THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Burley Sanders	)	OEA Matter No. 1601-0135-11
Employee	)	
	)	Date of Issuance: April 23, 2014
Vs.	)	
	)	Joseph E. Lim, Esq.
Metropolitan Police Department	)	Senior Administrative Judge
Agency	)	
	)	

Burley Sanders, Employee *pro se*
Kevin Turner, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 18, 2011, Burley Sanders ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") challenging the Metropolitan Police Department's ("MPD" or "Agency") decision to terminate him on the basis of four separate charges. At the time of his termination, Employee worked as a Fifth District Watch Commander. The effective date of Employee's termination was the close of business on July 1, 2011.[1]

I was reassigned this matter on July 18, 2013, after originally being assigned to Judge Quander. A Conference was held on August 26, 2013. A Post Conference Order was subsequently issued and both parties responded accordingly. Agency also submitted a Motion for Summary Disposition ("MSD") and Employee responded. Based on the record, an Evidentiary Hearing is not warranted and this matter may be decided on the record. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency violated D.C. Official Code § 5-1031 (a) (2001), otherwise known as

[1] *See* Agency's Answer at Tab 9 (August 18, 2011).

the "90-day rule" in terminating Employee.

2. Whether Agency's action of terminating Employee's service was done in accordance with applicable law, rule, or regulation.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

The following facts are undisputed:

1. Employee was appointed to the Metropolitan Police Department as a police officer on March 28, 1988. Agency Exhibit 1, p. 26.

2. On Sunday, August 17, 2008, Sergeant Dawn Brown, who was also assigned to the Fifth District, reported to Inspector Brian Bray that she and Employee had been involved in an argument. She further reported that Employee grabbed her left arm and refused to let go despite her repeated requests for him to do so. According to Sgt. Brown, after a brief struggle Sergeant Brown managed to free herself from Employee's grip.

3. In a written statement prepared by Sergeant Brown on August 18, 2008, she also reported another incident between herself and Lieutenant Sanders that occurred on June 27, 2008. Agency Exhibit 1, p. 3.

4. The Internal Affairs Division (IAD) investigated the allegation. An IAD Agent interviewed Sergeant Brown on September 12, 2008, wherein Sergeant Brown informed the IAD investigator that Employee sexually assaulted her on June 27, 2008, while inside her office at the Fifth District Headquarters. Sergeant Brown alleged that Employee pulled her down onto his lap and rubbed his penis against her vaginal area against her will. Agency Exhibit 1, p. 4.

5. In April 2010, the United States Attorney's Office decided not to pursue the August 17, 2008, assault allegation against Lieutenant Sanders and to prosecute him only in reference to the June 27, 2008, Misdemeanor Sexual Abuse incident.

6. On April 13, 2010, the Superior Court of the District of Columbia issued an arrest warrant charging Employee with the Misdemeanor Sexual Abuse of Sergeant Brown. Agency Exhibit 1, p. 4.

7. On August 23, 2010, a Non-Jury trial took place before the Honorable Stuart Nash who found Employee Not Guilty of Misdemeanor Sexual Abuse; however, Judge Nash found Employee guilty of the lesser-included offense of Simple Assault.

8. The verdict and sentence was entered on the Court docket on September 10, 2010. On September 10, 2010, the Court entered the guilty verdict, and Employee was sentenced to 60 days in jail, execution of sentence suspended, and one year supervised probation. Agency Exhibit 2.

9. On December 30, 2010, the MPD served Employee with the Notice of Proposed Adverse Action. It contained the following:

Charge 1:	Violation of General Order Series 120.21, Attachment A, Part A-7, which provides," …Conviction of any member of the force in any court of competent jurisdiction of any criminal or quasi-criminal offense, or of any offense in which the member either pleads guilty, receives a verdict of guilty or a conviction following a plea of nolo contendere, or is deemed to have been involved in the commission of any act which would constitute a crime, Members who are accused of quasi-criminal offenses shall promptly report, or have reported their involvement to their commanding officers".
Specification 1:	In that, on August 23, 2010, in a bench trial, in D.C. Superior Court, before the Honorable Judge Stuart Nash, you were found guilty of Simple Assault against Sergeant Dawn Brown. Consequently, you were sentenced to one year of probation with 60 hours to be supervised; 100 hours of community service; $200.00 to be paid to the Crime Victims Compensation Program; and upon completion of the aforementioned stipulations to be sentence, the remainder of the probationary period is to be unsupervised.
Charge 2:	Violation of General Order 120.21, Attachment A, Part A-6, which reads, "Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Officer to, or in the present of, any superior Officer, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing."
Specification 1:	In that, on December 7, 2010, during an investigation regarding an alleged sexual assault, of which you were the subject, you provided a false account of how sergeant Dawn Brown came to be sitting in your lap during an incident at the Fifth District that occurred on June 27, 2008.
Charge 3:	Violation of General Order Series 120.21, Attachment A, Part A-12, which states: "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law, municipal ordinance, or regulation of

the District of Columbia."

Specification 1: In that, on April 13, 2010, an arrest warrant was issued by the DC Superior Court, charging you with Misdemeanor Sexual Abuse. Subsequently, you were found not guilty of this charge and guilty of Simple Assault.

Charge 4: Violation of General Order 120.21, Attachment A, Part A-25, which reads, "Any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force."

Specification 1: In that, on August 23, 2010, you provided questionable testimony during your bench trial which subsequently resulted in a verdict of guilty against you. Specifically, Judge Stuart Nash found proof beyond a reasonable doubt, that you did in fact commit a simple assault against Sergeant Dawn Brown.

Agency Exhibit 3 and Agency Exhibit 4.

10. On April 7, 2011, the MPD convened an Adverse Action Hearing. Employee pled guilty to each charge and specification. The Adverse Action Panel recommended that Employee be terminated from his position with the Department. Agency Exhibit 3.

11. Thereafter, the Chief of Police accepted the recommendation of the Adverse Action Panel. Thus, Employee was terminated from his position. This appeal followed.

Arguments of the Parties

Employee has pled guilty to each charge and specification and he is not challenging the MPD's guilty findings or the penalty. Instead, Employee contends that the MPD violated D.C. Official Code § 5-1031 when it untimely served him with the Proposed Notice of Adverse Action. Employee charges that Agency violated D.C. Code Section 5-1031(a), which requires Agency to initiate an adverse action against a sworn member of the police force no later than 90 days from the date Agency "knew or should have known of the act or occurrence allegedly constituting cause." Employee argues that the matter should be dismissed because MPD failed to propose his termination in a timely manner, in that it failed to propose the adverse action within 90 days of when it knew or should have known of the charged conduct.

Agency contends that not only did it have ample cause to terminate Employee's employment and that its penalty is appropriate, but that it did act within the requisite 90-day period. Agency asserts that January 4, 2011, is 90-days from August 23, 2010, and that it served Employee with the Proposed Notice of Adverse Action on December 30, 2010.

Whether Agency violated D.C. Official Code § 5-1031 (a) (2001), otherwise known as the "90-day rule" in terminating Employee.

D.C. Official Code § 5-1031 is frequently referred to as the 90-Day rule. It states as follows:

> **§** 5-1031. Commencement of corrective or adverse action
>
> (a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.
>
> (b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of Corporation Counsel, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

In *D.C. Fire and Medical Services Department vs. D.C. Office of Employee Appeals*, No. 08-CV-1557, 986 A.2d 419 (January 7, 2010), the D.C. Court of Appeals held that the 90-day period for Agency to propose removal of technician began to run on the date that a panel of Agency leaders interviewed technician in an investigation of the incident.

On August 23, 2010, a bench trial was convened in the Superior Court of the District of Columbia. The Court found Employee guilty of simple assault and announced the verdict on August 23, 2010. However, the verdict and sentence was entered on the Court docket on September 10, 2010. Agency Exhibit 2, MSD. Thus, the effective date of the conviction is September 10, 2010. The verdict is not official until it has been entered on the Court's docket.

Pursuant to the District of Columbia Court of Appeals Rule 4 (b) (1), the time for filing an appeal in a criminal cases begins to run on the day the judgment is entered onto the Court docket. Agency Exhibit 5.

Agency served Employee with the proposed notice of Adverse Action on December 30, 2010. With regard to Charge 1, Specification 1, the 90-day period began to run on September 13, the first business day following the entry of Employee's conviction on the docket. There are 76-business days between September 10, 2010, and the date the Department served Employee with the Proposed Notice of Adverse Action, December 30, 2010. Hence, December 30, 2010, is still well within the 90-day rule.

The misconduct identified in Charge 2, Specification 1, occurred on December 7, 2010. There are 14-business days between December 7, 2010, and December 30, 2010, the date the Department served Employee with the Proposed Notice of Adverse Action. Thus, it is well within the 90-day rule.

With regard to Charge 3, Specification 1, Agency concedes that this misconduct falls outside of the 90-Day rule as the offense occurred on April 13, 2010. However, since the Adverse Action Panel found him guilty of Charge 1, Specification 1, Charge 2, Specification 2, and Charge 4, Specification 1, and recommended termination for each charge individually, Agency argues that the error with regard to Charge 3 is harmless.

The misconduct identified in Charge 4, Specification 1 occurred on August 23, 2010. Agency served Employee with the Notice of Proposed Adverse Action on December 30, 2010. There are 88 business days between August 23, 2010, and December 30, 2010. Again, Agency was within the 90-day limit.

In his brief, Employee argues that the 90-day rule tolls from the date of the incident, June 27, 2008, as he alleges that three witnesses reported his misconduct.[2] Employee asserts that this placed Agency on notice of his misconduct. My examination of the charges and their specifications reveal that Employee's argument does not stand scrutiny. The first charge involves a criminal conviction, which did not and could not occur until after the Court enters a conviction on the record. The conviction was entered on September 10, 2010. None of the other charges involve any specifications that allege anything as early as Employee's alleged date of June 27, 2008. Indeed, the charges specified the dates of the offenses, all of which indicated that the misconduct occurred in 2010.

In addition, as noted above, D.C. Official Code § 5-1031 (b) states that the 90-day period for commencing a corrective or adverse action shall be tolled until the conclusion of any criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of Corporation Counsel, or an investigation by the Office of Police Complaints. Employee did not allege that to be the case here.

Thus, based on the above, I conclude that apart from Agency's charge 3, Agency did not violate the 90-day rule. After carefully reviewing the record and the arguments of the parties, the Administrative Judge concludes that Agency did initiate the adverse action in a timely manner.

Whether Agency's removal of Employee was an appropriate penalty

Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the Administrative Judge.[3] The undersigned may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of

[2] It is unclear from his submission what or which misconduct Employee is referring to, as the D.C. Superior Court record of his conviction gives the date of Employee's offense as May 15, 2010. See Criminal Case Number 2010 CMD 6551.
[3] *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

reasonableness.[4] When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.[5]

The Merit System Protection Board (MSPB) has outlined twelve factors that assist an agency in determining the appropriateness of a sanction.[6] In applying the factors, the MSPB cautioned that "[n]ot all of these factors will be pertinent in every case and frequently in the individual case, some of the pertinent factors will weigh in the [employee's] favor, while others may not, or may even constitute aggravating circumstances." Selection of an appropriate penalty must involve a responsible balancing of the relevant factors in an individual case.[7]

The Adverse Action Panel recommended that Employee be terminated for each charge individually. In the instant case, when assessing the appropriate penalty for each of the adverse actions and charges faced by Employee, Agency considered relevant *Douglas* factors and relied upon the Table of Offenses and Penalties Guide as set forth in the MPD's General Order 120.21 Disciplinary Procedures and Processes, (Effective Date April 13, 2006). Agency considered the following *Douglas* factors: (1) the nature and seriousness of the offenses; (2) Employee's job level and type of employment; (3) the employee's past disciplinary and work record; (4) the effect upon the employee's ability to perform at a satisfactory level; (5) consistency of the penalty with applicable tables and the consistency of the penalty for those imposed upon other employees for the same or similar offense.[8] All of these factors support Agency's decision to remove Employee from his position.

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[4] *See Id*.
[5] *Id*.
[6] *See Douglas v. Veterans Administration,* 5 MSPB 313 (1981).Those twelve factors, which are not exhaustive, include:
(1) The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
(2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
(3) the employee's past disciplinary record;
(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
(7) consistency of the penalty with any applicable agency table of penalties;
(8) the notoriety of the offense or its impact upon the reputation of the agency;
(9) the clarity with which the employee was on notice of any rules that where violated in committing the offense, or had been warned about the conduct in question;
(10) potential for the employee's rehabilitation;
(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[7] *See Id.*
[8] See Agency Exhibit 3. Notice of Proposed Adverse Action (December 30, 2010).

Here, Employee was found guilty of assault after a D.C. Superior Court bench trial on August 23, 2010. The only penalty provided under the above Table of Offenses and Penalties Guide for the first offense of being convicted for a crime is removal. The range of penalties for a first offense of a sustained charge of Conduct unbecoming an Officer ranges from a three-day suspension to removal. The range of penalties for a first offense of Prejudicial Conduct charge ranges from reprimand to removal. As a police officer, Employee's criminal conviction is conduct directly relevant to his position, job duties, and job activities. Thus, Agency's decision to remove Employee from his position based on his conviction of a criminal assault was appropriate and supported by the record.

Agency gave great weight to the nature and seriousness of the offense; Employee's job level and type of employment; and the effects of the offense upon Employee's ability to perform as a satisfactory level.[9] There was no evidence presented that Agency was prohibited by law, regulation, or guidelines from imposing the penalty of termination.

Based on the aforementioned, there is no clear error in judgment by Agency. I find that termination was a valid penalty under the circumstances. The penalty was based on a consideration of the relevant factors as outlined in *Douglas*. Based on a preponderance of the evidence, I conclude that given the aforementioned findings of facts and conclusions of law, Agency's action of removing Employee from service should be upheld.

ORDER

Based on the aforementioned, it is hereby **ORDERED** that Agency's decision to remove Employee from his position is **UPHELD**.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge

[9] *Ibid.*