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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	OEA Matter No.: 1601-0075-15
MICHAEL BRYANT,)	
Employee)	
)	Date of Issuance: January 15, 2016
v.)	
)	
DEPARTMENT OF GENERAL SERVICES,)	
Agency)	
)	Arien P. Cannon, Esq.
)	Administrative Judge
 Reginald L. Harlan, Employee Representative C. Vaughn Adams, Esq., Agency Representative Charles J. Brown, Jr., Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Michael Bryant (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on May 18, 2015, challenging the Department of General Services’ (“Agency”) decision to remove him from his position as a Boiler Plant Operator. Employee was removed from his position based upon Chapter 16 of the District Personnel Manual (“DPM”), Section 1603.3(b): Conviction of a misdemeanor based on conduct relevant to an employee’s position, job duties, or job activities; and DPM Section 1603.3(h): Any act which constitutes a criminal offense whether or not the act results in a conviction.¹ Agency filed its Answer on June 19, 2015. I was assigned this matter on August 12, 2015.

A Prehearing/Status Conference was convened on September 29, 2015, for the purposes of assessing the parties’ positions. A Post Status Conference Order was issued on September 30, 2015, which required the parties to submit briefs on the issues presented. Both parties submitted their briefs accordingly. Based upon the submissions, I determined there were no material issues of fact, thus an Evidentiary Hearing was not warranted. The record is now closed.

¹ Petition for Appeal, Attachment (May 18, 2015).

JURISDICTION

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

ISSUES

1. Whether Agency had cause to terminate Employee based on: “Conviction of a misdemeanor based on conduct relevant to an employee’s position, job duties, or job activities,” pursuant to the DPM § 1603.3(b), and “Any act which constitutes a criminal offense whether or not the act results in a conviction,” pursuant to DPM § 1603.3(h).
2. If so, whether Agency’s penalty of terminating Employee was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1 states that the burden of proof with regard to material issues of fact shall be by a preponderance of the evidence.² “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.

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.³

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Employee was removed from his position as a Boiler Plant Operator II, effective at the close of business on April 29, 2015. The cause for Employee’s removal was based upon: (1) Chapter 16 of the District Personnel Manual (“DPM”), Section 1603.3(b) Conviction of a misdemeanor based on conduct relevant to an employee’s position, job duties, or job activities; and (2) DPM Section 1603.3(h) Any act which constitutes a criminal offense whether or not the act results in a conviction.

The Advance Written Notice of Proposed Removal detailed the basis for Employee’s termination.⁴ Specifically, Agency asserts that the Metropolitan Police Department (“MPD”) was called on December 23, 2014, after Employee and an accomplice were observed by an Agency security officer in the basement of Spingarn Senior High School attempting to steal copper wires. Employee was arrested on the date of the alleged incident.⁵ On February 18,

² 59 DCR 2129 (March 16, 2012).

³ OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).

⁴ Agency Answer, Tab 1 (June 19, 2015).

⁵ *See Id.*, Tab 3.

2015, Employee entered into a guilty plea before the District of Columbia Superior Court for one count of Attempted Theft--Second Degree.⁶

6-B DCMR § 1619.2 provides that there is cause for adverse action when there is “[c]onviction of a misdemeanor based on conduct relevant to an employee’s position, job duties, or job activities.” Furthermore, 6-B DCMR § 1619.2 states that a plea of guilty to a charge of a misdemeanor involving the specified conduct shall constitute *prima facie* evidence of the elements of the misdemeanor. Here, it is not disputed that Employee entered into a guilty plea on February 18, 2015. Therefore, I find that Agency had cause to take adverse action based on DPM Section 1603.3(b): Conviction of a misdemeanor based on conduct relevant to an employee’s position, job duties, or job activities

6-B DCMR § 1619.8 and DPM § 1603.3(h) states that there is cause for adverse action for any act which constitutes a criminal offense whether or not the act results in a conviction. 6-B DCMR § 1619.8 further provides that a conviction is not needed and that an Agency may take adverse action based on an arrest record if the arrest is related to the job. Here, Employee was arrested while on duty on allegations of using his position with Agency to gain access to and steal Agency property. Without delving into the veracity of the allegations against Employee, it is undisputed that he was arrested while on duty for suspicion of stealing copper wiring. Agency provided the arrest record for Employee as an attachment in its Answer, which clearly indicates that Employee was arrested on December 23, 2014, at the address of Spingarn Senior High School, a District government building. Thus, based on Employee’s arrest for Attempted Theft, and in accordance with 6-B DCMR § 1619.8, Agency has satisfied its burden that it had cause to take adverse action against Employee for “any act which constitutes a criminal offense whether or not the act results in a conviction.”

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.⁷ The undersigned may only amend Agency’s penalty if Agency failed to weigh relevant factors or Agency’s judgment clearly exceeded limits of reasonableness.⁸ 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.⁹

The Merit System Protection Board (MSPB) has outlined, and the OEA Board has adopted, twelve factors that assist an agency in determining the appropriateness of a sanction.¹⁰

⁶ Agency’s Answer, Tab 2 (June 19, 2015).

⁷ See *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

⁸ See *Id.*

⁹ *Id.*

¹⁰ 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;

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.¹¹

Under the Table of Appropriate Penalties, 6-B DCMR § 1619.2, a first time offense for a charge of “any act which constitutes a criminal offense whether or not the act results in conviction” ranges from a ten (10) day suspension to removal. In addition, the Table of Appropriate Penalties provides that the appropriate penalty for a first time offense of a “conviction of a misdemeanor based on conduct relevant to an Employee’s position, job duties, or job activities” is removal. Thus, Agency’s decision to remove Employee from his position based on his arrest record and guilty plea of a misdemeanor relevant to his job position was appropriate and supported by the record.

ORDER

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

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge

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- (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 were 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.

¹¹ See *Id.*