THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
PAUL DAME	)	OEA Matter No. 1601-0043-03R07
Employee	)	
	)	Date of Issuance: April 11, 2008
v.	)	
	)	Joseph E. Lim, Esq.
DEPARTMENT OF CORRECTIONS	)	Senior Administrative Judge
Agency	)	
	)	

Alan Banov, Esq., Employee Representative
Fred Staten, Jr., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On March 21, 2003, Employee, a Computer Specialist, DS-13 in the Career Service, filed a petition for appeal from Agency's action summarily removing him from his position effective November 5, 1999. The employee appealed his removal by the agency for: other conduct (felony conviction for child abuse) during and outside of duty hours that would affect adversely the employee's or the agency's ability to perform effectively.

On November 4, 2003, the late Senior Administrative Judge Daryl J. Hollis issued an Initial Decision (ID) in which he dismissed Employee's appeal for failure to prosecute. He found that Employee had failed to submit the final Agency decision from which he was appealing, after being required by the Office to do so in a letter sent to him on October 14, 2003.

Employee timely filed a petition for review (PFR) of the ID with the OEA Board. Attached to his PFR were documents showing that he had in fact responded to the Office's October 14, 2003 letter as ordered. Thus, on January 14, 2004, the Board issued an Opinion and Order on Petition for Review in which it remanded the matter to Judge Hollis for further consideration.

On October 14, 2004, Judge Daryl J. Hollis issued an Addendum Decision on Remand, OEA Matter No. 1601-0043-03R04, in which he dismissed Employee's appeal for lack of jurisdiction because of Employee's untimely filing.

Again Employee filed a petition for review with the OEA Board. This time, the Board held that because Agency failed to provide Employee a copy of its final decision and thus

failed to provide proper notice to Employee of his appeal rights, Agency is precluded from arguing that Employee's appeal is untimely. Thus the Board remanded this matter back to this Office for further action consistent with its decision. Since Judge Hollis had retired, this matter was assigned to me on August 30, 2007.

On September 19, 2007, I held a status conference and subsequently ordered the parties to submit their legal briefs on the issue of whether Agency's decision removing Employee should be upheld. I closed the record after the parties made their submissions.

JURISDICTION

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

ISSUES

1. Whether Agency's action was taken for proper cause.

2. If so, whether the penalty was appropriate under the circumstances.

STATEMENT OF FACTS

Based on the submissions of both parties, I make the following findings of facts:

1. Employee started work for the District of Columbia in August 1976 as a Correctional Officer. Over the years, he progressed to the positions of Sergeant, Lieutenant, and Captain, before obtaining a civilian position working with computers.

2. Effective January 17, 1999, Agency promoted Employee from Program Analyst, DS-12, to Supervisory Computer Specialist, DS-13. Employee's position description indicates that as the systems and data administrator, his job was to supervise employees in the design, development and implementation of a variety of systems software for the Department's mainframe and minicomputer systems.

3. Although Employee then served as a civilian in his capacities as a Computer and Supervisory Computer Specialist, Agency asserts, and Employee did not deny, that he retained his law enforcement status and was covered by the retirement provisions of Title 5 USC, Section 8335(b). Thus, he remains a Law Enforcement Officer for personnel purposes.

4. On March 17, 1999, Maryland police arrested Employee in Anne Arundel County for possession of child pornography. Employee subsequently informed his supervisor of the arrest.

5. Shortly after his arrest, a psychiatrist diagnosed Employee with “Sexual Addiction” and stated that the actions for which he was arrested stemmed from this medical condition. Employee undertook treatment with medication, intensive therapy, and assistance from Agency’s Employee Assistance Program.

6. Employee’s supervisor gave him an “outstanding” performance evaluation and a favorable character reference for his criminal case.

7. On September 2, 1999, in the Circuit Court for Anne Arundel County, Maryland, Employee pled guilty to a felony involving child abuse. Specifically, Employee was accused of secretly videotaping his daughter. He was sentenced to ten years of incarceration, with all but 60 days of that sentence suspended. He was also ordered to a treatment program for sex addiction, medication, no contact with children except as approved by a family therapist, no non-work related internet use, and directed to register as a sex offender. Additionally, he was placed on five years probation.

8. Effective September 10, 1999, the District of Columbia Office of Personnel published new disciplinary regulations in 46 DCR 7208.

9. Because of his conviction, Employee received a November 4, 1999 Notice of Summary Removal from Agency. The notice advised him that he was being summarily removed effective November 5, 1999, for "Other conduct during and outside of duty hours that would affect adversely the employee's or the agency's ability to perform effectively." Under specifications, the notice simply states, “On September 2, 1999, you entered a plea of guilty to a felony charge in the Anne Arundel County Circuit Court.”

10. Employee obtained an internal administrative review of the action by Lawrence Greer, Agency's Deputy Director for Operations, the designated hearing officer. Mr. Greer met with him on December 1, 1999, at which time Employee presented his defense to the charge. By letter to Director Odie Washington dated December 15, 1999, Mr. Greer summarized Agency's case against Employee, and Employee's defense thereto. He then set forth his findings of fact and recommended that Employee be removed. Greer wrote that Employee’s temporary placement on the sex offender registry caused a “discredit to the Agency and a loss of confidence in [Employee’s] professional suitability,” and that the “standards [sic] of conduct of an employee of a law enforcement agency are expected to be significantly higher than those of the general public.”

11. In a Final Agency Decision dated January 6, 2000, Director Washington sustained the summary removal. This final decision advised Employee of his appeal rights to this Office and listed the Office's address and telephone number. Attached to the decision was a copy of the Office's Petition for Appeal Form. Apart from the aforementioned facts, Agency did not proffer any more evidence to back up its assertion of a nexus between Employee’s conviction and his work.

12. On September 10, 2002, the Circuit Court for Anne Arundel County, Maryland, reduced Employee's conviction to Probation Before Judgment (PBJ). The Court also denied the State's request to have Employee register as a sex offender.

13. On March 21, 2003, Employee filed the instant petition for appeal with the Office.

14. On June 22, 2006, Employee's criminal conviction pertaining to his March 17, 1999, arrest was expunged after the successful completion of his PBJ.

ANALYSIS AND CONCLUSION

Whether Agency's action was taken for cause.

Prior to October 21, 1998, there were twenty-two (22) statutory causes for which an employee in the Career or Educational Service could be subjected to adverse or corrective action. *See* D.C. Code Ann. § 1-617.1(d) (1992 repl.). One of these causes was that set forth here: "Other conduct during and outside of duty hours that would affect adversely the employee's or the agency's ability to perform effectively." *See* D.C. Code Ann. § 1-617.1(d) (16) (1992 repl.).

However, effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998, D.C. Law 12-124 (OPRAA), modified sections of the Comprehensive Merit Personnel Act, D.C. Law 2-139 (CMPA) in pertinent part by eliminating the twenty-two (22) stated causes, although language remained mandating that an employee could only be disciplined for "cause". Further, OPRAA delegated to the Mayor the task of promulgating new rules defining cause.

On May 21, 1999, the Mayor, through the D.C. Office of Personnel, promulgated emergency rules regarding adverse and corrective actions. *See* 46 D.C. Reg. 4659 (1999). Section 1603.3, *id.*, set forth the new definition of cause.[1] Additionally, these rules were made retroactive to the effective date of OPRAA, October 21, 1998. The rules were published as final on September 10, 1999. *See* 46 D.C. Reg. at 7208.

---

[1] In pertinent part, these definitions are as follows:

> [A]ny on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious. This definition includes, without limitation, unauthorized absence, negligence, incompetence, insubordination, misfeasance, malfeasance, the unreasonable failure to assist a fellow government employee in performing his or her official duties, or the unreasonable failure to give assistance to a member of the public seeking services or information from the government.

The instant matter occurred after the adoption of OPRAA, and thus is governed by its provisions. However, it occurred before the new regulations defining cause were published as final on September 10, 1999, and that is why the savings clause of § 1603.13, 46 D.C. Reg. at 7210 is important. That section provides that an employee may be subjected to an adverse action under the new regulations *only if* the employee could have been subjected to the same adverse action under "applicable regulations" that existed prior to the adoption of the new regulations.[2] Agency supported the cause with specifications pertaining to Employee's September 2, 1999, guilty plea.

In its oral arguments before the undersigned, Agency suggested that because he was an employee eligible to be reassigned or promoted to a Deputy Warden position within the D.C. Department of Corrections, Employee should also be charged under the above mentioned, "(a) Any act or commission which constitutes a criminal offense, whether or not such act or omission results in a conviction; …."

DPM (District Personnel Manual) Chapter 16, Part 1, Section 1603.4, which sets forth specific additional standards for "uniform member, officer, or civilian employee of the Metropolitan Department or the DC Department of Corrections; any commissioned special police officer employed by the District of Columbia; any employee of the Youth Services Administration covered by the law enforcement retirement provisions of the Civil Service Retirement System or the detention officer provisions of the District retirement benefits program established pursuant to DC Official Code § 1-626.05 *et seq.*; or any other District of Columbia employee authorized to carry a firearm while on duty, cause also means the following, whether occurring on or off duty: (a) Any act or commission which constitutes a criminal offense, whether or not such act or omission results in a conviction; …."

Agency based its contention by stating that Employee started as a Correctional Officer who progressed through the ranks to Captain and then on to civilian positions of Computer Specialist and Supervisory Computer Specialist. Agency states that although Employee served as a civilian, he retained his law enforcement status and was covered under their retirement provisions.

Indeed, this appears to be the more appropriate charge that should have been leveled against Employee. Yet, for whatever reason, this was not the charge Agency leveled against Employee, and thus this will not be considered.

The District of Columbia Court of Appeals has made clear that employees can be expected to defend only against the charges which were actually leveled against them. See *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 662 (D.C. 1994). *Goldstein v. Chestnut Ridge Vol. Fire Co.*, 218 F. 3d 337, 357 (4th Cir. 2000) ("Inasmuch as explanations legitimizing otherwise

[2] The prior applicable regulations governing adverse actions are found at 34 D.C. Reg. 1845 (1987), and amended at 37 D.C. Reg. 8297 (1990). Of specific relevance is the previous "Table of Appropriate Penalties", 34 D.C. Reg. at 1861.

prohibited conduct can easily be conjured post hoc, we have reviewed these explanations with a jaundiced eye.").

In addition, the Board in *Stuhlmacher v. U.S. Postal Service*, 85 M.S.P.R. 272 (2001) held that it will not sustain an agency action on the basis of a charge that could have been brought, but was not. Also *Johnston v. Government Printing Office*, 5 M.S.P.R. 354, 357 (1981) Rather, it is required to adjudicate an appeal solely on the grounds invoked by the agency, and may not substitute what it considers to be a more appropriate charge. *Gottlieb v. Veterans Administration*, 39 M.S.P.R. 606, 609 (1989).

Thus, I will adjudicate only the charge of "Other conduct during and outside of duty hours that would affect adversely the employee's or the agency's ability to perform effectively" as it is described in the agency's proposal and decision notices. See, *Rackers v. Department of Justice*, 79 M.S.P.R. 262, 276 (1998), *aff'd*, 194 F.3d 1336 (fed. Cir. 1999).

Agency cites the following statutes and regulations as supporting its adverse action:

"Other Conduct" - D.C. Code Ann. § 1-617.1(d)(16) (1992)

a. Cause for taking adverse action

The District of Columbia Code provides that an employee may be subjected to adverse action based on "[o]ther conduct during and outside of duty hours that would affect adversely the employee's or the agency's ability to perform effectively." *See* D.C. Code Ann. § 1-617.1(d)(16) (1992).

i. Nexus required between conduct and ability to perform effectively

The District of Columbia Office of Personnel (DCOP) Rules require a nexus between an employee's conduct and his or her ability to perform effectively. Specifically, Rules 1603.3 and 1603.4, 37 D.C. Reg. 8298 (1990), read in relevant part as follow:

1603.3 When a corrective or adverse action is proposed for cause as provided in . . . § 1603.1(p) . . ., the agency shall present evidence to demonstrate the following:

(b) That the conduct would affect or has adversely affected the ability of the employee or the agency to perform effectively. . . .

1603.4 In showing that the employee's conduct would affect or has affected adversely the ability of the employee or the employee's agency to perform effectively, the agency must demonstrate nexus, which may include, but is not limited to, one or more of the following:

(b) That the employee is unable or unsuitable to perform his or her assigned duties;

Rule 1601.1, 37 D.C. Reg. 8297 (1990), defines the term "nexus" as:

> NEXUS - a reasonable connection between the conduct of an employee and the ability of the employee to perform his or her job or the ability of his or her employing agency to perform effectively, determined in accordance with §§ 1603.4 and 1603.8.

This entire matter deals with whether Agency has established "nexus" between Employee's conduct and his or his agency's effective work performance.

Agency stated Pre-OPRAA regulation § 1603.4 provides that nexus may include, but is not limited to, one or more of the following: a) that the agency is less able to carry out its assigned function; b) that the employee is unable or unsuitable to perform his or her assigned duties; c) that other employees refuse to work with the employee who engaged in the misconduct; d) that the conduct has been publicized or has gained notoriety which has a deleterious effect on the operations of the agency; or e) that there is otherwise an adverse effect on the operation of the agency.

However, the accompanying §1603.5 also provides that "Any nexus as set forth in § 1603.4 which is relied upon in proposing a corrective or adverse action shall be set forth in the notice of the proposed corrective or adverse action."

Thus, an agency must make at least two separate determinations in its decision to remove an employee: (1) did the employee commit the act(s) allegedly responsible for his removal; and (2) is there a nexus between the employee's misconduct and the efficiency of the service. Both determinations must be supported by substantial evidence. *Young v. Hampton*, 568 F.2d 1253 (7th Cir. 1977).

Because there is no dispute that Employee did plead guilty, the issue is whether Agency has proffered any facts to demonstrate nexus between Employee's criminal conviction and the efficiency of the service.

Rule 1603.8, 37 D.C. Reg. 8297 (1990), permits an agency to rely upon [f]ederal case law, arbitration decisions, or other relevant authorities . . . in demonstrating a nexus.

The Merit Systems Protection Board (MSPB), this Office's federal counterpart, has held that "in some egregious circumstances a presumption of nexus may arise from the nature and gravity of the misconduct. In considering whether such a presumption arises, [t]he nature of the particular job as much as the conduct allegedly justifying the action has a bearing on whether the necessary relationship obtains." *Austin v. Department of Justice*, 11 M.S.P.R. 255, 258 (1982). (citation omitted).

In *Merritt v. Department of Justice*, 6 M.S.P.R. 493 (1981), the Board discussed the question of nexus and set out the framework under which this issue should be considered. In *Merritt, supra*, at 510, noted that in "certain egregious circumstances" a presumption of nexus may arise from the nature and gravity of the off-duty misconduct. Generally, a nexus determination must be based on evidence linking the employee's off-duty misconduct with the efficiency of the service, and the agency has the burden to establish this link. *Merritt, supra,* at 511.

The court in *Kruger, et. al. v. Department of Justice*, 32 M.S.P.R. 71 (1987), recognized three independent means by which an agency may show a nexus linking an employee's off-duty misconduct with the efficiency of the service: 1) a rebuttable presumption of nexus that may arise in "certain egregious circumstances" based on the nature and gravity of the misconduct; 2) a showing by preponderant evidence that the misconduct affects the employee's or his co-workers' job performance, or management's trust and confidence in the employee's job performance; and 3) a showing by preponderant evidence that the misconduct interfered with or adversely affected the agency's mission. See, e.g., *Johnson v. Department of Health and Human Services*, 22 M.S.P.R. 521, 526 (1984); *Gallagher v. U.S. Postal Service*, 6 M.S.P.R. 572, 576-77 (1981). Here the court held that employee, a correctional officer, smoking marijuana in public is directly opposed to the agency's law enforcement and rehabilitative mission

Nexus was also found where an employee held a high-level management position in which she had fiduciary responsibilities for up to $25,000, but was also convicted of switching the price tags on merchandise and purchasing and attempting to purchase the merchandise at a reduced price. The court established that she compromised the agency's trust in her ability to function in that supervisory position. *Schaffer v. U.S. Postal Service*, 39 M.S.P.R. 153 (1988).

In *Masino v. United States*, 218 Ct. Cl. 531, 589 F.2d 1048 (1978), a sufficient nexus between the employee conduct and the disciplinary action taken may be found where the nature of the misconduct is so egregious, such as where force is used towards oral sodomy. It is not the mere "immoral act," but rather the outrageous use of force which is controlling. There the court found that employee's removal is neither arbitrary nor capricious, and clearly did not constitute an abuse of agency discretion.

In *Allred v. Department of Health and Human Services*, 786 F.2d 1128 (1986), where employee was removed after entering a plea to a felony count of child molestation, the court held that the presumption of nexus was unnecessary because the misconduct's adverse effect on the efficiency of the service was clearly shown by factors other than the nature per se of the conduct. There was uncontroverted evidence that the offense of child molestation was directly opposed to the agency's mission to administer health and social services to the disadvantaged, elderly, disabled, indigent, and children. Thus, the employee's conduct was antithetical to the very programs that he monitored.

Employee herein argues that because there is no nexus between his prior conviction and his job, Agency had no cause for his removal. Employee points out that his arrest occurred off-site and

off-duty, the crime he was convicted of had no relationship to his job, there was no evidence of public notoriety regarding his crime despite the limited time that his name was entered in the sex offender registry, and his work performance and relations with his superiors and officemates were not negatively affected by his conviction. To buttress his arguments, Employee points out that his job does not involve any interaction with minors; that no one in the public or at the Agency ever came forward to allege that they had seen Employee's name during his temporary placement on the sex offender registry; that Agency continued working with him for half a year after becoming aware of his arrest; that his supervisor gave him an "outstanding" performance evaluation and even served as a favorable character reference for his criminal case, and that his criminal conviction has been expunged.

In examining whether Agency has presented sufficient grounds to establish nexus between Employee's conviction and the employee's or the agency's ability to perform effectively, we need to examine each of Agency's stated grounds.

In its brief, Agency presents several arguments to prove that it had established the necessary nexus. First, Agency states that a provision of Employee's probation which forbids him from being around children without approval of a sex or family therapist would make Agency his babysitter as it would have to monitor his encounters during his work hours. Agency participates in the District Government's "Bring Your Child To Work" Program, which encourages employees to bring their children to work to get a feel for the duties and responsibilities their parents perform for the District Government. All these would expose Employee to children. Agency has also participated in the District's Summer Youth Program, which employs youth between the ages of 14 and 18, for six weeks during the summer. Agency also contends it would have to monitor Employee's browsing of the internet, presumably to limit his internet use to work-related sites.

There are several problems with these arguments. First, the Pre-OPRAA regulation that Agency cited above, §1603.5, provides that "Any nexus as set forth in § 1603.4 which is relied upon in proposing a corrective or adverse action *shall be set forth in the notice of the proposed corrective or adverse action.*" *Emphasis supplied*. No where in any of its notices of adverse action does Agency mention any of these arguments. Indeed, Agency brings up these grounds for the first time on appeal.

In its notice of adverse action, Agency states that Employee had entered a guilty plea to a felony charge on September 2, 1999. It then simply states, "Mr. Dame, the nature and seriousness of this offense cannot be understated. Your felony conviction has adversely affected your ability and the Agency's ability to perform effectively. Further, your conduct has caused discredit to the Agency as well as a loss of confidence in your professional suitability." Apart from these general statements, Agency failed to delineate specifics to demonstrate Employee's or the Agency's diminished ability to perform effectively.

Thus, Agency's own notice violated its regulation.

Secondly, Agency does not contest Employee's assertion that his work does not require him to have contact with juveniles during the limited duration of the above mentioned programs. Thirdly, since Employee's conviction had been expunged, he is no longer under any restriction.

In its Administrative Review, Agency's hearing officer states, "The fact that the 'Order for Probation' stipulates that he be placed on the register for sex offenders makes this offense known to the general public, thus, causing discredit to the Agency and a loss of confidence in his professional suitability." However, the hearing officer did not present any evidence to support this finding.

Agency does not dispute Employee's assertion that no one in the public or at the Agency ever came forward to allege that they had seen Employee's name during his temporary placement on the sex offender registry. In fact, there is no allegation that the registry ever identified employee's employer. The agency must show a reasonable connection between the employee's conduct and embarrassment upon the agency.

In another case where an employee had to refute the charge of adverse publicity, the appellant was discharged for immoral conduct and for possessing personality traits which render him unsuitable for further Government employment, *Norton v. Macy*, 417 F.2d 1161 (D.C. Cir. 1969). The court said that the sufficiency of the charges "must be evaluated in terms of the effects on the service of what in particular he has done or has been shown likely to do." The court found that the agency was only relying on the possibility of embarrassment. The court must be able to discern "some reasonably foreseeable, specific connection between an employee's potentially embarrassing conduct and the efficiency of the service." In the *Norton* case, the court found that the agency had shown no connection.

Agency's third argument is that a felony conviction provides the necessary nexus. However, illegal conduct, even a criminal conviction, does not automatically supply nexus. Instead, a connection to job performance must be demonstrated. See *Phillips v. Bergland*, 586 F.2d 1007, 1011 (4th Cir. 1978). Additionally, evidence must be sufficient to support "allegations actually made." See *Office of D.C. Controller v. Frost*, 638 A.2d 657, 663 (D.C. 1994).

As to Employee's contention that his conviction has been expunged, Agency counters that Federal courts have held that an employee's subsequent acquittal of an even more serious charge of second-degree murder is not relevant in a administrative proceeding where the agency action was based, not on the fact of the arrest and indictment, but on the misconduct that led to the arrest. Where the cause relied on was the appellant's act of wrongdoing, the administrative action is not affected by the subsequent court action in a criminal case. See *Finfer v. Caplin*, 344 F.2d 38 (2d Cir.), *cert. den.* sub-nom. *Finfer v. Cohen*, 382 U.S. 883 (1965); *Finn v. U.S.*, 152 Ct. Cl. 1 (1961); *Homan v. U.S.*, 172 Ct. Cl. 608 (1965). In *Taylor v. U.S. Civil Service Commission*, 374 F.2d 466 (9th Cir. 1967), the plaintiff claimed that his removal action was based on charges which relied on two convictions which were expunged. The court held that the charges were based on the appelant's misconduct, not on convictions.

In the instant case, based on the adverse action notice, it appears to indicate that Agency's action was based on Employee's pleading guilty to a Maryland felony, not specifically on the underlying misconduct.

In addition, Employee subsequently received probation before judgment on his conviction. Maryland Code Ann. Art. 27, § 641 authorizes the trial court to place a person accused of a crime on probation before rendering judgment. After successful completion of probation, discharge under § 641 is without any civil disability or disqualification, as could occur with a criminal conviction. The Maryland courts have interpreted this provision to mean that a finding of guilt, entered pursuant to the probation before judgment statute, should not be used as evidence of guilt in a subsequent administrative proceeding. *See Tate v. Board of Educ.*, 485 A.2d 688, *cert. denied*, 496 A.2d 312, 316 (Md. 1985).

In *Green v. Metropolitan Police Department*, OEA Matter No. 1601-0115-86R89, *Opinion and Order on Petition for Review* (Jan. 22, 1993), __ D.C. Reg. __ ( ), the OEA Board deferred to the Maryland courts for their interpretation of Maryland law and found that an administrative judge is not obligated to use the court's determination of guilt as evidence of an employee's misconduct in a proceeding before the OEA. In summation, Employee's felony conviction in this case does not automatically provide nexus.

Lastly, Agency argues that there is a presumption of nexus in cases involving law enforcement officers, because such officers are held to higher standard.

In *Mojica-Otero v. Department of the Treasury*, 30 M.S.P.R. 46 (1986), the employee, a Customs Patrol Officer, was removed from his position following his apprehension for shoplifting. In upholding the removal, the MSPB stated that "[b]ecause of appellant's position as a law-enforcement officer, we find that a nexus exists between his off-duty shoplifting and [his removal, which promotes] the efficiency of the service." *Id.* at 50 (citations omitted). *See also Jones v. Department of the Army*, 52 M.S.P.R. 501, 506 (1992) ("It is well established that an employee in a law-enforcement position is held to a higher standard of conduct than other employees.").

Because law-enforcement employees are held to a higher standard based on their positions, this Office has held that it is reasonable to presume that indictments handed down against these employees render them "unable or unsuitable to perform [their] assigned duties." (quoting DCOP Rule 1603.4(b), *supra*) Thus, a presumption of nexus exists, and an agency's action, suspending a law-enforcement employee without pay pending the outcome of a criminal action, is justified. *See Moody v. Metropolitan Police Dep't*, OEA Matter Nos. 1601-0090-93 and 1601-0246-93 (Feb. 23, 1994), __ D.C. Reg. __ ( ).

Here we have a case where Agency was grossly deficient in choosing its charge and then failing, in its notice of adverse action, to provide specifics that would demonstrate the necessary nexus to support its charge. Reprehensible though Employee's off-duty conduct may be, Agency simply failed to supply the nexus that would support its charge that Employee's off-duty conduct

diminished his or his agency's effective performance.

So now we come to Agency's last leg, i.e., that because Employee is a law enforcement officer, he should be held to a higher standard and that the mere fact that he had pled to a felony supplies the necessary nexus to support the charge.

In another case involving a law enforcement officer, the District of Columbia Court of Appeals has held that an indictment constitutes sufficient cause to support the suspension of an employee. *See District of Columbia v. Broadus*, 560 A.2d 501 (D.C. 1989). In *Broadus*, the Metropolitan Police Department suspended Officer Van Broadus without pay. The suspension was based on a two-count indictment against Broadus for "assault with intent to kill while armed, and malicious destruction of property." *Id.* at 502. This Office granted the employee reinstatement and back pay on the premise that an indictment itself was insufficient cause to sustain disciplinary action and the agency had not proven the facts underlying the indictment. The Court of Appeals reversed this Office's award of reinstatement and back pay finding that an indictment itself on job-related charges constitutes sufficient cause to support a suspension and that the underlying facts need not be proven by agency independent of the indictment. *Id.* at 504.

This Office has applied the holding in *Broadus* to cases appealed to the OEA. In *Chapman v. Metropolitan Police Department*, OEA Matter No. 1601-0084-88, 41 D.C. Reg. 343 (1994), Officer Yvette Chapman was suspended without pay, based solely on her indictment for "Assault with Intent to Kill." *Id.* at 344. The administrative judge, citing *Broadus*, recommended to the OEA Board that the suspension be upheld. The Board agreed with the Administrative Judge's recommendation and upheld the agency's action.

Because there is no dispute that Employee was still a law enforcement officer at the time of his termination, I find that he is held to a higher standard of conduct. Where a person pleads guilty to a crime, he is acknowledging his culpability to the underlying facts of the crime that he pled to. I find that Employee knowingly performed what he knew, or should known, to be a serious crime, the crime of child sexual abuse. This is antithetical to his status as a law enforcement official sworn to uphold the law.

Here we have a difficult balancing act of weighing Agency's defective notice versus Employee's crime in relation to his status as a law enforcement official. Although the criminal record has been expunged, the fact remains that his admitted criminal conduct runs counter to the aims of his agency, thereby diminishing not just his, but also his agency's effective performance of its law-enforcement mission. Based on the above cited cases and the higher standard of conduct demanded of law enforcement officers, I therefore find that Employee's guilty plea to a felony supplies the necessary nexus to support the charge of "other conduct during and outside of duty hours that would affect adversely the employee's or the agency's ability to perform effectively."

Whether the penalty was appropriate under the circumstances.

Lastly, Employee alleges that the agency failed to consider mitigating factors such as his long and good work record, the isolated nature of the incident, the fact that the offense occurred off-duty, his medical condition affecting his judgment, prompt reporting of the conviction to his superior, etc.

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."[3] When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[4]

The range of penalties for a first offense of "other conduct" as described herein is reprimand to removal.[5] The penalty imposed, removal, is within the range allowed and there is no indication that the penalty was the product of an agency error of judgment. Accordingly, I conclude that the penalty was appropriate and should be upheld.

ORDER

It is hereby ORDERED that the agency's action removing the employee is UPHELD.

FOR THE OFFICE: _____

JOSEPH E. LIM, ESQ.
Senior Administrative Judge

[3] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

[4] *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

[5] The Table of Penalties, DPM Chapter 16, Part I, Rule 1618.16, 37 D.C. Reg. 8299 (1990).