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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CRAIG FARMER	)	OEA Matter No. 1601-0218-04
Employee	)	
	)	
v	)	Date of Issuance: January 17, 2006
	)	
METROPOLITAN POLICE DEPARTMENT	)	Muriel A. Aikens-Arnold
	)	Administrative Judge
Agency	)	
	)	

Mark Viehmeyer, Assistant General Counsel
Kyle A. McGonigal, Esq., Employee's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 27, 2004, Employee, a Detective, filed a Petition for Appeal of Agency's action to suspend him for 50 workdays for: Failure to obey orders or directives issued by the Chief of Police, ie., engaging in outside employment without authorization.[1] On September 13, 2004, this

[1] Agency initially proposed to terminate his employment; however, the Police Trial Board (PTB) panel conducted an evidentiary hearing, after which the panel members

Office notified Agency regarding this appeal and instructed Agency to respond no later than October 13, 2004. Agency responded as instructed.

On April 19, 2005, this matter was assigned to the undersigned Judge. On July 1, an Order Convening a Status Conference was issued scheduling said conference on July 12, 2005. On July 15, 2005, a Memorandum to the Record was issued summarizing the discussions at the status conference.[2] On July 28, 2005, a Briefing Schedule to Close the Record was issued giving each party an opportunity to file briefs supporting their respective positions. The parties were further advised that the record would close effective on September 29, 2005, that this Office is limited, by law, solely to a review of the existing record, and that a decision would be forthcoming.[3] Both parties filed briefs as scheduled and the record was closed effective September 29, 2005.

JURISDICTION

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

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recommended a 50-day suspension in lieu of removal, which the Chief of Police affirmed.

[2] Agency was given time to explore settlement alternatives while the Fraternal Order of Police (FOP) was given the same amount of time to make its decision regarding its continued representation. A FOP representative, who appeared at the conference, stated that his organization was investigating a prior commitment to represent Employee in his appeal before this Office. On 7/22/05, this Office received a Notice of Appearance (on Employee's behalf) from Kyle McGonigal, Esq.(formerly an FOP attorney).

[3] A D.C. Court of Appeals decision in *District of Columbia Metropolitan Police Department v Elton L. Pinkard*, 801 A.2d 86 (D.C. 2002) held that this Office erred in conducting a second evidentiary hearing when a Police Trial Board (PTB) hearing had previously been held in a disciplinary matter; and violated the Department's labor agreement which provided *solely* for a review of the PTB record on appeal. The Court remanded Pinkard's appeal to this Office to determine whether Agency's action was supported by substantial evidence, whether there was harmful procedural error or whether it was in accordance with law or applicable regulations. In this instance, however, Employee does not contest the merits of Agency's adverse action. Rather, employee argues that a lesser penalty should have been imposed.

ISSUE

Whether Agency's penalty was appropriate under the circumstances.

STATEMENT OF CHARGES AND AGENCY DECISION

Employee was notified by memorandum dated April 16, 2004 that the Department proposed to terminate his employment based on: Violation of General Order Series 1202, Number 1, Part 1-B-16 which provides, "Failure to Obey Orders or Directives issued by the Chief of Police."[4] In that memorandum, Employee was further advised that he had an opportunity to respond, in writing, and an election to have a departmental hearing. Said hearing was requested and subsequently held on May 20, 2004. On July 2, 2004, a Final Notice of Adverse Action was issued finding Employee guilty of the charge and specifications with a recommendation, to the Chief of Police, of a 50-day suspension in lieu of termination. On July 26, 2004, the Chief of Police issued a final decision, to Employee's appeal of the penalty, affirming the 50-day suspension.[5]

POSITIONS OF THE PARTIES

Employee's Position.

In his submission received in this Office on August 29, 2005, Employee contends that the 50-day suspension was too severe and should be reduced. Two reasons were given as the basis of that argument: 1) that

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[4]See Agency Brief (AB) filed 9/29/05 at Attachment 4, General Order 201.17, Outside Employment and Financial Statements, Part I-C-2 (Part I-C-3 was erroneously cited in the proposed notice): Members are prohibited from engaging in outside employment until authorization to do so has been granted by the Chief of Police, or his designee, the Human Resources Officer, as appropriate. Employee was specifically charged with working off-duty security without authorization; working off-duty security while on sick leave; working in plain clothes while working off-duty security; and acknowledging same to an official during a question and answer session. The charges will not be outlined as Employee does *not* contest the underlying basis of the adverse action.

[5] See Agency's initial response filed 10/13/04 at Tabs B, D and E.

Employee "had no prior discipline of this or any kind during his nearly ten years on the department . . ." and 2) that Employee's "penalty is not consistent with prior penalties rendered in similar cases."[6] Employee cites examples of other MPD disciplinary matters which he contends are " . . . of a similar, and even more severe nature, than that of the instant matter . . . in which far less severe penalties have been rendered."[7] Further, Employee argues that " . . . the Trial Board apparently gave no consideration to the fact that [Employee] was contrite and admitted his misconduct" and failed to explain how various Douglas factors were considered; "[T]hus, the Trial Board's findings and conclusions are not supported by the record."[8]

Agency's Response.

Agency contends that "[T]he multiple specifications of misconduct . . combined with the substantive gravity of the specifications clearly supported the proposed penalty of termination." Agency further asserts that the scope of each offense and the consequences thereof, must be considered in light of the "importance of regulating when, where, and how members may engage in outside employment."[9] Specifically, the following factors were listed: 1) Employee's admissions of said misconduct reflect that he "knowingly and willfully refused to comply with the requirement" to obtain prior authorization; 2) the prolonged period of time in which he engaged in the misconduct reflects a pattern of misconduct that "[H]e only stopped

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[6] See Employee's Brief (EB) filed on 8/29/05 at pp 2-3.

[7] See EB at pp. 4-5 and attachments 4 and 5: CS #03-0624; and *FOP v. MPD*, AAA Case No. 1639017684H (Daniel Schauf) which referenced six (6) prior MPD matters: DDRO Case Nos. 232-00; 278-02; 169-01; 180-01; 217-01; and 228-01. Relative to the examples cited, Employee represents, *inter alia*, that " . . . the type of outside employment engaged in by [Employee] [ie., Catholic church security] is otherwise permitted by the Department"; that two of the cases cited in the *Schauf* case "involved the additional misconduct of lying to an official about his unauthorized employment while on sick leave. In contrast, [Employee] never lied to anyone"; and, in the other case, the officer " . . . worked outside employment . . . plus the far more serious misconduct of affirmatively disobeying an MPD Official."

[8] See EB at p.6.

[9] See AB at p.4.

when confronted by department officials; 3) the fact that when Employee applied "to be put on paid sick leave, he asserted that he was incapacitated for duty . . . Yet on at least two of those occasions, Employee was apparently healthy enough to perform his police-related outside employment for a private employer"; and 4) a safety issue exists when an officer is working police-related outside employment in plain clothes and carrying a service weapon, that member is not easily identifiable as such.[10] Nevertheless, after weighing "Employee's guilty pleas . . . [his] testimony offered in mitigation of his offenses, and evaluating the *Douglas* factors," the PTB panel recommended a 50-day suspension in lieu of removal, to the Chief of Police, who made the final decision.[11]

Agency further responded to Employee's argument that other members received lesser penalties for similar and more severe misconduct. First, Agency asserts that *FOP v. MPD, id.,* is misplaced as that case was decided " . . . over 20 years ago, under policies and practices that existed several Chief's (sic) of Police ago and before many of the current legislative and regulatory provisions governing outside employment were enacted."[12]

Relative to Employee's statistical representations reflecting lesser penalty ranges of more recent cases, Agency contends that those representations, alone, do not reflect such factors as specific charge details, aggravating and mitigating factors that "must be considered in each case, nor do they reflect how many specifications of misconduct were leveled and sustained against the individual employees."[13]

Last, Agency cited a disciplinary matter in which an officer, with no prior discipline record, was terminated from the Department based on

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[10] See AB at pp. 3, 5, 6 and 7..

[11] See AB at p. 2; and *Douglas v Veterans Administration*, 5 M.S.P.R. 280 (1981) where the Merit Systems Protection Board (our Federal counterpart) established a 12-prong test for evaluating the appropriateness of the penalty, which this Office uses as a guide. Those factors will be addressed in the Analysis section below.

[12] See AB at p. 7.

[13] See AB at pp. 7-8.

working *approved* outside employment while in a sick leave status.[14] In sum, Agency contends that the 50-day suspension was appropriate.

ANALYSIS AND CONCLUSIONS

Whether the Penalty Was Appropriate Under the Circumstances.

Employee contends that the 50-day suspension was too severe and should be reduced based on: 1) the fact that he had no prior discipline; and 2) that the penalty was not consistent with prior penalties rendered in similar cases. First, Employee's argument to reduce the penalty based on the absence of prior discipline is without merit.[15] The panel's recommendation reflects that said factor was considered; and the range of penalty was determined by considering numerous factors, including testimony presented at the adverse action hearing. Moreover, Employee did not convince this Judge that the penalty imposed was, in any way, inconsistent with those of other officers under similar circumstances.[16]

Second, Employee contends that the PTB panel did not consider his contriteness and admission of guilt along with its failure to explain how various *Douglas* factors were considered. To the contrary, based on this Judge's review of the record, the panel's findings, conclusions, and recommendations reflect that, *inter alia*: 1) the panel accepted Employee's guilty plea pursuant to an agreement reached by the parties prior to the adverse action hearing; and 2) the panel addressed and "carefully

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[14] See AB at p. 8 and Attachment 7, DDRO Case #329-04 (officer worked uniformed security in a fast-food restaurant and, on seven separate occasions within a 3-week period,, the officer was in a sick leave status with Agency).

[15] See footnote 14. Agency provided a similar and more recent case (AB attachment #7 dated 4/1/05) which was not included in Employee's statistical representation (EB attachment #5 which appears to cover adverse actions taken in the years 2000 and 2001). Further, the *Schauf* Arbitration Decision was issued on 12/20/84.

[16] See footnotes 12 and 13. Agency presented compelling arguments regarding the changes in policies and practices over the years as well as the lack of specific information reflected in Employee's statistical representations.

considered" all twelve (12) *Douglas* factors.[17]

The following is a partial list of mitigating and aggravating factors considered by the panel:

> 1) the seriousness of the offenses and Employee's admission to the charge and specifications including, but not limited to, working while in a sick leave status;
>
> 2) the history of rehabilitation by other members for similar behavior and Employee's potential for same;
>
> 3) that Employee had no supervisory role and the panel members believed in Employee's ability to perform his assigned duties;
>
> 4) that the range of penalty was consistent with the Table of Penalties and with those imposed upon other employees for the same or similar offenses; and
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> 5) that a suspension in lieu of removal was viewed as a deterrent to Employee and others that such behavior will not be tolerated.[18]

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[17] See footnote 11 and Agency's Final Notice of Adverse Action dated 7/2/04 (last 3 pages.). Employee's contriteness is admirable; however, the panel members are charged with considering mitigating or aggravating circumstances that have been determined to exist, to such extent and with such weight as is deemed appropriate.

[18] See footnote 12. As Agency contends in its response, Employee has not shown that other members, in similar circumstances, have received lesser penalties. In fact, Employee argues that "[T]he only factor that could possibly cause the Department to increase the penalty of this otherwise technical violation of the rules (ie., failing to get written approval) would be that [he] admission (sic) that he worked on one or two occasions while he was on sick leave . . ." and minimizes such conduct. Indeed, Employee concedes that he did so and speculates that the Department would have approved same. In this Judge's view, that is not a logical or rational contention.

When assessing the appropriateness of the penalty, this Office is not to substitute its judgment for that of the agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). 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." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).[19]

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Removal, which was initially proposed, was within the range of penalties available to Agency, as was the suspension that was ultimately imposed. Based on a review of the record, this Judge finds no reason to disturb the penalty which was within the parameters of reasonableness and should be upheld.

ORDER

It is hereby ORDERED that the 50-day suspension is UPHELD.

FOR THE OFFICE: Muriel Aikens Arnold

MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge

[19] Here, Employee admitted to the charges.