THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0072-14
JAMELL STALLINGS, Employee	
	Date of Issuance: August 12, 2015
v.	
METROPOLITAN POLICE DEPARTMENT, Agency	
	Arien P. Cannon, Esq. Administrative Judge

Marc L. Wilhite, Esq., Employee Representative
Lindsey Neinast, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Jamell Stallings ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on April 18, 2014, challenging the Metropolitan Police Department's ("Agency") decision to remove her from her position as a Detective. Employee was terminated for "[c]onviction of any member of the force in any court of competent jurisdiction… of any offense in which the member either pleads guilty, receives a verdict of guilt, or a conviction following a plea of *nolo contendere*…"[1] Agency filed its Answer on May 22, 2014. I was assigned this matter on August 14, 2014.

After rescheduling the Prehearing/Status Conference on numerous occasions, the Prehearing/Status Conference was eventually convened on March 27, 2015 where both parties were present. The parties were ordered to submit briefs on the issues. Both parties submitted their briefs accordingly and it has been determined that there are no material issues of fact; thus, an Evidentiary Hearing is not warranted. The record is now closed.

[1] Agency's General Order Series 120.21, Attachment A, Part A-7.

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. Code § 5-1031 (2004) ("90-day rule"); and

2. Whether the penalty of removal 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 her position as a Detective, effective March 28, 2014. Employee's removal stems from a criminal conviction by a jury in the Circuit Court for Prince George's County, Maryland, of several counts of identity fraud, theft, and forgery. Initially, Employee was served a Proposed Notice of Adverse Action on December 5, 2012, which was a result of her *indictment* of the criminal charges levied against her. [4] Employee was found guilty on February 15, 2013, on twelve (12) of the seventeen (17) charges. Agency issued an Amended Notice of Proposed Adverse Action on May 20, 2013, as a result of Employee's criminal conviction.[5] The amended notice included a single charge: "*Conviction* of any member 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*…"[6] Thereafter, Employee, through counsel, filed an appeal with the Court of Special Appeals of Maryland. The appellate court denied Employee's appeal and upheld the convictions.

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[2] 59 DCR 2129 (March 16, 2012).
[3] OEA Rule 628.2, 59 DCR 2129 (March 16, 2012).
[4] Agency's Answer, Tab 2 (May 22, 2014).
[5] *Id*., Tab 3 (May 22, 2014).
[6] Agency's Answer, Tab 3 (May 22, 2014); *See also* Agency General Order Series 120. 21, Attachment A, Part A-7.

Agency issued its Final Notice of Adverse Action (Termination) on February 19, 2014.[7] Employee's termination became effective March 28, 2014. Employee's termination was a result of her criminal *conviction* as set forth in the Amended Notice of Proposed Adverse Action, rather than the indictment, which was set forth in the original Notice of Proposed Adverse Action.

D.C. Code § 5-1031 (2004) ("90-day rule") provides, in pertinent part:

> (a-1)(1)…[N]o corrective or adverse action against any sworn member or civilian employee of the…Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that 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 the Attorney General, 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.

It is not disputed that Employee was convicted of several charges in Prince George's County, Maryland. The threshold issues are: (1) whether Agency violated D.C. Code § 5-1031 (2004) ("90-day rule"); and (2) whether termination was appropriate under the circumstances. Both parties address the issue of when the 90-day period began to run under D.C. Code § 5-1031 (2004) in their briefs. The Amended Notice of Proposed Removal and the Final Notice of Removal both provide that Employee's *criminal conviction* in Prince George's County, Maryland, was Agency's reason for terminating Employee.

Agency argues that the date in which the 90-day period began was the date of conviction: February 15, 2013.[8] Employee argues that the date the 90-day period began to run was on January 23, 2012, which was the date Agency learned of the underlying allegations of theft, identify fraud, and forgery against Employee. When Agency learned of the allegations against Employee, its Internal Affairs Division conducted an investigation into the matter. Agent Sylvan Altieri ("Altieri"), who was a part of Agency's Internal Affairs investigation team, originally conducted an administrative investigation of the allegations that led to Employee's conviction and concluded that there were "insufficient facts" to take action against Employee for the underlying allegations.[9] This Final Investigative Report was issued on May 11, 2012.

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[7] *Id.*, Tab 5.
[8] *See* Agency's Answer, Tab 1 (Corrected Verdict Sheet); Agency's Brief (May 6, 2015).
[9] Agency's Tab 4, Attachment 1 at 4.

Employee maintains that the anchor date for the 90-day rule was on January 23, 2012, when Agency first became aware of the underlying allegations against Employee. Moreover, Employee argues that because the underlying conduct was a result of an investigation in Maryland, and not the District of Columbia, that the 90-day period was never tolled. Therefore, it is Employee's contention that the 90th business day for the allegations against her was on May 21, 2012. Given that Employee was not served with the original Notice of Proposed Removal of Adverse Action until December 5, 2012, she asserts that the proposed discipline is completely time barred.

Employee argues that in order for Agency to have complied with D.C. Code § 5-1031 (2004), it was required to bring administrative charges against Employee at the time of its initial investigation by Altieri. Since Agency's finding was "insufficient facts" during its Final Investigative Report, and it chose not to levy charges against Employee for her conduct, Employee asserts that the Notice of Proposed Adverse Action (December 5, 2012) and its Amended Notice of Proposed Adverse Action (May 20, 2013) were untimely.

While it is true that Agency's initial investigation of the underlying facts around Employee's conviction had a finding of "insufficient facts," it is apparent that Agency did not have all of the pertinent facts surrounding the case. Altieri was asked by the Maryland Assistant State Attorney overseeing the case in Prince George's County, not to contact Mr. Green, the victim of the allegations against Employee, since the investigation was before a Grand Jury.[10] On the advice of her legal counsel, Employee also did not provide a statement to Agency's Internal Affairs Division since the criminal charges were still pending.[11]

I find that Agency's initial investigation of the allegations against Employee by Altieri, was a separate and distinct occurrence from the indictment and the criminal conviction for purposes of the 90-day rule. Agency's General Order Series 120.21, Attachment A, Part A-7, provides for several types of offenses in which disciplinary action may be taken. It provides, in pertinent part, that there is cause to take disciplinary actions when there is a "*[c]onviction* of any member of the force in any court of competent jurisdiction of any criminal or quasi-criminal offense…" *or* "…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." (the indictment in this matter). Despite Employee's contention that the 90-day time frame began to run when Agency first learned of the allegations against Employee in January 2012, the indictment and conviction triggered separate causes for adverse action in both instances, and were separate occurrences from Agency's Internal Affairs investigation. Although the Investigative Report concluded that there were "insufficient facts," that does not negate the fact that Employee was convicted by a jury of her peers in a court of competent jurisdiction, in violation of Agency's General Order 120.21, Attachment A, Part A-7. Because Agency's Amended Notice of Proposed Adverse Action and the corresponding Final Notice of Proposed Removal cited Employee's conviction for the cause to take adverse action, the undersigned accepts the conviction as cause for removal.

[10] *See* Agency's Answer, Tab 4, Attachment 1.
[11] *Id.*

Therefore, I find that the 90-day time period for the adverse action against Employee began at the time of occurrence which triggered cause: the February 15, 2013 conviction. The Amended Proposed Notice of Adverse Action was issued on May 20, 2013, within 90 business days of the conviction, thereby satisfying the 90-day rule. For the sake of argument, even if Agency relied upon its original Advance Notice of Proposed Removal (based upon the indictment), issued on December 5, 2012, the commencement of adverse action was issued within 90 business days of the indictment.

Appropriateness of penalty

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). According to the Court in *Stokes*, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties; whether the penalty is based on a consideration of the relevant factors, and whether there is a clear error of judgment by agency. In the instant case, there is no dispute that Employee was convicted of criminal charges which created cause for Agency to take adverse action. Agency's General Order Series 120.21, Attachment A, also provides an applicable Table of Offenses and Penalties Guide. The guide provides that a first time offense for a conviction warrants removal. Furthermore, DCMR § 1619.1(1) (Table of Appropriate Penalties) also provides that removal is appropriate for a first time offense of a conviction.

Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the Administrative Judge.[12] The undersigned may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.[13] 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.[14] Here, in Agency's Final Notice of Adverse Action, it thoroughly discussed each *Douglas* factor.[15] Based upon the analysis of each *Douglas* factor, I find that Agency reasonably concluded that termination was appropriate penalty under the circumstances.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's decision to remove Employee from her position as a Detective is **UPHELD**.

FOR THE OFFICE:

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Arien P. Cannon, Esq.
Administrative Judge

[12] *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).
[13] *See Id.*
[14] *Id.*
[15] *Douglas v. Veteran Administration*, 5 M.S.P.B. 313 (1981); Agency's Answer, Tab 5 (May 22, 2014).