THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
JAMES O'BOYLE Employee	
v.	OEA Matter No.: 1601-0020-05
D.C. METROPOLITAN POLICE DEPARTMENT Agency	Date of Issuance: September 16, 2009

OPINION AND ORDER

ON

PETITION FOR REVIEW

James O'Boyle ("Employee") was a Sergeant with the Metropolitan Police Department ("Agency"). Agency sustained charges against Employee for 1) Drinking alcoholic beverage 2) Conviction; and 3) Conduct unbecoming of an officer.

The event from which the charges stemmed occurred on April 5, 2004, when Employee was involved in a motor vehicle accident while off-duty in Alexandria, Virginia. Employee was placed under arrest for Driving While Intoxicated ("DWI").

Employee's blood alcohol level was .27, over three times the legal limit in the State of Virginia. On July 21, 2004, Employee was convicted of the DWI charge and sentenced to 180 days in jail with 170 days suspended. Employee served ten (10) days in jail and was fined $2,500 with all but $500 suspended. Employee was also placed on probation, had his license suspended for one (1) year, and was required to complete an alcohol awareness program.

On August 11, 2004, Agency proposed to suspend Employee without pay based on his July 21, 2004 conviction. On August 30, 2004, Agency issued its final decision to suspend Employee without pay pending resolution of the administrative action.

Agency conducted an administrative investigation into the April 5, 2004 car accident and DWI conviction. Agency's Final Investigative Report recommended that Employee be cited for Adverse Action. On November 8, 2004, Agency issued a Notice of Proposed Adverse Action to Employee. Agency proposed to terminate Employee. Employee filed an Appeal with the Chief of Police on December 15, 2004. The Appeal was denied on December 28, 2004. Employee received notice that his termination would be effective January 8, 2005.

On November 22, 2005, the Administrative Judge ("AJ") conducted a pre-hearing conference. Employee submitted a request for mediation and conciliation on December 13, 2005 as a result of discussions during the pre-hearing conference. The case was assigned to a mediator at this Office, but, the parties failed to settle the matter. An Order Closing the Record was issued on May 8, 2006.

On February 1, 2005, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). In an Initial Decision issued October 17, 2006, the AJ

upheld Agency's decision to terminate Employee. The issue to be decided was whether removal was within the range of appropriate penalties available to Agency. After a detailed analysis of the issue, the AJ concluded that the suspension without pay proposed on August 11, 2004 constituted a non-disciplinary administrative action and not a disciplinary adverse action.[1] The AJ further stated that Agency's selection of a penalty was a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[2]

Employee then filed a Petition for Review on November 8, 2006. Employee asks us to reverse the Initial Decision on the grounds that "it was legal error for the Administrative Judge to determine that the suspension without pay proposed on August 11, 2004 and effected on August 30, 2004 was a non-disciplinary administrative action and not a disciplinary adverse action…when Employee was terminated…for the same alleged misconduct for which he was suspended without pay."[3] Employee claims that Agency's actions subject Employee to double punishment or double jeopardy because he was suspended without pay and subsequently terminated for the same offense.

Agency issued Employee a Final Notice of Decision to Suspend Without Pay stating "[i]n view of your conviction and incarceration in Fairfax County …you should be suspended without pay pending resolution of the administrative charges."[5] Agency argues that the purpose of the suspension was to allow Agency time to conduct an internal investigation into the DWI arrest and determine if Employee engaged in misconduct. However, this Board finds that suspension of an Employee without pay is a disciplinary adverse action. Employee's subsequent termination therefore constitutes a

[1] *Initial Decision*, p. 8 (October 17, 2006).
[2] *Id*.
[3] *Petition for Review*, p. 1-2 (November 8, 2006).

double punishment for the same alleged misconduct for which Employee was suspended without pay.

Agency's General Order No. 1202.1 Part I C-2 defines a suspension from duty as a type of adverse action under which there is a "temporary cessation of pay and police authority with a definite date of restoration." Agency defines administrative suspensions as suspensions that "temporarily prohibit a member of the Department from performing police duty and shall be distinguished from disciplinary suspension imposed as punishment following a final determination of misconduct."[4]

Although Agency's General Order denotes Employee's suspension without pay as an administrative action, this Board holds that the suspension was tantamount to an adverse employment action. Typically, adverse employment actions are economic injuries and involve a loss or reduction of pay or monetary benefits.[5] An actionable adverse employment action must involve a change in employment conditions that is more than an inconvenience or alteration of job responsibilities, such as reducing an employee's workload and pay.[6] Moreover, in *Gribcheck v. Runyon*[7], the Appeals court held that a plaintiff suffered an adverse employment action when he was suspended without pay for fourteen days and did not receive back pay.[8]

In this case, Employee suffered an economic injury when he was placed on leave without pay from August 30, 2004 until his termination on January 8, 2005. While it is understandable that Agency suspended Employee for the purposes of conducting its own

---

[4] General Order 1202.1 Part I-D-1.
[5] *Markel v. Board of Regents of Univ. of Wis. Sys.*, 276 F.3d 906, 911 (7th Cir.2002); *Collins v. State of Illinois*, 830 F.2d 692, 703 (7th Cir.1987).
[6] *Kirby v. City of Tacoma 124* Wash.App. 454, 465, 98 P.3d 827 (2004).
[7] *Gribcheck v. Runyon*, 245 F.3d 547, 551 (6th Cir.2001).
[8] Courts have held that a temporary suspension with pay is not an adverse employment action. *Id*., *See Jackson v. City of Columbus*, 194 F.3d 737, 752 (6th Cir.1999).

internal investigation, this does not absolve its actions from being adverse in nature. For this reason we find that Employee's suspension was an adverse disciplinary action and not an administrative suspension.[9]

Employee also argues that the penalty of termination was arbitrary, excessive, unreasonable and inconsistent with Agency actions in similar cases. Employee refers to several other Agency disciplinary cases in which the other employees were not terminated as a result of various offenses, including driving under the influence, reckless driving and driving while impaired.[10]

This Office's scope of review as to the appropriateness of a penalty is limited to a determination of whether the penalty imposed is within the range that is allowed by law, regulation and any applicable table of penalties.[11] In reviewing an agency's decision, a number of factors are important in determining whether a penalty is reasonable.[12] Among these factors is whether or not the agency has meted out similar penalties for similar offenses.[13]

However, in *Huntley v. Metropolitan Police Department*, this Office held that the principal of similar penalties for similar offenses does not require that agencies insist upon rigid formalism, mathematical rigidity or perfect consistency regardless of

---

[9] It should be noted that courts will defer to OEA's interpretation of personnel regulations to the same extent that it would defer to any agency's interpretation of a statute it administered because of the expertise this Office has developed in administering and enforcing District of Columbia personnel records. *Hutchinson v. District of Columbia Office of Employee Appeals*, App. D.C. , 710 A.2d 227 (1998).

[10] *Employee Brief*, pp. 3-6. *See* MPD disciplinary cases for: Detective Pamela Montague, Officer Gregory E. Countee, Officer Louis Schneider, Officer Jacob Lipscomb, Sergeant Christopher Whitehouse, Officer William Torres, Officer Kenneth Furr, Officer Duane Smith, Officer Joseph Belfiore, and Detective John Paprcka. The majority of the aforementioned employees were fined and/or placed on probation, but did not serve time in jail.

[11] *Huntley v. Metropolitan Police Department*, OEA Matter Number 1601-0111-91, *Opinion and Order on Petition for Review*, __ D.C. Reg. __ ( ).

[12] *Id.* at 4.

[13] *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985); *Employee v. Agency*, D.C. Reg. 4565 (1982); *Employee v. Agency*, 30 D.C. Reg. 352 (1983); *Giacobbi v. U.S. Postal Service*, 30 M.S.P.R. 39 (1986).

variation, but that they apply practical realism to each situation to assure that employees receive fair and equitable treatment where genuinely similar cases are presented.[14] Normally, in order to show disparate treatment, the employee must show that he or she worked in the same organizational unit as the comparison employees and that they were subject to discipline by the same supervisor within the same general time period.[15]

In this instance, we find that Employee was similarly situated to other MPD employees at the time of his termination. The employees cited in the Petition for Review all worked for the Metropolitan Police Department during 2003 and 2004. Employee was terminated during this time period. Moreover, each adverse action was reviewed and decided by Shannon P. Cockett, Assistant Chief Director of Agency's Human Services Section. In some cases, the employee pled guilty or was found guilty of DWI, DUI or reckless driving and was sentenced to suspended jail time. As a result, each employee was subjected to an adverse action. The penalties imposed by Agency against these officers ranged from a thirty (30) day suspension to a ninety (90) day suspension. None of the employees cited were terminated because of their misconduct. Although Employee was the only one to serve time in jail and only one other employee had obtained the rank of Sergeant, these factors alone do not constitute meaningful and significant differences between Employee's case and the other cases.

The selection of an appropriate penalty must involve a balancing of the relevant factors in the individual case. Here, Employee has provided enough evidence to at least raise the question of whether he received the same treatment as similarly situated

---

[14] *Huntley* at 5; *See also Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306-307 (1981).
[15] *See Carroll v. Department of Health and Human Services*, 703 F.2d 1388 (Fed. Cir. 1983); *Kuhlmann v. Department of Health and Human Services*, 10 M.S.P.R. 356 (1982); *Mille v. Department of the Air Force*, 28 M.S.P.R. 248 (1985).

employees. For this reason we must grant Employee's Petition for Review and remand this matter to the Administrative Judge for a determination on that issue.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **GRANTED** and this matter is **REMANDED** to the Administrative Judge for further proceedings consistent with this opinion.

FOR THE BOARD:

_____
Sherri Beatty-Arthur, Chair

_____
Barbara D. Morgan

_____
Richard F. Johns

_____
Hilary Cairns

_____
Clarence Labor, Jr.

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after the formal notice of the decision or order sought to be reviewed.