THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CURTIS WASHINGTON,	)	
Employee	)	OEA Matter No. 1601-0125-06
	)	
v.	)	Date of Issuance: February 27, 2009
	)	
D.C. FIRE AND EMERGENCY MEDICAL SERVICES,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge
	)	

Frederic Schwartz, Esq., Employee's Representative
Ross Buchholz, Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION

Curtis Washington ("Employee") was terminated on July 14, 2006 from his position as a Paramedic, DS-699-9, for the following reasons: (1) Any knowing or negligent material misrepresentation on an official government document or other document used to obtain a licensure and/or certification for a position of hire; and (2) failure to notify the Department of his arrests.[1]

Employee filed a timely Petition for Appeal from Agency's final decision removing him from his position. A Pre-Hearing Conference was held on November 13, 2006 and an evidentiary hearing was held on February 28, 2007 and April 5, 2007. Following their receipt of the Hearing transcript, the parties submitted proposed orders on August 21, 2007. The record is closed.

JURISDICTION

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

BURDEN OF PROOF

[1] Agency's Final Decision, Agency Exhibit 9

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUES

1) Whether the Agency's adverse action was taken for cause; and

2) If so, whether the penalty was appropriate under the circumstances.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

Statement of Charges:

By advance notice of removal ("Removal Notice") dated September 19, 2005, Gregory Blalock, Deputy Chief, EMS Operations, set forth the following causes and specifications against Employee:

> Cause No. 1: Any knowing or negligent material misrepresentation on an official government document or other document used to obtain licensure and/or certification for a position of hire.
>
> Cause No. 2: Failure to notify the Department of your arrests.

The details in support of this proposed action were as follows:

> Cause No. 1: You knowingly made false representations on government and other official documents to obtain certifications as an Emergency Medical Technician (EMT) and paramedic. Specifically, you failed to disclose your

felony convictions on your application for certification as an EMT, which was signed by you on September 11, 2002 and submitted to the D.C. Department of Health, Office of Emergency Health and Medical Services; your application for EMT-Paramedic, which was signed by you on April 18, 2003 and submitted to the National Registry of Emergency Medical Technicians (NREMT); and your application for certification as a paramedic, which was signed by you on May 12, 2003 and submitted to the D.C. Department of Health, Office of Emergency Health and Medical Services. The Department became aware of your felony convictions after being informed that you were arrested on May 28, 2005, for destruction of property. The Department then obtained your court records which contained the following:

x Felony conviction on November 23, 1988 for possession of cocaine with intent to distribute. Offense Date: October 3, 1988. Completed parole in 1993.

x Felony conviction on February 23, 1989 for possession of cocaine with intent to distribute. Offense Date: December 29, 1988. Completed parole in 1993.

The NREMT clearly states in its prequalification and suitability guidelines for certification that "[t]he NREMT will deny registration or take other appropriate actions in regards to applicants for registration or re-registration when a felony conviction has occurred." Your falsification of a material fact is clearly in breach of the ethical standards expected to be maintained by employees who occupy positions of high public trust and confidence.

Cause No. 2: You were arrested on May 28, 2005 for destruction of property, but failed to report it to the Department. The Department obtained court records which indicate that you also failed to report other arrests as enumerated below.

1. Arrested and charged with second degree assault in Prince George's County, Maryland on July 7, 2000. *Nolle Prose qui* September 14, 2000.

2. Arrested and charged with second degree assault in Prince George's County, Maryland on May 28, 2004. *Nolle Prose qui* July 27, 2004.

> Your failure to report your arrests are in violation of Article VI, Section 4 of the D.C. Fire and EMS Order Book, which states: "[a]ll employees of the Department shall immediately notify their appropriate bureau head, through the chain of command, giving full details, that they have been arrested."

Agency's Direct Case:

Jerome Stack, Assistant Director of Battalion Chief of the Emergency Medical Service (EMS) Operations

Jerome Stack ("Stack") testified in relevant part that: he was the chief supervisor of the platoon in which Employee was assigned. He testified that he was asked to investigate Employee's criminal history and records at the Agency in connection with Employee's application for certification as an EMT. Stack testified that on Employee's Department of Health ("DOH") applications for certification dated May 12, 2003, and September 19, 2002, Employee indicated that he had never been convicted of a felony. Tr. at 24-26. Stack also testified that Employee indicated that he had never been convicted of a felony on his application for the National Registry Emergency Medical Technician Paramedics ("NREMT"). Tr. at 27-28.

Stack testified that the NREMT requires each applicant to admit any felony convictions, no matter when they occurred, and based on that information, the NREMT determines whether the applicant should be certified. Tr. at 3 1-32. When Stack requested and received a copy of Employee's application from the NREMT, he did not receive any supporting documentation or indication that Employee had submitted information about his felony convictions to the Registry. Tr. at 37-40. Because of his concern about the results of his investigation into Employee's records and criminal history, Stack removed Employee from his normal position and placed him on administrative duties effective July 6, 2005. Tr. at 46. Following his investigation, Stack referred the matter to General Counsel for further action. Tr. at 47.

Adrian Thompson, former Chief of the D.C. Fire and EMS Department

Adrian Thompson ("Thompson") testified in relevant part that: as Chief, he made final decisions in disciplinary actions, including the decision to terminate Employee. Tr. p.79

Thompson testified that he was concerned with:

> …the fact that the charges were severe at the time in terms of what this individual did in terms of accuracy of reporting information on application forms for certifications and for licensing and the impact it had on the Agency as a whole, if something out there went wrong while he was out

> performing his job, so to speak, the liability that would be involved and the public perception of the Agency overall.
>
> Tr. at 80

Thompson testified that he considered several factors when making his decision, including the repercussions to his Agency if the public lost confidence in EMTs, the number of instances of dishonesty by Employee, Employee's prior work history and record with the Agency, and the possibility of rehabilitating Employee. *See,* Tr. 82 -84. One of the factors that Thompson considered most important was that Employee did not take ownership for his actions; instead, he tried to "pass off on the Agency letting him do it" (referring to Employee's contention that Agency officials were aware of or encouraged his falsification of applications). Tr. at 84.

Gregory Blalock, Deputy Chieffor EMS Operations

Gregory Blalock ("Blalock") testified that he was responsible for EMS operations, which include supervision of all the EMTs and paramedics in Washington, D.C. Blalock testified that in order to become a paramedic, an individual must have a certification from the DOH. Blalock testified that, in response to the information he received from the Agency's investigation about Employee, he had Employee served with an Advance Notice of Removal, dated September 15, 2005.

The Notice referenced a violation of Article VI, Section 4 of the D.C. Fire and EMS Order Book, which Chief Blalock read in relevant part:

> All employees of the department should immediately notify their appropriate bureau head through the chain of command, in full details that they have been (1) arrested; (2) indicted; (3) convicted of or plead guilty to a felony, convicted or plead guilty for misdemeanor for conduct that would adversely affect the employee's or the Agency's ability to perform effectively, or (5), under investigation for criminal or illegal activity. Tr. p. 131, Agency Exhibit 12.

Blalock stated that regulation is important because the department is an agency responsible for public safety. He stated, "We have to ensure that our personnel are credible and honest and forthright with the work that we do." *Id.*

Blalock testified that he made a recommendation to Chief Thompson to terminate the Employee. In his recommendation, Chief Blalock cited the Employee for making a knowing or negligent material misrepresentation on an application for certification. He opined that he believed that Employee "purposely intended to deceive District government officials concerning his prior arrest record." *See,* Agency Exhibit No. 13.

Curtis Washington, Employee

Employee testified in relevant part that he did not indicate that he had prior felony convictions on the DOH applications dated May 12, 2003 and September 19, 2002. Tr. p. 144-146, Agency Exhibits 1 and 2. Employee explained this answer by stating that he believed that felony convictions more than five years old did not need to be included on these applications. Tr. p. 144-145. Employee testified that he had not included any written explanations of his understanding of the policy or of his felony convictions on his application. *Id.* Employee testified that he did not indicate his felony record on his NREMT application, and that no one at the NREMT had advised him to fill out the application in that way. See, Tr. at 150. Despite his testimony that Agency Exhibits 1, 2, and 3 were the only applications on which he had not included his felony record, Employee later testified that he did not include his felony record on another DOH application dated September 25, 2000. See, Tr. at 161, Agency Exhibit 14.

Employee further testified that he was not arrested in 2000 or 2004. He explained that on these two occasions, he had not been told he was under arrest, was not handcuffed, fingerprinted, or photographed, and was not taken into custody. See, Tr. at 300, 308, 3 12-13. However, Employee had no explanation for Agency Exhibit No. 16, which showed that Employee had been arrested in a park in 2000. See, Tr. at 308. Employee was unable to explain how the Prince George's County Sheriffs Department had a photo of Employee from the 2000 arrest even though Employee had previously claimed that he had been neither arrested nor fingerprinted. Similarly, Employee was unable to explain how the Prince George's County Sheriffs Department had his fingerprints on file along with his signature on the fingerprint card dated May 28, 2004, the date of his arrest for second degree assault and destruction of property charges. *See,* Tr. at 312– 313.

Although Employee presented evidence (Employee Exhibit No. 4) that one of his arrest warrants was withdrawn and a summons was reissued in its place, the arrest warrant to which Employee referred was not one of the two arrests that the Agency cited in its case.

James Murphy, Chief of Investigations for the Ofice of the Attorney General of the District of Columbia

James Murphy ("Murphy") testified as an expert witness in field of law enforcement. Murphy testified that his department had procured records from the Criminal Justice Information System (a Maryland State agency) and the Prince George's County Sheriff's Office, which demonstrated that Employee had in fact been arrested twice, on July 7, 2000 and May 28, 2004. Tr. p. 200-202 and Agency Exhibits 7, 15, 16, and 17.

Robert Powell, EMS training coordinator for the District of Columbia Department of Health

Robert Powell ('Powell") testified that individuals who apply for certification as EMTs or paramedics must complete a recognized Department of Transportation course to

become eligible for certification from the District of Columbia. At such time, the candidate fills out a DOH application for certification, which includes a section in which the individual must indicate any prior felony convictions. Powell testified that if the individual has a felony record, he must provide complete information about the felony(ies) along with the application. *See,* Tr. at 233, 239. Powell testified that there are no exceptions to the admission of felony conviction on applications for certification or recertification through the DOH. If an employee had at any time been convicted of a felony and indicated it on an application, the DOH would have to review the application and surrounding circumstances to determine whether to certify or recertify the individual each time the individual filled out an application. *See,* Tr. at 243.

Employee's Direct Case

Fernando Daniels, I, MD, former medical director for the D.C. Fire and EMS Department

Fernando Daniels, MD, ("Daniels") testified on behalf of the Employee. Daniels testified that while he worked for the D.C. Fire and EMS Department, he met Employee and reviewed his record when Employee applied for a training class that Daniels organized. Daniels further testified that, after reviewing Employee's record, he checked with the NREMT in either 2000 or 2001 about whether the Employee's felony convictions would prevent NREMT certification following the training course. Daniels said that the NREMT representative he spoke with said that there was a possibility that an individual with a felony record could be certified, but Dr. Daniels understood this was not a guarantee. Dr. Daniels also testified that he understood that the decision of whether or not to certify the Employee was ultimately that of the NREMT, not his decision. See, Tr. at 274– 275.

Daniels admitted that at the time he signed Employee's NREMT certification application, he was aware that Employee had a felony history that Employee did not indicate, but it was a "mistake" on his part to have signed the application. *See,* Tr. at 282.

Curtis Washington, Employee

Employee was called to testify again in Employee's direct case. Employee testified that he had not indicated his felony record on his applications to the DOH and NREMT because of the way he "interpreted the policy," not because any member of the Agency, including Daniels, encouraged him to falsify records. Employee claims that he believed that because his felony convictions had occurred more than five years prior to completing the forms, he did not have to include them on the applications.

Employee testified that he had been arrested four times, in 1988, 1989, 1994, and 2005. *See,* Tr. at 301. As he previously testified during Agency's direct case, Employee did not believe he had been arrested in 2000 or 2004, despite the arrest records from the

Criminal Justice Information System (a Maryland State agency) and the Prince George's County Sheriff's Office. *See,* Tr. at 308– 312.

Findings of Facts, Analysis, and Conclusion

The Agency has met its burden of proof to demonstrate that its actions were for cause. First, the Agency proved that Employee made a "knowing or negligent material misrepresentation on an official government document or other document used to obtain licensure and/or certification for a position of hire." Employee admitted to misrepresenting his felony record on four documents used for certification or recertification. *See generally,* Agency Exhibits 1, 2, 3, and 14. Employee testified that it was his understanding that he did not need to include information about his felony record.

Employee's claim that he misunderstood the policy is not a defense for his actions. Powell, the EMS training coordinator, testified that there are no exceptions to the DOH policy. The NREMT issued Employee a reprimand based on his failure to indicate his felony history on the NREMT application. This reprimand, now part of Employee's permanent file at the NREMT, clearly indicates that, despite how Employee may have understood the policy, failure to follow it was cause for disciplinary action. *See generally,* Agency Exhibit 18.

The misrepresentations were material because they affected how Employee's applications were processed. Powell's testimony indicated that the disclosure of any prior felony conviction would change the way the application would be reviewed and processed, because the disclosure is material to the application. Therefore, by not including his felony history on the DOH and NREMT applications, Employee preempted the heightened scrutiny that his applications would have received.

It is irrelevant that Employee's felony convictions were part of his personnel record. Rather, the Agency correctly relies on the honesty of the applicants to indicate any felony history that would trigger a more detailed review. Thompson testified that the honesty of EMTs and paramedics is crucial because these employees are serving citizens *in extremis.* Employee, in his knowing decision not to report his felony history, did not display the honesty that the Agency mandates from its employees.

Further, the NREMT Felony Conviction Policy provides the following three categories of Denials: 1) General Denial; 2) Presumptive Denial; and 3) Discretionary Denial. *See generally,* Agency Exhibit 4. These categories reference criminal convictions that shall or may disqualify an applicant from EMT certification. Employee's convictions for "crimes involving controlled substances" may have served to disqualify him under the "Presumptive Denial" policy, had it not been for the fact that those crimes occurred more than five years prior to his application. However, due to Employee's failure to list those crimes on his application, NREMT was unable to properly consider whether it chose to deny Employee's application under the "Discretionary Denial" policy. Evidence of the fact that NREMT considered Employee's

misrepresentation to be dishonest and material is found in the letter of reprimand from NREMT to Employee dated August 14, 2006. *See generally,* Agency Exhibit 18.

An administrative judge must find facts and in that capacity must assess the credibility of witnesses. *Dell v. Department of Employment Services,* 499 A.2d 102 (D.C. 1985). To assess the credibility of witnesses, the Administrative judge can consider the demeanor and character of the witness, the inherent impossibility of the witness's version, the witness's bias or lack of bias, inconsistent statements of the witness and the witness's opportunity and capacity to observe the event or act at issue. *Hillen v. Department of the Army,* 35 M.S.P.R. 453, 7-8 (1987).

I find that Employee was not a credible witness. Employee's testimony was, at times, internally inconsistent, as well as inconsistent with the evidence, such as when he described his past arrests. For example, Employee has offered no credible testimony or evidence to refute Agency's showing that he was arrested twice during the course of his employment and failed to report these arrests to the Agency. Agency presented certified records from both the Criminal Justice Information System and the Prince George's County Sheriff's Office, along with credible expert testimony from Murphy, to demonstrate that Employee was arrested on July 7, 2000 and May 28, 2004.[2] Although Employee claims he was not arrested and instead presented himself willingly at the police station, the records show that Employee was in fact arrested on both occasions.

I find it significant that even after Employee was shown 1) a photo from the Prince George's County Sheriff's Department and the arrest records for July 7, 2000, and 2) a fingerprint card with Employee's signature and the arrest records for May 28, 2004, Employee continued to testify that he was not fingerprinted or photographed on either of these dates. Employee offered no credible explanation to reconcile the contradictions between the documentary evidence and his testimony in this regard.

In contrast, I find Agency's witnesses were credible. The testimony of Agency's witnesses was internally consistent and consistent with one another and the documentary evidence. Accordingly, Agency met its burden of proof by a preponderance of the evidence.

D.C. Code § 5-103 1, part of the Omnibus Safety Agency Reform Amendment Act of 2004, established a statute of limitations for disciplinary actions brought against employees of the Police and the Fire and Emergency Medical Services Departments. It provides that:

> (A) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays,

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[2] The date of May 28, 2005, referenced in the Notice is apparently a typographical error. The operative date for Employee's arrest on the charge of "destruction of property" is May 28, 2004 as reflected in Agency Exhibits 9 and 15.

> after the date that the Fire and Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.
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> (B) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the office of Corporation Counsel, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection(a) of this section shall be tolled until the conclusion of the investigation.

Employee has argued that Agency violated this statute considering that from the time of his application was processed through the time that he was notified of the instant charges was greater than the 90 day window allowed for under D.C. Code § 5-103 1. I disagree. I find that Employee's actions, being deceitful in nature, effectively prevented Agency of ascertaining when the acts that underlie the instant action occurred. And considering that in all reasonable circumstances the Agency could not have discovered these acts without Employee being forthright about their occurrence. Considering as much, I find that Agency did not violate D.C. Code § 5-103 1, when it instituted its adverse action against Employee.

When an Agency's charge is upheld, the Office of Employee Appeals 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). In assessing the appropriateness of the penalty, the Office of Employee Appeals is limited to ensuring that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia,* 502 A.2d 1006, 1010 (D.C. 1985). "Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by" the OEA. *Gregory Miller v. Department of Public Works,* OEA Matter No. 1601-0113-98, *Opinion and Order on Petition for Review,* (November 22, 2002) ___ D.C. Reg. ____ ( ). The Administrative Judge concludes that in this instance, managerial discretion was legitimately invoked and properly executed. There are no ranges imposed by law, and no prohibition in law, regulation or guideline that bars Agency from removing Employee. Agency has presented sufficient evidence to establish that its decision was not an error of judgment.

I CONCLUDE that, given the totality of the circumstances as enunciated in the instant decision, the Agency's action of removing the Employee from service should be upheld.

ORDER

Based on the foregoing, it is ORDERED that the Agency's action of removing the Employee from service is hereby UPHELD.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Administrative Judge

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