THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EMPLOYEE, Employee	OEA Matter No. 1601-0002-24
v.	Date of Issuance: November 19, 2024
DC PUBLIC SCHOOLS, Agency	Joseph E. Lim, Esq. Senior Administrative Judge

Monica Douglas, Esq., Employee Representative
Lynette Collins, Esq. Agency Representative

INITIAL DECISION

PROCEDURAL HISTORY

On October 5, 2023, Employee, a Preschool Educational Aide in the Career Service, filed a Petition for Appeal contesting D.C. Public Schools' ("DCPS" or "Agency") action of terminating him from his position effective September 5, 2023. Employee appealed his removal for 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." Agency's Answer was submitted on November 6, 2023, after being required by the Office to do so in a letter dated October 6, 2023.

This matter was assigned to the undersigned Senior Administrative Judge ("AJ") on November 13, 2023. On December 12, 2023, I issued an Order scheduling a Prehearing Conference for March 6, 2024. Both parties attended the scheduled Prehearing Conference. I also held subsequent Status Conferences on March 6, 2024, May 9, 2024, and July 26, 2024, after extending the discovery deadline to June 30, 2024, based on Employee' request. After determining that no material facts were in dispute, I subsequently ordered the parties to submit their legal briefs on the issue of whether Agency's decision removing Employee should be upheld. Briefs were due by October 4, 2024. The parties submitted their briefs as required. The record is now closed.

JURISDICTION

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

ISSUE

Whether Agency's action was taken for cause.

FINDINGS OF FACT

The following facts are not subject to genuine dispute:

Employee was employed at Langdon Elementary School as a Pre-K Educational Aide during the 2022-2023 schoolyear. As an educational aide Employee was responsible for supporting the learning environment for children and serving as a role model to students, peers and the community both on and off duty. Further, Agency requires all employees to obey all laws, policies and regulations also both on and off duty.[1]

On February 23, 2022, at approximately 9:41 pm, members of the Metropolitan Police Department ("MPD") major crash unit responded to Brentwood Road NE, Washington DC to investigate a hit and run traffic crash. Their investigation revealed that on February 23, 2022, at approximately 7:12 pm, Employee struck a pedestrian walking in the 1000 block of Brentwood Road while driving his car. The pedestrian came to a final rest approximately 120 feet from the area of impact. The pedestrian was pronounced dead on the scene. Agency claims that after hitting the pedestrian, Employee fled the scene.[2]

While MPD officers were processing the area, Employee returned to the scene approximately twenty (20) minutes later. Employee advised officers that he may have hit someone after drinking alcohol earlier that day. In response, officers completed several field sobriety tests. The Officer determined that Employee failed all three (3) tests. The first test was the Horizontal Gaze Nystagmus ("HGN"), a standard field sobriety test used by police to check for involuntary jerking in the eyes of a driver suspected of drunk driving. The Officer performing the HGN observed two clues of impairment: a lack of smooth pursuit in both eyes. On the "Walk and Turn" test, the officer observed that Employee missed the heel-to-toe and that he stepped off the line. On the "One Leg Stand" test, the officer observed that Employee swayed while trying to balance, used his arms to balance and that he put his foot down during the test.

Employee was taken into custody and charged with Involuntary Manslaughter and Driving under the Influence. Once at the Fifth District Police Station, Employee refused a breathalyzer to determine his specific level of impairment.[3] On February 25, 2022, a Fox Five news report identified Employee as a DCPS employee arrested in a deadly hit and run.[4] Employee did not notify the Agency that he had been arrested.[5] On or about February 26, 2022, the Agency became aware of the Employee's arrest.[6] Thereafter, the Agency obtained copies of the police report surrounding the Employee's arrest. After concluding its investigation,

1 Agency's Exhibit 1.
2 Agency's Exhibit Number 3.
3 *Id.*
4 See *Agency's Exhibit 4 & 6*
5 *Supra* Agency's Exhibit 1.
6 Agency's Exhibit Number 6.

Employee was placed on enforced leave on February 28, 2022.[7]

On August 10, 2022, Employee appeared in the Superior Court for the District of Columbia before Judge Robert Okun for a preliminary hearing on the charge of involuntary manslaughter. The Court heard testimony of government witness, Metropolitan Police Department ("MPD") Sergeant Nguyen. After considering Officer Nguyen's testimony, the admitted evidence, and the arguments of the parties, Judge Okun found that there was no probable cause against Employee for involuntary manslaughter and dismissed the charge.[8] On or about August 11, 2022, the criminal case was dismissed.

Thereafter, Agency completed all relevant Douglas Factors to determine the appropriate discipline.[9] On August 21, 2023, Agency issued a Notice of Termination.[10] According to the Notice of Termination, the grounds for the termination was 5-E DCMR Section 1401.2 (v) "Other conduct during and outside of duty hours that would affect adversely the Employee's or the Agency's ability to perform effectively." The reasons cited were that Employee was indicted on charges, including Involuntary Manslaughter. Agency reasoned that despite "not being convicted, these charges are of such a nature that they would shock the public conscience if disciplinary action were not taken, and [it] calls into question your ability to effectively perform your duties as an aide."[11] Employee's termination became effective September 5, 2023.

ANALYSIS AND CONCLUSIONS OF LAW

Positions of the Parties

In its brief, Agency argues that because Employee was charged with a criminal offense of vehicular manslaughter after admitting to ingesting alcohol, it had cause to terminate his employment since he failed to obey all laws, regulations, and policies on and off duty and failed as a role model to his school. The death of the pedestrian led to a local news report which stated that an Agency employee was involved. Agency argued that Employee's poor judgment and failure to submit to an alcohol breathalyzer test was concerning.

Employee denies being indicted for charges including involuntary manslaughter. He points out that after hearing all the evidence against him, D.C. Superior Court Judge Okun ("Okun") held that there was no probable cause for any criminal charges against Employee. Okun considered the fact that there was no evidence of speeding by Employee, that the accident occurred at night, that the video of Employee's behavior during his field sobriety tests did not indicate alcohol impairment, and that the decedent had a blood alcohol level that was four times the legal limit and was not crossing the street in a crosswalk. Okun concluded that the

7 Agency's Exhibit Number 2.
8 Employee's Reply Brief, Exhibit. B, 8/10/22 Preliminary Hearing transcript.
9 *Agency's Exhibit Number 1 & 4.*
10 Agency's Exhibit Number 5.
11 *Id.*

government failed to prove that Employee was guilty of a gross deviation from a reasonable standard of care and dismissed all charges against him.

Employee argues that for Agency's disciplinary action to be lawful, there are three (3) distinct requirements the agency must satisfy and it must prove the facts supporting each requirement by a preponderance of the evidence: 1) that the wrongful conduct actually occurred (cause), 2) that there is an adequate relationship (a nexus) between the (proven) wrongful conduct and the employee's job performance, *i.e.*, that the wrongful conduct impairs the efficiency of the service, and 3) that the penalty was appropriate in proportion to the (proven) wrongful conduct, *i.e.*, that the punishment fit the crime.[12]

Whether Agency had Cause for taking adverse action "Other Conduct"

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. The Mayor, through the D.C. Office of Personnel, promulgated rules regarding adverse and corrective actions in several iterations beginning in 1999 to 2017.[13]

The District of Columbia Code provides that an employee may be subjected to adverse action based on "Off-duty conduct that adversely affects the employee's job performance or trustworthiness, or adversely affects his or her agency's mission or has an otherwise identifiable nexus to the employee's position." *See* 5E D.C. Municipal Regulations ("DCMR") § 1401.2(v) (updated 2017).

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, Table of Illustrative Actions 6B DCMR 1607.2 (a)(5) (2017), read in relevant part as follows:

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12 *Douglas v. Veterans Admin.,* 5 M.S.P.B. 313, 324-25, 329 (1981) (Employee Exh. J) ("We have no doubt that insofar as an agency's decision to impose the particular sanction rests upon considerations of fact, those facts must be established under the preponderance standard and the burden is on the agency to so establish them . . . appropriateness of a particular [] penalty, *once the alleged conduct and its requisite general relationship to the efficiency of the service have been established*, is 'yet a third distinct determination.'"), citing *Young v. Hampton*, 568 F.2d 1253, 1257, 1264 (7th Cir. 1977) (Employee Exh. K) (in its decision to discipline and individual employee, "[t]he first judgment which an agency must make is that the individual to be disciplined actually committed the complained of acts (Point I) . . . [the] second determination [] must be to the effect that the disciplinary action taken against the employee will "promote the efficiency of the service, (Point II) . . . [and the] plaintiff has properly pointed out yet a third distinct determination which must be made by an agency in its decision to discipline an employee: the agency must determine the amount of punishment for specific misconduct.").

13 *See* 46 D.C. Reg. 4659 (1999) to 5E DCMR § 1401 (2017).

> **1607.2(a)(5)** Off-duty conduct that adversely affects the employee's job performance or trustworthiness, or adversely affects his or her agency's mission or *has an otherwise identifiable nexus to the employee's position*. (Emphasis added.)

In a prior version of the DCMR, the term "nexus" was defined as "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…."[14] 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. 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."

In its Notice of Termination,[15] Agency states that "On February 24, 2022, you were indicted on charges including involuntary manslaughter." It then simply states, "Despite not being convicted, these charges are of such a nature that they would shock the public conscience if disciplinary action were not taken, and call into question your ability to effectively perform your duties as an aide." Apart from these general statements, Agency failed to delineate specifics to demonstrate Employee's or Agency's diminished ability to perform effectively.

There are several problems with Agency's charge against Employee. First, as Employee points out, Agency has not presented any evidence that Employee was ever indicted. For an indictment to be issued, a prosecutor must convince at least twelve (12) members of a grand jury that formal charges are warranted.[16] The main difference is grand juries file indictments and prosecutors file charges.[17] The evidence that Agency submits suggests that the charge of manslaughter was filed by a prosecutor, not a jury.

Indeed, being criminally charged appears to be the more appropriate charge that Agency should have levied against Employee. Yet, for whatever reason, this was not the charge Agency levied 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 levied against them.[18] In addition, *Stuhlmacher v. U.S. Postal Service*, 85 M.S.P.R.

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14 Rule 1601.1, 37 D.C. Reg. 8297 (1990).
15 *Supra*, Agency's Exhibit Number 5.
16 Thelawdictonary.org.
17 *Id.*
18 See *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 662 (D.C. 1994). Accord, *Goldstein v. Chestnut Ridge Vol. Fire Co*., 218 F. 3d 337, 357 (4th Cir. 2000) ("Inasmuch as explanations legitimizing otherwise prohibited conduct can easily be conjured post hoc, we have reviewed these explanations with a jaundiced eye.").

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.[19]

Even if the undersigned were to accept Agency's argument that a criminal charge is substantially the same as an indictment, Agency's charge still fails because it failed to demonstrate any nexus between Employee's dismissed manslaughter charge and his job. The evidence presented shows that Employee's arrest occurred off-site and off-duty, the crime he was absolved of had no relationship to his job, there was no evidence of public notoriety regarding his alleged crime despite the limited time that his arrest was in the news, and Agency presented no evidence that his work performance and relations with his superiors and workmates were negatively affected by his arrest. This Office has held that an arrest alone is insufficient evidence to support an adverse action.[20] The D.C. Superior Court has reached the same conclusion.[21] Thus, Agency had no cause for his removal. [22]

ORDER

It is hereby **ORDERED** that the agency action removing Employee is **REVERSED** and Agency is hereby ORDERED to issue Employee the back pay to which he is entitled and restore any benefits he lost as a result of the termination no later than thirty (30) calendar days from the date this Decision becomes final.

Agency is directed to document its compliance by filing with OEA a Statement of Compliance Report no later than forty-five (45) calendar days from the date this Decision becomes final.

FOR THE OFFICE: /*s/Joseph Lim, Esq.*
JOSEPH E. LIM, ESQ.
Senior Administrative Judge

19 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).
20 *See Employee v. Agency*, OEA Docket Nos. 1601-0005-81, 1601-0041-81 and 1601-0176-81, 31 D.C. Reg. 5381 (1984).
21 *See District of Columbia v. Green*, 93 MPA 13 (D.C. Super. Ct. Sept. 8, 1995).
22 Agency's last problem is that its penalty of termination is unreasonable for a first offense. *See* Table of Illustrative Actions, 5E DCMR § 1401.2(v) (updated 2017).