THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ANTHONY HOLLIDAY,	)	
Employee	)	OEA Matter No. 1601-0334-10
	)	
v.	)	Date of Issuance: February 8, 2013
	)	
D.C. METROPOLITAN	)	
POLICE DEPARTMENT,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Hugh Hassan, Employee Representative
Ronald B. Harris, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On July 14, 2010, Anthony Holliday ("Employee") filed a Petition for Appeal with the D.C. Office of Employee Appeals ("OEA" or "Office") contesting the D.C. Metropolitan Police Department's ("MPD" or "Agency") decision to suspend him for thirty (30) days for violating District Personnel Manual ("DPM") §1603.3. At the time of the suspension, Employee was employed as a Vehicle Maintenance Officer ("Civilian Fleet Servicer") with Agency. The effective date of his suspension was July 5, 2010. On August 10, 2010, Agency submitted its Answer to Employee's Petition for Appeal.

This matter was assigned to the undersigned Administrative Judge ("AJ") on July 10, 2012. Thereafter, on July 12, 2012, I issued an Order scheduling a Status Conference in this matter for August 8, 2012. During this Status Conference, the parties requested that the matter be submitted to mediation. Following a failed Mediation attempt, I issued another Order dated October 1, 2012, scheduling a Status Conference for October 24, 2012. Both parties were present for the October 10, 2012, Status Conference. On October 25, 2012, I issued a Post-Status Conference Order requiring the parties to submit written briefs addressing the issues raised at the Status Conference. Both parties have now submitted their written briefs. After considering the parties' arguments as presented in their submissions to this Office, I have decided that there are no material issues in dispute, and as such, an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUES

1) Whether Employee's actions constituted cause for adverse action; and
2) If so, whether the penalty of thirty (30) days suspension is within the range allowed by law, rules, or regulations.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "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.

OEA Rule 628.2 *id.* states:

> 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.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

According to the record, Employee was hired as a Civilian Fleet Servicer with Agency on September 17, 2007. On September 17, 2008, Employee was terminated by Agency. Employee appealed his termination to this Office. In an Initial Decision dated November 6, 2009, this Office reversed Employee's termination, and ordered Agency to reinstate Employee, and reimburse him all pay and benefits lost as a result of the 2008 termination.[1] During the processing of his reinstatement, Employee revealed in his Personal History Statement that he was arrested in Anne Arundel County, Maryland on December 23, 2008, for second degree Assault. Following a background check, Agency determined that in December 2008, Employee was arrested in Maryland for first degree Assault, second degree Assault, Reckless Endangerment and False Imprisonment. However, Employee was only convicted for Second degree Assault, a misdemeanor. He was sentenced to eighteen (18) months in jail. He was incarcerated prior to his trial for two-hundred and six (206) days, which was factored into his sentence as time served. He was also sentenced to two (2) years supervised probation. On May 12, 2010, Agency issued Employee a fifteen (15) day advanced notice of proposed adverse action.[2] Employee was given

[1] *See* Agency's Answer (August 19, 2010), at Tab D, Attachment 2; *See also, Holliday v. Metropolitan Police Department*, OEA Matter No. 1601-0046-09 (November 6, 2009).
[2] *Id*. at Tab C.

an opportunity to defend the charges set against him in the May 12, 2010, notice. During an administrative proceeding, the Deciding Officer recommended that Employee be suspended for thirty (30) work days.[3] On June 16, 2010, Agency issued a Notice of Final Agency Decision ("FAD") to Employee.

Employee's Position

Employee does not deny that he was convicted for second degree Assault, a misdemeanor. However, he argues that; (1) he was not employed with Agency at the time of his arrest and conviction in 2008; (2) there is no nexus between his conviction for second degree Assault and his job duties and activities as a Fleet Servicer with Agency; and (3) the penalty imposed on Employee is inappropriate. Employee explains that he was forthcoming about the circumstances of his arrest when he was reinstated to his position with Agency. He notes that he truthfully answered the questions on the pre-reinstatement forms. Employee further explains that his position involves maintaining police vehicles; he has minimal contact with the public; there was no public knowledge of his conviction or public notoriety about his case. Employee contends that though he is employed by a law enforcement agency, he is not a law enforcement officer.[4]

Agency's Position

Agency asserts that it appropriately took disciplinary actions against Employee for his post-termination misconduct. Agency submits that, although Employee was not its employee at the time of his arrest and conviction in 2008, his appeal of his 2008 termination was active. Agency explains that the effect of OEA's reversal of Agency's 2008 termination action was to make Employee whole and reinstate Employee as if he had never left the employ of Agency. Agency further explains that its action of investigating Employee's explanation of his arrest and conviction for second degree Assault was taken as if Employee had never left Agency's employ. Additionally, Agency states that Employee's conduct in not being forthcoming in informing Agency of his complete arrest history and conviction for second degree Assault during the reinstatement process was sufficient cause for the imposition of discipline under DPM §1603.3, specifically (1) "…a conviction (including a plea of nolo contender) of another crime (regardless of punishment) at any time following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or activities; and (2) any knowingly or negligently material misrepresentation on an employment application or other document given to a government agency…"[5] Agency further argues that Employee did not inform Agency of all the charges filed against him after his arrest, and this negligence in the making of a material misrepresentation also constitutes cause.[6]

Furthermore, Agency submits that there is a clear nexus between Employee's criminal misconduct and his position with Agency. Agency maintains that, all employees of Agency including civilians are viewed by the public as trustworthy and persons of integrity who enforce

[3] *Id*. at Tab B.
[4] Brief on Behalf of Employee (January 7, 2013).
[5] Agency's Brief (December 3, 2012).
[6] *Id.*

and obey the law. Agency explains that Employee's uniform has a shoulder patch which identifies him as employed by a law enforcement agency, and Employee as a Fleet Servicer, has access to police department information, equipment and vehicles. Agency also notes that the public has a right to expect that police department officers, as well as civilians, do not engage in criminal acts that call into question their character as employees of Agency. Agency additionally notes that the penalty imposed on Employee is appropriate given the nature of Employee's misconduct and his disciplinary history.[7]

1) Whether Employee's actions constituted cause for discipline

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, the DPM § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Under DPM §1603.3, the definition of "cause" includes a conviction (including a plea of nolo contender) of another crime (regardless of punishment) at any time following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or activities;[8] and (2) any knowingly or negligently material misrepresentation on an employment application or other document given to a government agency.[9] Here, Employee's suspension for thirty (30) work days from his position at Agency was based upon a determination by Agency that Employee's misdemeanor conviction was relevant to his job, and because Employee was not forthcoming in informing Agency of his complete arrest history and conviction.

a) <u>A conviction (including a plea of nolo contender) of another crime (regardless of punishment) at any time following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or activities</u>

In the instant case, Employee argues that he was not an MPD employee when he was arrested, and that there is no nexus between his conviction for second degree Assault and his job as a Civilian Fleet Servicer with Agency. Agency on the other hand maintains that, while Employee had been terminated from his position with Agency when he was arrested, per OEA's order reversing Agency's decision to terminate Employee, he was made whole as if he had never left the employ of Agency. I agree with Agency's assertion. Employee's misconduct, arrest and misdemeanor conviction occurred while Employee's termination from Agency was under appeal with this Office. And because the November 6, 2009, Initial Decision issued by this Office ordered Agency to reinstate Employee and reimburse him all pay and benefits lost as a result of the improper 2008 termination, Employee was not adversely affected by the termination since he did not incur any break in service or pay. Agency's reinstatement of Employee pursuant to the November 6, 2009, Initial Decision is equivalent to Employee never leaving Agency. Employee

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[7] *Id.*

[8] This language is consistent with the current DPM §1603.3(b) which reads as follows: "[c]onviction of a misdemeanor based on conduct relevant to an employee's position, job duties, or job Activities;" and DPM §1619.1(2).

[9] This language is consistent with the current DPM §§ 1603.3(c) and (d) which reads as follows: "[a]ny knowing or negligent material misrepresentation on an employment application;" and "[a]ny knowing or negligent material misrepresentation on other document given to a government agency;" respectively; and DPM §§1619.1(3) and (4).

did not have to re-apply and go through the application process for his position. Moreover, upon reinstatement, Employee received all back pay and benefits from the time he was improperly terminated to the time he was reinstated, which includes the time of his misconduct, arrest and misdemeanor conviction. Therefore, I conclude that Employee was retroactively employed by Agency when he was arrested, and eventually convicted for second degree Assault.

I further concur with Agency's argument that a nexus exist between Employee's misconduct and his job as a Civilian Fleet Servicer with Agency. While Employee was not a law enforcement officer, he still held himself out as a member of Agency. Employee wears a uniform with a shoulder patch that identifies him as a member of Agency. Also, according to the record, Employee has access to police department information, equipment and vehicles. As a member of Agency (civilian or law enforcement) Employee's misconduct reflects poorly on his employer (Agency and the District of Columbia in general). Moreover, irrespective of whether Employee is a law enforcement officer or a civilian, the fact remains that, Employee is still an employee of MPD and as such, he is held to a higher standard by the public in general. As an MPD employee, the public expects Employee to be aware of, and abide by the law. Furthermore, Employee's conviction is public knowledge since it is published in the Maryland case database for anyone with access to the internet to view. Accordingly, I conclude that there is a nexus between Employee's conviction for second degree Assault (a misdemeanor) in Maryland and his position with Agency, as Employee's misdemeanor conviction interferes with, and undermines the efficiency and integrity of Agency's operations. Consequently, I find that Agency is justified in bringing an adverse action against Employee for violating DPM §1603.3(b).

b) <u>Any knowing or negligent material misrepresentation on an employment application or other document given to a government agency.</u>

Employee was also charged with violating DPM §§1603.3(c) and/or (d), and DPM §§ 1619.1(3) and/or (4) referenced above. Agency argues that Employee was not forthcoming in informing Agency of his complete arrest history during the reinstatement process. Agency maintains that Employee did not inform Agency of all the charges filed against him after his arrest, and this negligence constitutes cause. Employee submits that he was forthcoming about the circumstances of his arrest when he was reinstated to his position with Agency. He notes that he truthfully answered the questions on the pre-reinstatement forms.

Prior to his reinstatement to Agency, Employee was required to complete pre-reinstatement forms. According to the record, these forms included a Personal History Statement.[10] Employee answered "Yes" to question number 72A and E, which asked if Employee had ever been arrested, and if he had ever been placed on Probation. Question number 75 stated that, "If you answered "Yes" to any part of questions 71, 72, or 73, give complete details in the section below. Include (as a minimum): (1) the date of the offense, (2) charge(s), (3) city and state, (4) name of law enforcement Agency involved, and (5) final disposition…" Here, Employee provided the county, state, date and the disposition of the matter. However, Employee did not include all the offenses he was arrested for, such as first degree Assault, second degree Assault, Reckless Endangerment and False Imprisonment. Although the pre-reinstatement forms are not an employment application, I find that they fall under the second part

[10] Agency's Answer, *supra*, at Tab D, Attachment 3.

of the above referenced cause of action (other document given to a government agency). Employee filled out these documents/forms, including the Personal History form, and submitted them to MPD, a government Agency. Agency asserts that Employee's failure to inform Agency of all the charges he was arrested for constitutes negligence on the part of Employee. I agree with Agency's assertion. There is no evidence within the record to show that Employee intentionally left out the other charges. Consequently, I find that, Agency is justified in charging Employee with this cause of action.

2) Whether the penalty of thirty (30) days suspension is within the range allowed by law, rules, or regulations.

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).[11] 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 ("TAP"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by the agency. In the instant case, I find that Agency has met its burden of proof for the charges of (1) [a] conviction (including a plea of nolo contender) of another crime (regardless of punishment) at any time following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or activities; and (2) [a]ny knowing or negligent material misrepresentation on an employment application or other document given to a government agency.

In reviewing Agency's decision to suspend Employee for thirty (30) days, OEA may look to the Table of Appropriate Penalties. Chapter 16 of the DPM outlines the Table of Penalties for various causes of adverse actions taken against District government employees. The penalty for "[a] conviction (including a plea of nolo contender) of another crime (regardless of punishment) at any time following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or activities" is found in § 1619.1(2) of the DPM. Here, Employee was convicted for second degree Assault in Maryland, which is a misdemeanor, and therefore is consistent with the language in DPM §1603.3(b). The penalty for any cause of action under §1619.1(2) is removal. The penalty for "[a]ny knowing or negligent material misrepresentation on an employment application or other document given to a government agency" is found in DPM §§1619.1(3) and (4). Here, Employee submitted a Personal History document to Agency which misrepresented his arrest record, as it did not include a complete list of all the charges he was arrested for, thereby, his action is consistent with the language of DPM §1603.3(d). Because Agency conceded that Employee's misconduct was non-intentional, the

[11] *See also Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration,* OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

penalty range for any cause of action under §1619.1(4)(a) is five (5) to fifteen (15) days suspension.[12] Given the totality of the circumstance, I find that, by suspending Employee for thirty (30) days, Agency engaged in progressive discipline, and did not abuse its discretion.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[13] When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines; is based on consideration of the relevant factors; and is clearly not an error of judgment. I find that the penalty of thirty (30) days was within the range allowed by law. Accordingly, Agency was within its authority to suspend Employee for thirty (30) days, given the TAP.

Penalty was Based on Consideration of Relevant Factors

An agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[14] The evidence does not establish that the penalty of thirty (30) days suspension constituted an abuse of discretion. Agency presented evidence that it considered relevant factors as outlined in *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981), in reaching the decision to suspend Employee.[15]

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[12] It is also worth noting that Employee was disciplined for "willfully and knowingly making an untrue statement of any kind…" in February 2010, and he was suspended for fifteen (15) days.

[13] *Love* also provided that "[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).

[14] *Butler v. Department of Motor Vehicles,* OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).

[15] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and it's 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 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;

In this case, the penalty for a first time offense for violating DPM §1603.3(b) is removal, while the penalty for a first time offense for violating DPM §1603.3(d) is five (5) to fifteen (15) days suspension. In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." In reaching the decision to suspend Employee for thirty (30) days, Agency gave credence to the nature and seriousness of the offense; disciplinary history; type of employment; and the notoriety of the offense on the reputation of the Agency. In accordance with DPM §1619.1(2) and DPM §1619.1(4)(a), I conclude that Agency had sufficient cause to suspend Employee for thirty (30) days. Agency has properly exercised its managerial discretion and its chosen penalty of thirty (30) days suspension is reasonable and is clearly not an error of judgment. Accordingly, I further conclude that Agency's action should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of suspending Employee for thirty (30) days is **UPHELD**.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Administrative Judge

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.