THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
PAUL DAME,	)	OEA Matter No. 1601-0043-03
Employee	)	
	)	Date of Issuance: July 30, 2010
	)	
	)	
D.C. DEPARTMENT OF CORRECTIONS,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Paul Dame ("Employee") worked as a Computer Specialist at the Department of Corrections ("Agency") for twenty-three years before being terminated. On September 2, 1999, Employee entered a guilty plea to an Internet Child Abuse felony charge in Anne Arundel County. Agency then provided Employee will a notice of Summary Removal on November 4, 1999. The notice provided that he was being summarily removed from his position within Agency for "other conduct during and outside of duty hours which would affect adversely the [E]mployee's or the [A]gency's ability to perform effectively."[1]

[1] *Employee's Response to Letter from OEA Administrative Assistant*, p. 5-6 (November 6, 2003).

It was not until March 21, 2003, that Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). He alleged in his petition that he never received Agency's final decision. As a result, he was unaware of his appeal rights until he met with an attorney on February 21, 2003.[2]

The Administrative Assistant from OEA issued a notice to Employee requesting a copy of Agency's final decision to establish this Office's jurisdiction in his case. The notice gave Employee until October 24, 2003, to provide the decision. The notice went on to state that if Employee did not provide a copy of the decision, then his appeal may be dismissed for lack of jurisdiction.[3]

On October 16, 2003, Employee provided a copy of his Personnel Form 1 and a letter stating that he never received a copy of Agency's final decision. The letter went on to note that Agency should be required to produce this document. Employee also attached a copy of Agency's Summary Notice of Termination.[4]

The Administrative Judge ("AJ") issued an Initial Decision on November 4, 2003. The AJ dismissed the case because Employee failed to respond to the letter from the Administrative Assistant requesting a copy of Agency's final decision.[5] Employee then filed a Petition for Review with OEA arguing that he did provide a response to the

[2] *Petition for Appeal*, p. 4 (March 21, 2003).
[3] *Letter from OEA Administrative Assistant,* p. 1-2 (October 14, 2003).
[4] *Employee's Response to Letter from OEA Administrative Assistant* (November 6, 2003).
[5] *Initial Decision,* p. 2 (November 4, 2003).

Administrative Assistant's request. He provided a copy of his response and the returned receipt signed by a staff member at OEA.[6]

On January 14, 2004, OEA's Board issued an Opinion and Order. It provided that Employee filed a timely statement in response to the Administrative Assistant's request. It was later determined that the letter was not placed in the file before the AJ rendered his decision. Therefore, because of Employee's timely submission, the case was remanded to the AJ for further consideration.[7]

The AJ then convened a Pre-hearing Conference. Shortly after the conference, Agency submitted a Motion to Dismiss Employee's Petition for Appeal on the grounds that it was filed untimely. Agency alleged that it issued a final notice of decision to Employee on January 6, 2000. According to Agency, the notice was mailed to Employee on January 12, 2000.[8] Therefore, he had until February 14, 2000, to file a Petition for Appeal. However, his appeal was not filed until over three years later on March 21, 2003. Therefore, Agency believed that his appeal should be dismissed because he did not file it within the requisite thirty-day time frame.[9]

On October 13, 2004, Employee filed a response to Agency's Motion to Dismiss. He argued that his arrest in no way impeded his abilities to perform his job duties. He again asserted that he did not receive a copy of Agency's final decision, nor did they make him aware of his true appeal rights. Employee provided that his appeals rights did not begin until Agency informed him of such rights.[10] He also stated that he exercised

---

[6] *Employee's Petition for Review* (November 10, 2003).
[7] *Opinion and Order*, p. 1-2 (January 14, 2004).
[8] Agency provided that it attempted to serve its final decision on Employee, but the notice was returned to sender unclaimed.
[9] *Agency's Motion to Dismiss Employee's Petition for Appeal on the Grounds of Untimely Filing* (January 22, 2004).
[10] *Employee's Opposition to Agency's Motion*, p. 8 (October 13, 2004).

due diligence when he called Agency to inquire if the notice of its final decision was mailed to him.[11]

The AJ then issued an Addendum Decision on Remand. He found that due to Employee's untimely filing of his Petition for Appeal, OEA lacked jurisdiction to adjudicate this matter. The AJ provided that Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, outlined the statutory time limit of thirty days to file an appeal with OEA. Additionally, he noted that the D.C. Court of Appeals held that the time limit is mandatory and jurisdictional in nature. The AJ found that Employee simply failed to prove that this Office had jurisdiction over his case. He also held that Employee improperly placed the blame on everyone else for his failure to comply with the mandatory filing. Consequently, Employee's Petition for Appeal was dismissed.[12]

Employee disagreed with the AJ's decision and filed another Petition for Review with the OEA Board on November 18, 2004.[13] Employee raised the same arguments as previously outlined. Agency responded on December 4, 2004, with the same arguments that it previously asserted. Agency also presented some arguments on the merits of the case that were not raised before the AJ.[14]

On February 27, 2007, OEA's Board issued a second Opinion and Order on Petition for Review. The Board held that Agency failed to provide Employee with a copy it its final decision. Agency also failed to apprise Employee of his appeal rights to OEA

[11] When Employee returned for a trip, he found notices in his post office box that a letter was returned to sender because he did not pick it up. He called Agency to determine if it was a copy of its final decision. The Agency representative could not tell Employee definitively, but he said that if the letter was returned it would have come back to that particular office. *Employee's Opposition to Agency's Motion*, p. 3-4 (October 13, 2004).
[12] *Addendum Decision on Remand*, p. 5-8 (October 14, 2004).
[13] *Employee's Petition for Review* (November 18, 2004).
[14] *Agency's Opposition to Employee's Petition for Review* (December 3, 2004).

despite their responsibility to do so. Because Employee filed his petition within thirty (30) days after learning of his right to appeal, the Board held that his appeal was filed in a timely manner. The matter was then remanded to the Administrative Judge for consideration on the merits.[15]

The AJ conducted a hearing and issued an Initial Decision on April 11, 2008. In determining whether Agency's actions were taken for cause, the AJ addressed two primary issues: 1) whether the employee committed the act(s) allegedly responsible for his removal; and 2) whether there was a nexus between the employee's misconduct and the efficiency of his or Agency's service.[16] To support his conclusions, the AJ cited *District of Columbia v. Broadus* and held that, in this case, Employee should be held to a higher standard because of his position as a law enforcement officer.[17] The AJ stated that because Employee pled guilty to a felony, he acknowledged his culpability to the underlying facts of the crime.[18] He found this action antithetical to his status as a sworn law enforcement official. The guilty plea therefore provided the required nexus to support the charges against Employee. Lastly, the AJ found termination to be an appropriate penalty under the circumstances because Agency's managerial discretion was properly invoked and exercised.

Employee then filed a Petition for Review on May 19, 2008. Employee asks us to reverse the Initial Decision because: 1) Agency had no cause to remove employee; 2) Employee's due process rights were violated when Agency failed to specifically provide

---

[15] *Opinion and Order on Petition for Review* (February 27, 2007).
[16] *Initial Decision* at p. 7 (April 11, 2008)
[17] *Id*. at p. 12; 560 A.2d 501 (D.C. 1981); *Chapman v. Metropolitan Police Department*, OEA Matter No. 1601-0084-88, 41 D.C. Reg. 343 (1994) in making a determination that Employee should be held to a higher standard.
[18] *Id*.

a reason for his termination in the Notice of Final Removal; and 3) Agency did not give due weight to any mitigating factors when determining the appropriate penalty.[19]

Agency filed their response to Employee's Petition for Review on June 20, 2008. Agency argues that it had substantial cause to remove Employee based on his act of pleading guilty to a felony charge.[20] According to Agency, the ruling in *Broadus* allows an assumption that there is a nexus between an employee's guilty plea and their employment status.[21] Lastly, Agency believes that the AJ did not err in making his decision regarding the penalty of removal. Agency contends that the AJ properly ruled that removal was within the range allowed by law and that there was no indication that the penalty was a result of Agency's error of judgment. [22]

Agency removed Employee based on a charge of "[o]ther conduct during and outside of duty hours that would affect adversely the employee's or the agency's ability to perform effectively." Employee's primary argument is that Agency failed to prove that a nexus existed between Employee's conduct and his ability to perform effectively. This Board finds that Agency provided substantial evidence to prove a nexus between Employee's misconduct and his efficiency of service.

Under regulation 1601.1, 37 D.C. Reg. 8297(1990), nexus is defined as a *reasonable* connection between the conduct of an employee and the ability of the employee to perform his or her job or the ability of his or her employing agency's effective work performance (emphasis added). In *Austin v. Department of Justice*, the Merit Systems Protection Board (MSPB) held that a presumption of a nexus may arise in

[19] *Petition for Review* (May 19, 2008).
[20] *Agency's Opposition to employee's Petition for Review* (June 20, 2008).
[21] *Id*. at 4.
[22] *Id*. at 5.

some egregious circumstances based on the nature and gravity of the misconduct.[23] Likewise, in *Kruger, et. al. v. Department of Justice,* the Board noted that an agency may show a nexus linking an employee's off-duty misconduct with efficiency of service by showing: 1) employee's behavior was egregious based on the nature and gravity of the circumstances; 2) a showing that the misconduct affected the employee's or his co-worker's job performance, or management's trust and confidence in the employee's job performance; or 3) a showing that the misconduct interfered with or adversely affected the agency's mission.[24]

In *Gueory v. Hampton*, the D.C. Circuit court concluded that an employee's conviction of manslaughter provided the requisite nexus even without a showing of an explicit deleterious effect on the efficiency of the service.[25] In *Gueory,* the Court made a clear determination that manslaughter fell into an area where the nexus was strong and secure.[26] The fact that *Gueory* only received a suspended sentence and probation did not destroy the nexus as firings based on criminal arrest even where the employee was subsequently acquitted have been upheld.[27] Moreover, in *Cooper v. United States*, the Court of Claims concluded that the employee's alleged sexual abuse of a five-year-old girl, if proven, would adversely affect the efficiency of service.[28] The judge in *Cooper* held that the particular conduct alleged was of a nature that would clearly be deemed abhorrent to any normal person.[29]

---

[23] 11. M.S.P.R. 255 (1982).
[24] 32 M.S.P.R. 71 (1987).
[25] 639 F.2d 727 (Ct. Cl. 1980).
[26] *Id*.
[27] *Id* at 1226; *Polcover v. Secretary of Treasury*, 155 U.S.App.D.C. 338, 477 F.2d 1223, 1231-1232 (1973); *Finfer v. Caplin*, 344 F.2d 38, 41 (2d Cir.), cert. denied, 382 U.S. 883, 86 S.Ct. 177, 15 L.Ed.2d 124 (1965).
[28] 639 F. 2d 717 (Ct. Cl. 1980).
[29] *Id*.

Employee first argues that Agency had no cause to remove him because there was no evidence that the Employee's alleged misconduct adversely affected Agency's service or his ability to perform effectively. Employee cites several cases in which the courts held that no nexus existed between the employee's off duty conduct and the efficiency of service to the agency.[30] We do not refute the holdings in these cases; however, this Board finds that a reasonable nexus existed between Employee's off duty actions and his job responsibilities.

Employee's job duties as a Supervisory Computer Specialist included accessing various Agency databases to monitor and enforce database security requirements. Employee was also responsible for the supervision of six employees involved in the design and development of several software systems. Agency would be forced to closely monitor Employee's use of the internet to ensure he was not using his or a colleague's computer to access the internet. Moreover, Agency participated in the District's Summer Youth Program, which employs children ages fourteen to eighteen for six weeks during the summer. Because of the nature of Employee's conviction, Agency would have to constantly supervise his whereabouts to ensure that he was not exposed to children on Agency grounds. Employee's conviction and terms of probation placed an unreasonable burden on Agency to monitor his daily actions while maintaining the same level of business functionality and efficiency.

The nature and severity of the crime of child sexual abuse is undoubtedly socially abhorrent and Employee's conviction was adversative to his position as a sworn officer of the law. Employee's guilty plea means that he acknowledged his responsibility for the crime he committed. Furthermore, Employee's actions caused a discredit to Agency and

[30] *Petition for Review* (May 19, 2008).

a loss of confidence in his professional suitability.[31] This offense is of such a nature that a nexus can be reasonably connected to Agency's charge of "other conduct during and outside of duty hours that would affect adversely the employee's or the agency's ability to perform effectively." As a result of Employee's behavior, Agency lost trust in Employee's ability to perform his job functions without constant supervision.

Evidence is substantial if it is "more than a mere scintilla."[32] This Board will uphold an Administrative Judge's decision so long as it is supported by substantial evidence in the record notwithstanding that there may be contrary evidence in the record.[33] "Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[34] Therefore, this Board may affirm an Initial Decision unless it is arbitrary, capricious, or otherwise an abuse of discretion and not in accordance with the law.[35]

After careful consideration of all the evidence, this Board finds that the Initial Decision was based on substantial evidence. This Board finds that the AJ's decision flowed rationally from the pleadings and records presented and there was substantial evidence to support the AJ's findings of fact and conclusions of law on the charges of "other conduct during and outside of duty hours which would affect adversely the [E]mployee's or the [A]gency's ability to perform effectively." Moreover, the AJ in this case has not abused his discretion in adjudicating the matter.

---

[31] Agency's Prehearing Statement at p. 7 (December 6, 2007).
[32] *Vogel v. D.C. Office of Planning*, 944 A.2d 456, 463 (D.C. 2008).
[33] *Ferreira v. District of Columbia Dep't of Empl. Servs*., 667 A.2d 310, 312 (D.C. 1995).
[34] *WMATA v. D.C. Dept. of Empl. Servs*., 926 A.2d 140, 147 (D.C. 2007) (quoting *Ferreira v. D.C. Dept. of Empl. Servs.*, 667 A.2d 310, 312 (D.C. 1995)).
[35] *See McCamey v. D.C. Dep't of Empl. Servs*., 947 A.2d 1191, 1196 (D.C. 2008) (citing *Landesberg v. D.C. Dep't of Empl. Servs*., 794 A. 2d 607, 614-15 (D.C. 2002) (overruling unrelated issues)).

Agency also argues that the AJ did not give due weight to Employee's mitigating factors. This Office will not substitute its judgment for that of the agency; we must ensure that managerial discretion was legitimately invoked.[36] The Board does not find that Agency abused its managerial discretion. After careful consideration of all the evidence, this Board finds that the Initial Decision was based on substantial evidence. For the aforementioned reasons, we must deny Employee's Petition for Review and uphold the Initial Decision.

[36] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:

_____
Clarence Labor, Jr., Chair

_____
Barbara D. Morgan

_____
Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after the formal notice of the decision or order sought to be reviewed.