**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| ROBERT L. JORDAN | ) | OEA Matter No. 1601-0289-97R07 |
| Employee | ) | |
| | ) | |
| v. | ) | Date of Issuance: December 18, 2008 |
| | ) | |
| METROPOLITAN POLICE DEPARTMENT | ) | Muriel A. Aikens-Arnold |
| Agency | ) | Administrative Judge |
| | ) | |

Alan Lescht, Esq., Employee Representative
Kevin J. Turner, Esq., Agency Representative

**INITIAL DECISION**

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 27, 2007, the Board issued an *Opinion and Order On Remand,* to this Judge for further proceedings consistent with that decision.[1] On August April 9, 2007, an Order to Convene a Prehearing Conference was issued scheduling said conference on May 3, 2007. After several extensions, said conference was ultimately held on July 27, 2007.[2] On August 6, 2007, an Order Convening a Hearing was issued scheduling said Hearing on September 18, 2007. On August 13, 2007, this Judge was contacted by Employee's newly retained Counsel, who entered his appearance and submitted a witness list on August 23, 2007. On September 13, 2007, an Amended Order Convening Hearing was issued rescheduling the Hearing on October 11, 2007. On October 9, 2007, the Hearing was postponed pending further discussions.[3] Thereafter,

[1] On 1/27/06, the Superior Court of the District of Columbia issued an Order pursuant to a mandate from the District of Columbia Court of Appeals reversing the Superior Court on a jurisdictional issue and remanding this matter to this Office for further consideration on the merits.

[2] Due to the withdrawal of former Counsel, Employee requested additional extensions to consider, seek and consult new Counsel and was granted such time until 7/6/08. On 7/11/08, a Second Order to Convene a Prehearing Conference was issued scheduling said meeting on 7/27/08. During that meeting, a hearing was scheduled for 9/18/08. As Employee advised of his continuing efforts to seek representation, and due to his submission of an extensive list of witnesses, Agency's Counsel offered to meet with Employee to identify witnesses who were no longer employed by Agency (or "Department") and discuss hearing exhibits. Employee was advised to, thereafter, submit a revised witness list.

[3] On 10/4/07, a teleconference was held during which prospective witnesses were discussed and Employee raised defenses, such as: 1) that he was not convicted of theft because successful completion of the Pretrial Diversion Program resulted in *nolle prosequi*; 2) that Employee wished to testify to explain his position that, *inter alia,* he "inadvertently recovered benefits" when he returned to work and there was

Agency requested a period of time to open discovery in order to respond to Employee's recent request for production of documents.[4] Said request was granted. Accordingly, this matter was held in abeyance until February 6, 2008.

On February 7, 2008, Agency filed a status report reflecting, *inter alia*, that said documents had been purged in accordance with the Department of Employment Services (DOES) document retention policy and were no longer available. Employee's status report, dated February 7, 2008, reflected that the DOES documents requested, if produced, would have substantiated Employee's contention that he did not engage in any wrongdoing.

On April 7, 2008, a Memorandum to the Record was issued summarizing a teleconference held on April 4, 2008 with the parties.[5] On April 8, 2008, an Order Closing the Record was issued directing the parties to submit written arguments, regarding their respective positions, which they did. The record was closed effective June 5, 2008.

## JURISDICTION

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

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no intent to defraud the Government; that Employee informed DOES, on more than one occasion before DOES sent him the unemployment benefits check in error, that he was returned to work on 7/1/94; and 3) that relevant correspondence on this issue should be produced by Agency to complete the record. This Judge advised that there was no genuine issue of material fact in dispute. Employee does not deny that he received what he characterizes as an "overpayment" and, therefore, no necessity for an evidentiary hearing was found. The remaining issue was the appropriateness of the penalty, which was left open pending Counsel's discussion with Employee who was not present for the teleconference.

[4] By letter dated 10/8/07, Employee contended that Agency should produce various mail claim forms (for the weeks ending 7/2/94, 7/9/94 and 7/16/94) referenced by DOES in its letter, to Employee, dated 8/7/96; and, in addition, raised an authentication issue regarding the mail claim form dated 7/16/94, "in that he did not check the boxes and [it] is in fact inconsistent with the mail claim forms he returned to DOES earlier that month."

[5] During that teleconference, this Judge again advised there was no material factual dispute which warranted a hearing to resolve. First, there is no factual dispute that Employee applied for Unemployment Compensation on 6/8/94, which generated the determination of benefits. Nor is there a dispute that Employee received and deposited a DOES check, issued 7/25/94 for $670, into his bank account. There is no dispute that Employee appeared in court on 10/21/96 for the theft charge and was placed in the Pretrial Diversion Program; and that his actions brought unfavorable publicity to the agency. Although the original claim forms referenced are no longer available, the copies in the record reflect Employee's signature thereon which conformed with other information of unreported earnings received from him.

## ISSUES

Whether the penalty was appropriate under the circumstances.

## STATEMENT OF CHARGES AND PARTY POSITIONS

By letter dated December 24, 1996, Employee was notified of an amended notice proposing to terminate his employment for the following:

> CAUSE: Violation of Chapter 16, Section 1618.1: "Other Conduct during and outside of duty hours that would affect adversely the employee's or the agency's ability to perform effectively." To wit: During or outside of duty hours, commission of or participation in criminal, dishonest, or other conduct, of a nature that would affect or has affected adversely the employee's or his or her agency's ability to perform effectively.
>
> SPECIFICATION NO. 1: In that beginning June 1, 1994, you were suspended for 30 days without pay for charges of "Dishonesty and Neglect of Duty." After serving your suspension, you were returned to a full duty status with pay. However, you applied for continued unemployment compensation and received a total of $670.00 in illegal compensation. For this reason, you were subsequently arrested and charged with Theft II.
>
> The investigative report reveals that you were dishonest when you signed for and received a check in the amount of $670 on July 17, 1994. The form you filled out on that date asked the following questions. In question No. 2, "Did you perform work during week(s) claimed? You checked "No" for both weeks. In question No. 6, "Did you return to full time work?" You checked "No" for both weeks. Additionally, the CERTIFICATION PART reads: "I hereby certify that these statements are true and correct. I understand that the law provides penalties for false statements to obtain or increase benefits." You certified this statement as being true when you affixed your signature and date to it knowing you had been returned to a full duty status during the time in question.
>
> SPECIFICATION NO. 2: In that on October 21, 1996, you appeared in court for the Theft II charge. You accepted placement in the Diversion Program in lieu of a conviction in this matter.
>
> Your actions which resulted in your arrest on August 8, 1996, brought unfavorable publicity to this agency and diminished your effectiveness in administering personnel policies and programs. As the highest ranking

> personnel officer in this agency, this conduct is unacceptable.
>
> On May 20, 1994, you received a Final Agency Action "Misuse, mutilation, or destruction of District property, public record or funds; and Inexcusable neglect of duty . . . Providing misleading information or inaccurate information to superiors, the Council, Congress or the public" for which you were suspended 30 days. It is because of your conduct that this agency has not been able to utilize your services for which you were hired (Supervisory Personnel Liaison Officer).
>
> Therefore, you are charged accordingly.[6]

On June 27, 1997, after a thorough review of all documents pertaining to Employee's case, a notice of final decision was issued affirming the removal effective July 5, 1997.[7]

*Employee's Position.*

Employee asserts that the penalty of removal was "too drastic" for the following reasons: Numbers 1 through 7 pertain to the charge of off-duty conduct unrelated to his job; that the offense was not criminal nor did it lead to a guilty plea or criminal conviction; and that the court dismissed the criminal charges due to Employee's agreement to enter the Diversion Program, which does not equate the prior arrest to a criminal offense. Number 8 asserts that Employee repaid DOES the overpaid amount prior to the Department's notification that an arrest warrant was issued. Numbers 9 and 10 contest the penalty of removal for a first time charge of an off-duty offense of this nature; and contends that the only Specifications/Causes identified in Section 1619, DCPM Table of Penalties that bear any relevance to this matter are numbers 4 and 8.[8]

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[6] See File 3 of 6, Tab 8-P: The remainder of the notice contained procedural rights which are not necessary to repeat. The amended notice superseded a prior advance notice of proposed removal dated 9/3/96. Said notice was based on: Dishonesty, to wit; Theft or misappropriation of government-owned or private property of more than nominal value (more than $25). The underlying charge stated that Employee fraudulently filed for and received unemployment compensation while serving a 30-day suspension for an adverse action in June, 1994. It is noted that the 7/17/94 date cited in paragraph 2 of Specification No. 1 (of the amended proposal) regarding the form filled out by Employee on that date is incorrect; the date on the form and in the investigative report was 7/16/94.

[7] Consideration was given to a report of findings and a recommendation from the Disinterested Designee who held a hearing on 5/29/97 and sustained the cause and specifications cited in the proposal notice.

[8] See pp. 1-3 of Employee's Closing Argument (ECA) filed 5/2/08. Number 4, "Any Knowing or Negligent Misrepresentation on (sic) Other Document Given to a Government Agency" calls for a suspension. Number 8, "Any Act which Constitutes a Criminal Offense Whether or Not The Act Results in a Conviction" permits the imposition of a 10-day suspension to removal. Further, Employee contends that this Office must find "beyond a reasonable doubt" that what Employee did amounted to a criminal offense; and that Agency should be required to prove that similarly situated individuals have been successfully prosecuted. Otherwise, what Employee did should not be found as a criminal offense because " . . . there are many laws on the books that are not enforced." It is noted that Employee does not identify the effective dates of the cited Table of Penalties.

Item Number 11 contends that Employee informed DOES that he returned to work on July 1, 1994 before DOES issued the unemployment benefits check in error. Said action should negate any finding that Employee committed a criminal offense. Agency's failure to produce the mail claim forms for the weeks ending 07/02/94, 07/09//94 and 07/16/94 should result in a favorable inference to Employee's position. Items numbered 12, 13, and 18 reflect that Agency did not comply with the requirements outlined in Chapters 8, 14 and 16, and 24 of the DCPM. Item number 14 disputes Agency's interpretation of the rules of another agency and, as such, had no jurisdiction to discipline Employee. Item number 15 contends the charge was not supported by the facts set forth in the specifications. Items number 16, 24, and 25 allege that this adverse action appears to be the same incident on which the 30-day suspension was based; and raises an issue regarding the elapsed time between the alleged infraction and Agency's initiation of adverse action.

Item number 17 contends that Employee, in accordance with his personnel action form promoting him effective July 25, 1993, was entitled to return to another position at no lower grade, in the event that this assignment is not continued. Items numbered 19 and 20 refer to Employee's performance ratings prior to issuance of the adverse action. Item number 21 questions Agency's legal authority to initiate a criminal investigation rather than an employee investigation based on alleged misconduct. Item number 22 addresses the DOES decision issued November 4, 1998 which found no misconduct relative to the same incident for which Employee was removed from service.

Items number 23 and 25 allege denial of Employee's 5th and 14th Amendment rights of due process, *eg*., retaliation against Employee for appealing his 30-day suspension. Item number 26, Employee asserts that Agency did not establish probable cause for Employee's August 8, 1996 arrest.

*Agency's Position.*

Agency responded to Employee's twenty-six (26) reasons why he believes the penalty of removal is too drastic. Reasons 1 through 7, and 26: Agency contends that DPM § 1618.1.16(e)

permits discipline whether or not the conduct is criminal or on or off duty. Here, Employee's misconduct was, *inter alia*, both criminal and dishonest. His theft of public funds eroded the Department's confidence in him as a manager, who is held to a higher standard than other employees. The penalty was appropriate, consistent with penalties imposed for similar misconduct and within the applicable Table of Penalties. Further, the Department considered Employee's past disciplinary record, his length of service, and dependability; and found no mitigating circumstances.

Reason 8: Employee's voluntary repayment was made well after the investigation commenced and after the Department of Employment Services, Office of Unemployment Compensation (OUC) contacted Employee to request a refund. Thus, the Department does not consider Employee's repayment as a mitigating factor to merit a penalty less than removal. Reason 9: The Table of Penalties (DPM § 1618.1.16(e), Transmittal No. 22, January 10, 1991) permits any penalty from reprimand to removal for the first offense. Reason 10: The Table of Penalties on which Employee relies was promulgated on February 8, 2008 and published on February 22, 2008, and therefore, inapplicable here. Reason 11: The evidence of record shows that Employee notified OUC on July 31, 1996 that he had returned to work on *July 1, 1994*, after receiving the July 12, 1996 OUC notification regarding the overpayment. Employee's acknowledgment of his misconduct after it was detected is not a basis to mitigate the penalty. Further, Agency opposes Employee's request for the Judge to make an adverse inference due to Agency's failure to produce pertinent OUC documents requested more than 10 years after he was terminated.[9]

Reasons 12 and 13 and 15: These bare statements are not a basis to mitigate the penalty. The offense with which Employee was charged is supported by the facts set forth in the specification. Reason 14: Employee's discipline was not based on the interpretation of another Agency's rules. Reason 16: The instant adverse action was not based on the same incident for which Employee was previously suspended for thirty (30) days. Reasons 17, 18, 20, and 22-25: Various allegations are unsupported in the record and do not provide a basis to mitigate the penalty. Reason 19: Although the Department considered Employee's length of service, past disciplinary record and work performance, the nature of his misconduct and given that he worked for a law enforcement agency did not warrant a lesser penalty. Reason 21: No response warranted as the question is one posed to the Judge.

## ANALYSIS AND CONCLUSIONS

*Whether the Penalty Was Appropriate Under the Circumstances.*

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

[9] See Agency's Closing Statement (ECS) at pp. 1-6.

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).[10]

Based on consideration of the entire record and the arguments of both parties, this Judge finds that the penalty was appropriate under the circumstances as explained below.

This Judge finds no due process violations; and Agency is not required to establish probable cause for Employee's arrest. That requirement is a function of the legal system and is not an issue within the authority of this Office to address. Employee was removed based on the underlying misconduct, *ie*., his dishonest actions in applying for Unemployment Compensation, and depositing a check to which he was not entitled.[11] Employee's position required him to, *inter alia*: provide personnel advice and direction; oversee and administer disciplinary actions; as well as to "monitor workmen's compensation." As the Department's highest ranking personnel officer, such conduct severely diminished the confidence held by the Department in Employee's administration of personnel policies and programs.[12]

Whether or not Employee's arrest on August 8, 1996 resulted in a conviction is immaterial as his actions violated the DPM regulations, were unacceptable, and brought unfavorable publicity to the Department. Notwithstanding, Employee's choice to enter and successfully complete the Pretrial Diversion Program resulted in *nolle prosequi* which means the criminal charges are dismissed by the Court; and no further prosecution will be pursued. That result does not otherwise bestow innocence of wrongdoing in this matter.

Further, the repayment of Government funds, two (2) years later, to which he was not initially entitled, also does not mitigate the penalty. The aforementioned check that Employee deposited in his personal bank account reflects "WEEK END: 07/16/94", during which time he was on paid leave or had resumed work. Employee's prior written response to the initial proposed removal stated, in part, "On or around June 8, 1994, while I was on a thirty (30) day

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[10] Section 1603.9 of the DC Office of Personnel and Metropolitan Police Department regulations (47 DCR 7096 (2000) reads: "Unless otherwise required by law, in selecting the appropriate penalty to be imposed in a corrective or adverse action, consideration shall be given to any mitigating or aggravating circumstances that have been determined to exist, to such extent and with such weight as is deemed appropriate."

[11] In response to Reason 21 of Employee's argument, the Office of the Inspector General (IG), not the Department, referred a copy of the investigative report to the US Attorney's Office for criminal prosecution. The IG is responsible for investigating, *inter alia*, fraud, waste, and abuse in violation of law within District agencies.

[12] See File 2 of 6, Tab 2; letter dated 8/12/97 from Employee to this Office amending PFA with attachments (including position description).

suspension for cause, I merely applied to ascertain if I was eligible for unemployment . . ." This Judge is astounded that Employee, whose job required the administration of disciplinary actions and monitoring of the various benefit programs, such as Workers' Compensation, claimed ignorance regarding his eligibility for unemployment compensation as his reason for applying. Based on Employee's position and level of responsibility, this Judge finds it incredulous that Employee presumed that he was lawfully entitled to that money.[13] Moreover, a suspension from duty without pay constitutes an adverse action which is meant to send a message to the employee regarding his or her misconduct.

This matter has been pending since 1997; and the record reflects that Employee was previously given the opportunity to "personally inspect" the mail claim forms on which the overpayment determination was made. Since Employee only recently requested those documents that are, unfortunately, no longer available, and there is no corroborating evidence regarding such earlier attempts to question the accuracy of the information thereon, this Judge finds no reason to allow a favorable inference on Employee's behalf.[14]

Last, relative to Employee's contention that the Table of Penalties permits a suspension action for a first offense of this nature is not valid. The DPM Table of Appropriate Penalties in effect in 1996, when this adverse action was initiated, was the one issued for Chapter 16, Adverse Actions and Grievances, Transmittal No. 22, January 10, 1991. Said Table of Penalties, § 1618.1, provided "Reprimand to Removal" for the first offense.[15]

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Based on the totality of circumstances, this Judge concludes that removal was the appropriate penalty, was not an error of judgment, and should be upheld.

## ORDER

It is hereby ORDERED that Agency's action in removing Employee is UPHELD.

FOR THE OFFICE:

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MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge

[13] See File 1 of 6, Tab 1, Employee's PFA, Attachment 11 at p. 8.
[14] See Agency Closing Statement, Exhibit 2, DOES letter dated 8/7/96 to Employee.
[15] See footnote 8. It is noted that the instant adverse action was not a first offense, but was a subsequent action for different, but similar misconduct.