THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
GENE WATSON	)	OEA Matter No. 1601-0231-09
Employee	)	
	)	Date of Issuance: November 29, 2011
v.	)	
	)	Lois Hochhauser, Esq.
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT	)	Administrative Judge
Agency	)	
	)	

Steven B. Chasin, Employee Representative
Thelma Chichester, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

Gene Watson, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on August 24, 2009, appealing the final decision of the D.C. Fire and Emergency Medical Services Department, Agency herein, to remove him from his position as Heavy Mobile Equipment Mechanic, effective July 30, 2009. At the time of the adverse action, Employee was in permanent career status.

At the prehearing conference on February 16, 2011, a hearing date of March 16, 2011 was scheduled. However, on March 9, 2011, the parties filed a "Joint Motion to Submit this Matter on the Record". I met with the representatives on March 15, 2011, and they advised me that they had entered into stipulations and wanted to rely on briefs in lieu of a hearing. I granted the motion and cancelled the hearing. A briefing schedule was agreed upon by the parties, and an Order confirming that schedule was issued on March 16, 2011.[1] Following the filing of final submissions, the record closed on September 26, 2011.

[1] Numerous deadlines were extended at the request of one of the parties for good cause and with the consent of the other party. After reviewing all submissions, an Order was issued on August 14, 2011, directing the parties to submit additional information and/or documentation.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUES

1. Did Agency act in a timely manner?
2. Was Agency's action taken for cause?
3. If so, is the penalty appropriate?

FINDINGS OF FACT, ARGUMENTS, ANALYSIS AND CONCLUSIONS

Findings of Fact[2]

1. On June 17, 2008, Employee was arrested for a traffic violation. According to the reports of the Metropolitan Police Department immediately following his arrest, Employee had in his possession "a clear plastic bag containing a large white rock substance a clear plastic bag containing a green-plant substance in his left sock" and U.S. currency on the amount of $1,387.00 "in three separate bundles wrapped in rubber bands…:"

2. Employee was released on June 17, 2008 and directed to appear in court on July 10, 2008

3. Notification of the arrest was made to Agency on June 18, 2008.

4. On June 24, Employee was placed on enforced leave.

5. Following a trial and a finding of guilt on January 28, 2009, the matter was rescheduled for March 27, 2009.

6. On March 31, 2009 a final entry was entered in the court record.[3]

7. On May 28, 2009, Agency issued the Proposed Notice of Adverse Action.

Notices Issued by Agency:

On May 28, 2009, Agency issued an advance notice proposing to remove Employee from his position based on the following violation of Article VII, Section 2.4 of the D.C. Fire and EMS Order Book which states:

> Any conviction of a crime (including a plea of no contest) regardless of the punishment, when the crime is relevant to the member's position, job duties or job activities.

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[2] These findings are the Stipulations of Fact submitted by the parties on March 4, 2011.
[3] Employee was sentenced to 60 days in jail. *See*, Employee's OEA Brief, p. 1.

Agency based its decision on Employee's arrest and charge of "attempted possession of Marijuana" and concluded that:

> This conduct is defined as cause, to wit: "any on-duty or employment-related act or omission that an employee knew or should reasonably have known is a violation of law; in 6 D.C.M.R. Section 1603.3(e), 54 DCR 12043 (December 14, 2007)."

According to the proposed notice, the following "detail" supported the proposed action:

> On June 17, 2008, while off duty you were stopped for a traffic violation and cocaine and Marijuana were recovered from your vehicle. You were arrested for drug possession and charged with attempted possession of a controlled substance Marijuana…You stated that on June 17, 2009[4], you had been arrested for speeding at 72 MPH.

Following the recommendation of a hearing officer at the administrative level that proposed removal be sustained, Agency issued its notice of final decision on July 28, 2009 removing Employee from his position, effective July 30, 2009. In the final notice, Fire and EMS Chief Dennis Rubin concluded that Employee's arrest and charge of attempted possession of marijuana violated 6 D.C.M.R. Section 1603.3(e), 54 DCR 12043 (December 14, 2007) which states that "any on-duty or employment-related act or omission that [Employee] knew or should reasonably have known is a violation of law," may form the basis for removal. The letter referred to Article VII Section 2.4 of the D.C. Fire and EMS Department Order Book which states that "any conviction of a crime…regardless of the punishment, when the crime is relevant to the member's position, job duties or job activities". The final notice stated that Employee's:

> duties and responsibilities include obeying the laws of the District of Columbia. A finding of guilty to attempted possession of Marijuana contradicts this edict. Your behavior and judgment in this situation compromises the mission of the Agency and violates the public's trust. The offense, which you committed, is indefensible.

Positions of the Parties

Employee argues that the removal cannot be sustained for several reasons. First he argues that Agency based this adverse action on Section 1603.3(e) of the DPM which prohibits an "on-duty or employment-related act or omission," while the conduct with which Employee was charged and his arrest occurred off duty. Second, he contends that there is no nexus between his position as mechanic and the conviction for drug possession. Next he argues that his conduct was not "especially egregious or notorious." Employee also contends that Section 1603.3(e) does not require a conviction, therefore Agency should have initiated the adverse action at the time of his arrest, not at the time of his conviction. It relies on DPM Section 1601.9(a) which requires Agency to initiate adverse action no later than 90 business days from when it "knew or should have known of the act or occurrence allegedly constituting cause for the corrective action" that Agency acted in an untimely manner.

[4] The correct year is 2008 and not 2009.

Employee argues that, assuming *arguendo,* that the conviction date was appropriate, Agency was required to initiate the action on June 5, 2009, but Agency has only a handwritten notation that the proposed notice was issued on June 2, 2009. Employee also contends that Agency did not initiate the adverse action in a timely manner. He asserts that Agency relied on 6 D.C.M.R. Section 1603.3(e), which is premised on the arrest and not the conviction. Employee maintains that Section 1601.9 of the DPM requires Agency to commence its adverse action within 90 business days after it knew or should have known of the occurrence or after the completion of the criminal investigation. In this matter, Employee was arrested on June 17, 2008; no investigation was initiated after that date, and Agency was notified of the arrest on June 18, 2008. Therefore, Employee argues that Agency was required to initiate its disciplinary action by no later than October 21, 2009. Finally, Employee contends that even if the 90 days began to run on January 28, 2009, *i.e.*, the day Employee was convicted, Agency exceeded the permitted time period. Employee asserts that the proposed notice should have been received by Employee on or before June 5, 2009 but that the record contains only a handwritten notation on the certified letter form that it was mailed on June 2, 2009. There is no documentation confirming Employee's receipt.

Agency maintains that there is "a nexus between off-duty misconduct and the efficiency of government service which may subject an employee to disciplinary action. It notes that the Merit Systems Protection Board (MSPB) in *Wagstaff v. Government Printing Office*, No. DC-0752-10-0616-1-1, 2010WL 6641026 (PERSONNET) found that this nexus can be established in three ways: a rebuttable presumption "in certain egregious circumstances", "preponderant evidence that the misconduct adversely affects the [Employee's] or co-worker's job performance or the agency's trust and confidence in the [Employee's] job performance"; or preponderant evidence that the misconduct interfered with or adversely [affects] the agency's mission". Agency points out that the MSPB, citing *Parker v. U.S. Postal Service*, 819 F.2d 1113 (Fed. Cir 1987), concluded under those circumstances that "involvement in drug trafficking, even when limited to off-duty misconduct, is sufficiently egregious conduct to warrant a presumption of nexus". Agency maintains that the "irrefutable evidence of Employee's off-duty drug trafficking is sufficient to establish a rebuttable presumption that there is a nexus between his off-duty misconduct and his employment". It further maintains that Employee's "involvement in drug trafficking adversely affects the agency's trust and confidence in his performance". (Agency's Brief, p.3).

With regard to the timeliness issue, Agency contends that proposed notice was issued within 90 business days of Employee's conviction and that any action prior to that time, it would have been initiating "disciplinary action based upon criminal conduct which had not been fully adjudged and would violate Employee's Fifth Amendment Due Process Rights under the United States Constitution." (Agency's Brief, p. 4).

Analysis, Findings and Conclusions

Agency is required to prove its case by a preponderance of evidence. "Preponderance" is defined as "that degree of relevant evidence which the reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue". OEA Rule 629.1, 46 D.C. Reg. 9317 (1999).

Employee contends that Agency did not issue the proposed notice in a timely manner. DPM Section 1601.9 states that adverse actions against Agency employees must be commenced with 90 business days "after the date that the [Department] knew or should have known of the act or occurrence allegedly constituting cause for the corrective or adverse action". Employee presents two arguments in support of its position that Agency was untimely. First, it contends Agency should have initiated its action when Employee was arrested. Alternatively, it argues that Agency did not establish that the proposed notice was received by Employee within 90 business days as required by DPM Section 1601.9. With regard to the first argument, Agency maintains that if it had initiated the adverse action prior to the conviction, it would have violated Employee's due process rights. The Administrative Judge concurs with Agency, and concludes that it acted appropriately by waiting until Employee's conviction to initiate the adverse action. Although there is some dispute as to the underlying charge, Employee was proposed for removal based on Article VII, Section 2.4 of the D.C. Fire and EMS Order Book which requires a conviction, not an arrest.

Employee bases his argument that the proposed notice was not issued in a timely manner in the lack of documentation that Employee received the proposed notice in a timely manner, i.e., within 90 days from the date of conviction. In support of this argument, Employee asserts that Agency did not produce any documentation of receipt by Employee. The Administrative Judge does not find sufficient merit to this argument for several reasons. First, Employee did not allege that he did not receive the proposed notice in a timely manner. This matter was scheduled for an evidentiary hearing. A few days before the hearing, the parties advised the Administrative Judge that there was no need for an evidentiary hearing because no relevant facts were in dispute. While Agency did not present anything more than the hand notation on the certified mail form, if Employee was alleging that he did not receive the notice or that he did not receive it in a timely manner and there was not a stipulation on this matter, he was required to present at least testimonial evidence on that issue. Second, Agency is not required to submit the postcard documenting receipt, indeed, the postcard may not be returned to Agency if Employee did not receive the document or through error of the U.S. Postal Service. Only if Employee challenges the receipt of the document would evidence be sought. DPM Section 1601.9(a) requires Agency to initiate the adverse action within 90 days of when it knew or should have known of the conduct that forms the basis of the disciplinary action. In this matter, the operative date is the date that Employee was convicted, i.e., January 28, 2009. The documentation constitutes sufficient evidence to establish that Agency initiated the adverse action in a timely manner.

An adverse action, particularly a removal, is a severe penalty, and the charge which results in the removal must be articulated by the agency so that the charged employee who challenges the removal, is able to address the charge. An employee can only expected to defend against the charge that Agency has stated was the basis for the adverse action. *Office of the District of Columbia Controller v. Frost,* 638 A.2d 657 (D.C. 1994). The charge must be clearly stated to allow the charged employee to understand the charge and prepare his or her challenge. In this matter, Employee was charged with violating Article VII, Section 2.4 of the D.C. Fire and EMS Order Book which relates to the conviction of a crime in the proposed notice, but refers to Employee's arrest and charge of "attempted possession of marijuana" in the descriptive language. The final notice identifies the basis for the removal as Employee's conviction which violated Article VII, Section 2.4

of the D.C. Fire and EMS Order Book. In the narrative, however, Agency Chief states that Employee's arrest and charge of attempted possession of marijuana "violated 6 D.C.M.R. Section 1603.3(e), 54 DCR 12043 (December 14, 2007) which states that "any on-duty or employment-related act or omission that [Employee] knew or should reasonably have known is a violation of law," could be the basis for removal. The proposed and final notices could have been more clearly stated. However, the Administrative Judge concludes that the final agency notice put the Employee on clear notice that he was being removed from his position because of his conviction of attempted possession of a controlled substance.

According to Section 48-904.09 (2001) of the District of Columbia Code, a person is guilty of attempted possession if the individual "attempts or conspires to commit any offense defined in this subchapter", said subchapter being "Controlled Substance Act. Since Employee's removal was based on conduct committed off-duty, Agency must establish the nexus between Employee's position and Agency's decision. In support of its position, Agency refers to the standard used by MSPB, while noting that, although this Office "is not bound by determinations made by the [MSPB] it has been recognized that the Comprehensive Merit Personnel Act (CMPA) is patterned after federal merit systems principles." (Agency's Brief, p. 2). The Administrative Judge finds that this standard to be useful in this case, since it utilizes as preponderant of evidence standard, and that is the same standard that Agency is held to by this Board to establish the charged misconduct. Using the standard established in *Wagstaff, supra,* Agency must establish by a preponderance of evidence that the misconduct adversely affects the Employee's or co-worker's job performance or the agency's trust and confidence in Employee's job performance; or that the misconduct interfered with or adversely affects the agency's mission.

The Administrative Judge concludes that there is a sufficient nexus between Employee's duties and the charged misconduct. Employee was a heavy mobile equipment mechanic at the agency which responds to life-threatening emergencies. Both Agency and Employee's co-workers could reasonably believe that their safety to be in jeopardy if Employee is performing his duties under the influence of controlled substances. The Administrative Judge realizes that Employee was not charged with using drugs but rather with attempted possession of drugs, but the fact that Employee was convicted of a drug-related offense is sufficient to adversely affect the confidence and trust of Agency and Employee's co-workers in Employee's job performance. The Administrative Judge further concludes that Agency established by a preponderance of evidence that the charged misconduct would reasonably interfere with and adversely affect Agency's mission, because Agency would have sufficient basis to lack confidence in Employee and to question the quality of his work. The Administrative Judge believes that agencies must be careful not to immediately remove employees convicted of any offense based only on the fact of conviction. Our system of justice is not that harsh, and each case must be assessed on the facts presented. In this instance, given Agency's mandate to respond to life-threatening emergencies, it is imperative that Agency be confident that all vehicles are prepared to serve the public immediately. It would reasonably lack such confidence in an employee convicted of a drug-related offense. In sum, t he Administrative Judge concludes that it was reasonable for Agency to determine that the conviction for attempted possession of a controlled substance, in this case marijuana, although not related to any on-duty action, was sufficiently

employment related, in that it undermined the confidence of Agency in Employee's ability to carry out his duties.

Agencies have the primary responsibility for managing their employees. *See, e.g.*, *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), ____ D.C.Reg. ____ ( ). This Board has long recognized that the appropriateness of a penalty "involves not only an ascertainment of factual circumstances surrounding the violation but also the application of administrative judgment and discernment". *Beall Construction Company v. OSHRC*, 507 F.2d 1041 (8th Cir. 1974). This Office will not substitute its judgment when determining if a penalty should be sustained, but rather will limit its review to determining that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia,* 502 A.2d 1006, 1009 (D.C. 1985). A penalty will not be disturbed if it comes "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 (1985). For the reasons stated above, the Administrative Judge concludes that Agency did not abuse its discretion in its decision, and further concludes that the penalty was within the permitted range and was not a clear error of judgment.

Agency must meet it burden of proof by a preponderance of evidence. For the reasons stated herein, the Administrative Judge concludes that Agency met its burden of proof in this matter.

ORDER

It is hereby

ORDERED: The petition for appeal is denied.

FOR THE OFFICE: LOIS HOCHHAUSER, ESQ.
Administrative Judge