THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
JAMES O'BOYLE Employee	OEA Matter No. 1601-0020-05R09
v.	Date of Issuance: January 27, 2010
D.C. METROPOLITAN POLICE DEPARTMENT Agency	Joseph E. Lim, Esq. Senior Administrative Judge

Ross Buchholz, Esq., Agency Representative
Robert Deso, Esq., Employee Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On February 1, 2005, Employee, a sergeant, appealed his termination effective January 8, 2005, for 1) Drinking alcoholic beverage 2) Conviction; and 3) Conduct unbecoming of an officer. In an Initial Decision issued October 17, 2006, the Administrative Judge (AJ) Muriel Aikens-Arnold upheld Agency's decision to terminate Employee. The AJ concluded that the suspension without pay proposed on August 11, 2004 constituted a non-disciplinary administrative action and not a disciplinary adverse action. The AJ further stated that Agency's selection of a penalty was a management prerogative, not subject to the exercise of discretionary disagreement by this Office.

Employee then filed a Petition for Review on November 8, 2006. In an Opinion and Order on Petition for Review issued on September 16, 2009, the Office of Employee Appeals (OEA) Board remanded the matter to the AJ for a determination on the appropriate penalty. The Board had found that there was disparate treatment and that Employee had been penalized twice for the same offense.

The matter was reassigned to the undersigned judge on November 2, 2009. I held a status conference on December 7, 2009, and closed the record after receiving briefs from the parties.

JURISDICTION

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

ISSUE

What is the appropriate penalty for Employee under the circumstances.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

The event from which the charges stemmed occurred on April 5, 2004, when Employee was involved in a motor vehicle accident while off-duty in Alexandria, Virginia. Employee was placed under arrest for Driving While Intoxicated ("DWI"). Employee's blood alcohol level was 0.27, over three times the legal limit in the State of Virginia. On July 21, 2004, Employee was convicted of the DWI charge and sentenced to 180 days in jail with 170 days suspended. Employee served ten (10) days in jail and was fined $2,500 with all but $500 suspended. Employee was also placed on probation, had his license suspended for one (1) year, and was required to complete an alcohol awareness program.

On August 11, 2004, Agency proposed to suspend Employee without pay based on his July 21, 2004 conviction. On August 30, 2004, Agency issued its final decision to suspend Employee without pay pending resolution of the administrative action. Agency conducted an administrative investigation into the April 5, 2004 car accident and DWI conviction. Agency's Final Investigative Report recommended that Employee be cited for Adverse Action.

On November 8, 2004, Agency issued a Notice of Proposed Adverse Action to Employee. Agency proposed to terminate Employee. Employee filed an Appeal with the Chief of Police on December 15, 2004. The Appeal was denied on December 28, 2004. Employee received notice that his termination would be effective January 8, 2005.

In an Initial Decision issued October 17, 2006, the AJ upheld Agency's decision to terminate Employee. The issue to be decided was whether removal was within the range of appropriate penalties available to Agency. After a detailed analysis of the issue, the AJ concluded that the suspension without pay proposed on August 11, 2004 constituted a non-disciplinary administrative action and not a disciplinary adverse action.[1] The AJ further stated that Agency's selection of a penalty was a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[2]

Employee then filed a Petition for Review on November 8, 2006, arguing that "it was legal error for the Administrative Judge to determine that the suspension without pay proposed on August 11, 2004 and effected on August 30, 2004 was a non-disciplinary administrative action and not a disciplinary adverse action…when Employee was terminated…for the same alleged misconduct for which he was suspended without pay."[3] Employee claims that Agency's actions subject Employee to double punishment or double jeopardy because he was suspended without pay and subsequently terminated for the same offense.

Agency had issued Employee a Final Notice of Decision to Suspend Without Pay stating "[i]n view of your conviction and incarceration in Fairfax County …you should be suspended without pay pending resolution of the administrative charges."[5] Agency argued that the purpose of the

[1] *Initial Decision*, p. 8 (October 17, 2006).
[2] *Id*.
[3] *Petition for Review*, p. 1-2 (November 8, 2006).

suspension was to allow Agency time to conduct an internal investigation into the DWI arrest and determine if Employee engaged in misconduct.

Agency's General Order No. 1202.1 Part I C-2 defines a suspension from duty as a type of adverse action under which there is a "temporary cessation of pay and police authority with a definite date of restoration." Agency defines administrative suspensions as suspensions that "temporarily prohibit a member of the Department from performing police duty and shall be distinguished from disciplinary suspension imposed as punishment following a final determination of misconduct."[4]

Although Agency's General Order denotes Employee's suspension without pay as an administrative action, the Board concluded that the suspension of an Employee without pay is a disciplinary adverse action. Employee's subsequent termination therefore constituted a double punishment for the same alleged misconduct for which Employee was suspended without pay. The Board held that the suspension was tantamount to an adverse employment action. Typically, adverse employment actions are economic injuries and involve a loss or reduction of pay or monetary benefits.[5] An actionable adverse employment action must involve a change in employment conditions that is more than an inconvenience or alteration of job responsibilities, such as reducing an employee's workload and pay.[6] Moreover, in *Gribcheck v. Runyon*[7], the Appeals court held that a plaintiff suffered an adverse employment action when he was suspended without pay for fourteen days and did not receive back pay.[8]

In this case, Employee suffered an economic injury when he was placed on leave without pay from August 30, 2004 until his termination on January 8, 2005. While it is understandable that Agency suspended Employee for the purposes of conducting its own internal investigation, this does not absolve its actions from being adverse in nature. Thus the Board found that Employee's suspension was an adverse disciplinary action and not an administrative suspension.[9]

Employee also argued that the penalty of termination was arbitrary, excessive, unreasonable and inconsistent with Agency actions in similar cases. Employee refers to several other Agency disciplinary cases in which the other employees were not terminated as a result of various offenses, including driving under the influence, reckless driving and driving while impaired.[10]

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[4] General Order 1202.1 Part I-D-1.

5 *Markel v. Board of Regents of Univ. of Wis. Sys.*, 276 F.3d 906, 911 (7th Cir.2002); *Collins v. State of Illinois*, 830 F.2d 692, 703 (7th Cir.1987).

6 *Kirby v. City of Tacoma 124* Wash.App. 454, 465, 98 P.3d 827 (2004).

7 *Gribcheck v. Runyon*, 245 F.3d 547, 551 (6th Cir.2001).

8 Courts have held that a temporary suspension with pay is not an adverse employment action. *Id., See Jackson v. City of Columbus*, 194 F.3d 737, 752 (6th Cir.1999).

9 It should be noted that courts will defer to OEA's interpretation of personnel regulations to the same extent that it would defer to any agency's interpretation of a statute it administered because of the expertise this Office has developed in administering and enforcing District of Columbia personnel records. *Hutchinson v. District of Columbia Office of Employee Appeals*, App. D.C. 710 A.2d 227 (1998).

[10] *Employee Brief*, pp. 3-6. *See* MPD disciplinary cases for: Detective Pamela Montague, Officer Gregory E. Countee, Officer Louis Schneider, Officer Jacob Lipscomb, Sergeant Christopher Whitehouse, Officer William Torres, Officer Kenneth Furr, Officer Duane Smith, Officer Joseph Belfiore, and Detective John Paprcka. The majority of the

This Office's scope of review as to the appropriateness of a penalty is limited to a determination of whether the penalty imposed is within the range that is allowed by law, regulation and any applicable table of penalties.[11] In reviewing an agency's decision, a number of factors are important in determining whether a penalty is reasonable.[12] Among these factors is whether or not the agency has meted out similar penalties for similar offenses.[13]

However, in *Huntley v. Metropolitan Police Department*, this Office held that the principal of similar penalties for similar offenses does not require that agencies insist upon rigid formalism, mathematical rigidity or perfect consistency regardless of variation, but that they apply practical realism to each situation to assure that employees receive fair and equitable treatment where genuinely similar cases are presented.[14] Normally, in order to show disparate treatment, the employee must show that he or she worked in the same organizational unit as the comparison employees and that they were subject to discipline by the same supervisor within the same general time period.[15]

In this instance, the Board found that Employee was similarly situated to other MPD employees at the time of his termination. The employees cited in the Petition for Review all worked for the Metropolitan Police Department during 2003 and 2004. Employee was terminated during this time period. Moreover, each adverse action was reviewed and decided by Shannon P. Cockett, Assistant Chief Director of Agency's Human Services Section. In some cases, the employee pled guilty or was found guilty of DWI, DUI or reckless driving and was sentenced to suspended jail time. As a result, each employee was subjected to an adverse action. The penalties imposed by Agency against these officers ranged from a thirty (30) day suspension to a ninety (90) day suspension. None of the employees cited were terminated because of their misconduct. Although Employee was the only one to serve time in jail and only one other employee had obtained the rank of Sergeant, these factors alone do not constitute meaningful and significant differences between Employee's case and

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aforementioned employees were fined and/or placed on probation, but did not serve time in jail.

[11] *Huntley v. Metropolitan Police Department*, OEA Matter Number 1601-0111-91, *Opinion and Order on Petition for Review*, __ D.C. Reg. __ ( ).

[12] *Id.* at 4.

[13] *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985); *Employee v. Agency*, D.C. Reg. 4565 (1982); *Employee v. Agency*, 30 D.C. Reg. 352 (1983); *Giacobbi v. U.S. Postal Service*, 30 M.S.P.R. 39 (1986).

[14] *Huntley* at 5; *See also Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306-307 (1981).

[15] *See Carroll v. Department of Health and Human Services*, 703 F.2d 1388 (Fed. Cir. 1983); *Kuhlmann v. Department of Health and Human Services*, 10 M.S.P.R. 356 (1982); *Mille v. Department of the Air Force*, 28 M.S.P.R. 248 (1985).

the other cases.

The selection of an appropriate penalty must involve a balancing of the relevant factors in the individual case. Here, Employee has provided enough evidence to at least raise the question of whether he received the same treatment as similarly situated employees. For this reason the Board granted Employee's Petition for Review and remanded this matter to the Administrative Judge for a determination on that issue.

In its brief regarding the appropriate penalty, Agency disagreed with the Board's findings and conclusion, insisting that the ultimate penalty of termination is still the appropriate penalty for Employee's actions. To support its contention, Agency submitted an affidavit of its Director of Human Resources, Ms. Diana Walton, attesting that Agency used the Douglas factors[16] in determining termination as the appropriate penalty for Employee.

In its brief regarding the appropriate penalty, Employee provided more details regarding the ten similarly situated Agency employees. In 5 of the 10 similarly situated cases, the employee was involved in an off-duty traffic accident and was convicted of either DWI (driving while intoxicated), DUI (driving under the influence), or reckless driving. In 4 of those 5 cases, the employee entered into a Conciliation Agreement with Agency, pursuant to which a 30-day suspension was imposed, 10 days of which was held in abeyance. Effectively, this resulted in a 20-day suspension. In the 5th case, the employee received a 30-day suspension. The other 5 cases did not involve accidents or Conciliation Agreements. In 2 of those 5 cases, the officers were suspended for 30 days with 10 days held in abeyance. In another case, the officer was suspended for 30 days. In another, the officer was suspended for 60 days. In the final case, a sergeant, who was convicted of DWI while off-duty, had engaged in high speed pursuit and had an altercation with a citizen. He received a 90-day suspension, with 30 days held in abeyance.

In the instant case, Employee had already served an administrative suspension without pay for a little more than four months. In addition, he was also subsequently terminated for the same offense. Given the facts of this case and the Board's findings in the Opinion and Order on Petition for Review, I find that on remand, a penalty of a 30-day suspension, with 10 days held in abeyance (effectively a 20-day suspension) would place Employee in the position where he would have received the same treatment as similarly situated employees. Again, based on the Board's findings, I also find that the termination was a double punishment that should be reversed. I therefore reverse Employee's termination.

ORDER

It is hereby ORDERED that:

1) Agency's action removing Employee is REVERSED;

[16] *Douglas v. Veterans Administration*, 5 M.S.P.B. 313; 5 M.S.P.R. 280 (1981).

2) Agency's action suspending Employee from August 30, 2004 until January 8, 2005, is modified and reduced to a 30-day suspension, with 10 days held in abeyance;

3) Agency reinstate Employee and reimburse him all pay and benefits lost as a result of the removal and excessive suspension; and

4) Agency file with this Office documents showing compliance with the terms of this Order within thirty (30) days of the date on which this decision becomes final.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge