THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No. 1601-0084-09
JUAN ESPINAL	
Employee	Date of Issuance: April 21, 2010
v.	Sheryl Sears, Esq.
	Administrative Judge
METROPOLITAN POLICE DEPARTMENT	
Agency	

James E. McCollum, Jr., Esq., Employee Representative
Pamela Smith, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

Juan Espinal ("Employee") was a Lieutenant in the Metropolitan Police Department ("Agency" or "MPDC" or "MPD"). As the result of an investigation, Agency proposed to remove Employee for allegedly brokering outside employment. By letter dated June 24, 2008, Jennifer Greene, Commander, Office of Human Resources, notified Employee that he was charged with misconduct as follows:

> Charge No. 1:
> Violation of General Order Series 120221, Attachment A. Part A-16 which states: "Failure to obey orders or directives issued by the Chief of Police," as further specified in General Order 201.17, Part V-F-1 which states: "No member shall engage in brokering outside employment. Any member of the Metropolitan Police Department who engages in brokering outside employment may be subject to Metropolitan Police Department

> discipline at the discretion of the Chief of Police, including adverse action. Any member of the Metropolitan Police department the rank of Captain or above who engages in brokering outside employment may be subject to adverse action (2.5:3(a) & (b) of the Police Manual)."
>
> Specification:
> On, or about, February 26, 2008, you acted as a liaison, intermediary, and/or referral agency when you distributed employment application packages from the Safe Ride Solutions company to officers of the Fourth District, via departmental email. Specifically, the paperwork indicated that you would receive a "$20.00 commission for every officer's first drive and $10.00 for every other ride as long as you worked for Safe Ride Solutions." [1]

There was a hearing at the agency level on October 20, 2008. By letter dated November 26, 2008, Agency notified Employee that he would be removed effective on December 19, 2008. On January 31, 2008, Employee submitted his resignation to Agency. It was effective March 13, 2009.

On February 13, 2009, Employee filed a petition for appeal with the Office of Employee Appeals ("the Office" or "OEA"). This matter was assigned to this Judge on July 22, 2009. On July 27, 2009, this Judge ordered Employee to submit a written statement showing cause why this appeal should not be dismissed for lack of jurisdiction because he resigned and was not removed. Employee responded, in a timely fashion, with a "Memorandum of Points and Authorities in Support of Jurisdiction." He stated

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[1] Agency's original charges also included the following:

> Charge No. 2:
> Violation of General Order Series 120.21, Part 1-B-16, which states: "Failure to obey orders or directives issued by the Chief of Police," as further specified in General Order 201-17, Part V1-H, which states, "Any member desiring to engage in outside employment shall notify the Department of such intention by submitting the following documents, an origin[al] and three copies to the member's Commanding Officer prior to accepting such employment (6A0 DCMR 302.1) (CALEA 22.3.4-d)."
>
> Specification No. 1:
> You, by your own admission, have been selling MPDC sweaters to members of the department for the past five or six years.

However, at the hearing before the Adverse Action Panel of Agency, Employee was found not guilty of this charge.

that "he does not appeal his resignation." Instead, Employee seeks relief from the thirty (30) day suspension that Agency imposed in lieu of the removal.

This Judge concluded that the Office has jurisdiction over the appeal from the suspension and convened a pre-hearing conference on December 16, 2009, and an evidentiary hearing on March 10, 2010. During both proceedings, Employee, his representative, Agency's representative and Mr. Jeffrey Podell, a friend and assistant to Employee, were present. The parties have submitted written closing arguments. The record is now closed.

JURISDICTION

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

ISSUES

I. Whether Employee committed the acts with which he is charged.

II. If so, whether Employee actions constitute cause for adverse action as charged.

III. If so, whether the penalty was appropriate.

POSITIONS OF THE PARTIES

Agency alleges that Employee acted in contravention of applicable rules and regulations by brokering police work to other officers employed by Agency in exchange for compensation. Agency maintains that the penalty of suspension for thirty (30) days was in keeping with its regulations and appropriate under the circumstances.

Employee denies that his actions constituted brokering because he was not seeking to link police officers with employment in which they would be using their police powers. He also asserts that he would have achieved no financial gain because any monies that he received were designated for donation to a charity. Employee notes that no officers pursued that offer of employment. None applied for or was hired by the company in question. Finally, Employee contends that the penalty was excessive.

BURDEN OF PROOF

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) provides that "[f]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction." Accordingly, the agency has the burden of proof in this matter. Pursuant to OEA Rule 629.1, id., the applicable standard of proof is a "preponderance of the evidence." OEA Rule 629.1 defines a preponderance of the evidence as "[t]hat 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." Accordingly, Agency must prove, by a preponderance of the evidence, that Employee committed acts that constitute cause for adverse action and that removal was a reasonable penalty.

SUMMARY OF TESTIMONIAL EVIDENCE OF AGENCY'S WITNESSES

Dierdre Porter, Inspector, Director of the Disciplinary Review Branch

Inspector Porter said that her job was to review investigative reports of misconduct at Agency and determine the appropriate penalty for substantiated charges. She defined "brokering" as an employee acting as a liaison between a member of the police force and an outside employer. At the time Porter reviewed Employee's matter, the penalty in place for brokering was a thirty (30) day suspension. She concluded that penalty was appropriate for Employee.

Samuel Swarn, Police Officer

Swarn heard Employee's announcement before roll call and received notice by email of the opportunity to work as a driver for professional football players who came to town to play the Redskins. He understood that a commission would be generated and paid to someone else if he got the job. However, he was not interested and did not respond.

On March 20, 2008, Agent Tracy Malcolm of Agency's Office of Internal Affairs, interviewed Swarn while investigating the allegations against Employee. According to her written report, Swarn conveyed to her that "he understood that Lt. Espinal would be the manager, organizer and contact person for the officers that he was attempted [sic] to recruit."

Ernie Davis, Patrol Officer

Davis testified that he heard Employee mention, during roll call, the opportunity to drive NFL players around. Davis recalled that an "overseer" would receive a commission. Davis was interested in meeting professional football players because he hoped to invite them to participate in an annual public event for local youth that he organizes. However, David declined the offer as well. He explained his reasoning as follows:

> After I reviewed it, I didn't think it was appropriate because I thought that as a driver, you're only making $35.00 an hour and somebody else was making more than you were and they weren't doing anything. And I also thought it was a conflict of interest because we all know that a lot of NFL players carry weapons and things with them and get in trouble and as a police officer, you have to

> do what's right as a police officer, as opposed to just being a civilian. (*Transcript, Page 39 , Lines 3 -11*).

Agent Malcolm also interviewed Davis. She reported that Davis told her that he initially told Employee that he was interested in the job. However, he decided not to apply because "it appeared to him that some one would be getting a cut because the dollar amounts did not add up."

Essray Taliaferro, Jr., Inspector, Director of the Office of Risk Management

Taliaferro explained that the agency is responsible for ensuring that no member takes an outside job that conflicts with their duties or any rules, laws or regulations of the D.C. government or Metropolitan Police Department. Members can only accept employment on private property. They cannot miss work due to outside employment. Agency works with the other employer to resolve any potential scheduling conflicts. Taliaferro was responsible for ensuring that members of the D. C. police force engaging in outside employment did so in compliance with applicable rules and regulations. Every request for outside employment goes through the supervisory ranks to the Bureau Chief for approval. Once it is approved, the Office of Risk Management creates and maintains a jacket on that employee. Outside employers of officers for police related work must sign a contract with agency to express their understanding of all applicable policies.

Taliaferro described brokering as more than just telling a colleague about a job opportunity. It is helping to arrange police related outside employment for an officer. Brokering can include soliciting a company for work, negotiating the scheduling of an officer and getting paid to do so. Even if the "broker" is not paid or donates the money to charity, the activity would be considered improper if it circumvents Agency's internal processes for assuring the appropriateness and lawfulness of outside work by officers. Agency's policies against brokering are meant, in part, to discourage any officer from creating outside jobs by convincing a company that they have to pay for police services that are available to every member of the public at no cost.

Tracy Malcolm, Agent, Internal Affairs Division

Malcolm interviewed Employee and several other officers. She found that Employee received an email from a company, Safe Ride Solutions (SRS), seeking to recruit police officers as professional drivers for National Football League players. Employee forwarded it to his fellow officers. The terms of his arrangement were that, if Employee got the officers to sign up, he would be paid $20.00 for their first drive and $10.00 for each one after that. Employee told Malcolm that he would be donating the money to the National Latino Police Association.

Malcolm concluded that Employee's actions constituted the offense of brokering because he would be getting paid and applicants were required to produce evidence of police credentials. She quoted from an email from on J.H., Operations Director of SRS, in which Employee stated, "Juan, thank you for your help. I need ten completed packets

from law enforcement drivers." "The completed packet is an application, W9, signed contract and a photocopy of the police ID/license." The company's guidelines require, at Section 7 D, that "a driver must maintain a police issued identification card with their local enforcement agency." Number C of Safe Ride Solutions Policies and Procedures states, "If at any moment you are no longer a peace officer or you no longer have a valid driver's license, you must inform Safe Ride Solutions immediately. In any instance listed above, you shall not accept any job for the Safe Ride Solutions Program."

Summary of Testimony Employee's Testimony

Employee started working as a police officer in 1985 and was promoted to Sergeant and the Lieutenant. During his tenure he helped to recruit minority officers and served as the President of the Latino Peace Officers Association. He described SRS as a company formed by police officers to provide driving services to the NFL. The service was offered to prevent players from getting arrested or injured by driving drunk. J.H., of SRS, contacted Employee and asked him to spread the word about the availability of positions.

With the permission of his Commander (Burton), Employee made an announcement at roll call. Employee also forwarded an emailed information packet from his personal email address to his colleagues. He then left it to them to decide whether to respond. Employee said, "I was not scheduling, I was not hiring, I was not paying. I didn't have anything to do with any of those activities, except to give them the information and then it was up to them." (*Transcript, Page 95, Lines 17 - 20*). Employee understood that the officers would work as drivers on their off days and not as bodyguards or providing security. He acknowledged that SRS only hired active or retired law enforcement officers. Drivers were clearly prohibited, by SRS policies, from driving passengers to illegal activities.

Employee also acknowledged that there was an opportunity for his efforts to generate money. However, he said that he told J.H. to "send that money to the National Latino Peace Officers Association." (*Transcript, Page 97, Lines 3 - 4*). Employee said that the Association is a non-profit organization. No money was, in fact, generated by his efforts as no officers went to work for the company.

FINDINGS OF FACT
AND
ANALYSIS AND CONCLUSIONS

Agency's General Order, at Item D of Section III. Definitions, describes "brokering outside employment" as "any practice whereby one member of the Metropolitan Police Department acts as an intermediary, liaison, referral agent, consultant or third-party provider of police related outside employment between a current or potential outside employer and any other member of the Metropolitan Police Department for the purpose of scheduling, coordinating or any other similar activity." Employee notes that the 6A of the D.C. Municipal Regulations (DCMR), at 399.1,

defines "police-related outside employment" as "any employment of a member of the Metropolitan Police Department, during office hours, which is conditioned on the actual or potential use of the member's law enforcement authority." Employee urges that his efforts were not intended to generate police related outside employment as described in this definition.

Employee did position himself as a liaison between SRS and his fellow police officers. He communicated information about the opportunity for work with SRS to them orally and by email. Although agency officials testified that compensation is not always a component of brokering, in this instance it was. Employee acknowledged that his arrangement with SRS included compensation to him for each drive taken by an officer employed by SRS through his recruitment efforts. Employee's decision to assign the monies he earned to the National Association of Police Officers does not change the nature of the arrangement by which he was gaining them. Nor is the seriousness of Employee's actions diminished by the fact that none of the officers applied for or accepted employment with SRS.

The work in question did, potentially, involve the use of police expertise. Even though no security or bodyguard work was specified for the officers employed as "drivers" by SRS, the company's regulations are clear in their requirement that applicants must have police credentials and experience. And some of the efforts of the "drivers" were clearly directed toward helping NFL players avoid illegal activity. Clearly, SRS relies upon its employees meeting their job requirements by using their knowledge as peace officers to recognize, avoid and report illegal activity.

Arranging to accept money for directing officers to work that required police credentials did constituted brokering. Brokering is violative of Agency rules, regulations and guidelines. Therefore, Agency has met its burden of proving that Employee committed acts constituting brokering as charged. In so doing, Employee violated Agency's orders and directives prohibiting it.

The legal standard for the appropriateness of a penalty was established by the *Merit Systems Protection Board in Douglas v. Veterans Administration*, 5 MSPB 313 (1981). In *Douglas*, the MSPB set forth a list of factors to be considered when assessing the appropriateness of a penalty. *Douglas*, at 331-332. The reasoning and factors established in Douglas have been adopted by the District of Columbia Court of Appeals in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). The Court in *Stokes* stated:

> Review of an Agency imposed penalty is to assure that the agency has considered the relevant factors and has acted reasonably. Only if the Agency failed to weigh the relevant factors or the Agency's judgment clearly exceeded the limits of reasonableness, is it appropriate . . . to specify how the Agency's penalty should be amended. *Stokes*, at 1010.

This Office will leave an 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. 2915, 2916 (1985).

In 1981, the Merit Systems Protection Board ("MSPB") in *Curtis Douglas v. Veterans Administration*, 5 MSPR 280, established criteria that supervisors must consider in determining an appropriate penalty to impose for an act of employee misconduct. To support the adverse action, there must be an adequate relationship or "nexus" between the misconduct and the efficiency of the service. An Agency is bound to consider any of the relevant "Douglas Factors" set forth below:

These "Douglas Factors" are set forth below:

1. The nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities, including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

3. The employee's past disciplinary record;

4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's work ability to perform assigned duties;

6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;

7. Consistency of the penalty with any applicable agency table of penalties;

8. The notoriety of the offense or its impact upon the reputation of the agency;

9. The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

10. The potential for the employee's rehabilitation;

11. Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

12. The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Douglas, 5 M.S.P.R. at 305-306.

The MSPB further stated that "[n]ot all of these factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the appellant's favor while others may not or may even constitute aggravating circumstances. Selection of an appropriate penalty must thus involve a responsible balancing of the relevant factors in the individual case." *Id*. at 306.

Employee urges that the penalty should reflect his twenty-three (23) years of service including over thirty (30) commendations, three hundred (300) arrests, creation of the Latino Liaison Unit and efforts in recruiting Latino police officers to the MPD and improving relations between the MPD and Latino community. During his years of service with the MPD, Lt. Espinal played an active role in the National Latino Peace Officers Association, the largest Latino law enforcement organization in the United States.

Employee contends that his efforts were not intended for personal gain and did not violate any public, professional, and civic trusts. He maintains that he had no reason to know that his actions would constitute a violation of Agency rules. Employee has no previous incident of this nature on his record. No witness at the hearing expressed a lack of confidence in his supervisory ability as a result of the incident. And, according to Employee, no harm has come to the reputation of the MPD as a result of his behavior. He offers himself as a good candidate for rehabilitation and, therefore, an alternative penalty.

However, some of Employee's reasoning actually goes to support the selection of the penalty. As a highly visible member of the police force and supervisor, Employee had a duty to maintain professionalism and strict adherence to agency rules and regulations. Employee testified in a straightforward and direct manner about his involvement in the process. Employee presented this employment opportunity openly to the officers employed by Agency. He transmitted the email to several officers from his personal email address. There is was no evidence of subterfuge in his efforts. He even sought to

avoid direct personal gain by designating the monies generated by his efforts for a non-profit organization. Even with all of that, Employee's actions violated Agency's rules and regulations both in letter and spirit. Employee erred greatly in his exercise of judgment in this matter. With Agency's policies specifically intended to maintain control over the nature and scheduling of outside work by its members, Employee should have not published this work opportunity or positioned himself to receive income from it.

Moreover, Employee recognizes no wrong in his actions. This counters his argument that he is a good candidate for rehabilitation. When an employee does not recognize or accept that he has acted inappropriately, there is no starting point for modifying the behavior in question.

A suspension for thirty (30) days was no more than reasonable to convey to Employee the seriousness of his actions without punishing him excessively. The penalty imposed by Agency was commensurate with the offense that Employee committed.

ORDER

It is hereby ORDERED that Employee's suspension is UPHELD.

FOR THE OFFICE:

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SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE