute that he disclosed driver's license and warrant information obtained from "a government data base."¹⁴ In

government operations; and any other on-duty or employment related reason for corrective or adverse action that is not arbitrary or capricious."

¹¹ See *Stevens Chevrolet, Inc. v. Commission on Human Rights*, 498 A.2d at 440-450 (D.C. 1985) where the Court emphasized the importance of credibility evaluations by the individual who sees the witness "first-hand."

¹² See Final Investigative Report and Recommendation for Adverse Action, dated 12/30/02, located in AA at Tab J. The standard of proof in a criminal proceeding is "beyond a reasonable doubt" (entirely convinced; satisfied to a moral certainty), which is a higher standard than the "preponderance of evidence" standard that is required in an administrative matter. *Black's Law Dictionary*, Fifth Edition.

¹³ Agency's regulation in General Order Series 1202, Number 1, Part I-B-7 reads, in part, "Conduct unbecoming an officer [includes] . . . any criminal offense . . . in which the member . . . 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."

¹⁴ See AA at Tabs H (Motion for New Trial and/or Judgment of Acquittal) and K (Department

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fact, Employee asserted, *inter alia*, an “entrapment” defense when he was criminally charged with disclosing confidential information from a restricted law enforcement database and accepting money therefore.¹⁵ Further, the Court stated, in part, “. . . one or more of Valdes’ disclosures may have been unethical, sanctionable , or even criminal independently” of the statute and that “. . . disclosure of an outstanding arrest warrant might have an indirect effect on its execution . . .” As a detective, who was authorized access to a confidential department database in the performance of his duties, Employee’s acceptance of money for said information constitutes total disregard for the responsibilities entrusted to him.

The agency’s burden is met when an employee admits to the factual allegations underlying the charges. Notwithstanding Employee’s admission, in this instance, Agency’s internal investigation documented the aforesaid activities through such means as, consensual telephone calls and face-to-face meetings with an FBI informant, which supported said charge by a preponderance of the evidence.¹⁶

Whether the Penalty Was Appropriate Under the Circumstances.

When assessing the appropriateness of the 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. 1915, 1916 (1985).

memorandum dated 10/15/02); also Tab J, attachment 9, U.S. District Court for the District of Columbia, Grand Jury Indictment which reflects, *inter alia*, that Employee was authorized to use the Washington Area Law Enforcement System (WALES), a computerized database (restricted to law enforcement personnel) used by the Department and other law enforcement agencies to store and retrieve information about individuals, including, but not limited to, arrest warrant files, and driver/vehicle information. WALES also interfaces with a nationwide system containing millions of records regarding persons and property as well as criminal records of over 24 million people. The use of information obtained through WALES for other than law enforcement purposes is prohibited by federal regulations.

¹⁵ See footnote 11; and Employee statement dated 7/23/03 in AA at Tab F. On 2/24/06, the U.S. Court of Appeals for the District of Columbia Circuit reversed Employee’s conviction, under 18 U.S.C., Section 201 (c)(1)(B) of three counts of receipt of illegal gratuities “for or because of an official act” and noted that “[S]ave for information about the non-existence of an arrest warrant . . . the information was, according to uncontradicted testimony, publically available.” The Court found, *inter alia*, that Agency “failed to show that the acts for which Valdes received compensation were official acts within the meaning of Section 201.”

¹⁶ See AA at Tab J.

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Here, Employee's misconduct undermined the trust and confidence needed to warrant his retention. Employee violated a known duty of confidentiality concerning agency records, as well as nationwide law enforcement information. His involvement in the distribution of illegal drugs and the acceptance of money in exchange for confidential law enforcement information is inconsistent with Agency's mission as he violated the laws he was sworn to uphold.

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Based on a review of the record and the totality of circumstances, this Judge concludes that the penalty promoted the efficiency of the service, was within the parameters of reasonableness, and should be upheld.

ORDER

It is hereby Ordered that Agency's action in removing Employee is UPHELD.

FOR THE OFFICE:

MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
JAMES O'BOYLE	)	OEA Matter No. 1601-0020-05
Employee)	
)	
v	)	Date of Issuance: October 17, 2006
)	
METROPOLITAN POLICE	)	Muriel A. Aikens-Arnold
DEPARTMENT	)	Administrative Judge
Agency)	
_____)	

Ross Buchholz, Esq., Assistant Attorney General, D.C.
 Robert E. Deso, Esq., Employee's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On February 1, 2005, Employee, a Sergeant, filed a Petition for Appeal of Agency's action to remove him effective January 8, 2005 for: 1) Drinking alcoholic beverage . . . or being under the influence of "alcoholic beverage" when off duty; 2) Conviction; and 3) Conduct unbecoming an officer. On February 11, 2005, this Office notified Agency regarding this appeal and instructed Agency to respond within thirty (30) days. Agency responded as instructed.

This matter was assigned to the undersigned Judge on August 23, 2005. On October 31, 2005, an Order Convening a Prehearing Conference was issued scheduling said conference on November 22, 2005. The prehearing conference was conducted as scheduled; and on December 5, 2005, an Order Convening Hearing was issued scheduling said hearing on January 10, 2006. However, on December 12, 2005, Employee filed a request for mediation. On December 16, 2005, this matter was referred to the Director of Mediation and an Order to Postpone the Hearing was issued.

On or about April 6, 2006, this matter was returned to this Judge for further proceedings when mediation was unsuccessful. After further discussions, the parties agreed to file briefs supporting their respective positions regarding the appropriateness of the penalty. Thereafter, both parties filed briefs and the record closed effective June 26, 2006.

JURISDICTION

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

ISSUE

Whether Agency's penalty was appropriate under the circumstances.

STATEMENT OF CHARGES AND AGENCY DECISION

Employee was notified by memorandum dated November 8, 2004 that the Department proposed to terminate his employment based on the following misconduct:

Charge No. 1: Violation of General Order Series 1202, Number 1, Part I-B-2 which reads: Drinking alcoholic beverage or beverage as described in Section 25-103, subsection (5) of the DC Code, District of Columbia Alcoholic Beverage Control Act, "while in uniform off duty"; or being under the influence of "alcoholic beverage" when off duty. This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual (DPM).¹

Charge No. 2: Violation of General Order 1202.1, Part I-B-7, which reads: 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 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. 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 defined as cause in Section 1603 of the D.C. Personnel Manual.²

¹ See Agency's initial response (hereinafter referred to as AIR) filed 3/14/05 at Tab E. Specifically, Employee was involved in a vehicle accident in Alexandria, VA and subsequently arrested for Driving While Intoxicated as his blood alcohol content (BAC) was .27, which is considered to be over three times the legal limit in the state of Virginia.

² Specifically, Employee went to trial, was convicted of Driving While Intoxicated, and sentenced to 180 days in jail with 170 days suspended and immediately stepped back. He was also fined \$2,500 with all but \$500 suspended and his driver's license was suspended for 12 months.

Charge No. 3: Violation of General Order 1202.1, Part I-B-12, which reads: 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 of any law or municipal ordinance, or regulation of the District of Columbia. This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.³

For the aforementioned dereliction(s), the department proposes to terminate your employment.

Employee was further advised that he had an opportunity to respond, in writing, with an election to have a departmental hearing. On December 3, 2004, a Final Notice of Adverse Action was issued by Assistant Chief Shannon P. Cockett finding Employee guilty of the charges based on the evidence of record and effecting his removal on January 8, 2005.⁴ On December 28, 2004, the Chief of Police issued a final decision, to Employee's subsequent appeal, affirming the removal.⁵

POSITIONS OF THE PARTIES

Employee's Position.

Employee contends: 1) that he was unlawfully subjected to double punishment when he was suspended without pay and subsequently terminated for the same offense; and 2) that the penalty imposed was arbitrary, excessive, unreasonable and inconsistent with Agency's actions in similar cases. Specifically, in an arbitration matter between the Fraternal Order of Police (FOP) and the Metropolitan Police Department (MPD), the Arbitrator found, in part, that, based on the circumstances described therein, the indefinite suspension without pay (of the grievant) was "... not only a disciplinary action, but also, constitutes double jeopardy."⁶

³ Specifically, Employee was stepped back to carry out his jail sentence immediately.

⁴ See AIR at Tab D. Employee did not request a departmental hearing.

⁵ See AIR at Tabs B and C. An appeal of Employee's removal was filed by the FOP/MPD Labor Committee on 12/15/04.

⁶ See Employee's Brief (EB) filed on 5/19/06 at pp 2-3; Exhibit 4 (Final Notice of indefinite suspension without pay, dated 8/30/04, pending resolution of the instant administrative charges; and Exhibit 6 (Final Notice of Proposed Adverse Action dated 12/03/04 effecting the instant removal); See also Exhibit 9 (FOP and MPD Arbitration award in AAA Case No. 16-39-0166-83P, 8/22/83), in which the agency, with no subsequent inquiry or investigation, proposed Employee's termination for the same offense; and Exhibit 10 (OEA Board Decision, Employee v. Agency, Matter No. 1601-0082-83 (10/16/84) which held that the removal was unwarranted based on, *inter alia*, Agency's reliance on a Letter of Direction

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Further, Employee cites ten (10) examples of “. . . MPD disciplinary cases similar to Employee’s in which the employees were *not* terminated.”⁷

Agency’s Response.

Agency contends that: 1) the panel acted within its discretion, that relevant factors were considered, and the penalty imposed was in accordance with applicable law and regulation; 2) Employee was not subjected to double punishment as he received a non-disciplinary administrative suspension which is distinguished from a disciplinary punishment (suspension/termination); and 3) Employee’s evidence does not support a claim of disparate treatment and the penalty is appropriate considering the circumstances.⁸

ANALYSIS AND CONCLUSIONS

Whether the Penalty Was Appropriate Under the Circumstances.

When assessing the appropriateness of the 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. 1915, 1916 (1985).⁹

based on the same incidents as the adverse action.

⁷ See EB at pp. 3-6; and Exhibit 11 with attachments a-j for comparator cases. Listed in EB were: P. Montegue, No. 048-03; G. Countee, No. 14-03; L. Schneider, No. 198-03; J. Liscomb, No. 247-03; C. Whitehouse, No. 055-03; W. Torres, No. 288-03; K. Furr, No.97-04; D. Smith, No. 345-04; J. Belfiore, No. 285-04; and J. Papcrcka, No. 019-04.

⁸ See Agency’s Brief filed 06/26/06 (hereinafter referred to as “AB”) at pp. 2-8. Agency cites legal precedent which, *inter alia*, limits the review of the penalty, by this Office, when Agency’s charge is upheld. Agency further cites its regulations, specifically: 1) MPD General Order No. 1202.1, Part I-D which distinguishes administrative suspensions to temporarily prohibit a member from performing police duty pending further action, from disciplinary suspensions imposed following a determination of misconduct; and 2) MPD General Order No. 1202.1, Part I-C.2.b which defines a suspension as “a temporary cessation of pay and police authority with a definite date of restoration.” In addition, Agency distinguishes the disciplinary action taken against Sergeant C. Whitehouse who: 1) was also a supervisor, and therefore the only similarly situated employee, whose job level and rank are factors to consider when determining the appropriate penalty; and 2) he offered mitigating evidence that was considered in determining the penalty, whereas Employee, in the instant matter, did not. Further, Agency cites the removal of Officer James Dan effective 5/27/05 for “misconduct following a conviction for Driving While Impaired.”

⁹ Here, Employee admitted to the charges.

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Here, Employee's arguments do not convince this Judge that the removal was *not* the appropriate penalty. First, Department regulations clearly distinguish administrative suspensions from disciplinary suspensions. An indefinite suspension is initiated to allow examination into an employee's conduct and to determine whether further action is warranted.¹⁰ Second, the record reflects that Agency conducted an internal investigation regarding the circumstances of the criminal charges and conviction of Employee *after* Employee was placed on indefinite suspension and *prior* to issuance of the proposed removal notice on November 8, 2004, which nullifies Employee's argument, on that point, in the aforementioned arbitration case.¹¹ Although this Judge has no obligation to follow any grievance/arbitration decision from another forum, it is noted that the arbitrator's decision included consideration of other evidentiary and due process factors *not* reflected in this matter. Further, the Board decision (referenced by Employee) reflects that the testimonial evidence demonstrated that the Letter of Direction was *intended* to be disciplinary action targeted at the employee.¹² Not so, in this matter.

Third, the Final Notice of Proposed Adverse Action, issued on December 3, 2004, reflects that Employee was previously informed that he had twenty-one (21) days to submit a written response to the proposal, to indicate whether he elected to have a departmental hearing before a designated three (3) member panel, to be represented by counsel, and to furnish any pertinent documents that he wished to offer as evidence. Employee elected not to do so.¹³ In that Employee "failed to offer any new evidence to mitigate, exonerate, or controvert the facts contained in the investigative report," the departmental panel evaluated this case based on the evidence of record, including relevant factors such as, the egregious nature of Employee's "personal conduct," disregard for the responsibilities of a law enforcement officer and the erosion of public confidence and respect for the Department.¹⁴

Fourth, in response to Employee's appeal of the final decision, the Chief of Police

¹⁰ See footnote 8.

¹¹ See AIR at Tab G (Final Notice of Decision to Suspend Without Pay dated 8/30/04); Tab F (Final Investigative Report With Recommendation dated 9/7/04); and Tab E (Proposed Notice of Adverse Action dated 11/8/04). It is noted that Tab F includes additional documentation, such as: the Police Crash Report (4/5/04); a statement from Employee taken on 8/24/04 by agents of the Office of Internal Affairs; and statement of Fairfax County Police Officer G. S. Tuggle (9/2/04) who investigated the accident. Further, the preliminary investigation report (4/5/04) from Lieutenant B. M. Hawkins, Fifth District, did not include the aforementioned documents and reflects that Officer Tuggle "did not have the accident report or arrest paperwork completed, as of this writing . . ." and the matter was referred to the D.C. Office of Professional Responsibility for further investigation.

¹² See EB (Exhibit 10 at p. 2).

¹³ Employee was further advised that, should he desire a hearing, said panel would hear the charges against him on 11/29/04 at the Regional Operations Command-North Building; and that the case shall be decided based on the preponderance of evidence standard.

¹⁴ See AIR at Tab D.

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affirmed the removal, advising that “[A]ccording to our records, since [Employee] served time in jail for his violation, [Employee’s] case is different than the comparator cases identified by the Union.”¹⁵ Likewise, this Judge finds that, based on a review of the comparator cases identified by Employee’s Counsel, in this matter, no time was served in jail by any of those employees.¹⁶

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Removal was within the range of penalties available to Agency. Based on a review of the record, this Judge finds no reason to disturb the penalty which was within the parameters of reasonableness and should be upheld.

ORDER

It is hereby ORDERED that the removal is UPHeld.

FOR THE OFFICE:

MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge

¹⁵ See AIR at Tabs B, C, D and E.

¹⁶ See footnote 7.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
MARION WRIGHT	)	OEA Matter No. 1601-0127-06
Employee)	
)	
v	)	Date of Issuance: January 22, 2007
)	
D.C. PUBLIC SCHOOLS	)	Muriel A. Aikens-Arnold
Agency	)	Administrative Judge
_____)	

Marion Wright, *Pro se*
Sara White, Esq., Office of the General Counsel

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 4, 2006, Employee, a Teacher, filed a Petition for Appeal (PFA) from Agency’s action to separate him from service effective June 30, 2006 for failure to satisfactorily complete and maintain teacher certification requirements. Agency was notified by this Office regarding this appeal on August 9, 2006 and directed to respond within thirty (30) days. Agency responded as instructed.

This matter was assigned to the undersigned Judge on September 11, 2006. On December 21, 2006, an Order Convening a Prehearing Conference was issued scheduling said conference on January 16, 2007 with prehearing statements due no later than January 10, 2007. Employee submitted a prehearing statement when he appeared for the conference. Agency’s representative appeared, via telephone, for the meeting.¹

During the prehearing conference, this Judge informed Employee that this Office did not have the statutory authority to address his removal, as will be explained below. No further proceedings were held. The record is closed.

¹ Employee agreed to Agency’s telephonic participation. No Agency prehearing statement was received although its representative indicated her intention to forward same.

JURISDICTION

As will be discussed below, the Office lacks jurisdiction over this appeal.

ISSUE

Whether this appeal should be dismissed for lack of jurisdiction.

FINDINGS OF FACT

On October 5, 2004, you signed an Acceptance of Offer of Employment for a teacher position (subject to terms and conditions therein). Item 1 of that offer stated that “. . . the offer would be null and void if: [among other things] (b.) I do not possess or I am not eligible to obtain the requisite teaching credential for this position.”²

Employee disputes timely receipt of Agency letters advising him regarding the certification requirements needed by the June 30, 2006 deadline.³ However, Employee stated that his principal informed him (at a staff meeting) that “if anyone received this type of letter [meaning the May 2, 2006 letter mailed by Agency], inform him immediately.”⁴ Employee further stated that he completed the first Praxis examination in April, 2006; and in August, 2006, he completed the Praxis II examination. Subsequently, on August 17, 2006, Agency issued a provisional license to Employee.⁵

During the prehearing conference, Agency agreed to have further discussions with Employee regarding the mail issue and his nonreceipt of proper notice regarding the teaching certification deadline. When the Agency representative inquired whether Employee wished to return to his teaching position in the D.C. Public Schools, his answer was negative, as he had taken another job.

ANALYSIS AND CONCLUSIONS

The threshold issue, in this matter, is one of jurisdiction. This Office was established by the District of Columbia Comprehensive Merit Personnel Act (CMPA) (1978), D.C. Official Code, Section 1-606.01 *et seq.* (2001) and then amended by the Omnibus Personnel Reform

² See attachments to Employee's PFA.

³ See Agency's Answer to Employee's Petition for Appeal filed 9/8/06 which included letters dated 11/29/05, 5/2/06 (both notification of certification requirements) and 6/21/06 (termination letter).

⁴ See Employee's written statement (hereinafter referred to as "ES") submitted on 1/16/07 in which he also explains previously having submitted a change of address which Agency did not utilize. Employee did not indicate when the staff meeting took place.

⁵ See ES.

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Amendment Act (OPRAA), D.C. Law 12-124 (1998). Both the Act and OPRRA confer jurisdiction on the Office to hear appeals, with some exceptions not relevant to this case, of permanent employees in the Career or Education Service who have successfully completed a probationary period.⁶ The types of actions that said employees of the District of Columbia may appeal are stated in D.C. Official Code Section 1-606.03, which reads as follows:

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

Here, Employee was unable to achieve permanent status because he lacked the requisite license.⁷ An unlicensed employee serves in an "at will" capacity, subject to the discretion of the appointing authority regarding whether the employee otherwise qualifies for continued employment. As an at-will Employee, she could be removed from her position "for any reason or no reason at all." See *Cottman v. D.C. Public Schools*, OEA Matter No. JT-0021-92, *Opinion and Order on Petition For Review*, (July 10, 1995 __ D.C. Reg. __ ().

Further, unless an employee has permanent status in the Career or Educational Service or is appointed under special authority in the Excepted Service, the employee has no statutory right to utilize the appeal processes of this Office. See *Davis v. Lambert*, MPA No. 17-89, 119 DWLR 305 (February 13, 1991). Therefore, this Judge concludes that this Office has no jurisdiction to hear this matter and the matter should be dismissed.

ORDER

It is hereby ORDERED that this matter is DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge

⁶ See D.C. Code, Section 1-609.1(b)(2)(E)(1999).

⁷ See Title 5, section 1001.1 (Certification) *et seq.* and Title 5, section 1310.5 which states, "Failure to maintain a valid professional certificate shall result in ineligibility for employment in the field of the certificate and may result in termination."

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
WILLIAM JOSEPH,)	
Employee	)	OEA Matter No. 1601-0030-06
)	
v.	)	Date of Issuance: October 2, 2006
)	
D.C. FIRE AND EMERGENCY)	
MEDICAL SERVICES)	
DEPARTMENT,)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge
)	

Dennis Gottesmann, Esq., Employee Representative
Pamela Smith, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 27, 2004, William Joseph (hereinafter “the Employee”) sustained a work related injury for which he applied for and started receiving disability compensation through the D.C. Disability Compensation Program Office of Worker’s Compensation. The Employee’s last position of record before sustaining this injury was with the D.C. Fire and Emergency Medical Services Department (hereinafter “the Agency”) as a Paramedic Instructor, DS-0699-10-02. The Employee has been on a leave without pay status with the Agency since September 18, 2004. On January 30, 2006, the Agency sent the Employee a Memorandum regarding its Final Decision to remove him from his position. The stated cause for removal was the Employee’s “[i]nability to satisfactorily perform one or more major duties of [his] position.” The effective date of Agency’s adverse action was February 18, 2006. Because of his injury, Employee does not deny that he is currently unable to perform his duties. He is currently awaiting approval for surgery that will hopefully correct his malady and allow him to return to duty.

On February 14, 2006, the Employee timely filed a petition for appeal with the Office of Employee Appeals (hereinafter “the Office”) contesting the Agency’s action of terminating his employment. As part of the petition for appeal process, the Agency was required to send an Answer to the Employee’s petition for appeal stating its legal justifications for its adverse action. The Agency complied and included with its Answer

a Motion to Dismiss, the crux of which I shall address *infra*. I was assigned this matter on March 23, 2006. On that same date, I issued an Order Convening a Prehearing Conference for May 11, 2006. The Prehearing Conference was rescheduled for May 17, 2006. Based on the parties positions as stated during the Prehearing Conference and the documents of records I determined that an Evidentiary Hearing would be unnecessary. Consequently, I ordered the parties to submit final legal briefs. Both parties have since complied. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency's action of terminating the Employee was done in accordance with all applicable laws, rules, and regulations.

BURDEN OF PROOF

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

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

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 629.3 *id.* states:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

POSITION OF THE PARTIES

According to the Agency's Answer and its Motion to Dismiss, the stated cause for removing the Employee was his "inability to satisfactorily perform one or more major duties of his position." The Agency does not deny that the Employee suffered a work related injury that necessitated his being placed on a leave without pay status by the Agency while he attempted to recuperate from said injury. The Agency contends that pursuant to D.C. Official Code § 1-623.45 (b) (1) (2005 Repl.), it was only required to hold the Employee's position open for one year before starting the removal process. The Agency further contends that it did in fact start its removal action after the statutorily

mandated one year time period had elapsed. It also argues that some of the relief the Employee is seeking, namely, the Employee's request that I order the Agency to provide medical treatment and/or benefits, is outside of the jurisdiction of this Office. Considering all of the preceding, the Agency contends that it complied with all applicable statutory requirements and therefore its decision removing Employee should be upheld.

According to the Employee's Brief in Opposition of the Final Agency Action (hereinafter "Employee's Brief"), the Employee states that "[he] is not requesting this Board to order that he receives appropriate medical treatment, but rather has requested this Board to determine that the Department's refusal to either approve or deny his request in writing prevents him from getting the treatment he needs so he may be able to return to work." The Employee goes on to argue that the reason why he is unable to return to work is because some "department" within the District of Columbia government has yet to approve (or deny) his request for surgery. The Employee contends that the D.C. government "ignored" some sections of D.C. Act 15-685 (which, *inter alia*, amended portions of D.C. Official Code 1-623.45) when it relied on this statute to legally support its adverse action terminating the Employee. According to the Employee, the portions that were ignored dealt with how "the Mayor or his designee shall provide a claim with written authorization for payment of treatment of procedures within thirty days after the treating physician makes a written request. The Agency has failed to respond to the numerous requests and thus, its actions prevent the Employee from even being given an opportunity to appeal a decision to the Worker's Compensation Commission." Employee's Brief at 2. Considering all of this, the Employee requests that I reverse Agency's decision in this matter and/or require "the Agency (or some other agency within the D.C. government) to respond to the request for medical treatment by approving or rejecting the same so he can have his hearing knowing full well the Office of Employee Appeals cannot require the [Agency] to provide such medical benefits." Employee's Brief at 3.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSION

As was stated previously, the Employee contends that I should order the Agency to respond to his request for medical treatment. To buttress this argument, the Employee cited various portions of D.C. Official Code, which outline how the Agency (or the D.C. Government) should proceed under these circumstances. The Employee then provides argument that alleges that the Agency (and/or the D.C. Government) failed to follow all applicable laws when it has yet to approve or deny Employee's request for surgery. My only response to this argument is that this Office is not a forum of general jurisdiction. Furthermore, this Office has no authority to review issues beyond its jurisdiction. See *Banks v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (Sept. 30, 1992), __ D.C. Reg. __ (). Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

- (a) An employee may appeal [to this Office] a final agency

decision affecting a performance rating which results in removal of the employee . . . , an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . . , or a reduction in force [RIF]...

Based on the preceding statute I may only adjudicate matters that squarely fall within the purview of D.C. Official Code § 1-606.03. The jurisdiction of this Office is limited to performance ratings that result in removals; final agency decisions that result in removals, reductions in grade or suspensions of ten days or more; or reductions in force. OEA Rule 604.1, 46 D.C. Reg. 9299 (1999). I find that under this set of circumstances, the requested relief in the form of ordering the Agency (or the D.C. Government) to respond to Employee's request for medical treatment or any other request that deals squarely with "medical benefits" are outside the jurisdiction of this Office and therefore must be summarily denied¹.

The Agency contends that its removal action was legally justified. Agency relies on D.C. Code § 1-623.45 (b) (1) (2005 Repl.), which states in relevant part that:

Career and Educational Services retention rights [Formerly § 1-624.45]

(a) In the event the individual resumes employment with the District government, the entire time during which the employee was receiving compensation under this subchapter shall be credited to the employee for the purposes of within-grade step increases, retention purposes, and other rights and benefits based upon length of service.

(b) Under rules and regulations issued by the Mayor the department or agency which was the last employer shall:

(1) Immediately and unconditionally accord the employee the right to resume his or her former, or an equivalent, position as well as all other attendant rights which the employee would have had or acquired in his or her former position had he or she not been injured or disabled, including the rights to tenure, promotion, and safeguards in reduction-in-force procedures, *provided that the injury or disability has been overcome within one year after the date of commencement of compensation or from the time compensable disability recurs if the recurrence begins after the injured employee resumes regular full-time employment with the District of Columbia government*; or

(2) If the injury or disability is overcome within a period of more

¹ There are other judicial and quasi-judicial forums that have the statutory authority to adjudicate this issue. Hopefully, the Employee has (or will) avail himself of these forums.

than 2 years after the date of commencement of payment of compensation or the provision of medical treatment by the Disability Compensation Fund, make all reasonable efforts to place, and accord priority to placing the employee in his or her former or equivalent position within such department or agency, or within any other department or agency.

(c) Nothing in this provision shall exclude the responsibility of the employing agency to re-employ an employee in a full-duty or part-time status.

(emphasis added).

Generally speaking, the preceding portion of the D.C. Code provides that, *inter alia*, a D.C. government agency may institute a removal action if the Employee is physically unable (or unwilling) to resume his work related duties after one year has elapsed since that Employee was placed on a leave without pay status. Such is the case in this matter.

The Agency instituted the removal action against the Employee even though the District Personnel Manual (hereinafter "DPM") provides for a different outcome under the circumstances. DPM § 827.3 states that "[a]n agency shall carry an employee covered by § 827.1(b)² on leave without pay for *two (2) years* from the date of commencement of compensation". (Emphasis added). Under the circumstances as presented in the instant matter, Agency's action is considered timely according to the Code, while its adverse action would be considered premature (by at least one year) according to the DPM. It is a generally well known principle that the D.C. Official Code shall prevail over the DPM³ on the rare occasion when the two are inconsistent. *See generally, Sheetz v. District of Columbia*, 629 A.2d 515, 519 (D.C. 1993). Any other regulation that would provide for a contrary outcome in this matter cannot be given greater weight than what is duly afforded under D.C. Official Code § 1-623.45 (b) (1). Consequently, this decision will follow what is contemplated under that Code section even though DPM § 827.1(b) would provide for a different result in this matter. Consequently, I conclude that D.C. Official Code § 1-623.45 (b) (1), shall be considered mandatory authority over the instant matter.

² DPM § 827.1 (b) states the following:

The provisions of this section shall apply to the following:

(b) An employee holding any type of appointment in the Career Service who is receiving disability compensation under Title 1, Chapter 6, Subchapter XXIV, DC Code (1981);

³ This is also true for any other similar published regulations, e.g., the D.C. Register and the D.C. Municipal Regulations.

While I empathize with the Employee's predicament, I find that the Agency adequately complied with D.C. Official Code § 1-623.45 (b) (1) when it removed the Employee from service. Reluctantly, I must uphold Agency's action in this matter.

ORDER

It is hereby ORDERED that Agency's Motion to Dismiss is GRANTED and it is FURTHER ORDERED that Agency's adverse action of removing the Employee from service is hereby UPHeld.

FOR THE OFFICE:

Eric T. Robinson, Esq.
Administrative Judge