

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
DWAYNE YOUNG)	OEA Matter No. 1601-0053-20
Employee)	
)	
v.)	Date of Issuance: April 29, 2021
)	
DEPARTMENT OF MOTOR VEHICLES)	JOSEPH E. LIM, ESQ.
Agency)	Senior Administrative Judge
_____)	
Bradford Seamon Jr., Esq., Agency Representative		
Dwayne Young, Employee <i>pro se</i>		

INITIAL DECISION¹

PROCEDURAL HISTORY

On July 20, 2020, Employee appealed from the Department of Motor Vehicles (“DMV” or “Agency’s”) final decision removing him for a criminal conviction of Felony Possession with Intent to Distribute a Controlled Substance. This matter was assigned to the undersigned Administrative Judge on February 26, 2021. I held a Prehearing Conference on April 12, 2021. As there were no material facts in dispute, no evidentiary hearing was held. At the Prehearing Conference, Employee admitted he received a felony conviction but argued that the penalty should be overturned because he had forgotten he occupied a safety-sensitive position, his friend had set him up for drug offenses, and that he was actually innocent. I afforded the parties the opportunity to address the issue of the appropriateness of the penalty. After the parties declined to submit written briefs, I closed the record on April 13, 2021.

JURISDICTION

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

ISSUES

1. Whether Agency's action was taken for cause.
2. If so, whether the penalty was appropriate under the circumstances.

FINDINGS OF FACT

¹ This decision was issued during the District of Columbia’s Covid-19 State of Emergency.

The following facts are uncontested:

1. Since November 28, 2005, Employee worked as a Motor Vehicle Inspector within Agency's Vehicle Services.
2. On July 7, 2019, Employee was promoted to a Lead Motor Vehicle Inspector ("Lead Inspector"), which is a "safety sensitive" position as classified by the District Personnel Manual. 6B DCMR § 409.1.
3. As a Lead Inspector, he was tasked with leading a team of inspectors, managing motor vehicle inspection stickers, performing vehicle inspections, and providing testimony in court proceedings pertaining to motor vehicle inspections. Employee's position involved working directly with the public in a garage type environment, placing him at risk of vehicle collisions and malfunctions that could result in an explosion.
4. Coupled with the fact that motor vehicle inspectors have been subject to bribery attempts by members of the public who do not want to fail an inspection, Employee's position required an extremely high level of trust, responsibility and credibility. As a result, Lead Inspectors are subject to periodic criminal background checks consistent with 6B DCMR § 410.1.
5. On September 9, 2019, Metropolitan Police Department officers arrested Employee on narcotics charges.
6. On or about October 17, 2019, Employee underwent digital fingerprinting as part of a periodic criminal background check. Based on the results of Employee's background check, the D.C. Department of Human Resources ("DCHR") conducted an investigation on DMV's behalf and verified Employee's criminal history.
7. On February 24, 2020, Employee was indicted and subsequently found guilty of felony possession with intent to distribute PCP. Employee was sentenced to a suspended five-year sentence and one year of supervised probation.
8. Following Employee's conviction, DCHR officially determined that Employee was no longer suitable for employment as a Lead Inspector in accordance with Title 6-B, Chapter 4, of the D.C. Municipal Regulations.
9. On May 5, 2020, DCHR provided DMV with a Notice of Proposed Separation to serve on Employee, and on May 14, 2020, DMV effectuated service of the notice.
10. Ms. Mia Olsen was selected as the administrative review officer regarding the matter. In Employee's submission to Ms. Olsen, Employee admitted that he was

convicted of the felony offense but alleged that he was, in fact, innocent. After considering the record and submissions from both DMV and Employee, Ms. Olsen issued a written report on June 22, 2020, concluding that evidence supported the Agency's decision to separate Employee.

11. On July 1, 2020, DCHR issued Employee a Final Notice of Separation, which stated that Employee was unsuitable for continued employment as a Lead Inspector based on his felonious drug distribution while employed as a supervisory official for D.C. government. Employee's separation was effective immediately.

ANALYSIS AND CONCLUSIONS OF LAW

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

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. The DPM § 1602.1 provides that disciplinary action against an employee may only be taken for cause. Under DPM §1605.4 (a)(1), the definition of "cause" includes a conviction of any felony; and DPM §1605.4 (a)(2), Conviction of any criminal offense that is related to the employee's duties or his or her agency's mission; and DPM §1605.4 (a)(4) Off-duty conduct that adversely affects the employee's job performance or trustworthiness, or adversely affects the employing agency's mission or has an otherwise identifiable nexus to the employee's position.

Employed in a "safety sensitive" position, Employee was subject to enhanced suitability requirements, and this enhanced suitability included random criminal background checks. Employee's October 17, 2019 criminal background check revealed his arrest for a felony crime and, due to the nature of the job and his supervisory role, the Agency found this to be extremely problematic and in violation of the DPM. 6-B D.C.M.R. §§ 435.9 further states: "If an employee is deemed unsuitable, the personnel authority may terminate his or her employment pursuant to the appropriate adverse action procedure as specified in this subtitle or any applicable collective bargaining agreement..."

Agency's action is supported by the fact that Employee's February 24, 2020, conviction of felony possession with intent to distribute a controlled dangerous substance renders him unsuitable in violation of 6B DCMR §§ 435.9, 1605.4(n), and 1607.2(n), which provide that an employee is subject to termination from a covered position based on a finding that he or she is unsuitable. Moreover, Employee's conviction places him in violation of 6B DCMR §§ 1605.4(a)(1), (2), and (4), 1607.2(a)(1), (2) and (5), which establish cause for disciplinary action based on a conviction of any felony or off duty conduct that adversely affects the employee's job performance or trustworthiness.

After a thorough review of the allegations and subsequent conviction, DCHR learned that an undercover MPD officer directly observed Employee supplying PCP. According to Agency,

credibility is paramount for a Lead Inspector who is tasked with testifying in court proceedings and also relied upon to reject bribery attempts by members of the public. Employee's involvement with controlled dangerous substances could have a detrimental impact on Employee's ability to carry out his duties and ensure his own safety as well as the safety of those around him. Moreover, his conviction shows that Employee was in possession of a very serious narcotic. Based on the above facts, Agency's termination of Employee was reasonable and appropriate. Agency's action was taken pursuant to D.C. Official Code § 1-616.51 and the implementing regulations set forth in the District Personnel Manual ("DPM"), Title 6-B of the D.C. Municipal Regulations ("DCMR").

In his submissions of documents to this Office and in his representations to the undersigned, Employee admits that he incurred a felony drug conviction in February of 2020. However, he insists that his removal was unfair as his former friend set him up and that he was actually innocent of the charges. However, neither the Office of Employee Appeals nor Agency has the authority or jurisdiction to second-guess the judgment of the criminal court. In this matter, Agency's cause for adverse action was Employee's criminal record. It is undisputed that Employee's criminal record showed a recent felony conviction. Therefore, I conclude that Agency has met its burden of establishing cause and that it acted appropriately in taking adverse action against Employee for conviction of a felony.

2. Whether Agency's penalty was appropriate under the circumstances.

When assessing the appropriateness of a penalty, this Office will leave Agency's penalty undisturbed when it is satisfied, on the basis of the charges sustained, that the penalty is appropriate to the severity of the employee's actions and is clearly not an error of judgment. The penalty for a first occurrence of Conduct Prejudicial to the District Government for Conviction of Any Felony is removal.²

Here, Employee's felony conviction involved a crime of illegal drug distribution and a betrayal of public trust as he occupied a safety-sensitive position. Agency was clearly well within its discretion to terminate Employee and the D.C. Municipal Regulations sanction immediate termination for a safety sensitive employee who is deemed to be no longer suitable. The seriousness of his action points to the appropriateness of Agency's penalty of removal. Accordingly, I conclude that Agency's action should be upheld.

ORDER

It is hereby ORDERED that Agency's action of removing Employee is UPHeld.

FOR THE OFFICE:

/s/ Joseph Lim
JOSEPH E. LIM, ESQ.
Senior Administrative Judge

² See 2016 DPM Table of Illustrative Actions, Ch. 16 § 1607.2 (a)(1).