THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JUDE WADDY	)	
Employee	)	**OEA Matter No. 1601-0050-07**
	)	
v.	)	**Date of Issuance: April 28, 2008**
	)	
DISTRICT OF COLUMBIA	)	
METROPOLITAN POLICE DEPT.	)	**Rohulamin Quander, Esq.**
Agency	)	**Senior Administrative Judge**
	)	

Jude Waddy, *pro se*
Ronald B. Harris, Esq., Agency's Representative

INITIAL DECISION

BACKGROUND

On February 15, 2007, Jude Waddy (the "Employee"), a sworn officer and career service employee with the D.C. Metropolitan Police (the "Agency"), filed an appeal with the D.C. Office of Employee Appeals (the "Office"). Employee took exception from Agency's final decision, dated February 5, 2007, suspending him for twenty (20) days, based upon Agency's charge of misconduct, i.e., that Employee had engaged in outside employment, without having first obtained approval from the Agency. There was no Police Trial Board proceeding conducted in this matter.

This case was assigned to me on April 6, 2007. I convened a Pre-Hearing Conference on May 22, 2007, at which conference the parties agreed to attempt mediation, in order to settle the matter. Mediation was not successful. The case was returned to me on or about December 18, 2007. I then convened a second Pre-Hearing Conference on January 22, 2008, to update the status of the case. Upon a review of the record as established, I determined that an evidentiary hearing was not necessary. The record is now closed.

Sergeant Anthony Q. Langley, the Agency's Disciplinary Review Office, conducted an investigation into the allegations, and through Lieutenant Paul A. Charity of the Police Misconduct

Unit, issued a Final Investigative Report (IS #06001182, No. 06-51) on December 7, 2006. *Agency Tab "F"* The Report sustained the allegations, and was the underlying basis for Agency's issuance on December 29, 2006, of a Notice of Proposed Adverse Action to the Employee. *Agency Tab "E"* The Notice letter concluded with a notification to Employee that Agency proposed to suspend Employee for twenty (20) workdays, for the alleged violation.

JURISDICTION

The Office has jurisdiction over Employee's appeal pursuant to *D.C. Official Code* (the "*Code*") § 1-606.03(a) (2001).

ISSUES

The issues to be decided are:

1. Whether Agency has proven, by a preponderance of the evidence, that Employee committed the acts of which he is accused.
2. Whether Employee's actions constitute "cause" for taking an adverse action to justify Employee's suspension by the Agency for 20 days, as that term is defined by District of Columbia Office of Personnel (the "DCOP"), Rule 1603.3, 47 D.C. Reg. 7094, 7096 (2000).
3. If Agency's action was taken for cause, whether Employee's violation of the cause standard was "*de minimus*". Agency could not have subjected Employee to an adverse action if his violation of the cause standard was *de minimus. See* DCOP Rule 1603.5, 47 D.C. Reg. at 7097.
4. If Employee's violation of the cause standard was not *de minimus*, whether the penalty Agency imposed was appropriate under the circumstances, given any aggravating or mitigating circumstances that may have existed.

CHARGE LODGED AGAINST EMPLOYEE

The Notice contained one charge and one specification, as follows:

Charge No. 1:

> Violation of General Order 1202.1, Attachment A, Part A-16, which reads: Failure to obey orders or directives issued by the Chief of Police. This conduct is further prohibited by General Order 201.17, Part VI-H, which states in part: "Any member desiring to engage in outside employment shall notify the Department of such intention by submitting the following documents, an original and three (3) copies, to the member's Commanding Officer prior to accepting such employment . . . 1. PD 180 (Request to Engage in Outside Employment; 2. PD Form 180-B (Employer's Agreements to Conditions of Employment)."

Specification No. 1:

> In that, by your own admission, during the years 2000 through 2006, you participated in outside employment and received financial compensation for such outside employment. Moreover, you failed to make an official request or notification to the Metropolitan Police Department for the services that you would be providing to a private company (FMS) for compensation.[1]

Agency Tab "F"

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The *Code* at § 1-616.51 *et seq*. (2001) provides the general discipline policy parameters for employees in the Career and Educational services. The statute requires creation of a disciplinary system including, in pertinent part:

(1) A provision that disciplinary actions may only be taken for cause;
(2) A definition of the causes for which a disciplinary action may be taken.

District of Columbia Office of Personnel Rule ("DCOP") 1603.3, 47 D.C. Reg. 7094 (2000) sets forth the definition of "cause" and provides, in pertinent part:

> 1603.3 For the purpose of this chapter, "cause" means . . . 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 and capricious. This definition includes, without limitation . . . negligence, incompetence, insubordination, misfeasance, malfeasance . . . *Id.* at 7095.

In this case, Employee was charged with a failure to obey orders or a directive issued by the Chief of Police. This charge, if proven, is insubordination, and would constitute "cause" for adverse action under a plain reading of the above-quoted definition.

OEA rule 629.1 *et seq*., provides that Agency, in order to make its case, must prove by a preponderance of the evidence presented that Employee committed the alleged offenses. This rule defines "preponderance of the evidence" 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.

The following facts are not in dispute:

[1] The sole charge and specification were each recited in Tabs "E" and "F." However, the language of the respective citations and specification was slightly different. However, there was no difference in any critically significant component of the charge placed against the Employee.

1. Employee is Career Service, and was appointed to the Metropolitan Police Department in either 1973 or1974.[2] He was promoted to the rank of lieutenant and assigned to the Fourth District, and was serving in that position at the time that he was cited.
2. For several years, beginning in 2000, and continuing through 2006, but not necessarily every year, Employee, through his home-based consulting business, J&K Consultants, participated in outside employment, providing police training and related law enforcement services to Federal Management Services ("FMS"). He was monetarily compensated for those professional services.
3. At no time during the above-noted years, did Employee make an official request for authority to engage in outside employment, or otherwise notify Agency that he was providing outside services to FMS for compensation.
4. After it was inadvertently discovered that Employee might have been periodically engaging in outside employment for several years, Agency conducted an investigation, which confirmed the nature of the outside employment, and led to the issuance of a "Notice of Proposed Adverse Action" letter on December 29, 2006.
5. The proposal to impose adverse action for cause was consistent with General Order Series 120, issued by the Chief of Police on April 13, 2006.[3]
6. Employee has been fully cooperative throughout the entire pendency of this proceeding, beginning with his initial response to the allegations. In his own defense, he set forth a list of considerations that he considered to be mitigating factors, including:
   a. That the alleged outside employment was primarily his own home-based consulting business, J&K Consultants;
   b. The professional services involved were not provided in the District of Columbia;
   c. Employee used his own earned annual leave, while providing the consulting services;
   d. Employee's work product during the consultancy was not related to his police work in the District of Columbia;
   e. The provided services were not conditioned upon his membership status or employment with the Agency, or possession or potential use of police powers or service weapons; and
   f. The nature of the outside employment was in compliance with Agency policy regarding outside employment.
7. Agency received and considered Employee's submitted mitigation factors, evaluated them, and then reached several conclusions, based upon factors uncovered as a component of their investigation. Among those factors considered were the following:
   a. Employee was, for a sustained period of time, operating his business in violation of agency's long-stated policy regarding off-duty employment;
   b. Although Employee asserted that he operated a home-based consulting business, his error was the failure to make an official request to the Agency for authorization to

[2] The documents submitted by the parties reflect two different years. However, given the Employee's longevity in this position, the distinction has no significance in the outcome of this matter.

[3] This document replaced General Order 1202.1, "Disciplinary Procedures and Processes," effective from November 10, 1983. The section which defines "cause," to include a failure to obey orders, has been in place since at least 1999. Both documents have the same title.

maintain outside employment for either J&K Consultants or FMS;

c. The record established that Employee, as a paid consultant, received financial compensation from FMS through his home-based business, J&K Consultants;
d. His actions constituted misconduct, in violation of the provision in General Order Series 201, Number 17, Part 3, A, (issued on December 31, 1985, and updated on April 16, 2004) which defines, Outside Employment as, " . . . the engagement in any line of business or the performance at any type of any work or service for any person, firm or corporation, other than that required by one's official position in the Metropolitan Police Department, for the purpose of obtaining wages, salary, fee, gift, or other compensation;
e. Although Employee emphasized that the work performed was not police related to his job with the Agency, the existence of the regulation is not predicated upon whether or not the work performed is police related, but rather upon the fact that the regulation mandates that the employee in question must request and receive an authorization from the Agency, before he or she can engage in outside employment.

Having evaluated the entire record created in this matter, and weighing the respective position of the parties, I conclude that Employee's actions of engaging in sustained outside employment were in violation of Agency's long established guidelines regarding outside employment. Employee is a sworn officer of the District of Columbia Metropolitan Police Department. As such, he has taken an oath to not only enforce the law, but to likewise uphold the law and regulations with regard to his personal conduct. Although his conduct was not criminal in nature, the underlying purpose of the regulation is to assure the Agency that its employees are not engaging in conduct which is in conflict with their law enforcement duties, and likewise to assure that said employees do not place either the Agency or themselves into compromising or embarrassing situations which will adversely affect the credibility of the Agency or the affected individual. The existence of the regulation has a strong basis and likewise the scrupulous and literal adherence to its prohibitions, is based upon sound reasoning.

Although the work that Employee engaged in and accepted compensation for was neither directly nor indirectly related to his position with MPD, it did create some beneficial effect by helping to train existing and potential police officers in community law enforcement techniques. Most of the training, if not all, was conducted in Guyana, South America. FMS had a security contract with the U.S. Department of State, and Employee, and/or his company, were compensated by FMS from U.S. Department of State funds, for training services that he provided. While that is certainly a necessary component of future and cooperative law enforcement, according to the governing regulations that controlled and directed the Agency's established work environment, Employee still needed official approval to engage in that activity.

Shortly after being cited and subjected to this adverse action, Employee undertook to gain approval to continue engaging in his consultancy work. Said approval was granted as of February 2, 2007. Thus he has come into compliance. Given the multi-year act of non compliance, that the Agency elected to only seek a 20-workday suspension, rather than imposing a stiffer penalty, up to and including termination, speaks well to Employee's value with the Agency. He has a good work record and is widely appreciated as one who takes his job with the Agency very seriously. Still, his failure to be fully compliant was the basis for his being cited.

During the Pre-Hearing Conference convened on January 22, 2008, Employee admitted that he should have been more diligent in monitoring his outside work activities. He recognized that he could have saved himself both embarrassment and having to face this adverse action, which could have likewise resulted in the possible loss of valued employment.

EMPLOYEE'S VIOLATIONS OF THE CAUSE STANDARD IS NOT DE MINIMUS

As the presiding judge, and taking the record into consideration on the issue of misconduct, I find that Agency has submitted enough credible evidence to support a determination that Employee engaged in misconduct. Further, Employee has admitted that he was wrong, and has vacated the error by coming into compliance, which is a mitigating factor. Given the longevity of the violation - from about 2000 until 2006 - even though the violative period was only about one week's duration each time, I conclude that the violation was not *de minimus,* and that an appropriate penalty must be imposed.

APPROPRIATENESS OF THE PENALTY IMPOSED

Having concluded that Agency has sustained its burden of proof with reference to cause for adverse action against the Employee for misconduct, supplemented by Employee's admission of same, the next issue to be considered is the appropriateness of the penalty imposed. For the listed violation, Agency proposed suspending Employee for twenty (20) days.

In following the guidelines of General Order 1202.1, Agency adheres to the Table of Offenses and Penalties Guide, as set forth and enumerated in that document, for the implementation of discipline. Having found that Employee violated enumerated Offense #16, Failure to Obey Orders or Directives of the Chief of Police, I turn to the Guide for guidance regarding the appropriate, previously established penalty. The Guide indicates that for the first offense, the applicable disciplinary remedy ranges from reprimand to removal. Therefore, I conclude that any level of discipline that lies between those two extremes, is appropriate.

Rather than merely reprimand the Employee, or even to take steps to remove him, Agency has considered the matter broadly, deciding that a reprimand would be insufficient, and removal would me extreme. That he is a valued employee cannot be denied. I conclude and concur with Agency's determination that the imposition of a 20-workday suspicion is appropriate in this matter.

ORDER

The foregoing having been considered, it is hereby:

ORDERED, that Agency's charge of Misconduct, i.e., Failure to Obey Orders, is UPHELD; and, it is

FURTHER ORDERED, that Agency's imposition of a 20-day suspension is UPHELD.

FOR THE OFFICE / s /

ROHULAMIN QUANDER,
Senior Administrative Judge