THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ROGER BELL	)	OEA Matter No. 1601-0075-07
Employee	)	
	)	Date of Issuance: August 11, 2010
Vs.	)	
	)	
	)	Rohulamin Quander, Esq.
D.C. DEPARTMENT OF YOUTH	)	Senior Administrative Judge
REHABILITATION SERVICES	)	
Agency	)	

Harry T. Spikes, Esq., Employee Representative
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Roger Bell, Employee (the Employee) a former Correctional Officer DS-007-06, with the D.C. Department of Youth Rehabilitation Services (the Agency or DYRS), was summarily terminated from employment, effective as of March 1, 2007, pursuant to a letter of termination, dated for the same date. The single charge was for cause, based upon Agency's assertion that Employee falsified his job application, thus rendering him untrustworthy for the job that he encumbered and the related duties required at the Agency. On May 18, 2007, Employee filed a timely petition for appeal with the Office of Employee Appeals (the Office or OEA), challenging Agency's decision.

The matter was assigned to me on November 23, 2007. Subsequently, Employee engaged in a period of discovery, the effect of which raised some factual issues that I, as the presiding administrative judge (the AJ), determine to warrant an evidentiary hearing, before a final decision could be rendered. I convened the evidentiary hearing on December 9, 2008, and reconvened and concluded the hearing on March 3, 2009. The parties subsequently filed their respective closing briefs, and on May 20, 2009, I issued an Order which formally closed the record.

The Agency asserts that the record as a whole supports the fact that termination was based on cause, as Employee made a "knowing or negligent material misrepresentation on his employment application or other document given to a government agency" and such conduct "threatened the integrity of government operations and is detrimental to public health, safety or welfare." In particular, Employee submitted a District of Columbia Government Employment Application Form 2000 (DC Form 2000) and under section 8(a) checked "No" to the question, "During the past 10 years have you been convicted of or forfeited collateral for any Felony." *See Agency Exhibit # 2.* After conducting a criminal history background check, the Federal Bureau of Investigations (FBI) subsequently reported to the District of Columbia Office of Human Resources (DCHR) that the Employee had been convicted of a felony within that time frame. DCHR provided this information to DYRS and directed that the Employee's employment be terminated. Lastly, the Agency maintains that 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. 16-1-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 1915, 1916 (1985).

SPECIFICATIONS

Agency cited a single Cause, supported by two enumerated Specifications, as the underlying basis for the summary removal of Employee, i.e., Employee's knowing or negligent material misrepresentation on his employment application or other document given to a government agency.

Specification 1:

> On June 1, 2005, you signed and submitted a District of Columbia Government Employment Application (DCSF 2000) (sic) under Section 8(a) Background Information, you check (sic) "No" to the question "During the past 10 years have you been convicted of or forfeited collateral for any Felony. In accordance with D.C. Law 15-353: (*D.C. Official Code* §4-1501 *et seq*.) a Criminal background check was conducted which revealed that you have been convicted of a felony offense.

Specification 2:

> This omission of your felony conviction on your application for employment with the Department of Youth Rehabilitation Services deems you unsuitable for employment in the position of Correctional Officer and warrants your removal, pursuant to D.C. Law 15-353, "Child and Youth Safety and Health Omnibus Amendment Act of 2004, and District Government personnel regulation; chapter 4, § 407.1(a); & 412.21 (9).

See Agency Exhibit # 6.

Pursuant to the provisions of the District Personnel Manual **§** 1612, Administrative Review of Removal Actions, and prior to the final decision on termination, the summary removal termination letter advised Employee that he had the right to respond to his summary termination. Marie-Claire Brown, Esq. ("Brown"), was appointed to serve as the Administrative Hearing Officer, and designated with authority to conduct an administrative review of Agency's summary removal action. Further, Employee was accorded six (6) days, to allow him time to review the materials upon which the summary removal was based, and to likewise prepare a response to Agency's action, if he chose to do so. *See Agency Exhibit # 6.*

Employee, through counsel, timely responded and interacted with Brown. On March 30, 2007, Brown submitted her *Report and Recommendation on Administrative Review of Summary Removal of Employee Roger Bell, Department of Youth Rehabilitation Services.* Brown concluded that there was a sufficient enough basis to support Agency's proposed removal action, despite the presence of significant mitigating factors. However, she recommended that Agency's Proposing Official revisit the proposed termination anew, and likewise reconsider the termination action pursuant to § 407.3 of the District Personnel Manual.[1] Brown emphasized that the true consideration for Employee's retention was whether he constituted a present danger to children or youth. She concluded that his continued presence did not pose a danger.

JURISDICTION

Pursuant to *D.C. Official Code,* § 606.03, this Office's has jurisdiction to consider the matter.

ISSUE

The issues to be decided are:

1. Whether Agency has met its burden of proof to establish that Employee engaged in a misconduct that constituted a sufficient cause to justify his termination from Agency employment.
2. Whether the penalty Agency imposed was appropriate, given any aggravating or mitigating circumstances that may have existed.

BURDEN OF PROOF

[1] Per § 407.3, in the circumstance described in § 407.1 (d) of this section, the DCHR or independent personnel authority shall not only propose the administrative action to remove an employee who fails the criminal background check, as applicable, but shall also issue the final administrative decision on the removal action.

Pursuant to this Office's rules, Agency has the burden of proof in this appeal. *See* OEA Rule 629.3, 46 D.C. Reg., at 9317. The standard of proof with regard to material issues of fact shall be by the preponderance of the evidence, which is defined by this Office's rules as follows:

> 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.

Agency's Case

Agency called three witnesses to testify on its behalf, whose testimony was supported by 10 Agency Exhibits, as duly noted in the record. Their respective testimonies are summarized as below noted.

Catherine Ohler, Transcript ("Tr.") Pp. 39-158

Catherine Ohler ("Ohler"), an employee of the Department of Youth Rehabilitation Services, Office of Human Resources, was the first witness to testify on behalf of the Agency. Ohler testified that she is responsible for "all matters pertaining to human resources, recruitment, retention, hiring, employee relations, removals and disciplinary actions." She was present at the time that Employee was removed from his position as a youth correctional officer. She identified several documents from Employee's personnel file during the course of her testimony including, the position description for a youth correctional officer, Employee's D.C. Form 2000 Employment Application, the Personnel Action Form hiring Employee on August 8, 2005, and Employee's Affidavit, also dated the same date.[2]

She described how the facts of the current adverse action came to the Agency's attention, and resulted in the directive that Employee be removed from his position. Ohler identified *Agency Exhibit #5* as the background check document that was received regarding the Employee.[3] Ohler acknowledged during her testimony that *Agency Exhibit #6*, the March 1, 2007, Notice of Summary Removal, was initiated by DCHR and that DCHR informed the Director of DYRS that certain people, including the Employee, were to be terminated. Ohler further explained that "if an employee misrepresented themselves on their application that they were to be removed."[4] She described this approach as Agency's "zero tolerance" policy.

On cross examination, Ohler addressed the issue of "suitability," and responded that a felony conviction may exclude a person from employment, "if it falls within the charter of our organization".[5] Administrative Notice was taken of *Agency's Exhibit #4*, Item 5, which enumerated a category of felonies and addresses suitability. Also noted

[2] Tr. at pp. 40–46.
[3] Tr. at pp. 46-48.
[4] Tr. at pp. 50-52.
[5] Tr. at p. 86.

was that suitability and unsuitability is based upon the three basic categories specifically stated in *Agency's Exhibit #4*.[6] Ohler also testified that two other employees had failed to correctly respond to the same question. One employee had skipped the question and the other employee provided an incorrect response similar to Employee Bell. The Agency terminated both the similarly situated employees.[7] At the conclusion of Ohler's testimony, the AJ accepted for the record, *Agency's Exhibit #8,* an attested copy of the Judgment and Commitment papers identifying that Employee was convicted on December 18, 1996, of attempted possession with intent to distribute (PWID) cocaine.[8]

Vincent Schiraldi , Tr. Pp. 163-254

Vincent Schiraldi, Director ("Schiraldi" or "the Director") of DYRS, was Agency's second witness. His responsibilities include handling the budget, personnel and procurement issues, and establishing the overall philosophy for the approach the Agency is going to take. He made the final decision regarding the adverse action against the Employee, including his termination.[9] Employee's situation came to the witness's attention through an e-mail from DCHR stating that a criminal background check had revealed that several employees, including the Employee herein, had felony convictions. *See Agency Ex. #7.* The DCHR-initiated e mail stated that, "I had to terminate [everybody] because they hadn't told that they had it on their application."[10]

Before the ultimate termination, Schiraldi reviewed the prior record regarding the Employee's felony conviction. He pulled the criminal record at the courthouse, and spoke to David Rosenthal, an advisor from the D.C. Office of the Attorney General, who advised that attempted possession with intent to distribute ("PWID") cocaine was a felony. Schiraldi further explained that positions at DYRS are considered safety sensitive positions, which are held by, "a person . . . involved with children and that . . . they're responsible for their safety, health and welfare."[11]

Schiraldi considered the impact of Employee's working history on the Agency's

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[6] Tr. at p. 90; This document, which Employee signed as his Affidavit of truth, which accompanied his employment application, recites at Item 5, as follows:

> I have never been convicted of a felony or misdemeanor in the District of Columbia or any other state or territory for (I the offenses of child abuse, cruelty to children or any other crimes against children, youth, (ii) the offenses of murder, attempted murder manslaughter, assault, battery, assault and battery, assault with a dangerous weapon, mayhem, threats to do bodily harm, kidnapping, illegal use or possession of a firearm, rape, sexual assault, sexual battery, sexual abuse, or unlawful distribution or possession of, or possession with intent to distribute, a controlled substance, (iii) any other offenses which my make me ineligible for employment in a D[epartment of] P[arks and] R[ecreation] position requiring the provision of direct services that affect the health, safety, and welfare of children and youth.

[7] Tr. at p. 139.
[8] Tr. at p. 161.
[9] Tr. at p. 164.
[10] Tr. at pp. 164-169.
[11] Tr. at pp. 166-167; 172.

reputation in the community. He stated, "We're under a lot of scrutiny. It's already controversial that we would allow somebody with a felony conviction to work with the kids. . . . Depending on the circumstance of their case. But then to have people who didn't tell us the truth on the application so, therefore, we might not have known it, that – that would reflect very negatively on the Agency."[12] Additionally, he could see other potential problems as a result of this false statement, including testimony being discredited due to this lie on Employee's employment application whenever he was the only witness to a fight or drug use.[13]

The Director considered the Employee's defense that he thought he was convicted only of a misdemeanor, and therefore did not have to list the offense on his job application. However, based upon the content and spirit of *Agency's Exhibit #9*, i.e., a letter from Employee's former attorney seeking a plea bargain with the Narcotics Unit of the Corporation Counsel,[14] the Director testified that, "It seemed to cast doubt on that defense because, clearly, his attorney was trying to get it dropped down to be a misdemeanor. So it seemed more likely to me that with the attorney trying that hard to get it knocked down to a misdemeanor, that Mr. Bell would have known the outcome of that attempt."[15]

A correctional officer's observation is a major part of their job because, "they write incident reports all the time. We discipline kids on the basis of that. A lot depends on the correctional officer's and -- our ability to trust them." The Director then testified that no one was allowed to continue with their respective employment positions if they lied on their application regarding a felony conviction. The key element here is trust, and someone who lied on his job application in such a significant manner, is not considered to be trustworthy.[16]

In response to the question of what he considered when reaching his conclusion that Employee's offense was a felony, the Director stated, " . . . the fact that he was attempting to get a misdemeanor plea, which I think is a reasonable thing for him to try to do; the fact he failed because it was a felony; the fact that I know and have worked in the area of sentencing for 20-plus years and know what it's like when you go to sentencing, when you know it's going to be a felony or a misdemeanor; and the fact that I know Roger; actually know him. . . . And he's a very intelligent guy. He's not a person who I would have thought wouldn't know the answer to whether he was convicted of a

[12] Tr. at p. 173.
[13] Tr. at p. 174.
[14] On May 22, 1996, Mona Asiner, Esq., Employee's attorney, wrote a letter to Matthew Olson, whose title and legal capacity were not stated, located at the Narcotics Unit, 555 Fourth Street, N.W., Washington, D.C. The letter identified the offense as "F-3181-96," which is generally indicative of a "Felony" charge, as opposed to an "M" designation, customarily assigned to misdemeanor offenses. Further, after setting forth a series of mitigating factors, Ms. Asiner stated, "I believe that it would be a tragedy to saddle this young man with a felony conviction. A felony conviction would foreclose all professional licensing for him … " Ms. Asiner then concludes her letter by acknowledging that Employee is now an adult, but that in the interest of justice, she requested that Employee be allowed to enter a plea to a misdemeanor offense. There is no indication anywhere in this record that the effort to negotiate a misdemeanor plea was successful.
[15] Tr. at p. 175.
[16] Tr. at p. 179.

misdemeanor or a felony."[17]

Diana Haines-Walton, Transcript Pp. 339-418

Diana Haines-Walton, Deputy Director (the "Deputy Director") and Associate Director of Audit and Compliance of the D.C. Office of Human Resources ("DCHR"), was the Agency's final witness. She is involved with the Child and Safety Youth Act which requires that "people, employees, contractors, volunteers who have direct contact with children or youth are required by law to undergo criminal history testing. . ."[18] The Agency has the legal authority to conduct a background search of each employee, and a right to seek criminal information. She testified that, "our criminal background checks are performed by the Metropolitan Police Department. The information is sent by MPD to DCHR. The results of the criminal background check are based upon actual fingerprinting, so employees go to MPD and get their fingerprints taken. And then MPD sends the fingerprints out and then sends DCHR the results of the fingerprints."[19]

In response to the question regarding DCHR's policy when a person provides a false answer on the job application, the Deputy Director testified that, "DCHR's policy is that if a person writes something and signs the D.C. Form 2000 and it's determined at a subsequent point that the person lied on their application, we first make a decision as to whether or not . . . the comment or the statement was a material statement. If it's not material, then we will make a determination that it's not material. If it's a material falsification of the record, then that is cause to terminate the employee under Chapter 16 of the District Personnel Manual, 1603.3."[20]

During the history of this matter, the Deputy Director became familiar with the disposition of Employee's case. She stated, "There was a determination that Mr. Bell falsified his conviction of a felony on his D.C. Form 2000. As a result, DCHR informed the Agency head that the applicant had falsified their [sic] application and directed the agency to draft charges and specifications . . . so there could be a hearing as to the falsification of the application."[21] She acknowledged that DCHR had directed DYRS (the Agency) to terminate the Employee, which directive Agency followed.[22]

Prior to issuing the directive to terminate the Employee, "DCHR looked at the results of the fingerprint check and saw that this applicant had been convicted of a felony within ten years. We then went to the D.C. Form 2000 to see whether or not the applicant had answered 'Yes.' . . . The applicant in this case answered 'No'."[23] Finally, she testified that, "DCHR expects every applicant to know their own personal history, including whether or not they've been arrested or convicted of any crimes. And so it's our expectation that, applicants answer truthfully and that they know, they're in the best

[17] Tr. at pp. 246–247.
[18] Tr. at pp. 339-341.
[19] Tr. at p. 349.
[20] Tr. at pp. 355–356.
[21] Tr. at pp. 356–357.
[22] Tr. at p. 358.
[23] Tr. at pp. 358-359.

position to know their own status with respect to any crimes or, their interaction with law enforcement."[24]

In addition to the testimony summarized above, the Agency presented ten (10) Agency Exhibits in support of its case-in-chief, all of which were admitted into evidence and made a part of the case's official record. The admitted Agency Exhibits were the following:

1. 12-13-04, Employee's Position Description;
2. 6-1-05, Employee's Employment Application;
3. 8-8-05, Notification of Personnel Action;
4. 8-8-05, Affidavit of Roger Bell;
5. 10-27-05, D.C. Government report verifying existence of criminal record
6. 3-1-07, Letter of Summary Removal to Employee;
7. 2-12-07, Series of redacted e mails concerning other employees' criminal background investigation results;
8. 12-18-96, Judgment and Commitment/Probation Order, Superior Court, Judge Duncan-Peters;
9. 5-22-96, Letter of Attorney Mona Asiner to AUSA, Narcotics Unit, re possible reduction of felony charge to misdemeanor; and
10. 5-14-07, Notice of Final Decision letter.

Employee's Case

Testimony of Charles Everett, Tr. Pp. 290-336

Employee's sole witness was Charles Everett, a fellow correctional officer and former coworker with Employee. He is also a union representative and is familiar with some components of Employee's case. His testimony was primarily focused on union procedures, definitions of "felony" and "misdemeanor," and some of the procedural steps that were followed at the Agency level, as this matter progressed through the bureaucratic system. His testimony offered nothing essential to the issues of cause, misrepresentation, or Employee's state of mind at the time that he completed the job application.

Roger Bell

Robert Bell, Employee, did not testify. Rather, his counsel argued throughout both the pleadings and oral proceedings, that Employee believed that his 1996 drug case and subsequent conviction was a misdemeanor, and not a felony. Based upon this belief, now belatedly known to have been erroneous, Employee answered, "No!" to a job application question regarding whether he had been convicted of a felony within the prior 10 years. In retrospect, Employee appreciates his error, but postured that both the nature of the questions and circumstances of his 1996 conviction, and later his incorrect answer on the job application form, were each misleading as to whether the offense was for a felony or a misdemeanor.

[24] Tr. at p. 407.

Nowhere in the history of the drug case was the word, "felony" used. Likewise, the felony-related question on the job application lacked definitions of what constituted a "felony," verses what constituted a "misdemeanor," critical components to aid the job applicant in fully knowing how best and most accurately to answer the question. Without that information at hand, and clearly understood, Employee never adopted a state of mind at the time that he was completing the job application to intentionally lie on his job application.

Underscoring that the Agency had the burden of proof to establish facts sufficient to sustain its decision to terminate, counsel maintained that the Agency's summary removal notice was procedurally deficient on its face, and failed to carry its burden at its initial stage, and at every other stage of the proceeding. From his perspective, there was no proof or documentation presented that Employee sustained a felony conviction, and no delimitation of what constituted either a felony or misdemeanor. The employment application, which states that it provides the definition of Felony and Misdemeanor, did not provide the definitions. Rather, it provided the penalties incidental to a felony and a misdemeanor, i.e., Felony punishable by imprisonment of longer than one year; Misdemeanor…punishable by imprisonment of two years or less.

Employee was never imprisoned, but received two years probation for his offense. Counsel then asserted that the effect was that Employee was, therefore, not punished at all for his offense,[25] and that, by reference to the penalties on the employment application, the disposition of Employee's offense fell outside of both definitions. Not only did the Employment Application misrepresent material facts as far as explaining what the offenses were, its insufficiency was misleading to the point where it made it impossible for an applicant to give an accurate answer, if he was or was not similarly situated as the Employee herein.

Counsel noted that the National Criminal File Search Result, issued by Choice Point Services, Inc., *Employee's Tab # 1, Exhib. # 10-2,* is of limited direct help. Under case type, the term "Misdemeanor" is stated. While central to the outcome in this matter, this grave error only adds to the confusion regarding the nature of Employee's employment background and history, underscoring that Employee relied in good faith upon his belief that his crime was only a misdemeanor, and not a felony.[26]

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[25] It remains unclear to this AJ how or why counsel does not consider the imposition of a two-year probation to not be a punishment. *Black's Law Dictionary* 8th Edition, defines Probation as, "A court-imposed criminal sentence that, subject to stated conditions, releases a convicted person into the community instead of sending the criminal to jail or prison."

[26] Employee's counsel did not factor into his considerations that the Choice Point document is a clerically created document, not an official court record. Choice Point Services, Inc., issued a long cautionary on the face of the search result, that advised the reader: 1) that the information provided may not be the most current information; 2) that the information provided should first be verified, before making any decision with regard to the affected person; 3) that no decision should be made based solely upon the result of this search result; and 4) Choice Point does not guarantee, warrant, or assume any responsibility regarding the accuracy of the information provided.

In way of mitigation, Employee's counsel emphasized that Employee received an "Excellent" performance evaluation for the rating period, August 8, 2005, to August 8, 2006, and was also recognized as an outstanding worker, as acknowledged by the Letter of Appreciation issued by Agency's Superintendent for Operations on January 28, 2006, after Employee played a significant role relative to an escape at the Oak Hill grounds. Counsel also placed much emphasis upon that fact that Marie-Claire Brown, Agency's designated administrative review officer, after considering Agency's summary termination action, and the documents submitted in support of Agency's decision and action, recommended that Agency reverse its action and reinstate and retain Employee. Brown found, *inter alia*, that Employee believed that his prior conviction was only a misdemeanor offense, and that Employee likewise believed that his answer of "No!" on the job application was truthful. Further, based upon a meeting with Agency officials which occurred in April 2006, where the sole issue was the background check's uncovering Employee's prior conviction, Brown noted that Agency officials elected to retain Employee on staff, despite the results of the background check. Noted in his personnel file was a statement to the effect that Employee had the potential to be a very good supervisor.

Operating under this rubric, and in the belief that the matter was at rest, Employee served in his job capacity for approximately 16 additional months, before he was summarily terminated. Apparently, what he did not know at the time was that forces were moving at a higher level, beyond the Agency, which would eventually result in his summary termination. This continuity in position allowed Brown to conclude in her final Report that:

> The District was on notice of the Employee's felony conviction for almost sixteen (16) months during which time the Employee showed himself to be an exemplary employee. To allow the Employee to continue his employment after the issue was escalated to DYRS management cannot now be transplanted into an immediate hazard. Nothing in the record demonstrates a threat to the integrity of government operations. Because of the length of time that elapsed, this summary removal is deemed premised on the Employee's unsuitability for employment.

Pursuant to § 407.1 of the D.C. Personnel Regulations, Suitability Action, the personnel authorities may take suitability action against a District government employee when the authority determines that the employee, "was involved in a material, *intentional* [emphasis added] false statement or deception or fraud in his or her . . . falsification of official personnel records." Noting that Brown found that there was no Employee intent to mislead, Employee's counsel maintained that Agency had likewise failed in its efforts to establish the requisite of intent. Further, § 407.2(a), in the circumstances described in section 407.1 (a) through (c) of this section, requires that the employing agency remove the employee from District government service

Brown further concluded, and Employee's counsel adopted in significant measure

that, "While the Employee does not dispute the conviction, he believed it to be a misdemeanor, not a felony, therefore lacking the *requisite intent for removal based on suitability.* [emphasis added] The information relied on in support of the summary removal appears to be erroneous, although this information has been independently verified. . . . For the foregoing reasons, I recommend that Proposing Official reconsider the action taken, and consider action pursuant to the Section 407.3, taking into account whether the Employee poses a present danger to children or youth. Pursuant to Section 1613.2 of the District Personnel Manual, you may accept this recommendation, direct me to consider the matter further, or dismiss this matter in its entirety."[27] Brown's recommendation, if it had been adopted, would skirt around the regulation's mandate for termination, at least in part based upon the issue of whether Employee intended to conceal critical information when completing his employment application.

The Employee presented 11 exhibits during the Evidentiary Hearing as follows:

1. 5-13-97, Judgment and Commitment/Probation Order, Superior Court, Judge Mildred M. Edwards;
2. 4-28-04, Judgment and Commitment/Probation Order, Superior Court, Judge Mary E. Albrecht (not admitted into the record);
3. 12-18-98, Judgment and Commitment/Probation Order, Superior Court, judge's name illegible, and 12-19-02, Sentence of the Court, Judge Thomas J. Motley;
4. 4-7-03, Sentence of the Court, Superior Court, Judge Judith Retchin
5. 2-11-05, Judgment and Commitment/Probation Order, Superior Court, Judge Zenora Mitchell-Rankin (not admitted into the record);
6. 1-7-98, Judgment and Commitment/Probation order, Superior Court, Judge Ellen (last name illegible);

10-1. 8-5-96, Trial by Court of Jury, Superior Court, Judge Stephanie Duncan-Peters; and

10-2. 10-12-04, Choice Point Services, National Criminal File Search Results.

Employee moved to have the above-noted exhibits admitted into the record under Tab #1. Agency objected to Employee's exhibits #2 and #5 under Tab #1, most notably based upon the issue of relevance, given the comparative magnitude of the offense in this case. The AJ denied those two exhibits. All of the other exhibits were admitted into the record. Further, Employee also presented three additional Exhibits under a Tab #2, and

[27] Brown's recommendation was not accepted. On April 25, 2007, Schiraldi, Agency Director, issued a NOTICE OF FINAL DECISION; SUMMARY REMOVAL. In relevant parts the letter stated: *" …… The summary removal action was based on a charge of knowing or negligent material misrepresentation on an employment application or other documents given to a government agency. Specifically, you checked "No" to question 10(a) under the Background Information section of the D.C. Government employment application (DC 2000), which states, " During the past 10 years have you been convicted of or forfeited collateral for any Felony" " In accordance with D.C. Code Sec. 15-353, a criminal background check was conducted, which revealed that you had been convicted of a felony offense within the ten years. Based on a review of the documentation submitted, the Hearing Officer determined that there was no dispute that you were convicted of a felony in the District of Columbia……", See Employee's Exhibit 8 Tab #2.*

moved to have these Exhibits admitted, as follows:

2. 3-30-07, Report and Recommendation on Administrative Review of Summary Removal of Employee;
3. 1-28-06, Letter of Appreciation, and
4. 8-8-06, Letter of Appreciation.

Employee's 11 exhibits, plus a series of other documents were clipped together in a bound document. The AJ rejected pages 1 – 10 of the bound package, and likewise excluded those pages from evidentiary consideration. These pages were not evidence, but constituted a narration of what was forthcoming.[28]

FINDINGS OF FACT

Based upon a review of the record, including the transcripts of the sworn testimony, and evaluation of the exhibits admitted into the record during the Evidentiary Hearing, I now make the following Findings of Fact:

1. On June 1, 2005, Employee applied to the Department of Youth Rehabilitation Services for a position as a Youth Correctional Officer. He completed a District of Columbia Government Employment Application, also referred to as Form D.C. 2000.[29]
2. Question 8a. of Form D.C. 2000 stated "During the past 10 years have you been: 1) Convicted of or forfeited collateral for any felony; or 2) convicted by a court-martial?"[30]
3. Employee responded "NO" to question 8a.[31]
4. On or about August 8, 2005, Employee was hired and subsequently became employed in a safety sensitive position involving children.[32]
5. Employee subsequently executed an affidavit dated August 8, 2005, wherein he likewise stated at Item 5 (ii), that he had *never* (AJ emphasis added) been convicted of a felony *or misdemeanor* (AJ emphasis added) in the District of Columbia or any other state or territory.[33] This was a knowingly false statement on Employee's part.
6. A routine background criminal check was conducted, as authorized by the provisions of *Agency Exhibit # 4, Item # 7,* which investigation revealed that Employee had a 1996 felony conviction, Possession With Intent to Distribute (PWID) for cocaine, such being within the 10-year time frame at issue.
7. DCHR was notified by MPD that the FBI had completed a criminal background check on Employee, and that his fingerprints identified him as one who had committed the felony of attempted possession with intent to distribute cocaine

[28] Tr. at p. 81
[29] *See* Agency Exhibit #2.
[30] *See* Agency Exhibit #2.
[31] *See* Agency Exhibit #2.
[32] Agency Exhib. # 1 and # 3.
[33] *See* Agency Exhibit #4.

within the prior ten (10) years of his June 1, 2005, submission of his employment application to the District of Columbia, and his subsequent Affidavit of August 8, 2005.[34]

8. DCHR subsequently notified DYRS that Employee, along with at least one other employee of DYRS, had been found to have committed felonies within the prior ten (10) years, but failed to disclose the information on the D.C. Form 2000.[35]
9. A closer look at Employee's Employment Application revealed that he specifically answered "NO" to question 8a on the D.C. Form 2000.[36]
10. One other employee had failed to respond either in the affirmative or negative.[37]
11. Employee's falsification of his DC Form 2000, led to a directive from DCHR to Agency, directing Agency to terminate Employee.[38]
12. A major responsibility or duty of a youth correctional officer requires reporting observations to the Agency. Because of this requirement, it is very imperative that the Employer be able to trust the Employee's representations. Employee's falsification of his Employment Application compromised his trustworthiness in a job which requires that he relate observation of various incidents and events, when necessary. To have his trustworthiness brought into question renders him unreliable from the outset.[39]
13. Agency proceeded forward with an adverse termination action against all three of the affected employees.
14. Before the termination became final, the Agency Director required proof of Employee's felony conviction. He was allowed to review Employee's prior criminal record, which included a copy of the felony conviction.
15. The Agency Director contacted David Rosenthal, Senior Assistant Attorney General with the Criminal Division of the Office of the Attorney General for the District of Columbia. The Director provided information to Rosenthal regarding the finding of guilt of attempted possession with intent to distribute cocaine. Rosenthal then informed the Director that a conviction of Possession With Intent to Distribute (PWID) was indicative that Employee was guilty of a felony.
16. Based upon the disclaimer provided by Choice Point Services, Inc. that the information within its data base may not be accurate, no weight is given to their report that attempted possession with intent to distribute cocaine is a misdemeanor in the District of Columbia.[40]
17. DYRS served Employee with a notice of summary removal on March 1, 2007. Employee was charged with "any knowing or negligent material misrepresentation on an employment application or other document given to a government agency" and such "conduct that threatens the integrity of government operations, and is detrimental to public health, safety, or welfare."[41]

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[34] *See* Agency Exhibits #8.
[35] *See* Agency Exhibit #7.
[36] *See* Agency Exhibits #2 & #8.
[37] *See* Agency Exhibit #7.
[38] *See* Agency Exhibit #7.
[39] Tr. at p. 179.
[40] *See* Employee's Exhibit Tab #1, 10-2.
[41] *See* Agency Exhibit #6.

18. Employee was afforded an administrative review by Marie-Claire Brown, Esq., a disinterested administrative hearing officer, regarding the proposal of adverse action.[42]
19. The Deciding Official for Agency considered all reports and the recommendation of the administrative hearing officer prior to rendering the final agency decision. Consideration was given to the *Douglas* factors[43], i.e. seriousness of offense, impact on reputation of the agency, effect on Employee's ability to perform duties in the future, and both mitigating and aggravating factors.
20. A final agency decision was served on May 14, 2007, directing that Employee be terminated.[44]
21. Employee did not testify in his own defense. However, he called one witness, Charles Everett, who acknowledged that once before Employee relied on Choice Point Services, Inc. to support that he was only guilty of a misdemeanor. No other document was presented to support that Employee was not guilty of a felony.

CONCLUSIONS OF LAW

Pursuant to OEA Rule 629.3, the Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, the DPM at § 1603.2, provides that an Employee may be removed from a position for cause. Under DPM §§ 1603.3 and 1603.4, the definition of "cause" includes any knowing or negligent material misrepresentation on an employment application. Employee's removal from his position at the Agency was based upon a determination by the Agency that Employee was not fit to serve, as a result of the results of a background check which revealed an undisclosed felony conviction of attempted possession with intent to distribute (PWID) cocaine on December 18, 1996.

Therefore, Agency's burden is to establish, by a preponderance of the evidence, that the removal of Employee from his position of trust, was appropriate. Both the statute and case law in the District of Columbia identify PWID cocaine as a felony. Cocaine is defined as a Schedule II substance pursuant to *D.C. Official Code* § 48-902.06(1)(D).[45] There can be no doubt that an offense involving a Schedule II substance is a serious offense in that a Schedule II substance is defined as having a high potential for abuse and may lead to severe psychological or physical dependence. *See D.C. Official Code* § 48-902.05. The penalty for an offense involving a Schedule II substance is likewise set forth in *D.C. Official Code* at§ 48-904.01 (2001).[46] The penalty for this offense is not more than 30 years incarceration or a fine of not more than $500,000 or both.

Notably, the fact that Employee was charged with an attempt of PWID Cocaine does not lessen the penalty for the offense. The statute specifically states "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable

[42] *See* Agency Exhibit #6.
[43] *Douglas v. Veterans Admin.*, 5 MSPB 313 (1981).
[44] *See* Agency Exhibit #10.
[45] Formerly referred to as D.C. Code § 33-516(1) (D).
[46] Formerly referred to as D.C. Code § 33-541.

by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy." *See D.C. Official Code* § 48-904.09.[47]

Given the length of time that Employee could be confined for PWID Cocaine, it is clearly a felony offense. The length of the penalty far exceeds one year. The definition of felony is generally known as "a serious crime usually punishable by imprisonment for more than one year or by death." *See Black's Law Dictionary* (Seventh Edition) 1999 at p. 633. In that regard, the District of Columbia Court of Appeals has consistently referred to Possession With Intent to Distribute Cocaine as a felony. *See In re: Gerald R. Robbins*, 678 A.2d 37 (1996). *In re: Frank Valentin*, 710 A.2d 879 (1998). In a recent decision by the United States Court of Appeals for the District of Columbia Circuit, the Court stated that PWID Cocaine is a felony drug conviction in the District of Columbia. *See United States v. Williams*, 488 F.3d 1004, 1006 (2007).

Counsel for Employee has attempted to distinguish Employee's conviction from the intricacies of the above-noted drug law regarding cocaine possession, by claiming that Agency failed to make specific suitability determinations, which probably would have been to Employee's benefit. He also asserts that making a determination on the Employee's state of mind at the time that he completed the job application is both relevant and critical, since it raises the issue of whether there was an intent to misrepresent. However, counsel has not reinforced his claim, cited no statute, regulation, policy, or court holding to sustain the viability of this position.

He further asserted that Agency likewise gave short shrift to the many mitigating factors that should have allowed Employee to remain on staff, including his Excellent performance rating, his Outstanding citation for his role in an escape attempt, and Administrative Hearing Officer Brown's determination that Employee posed no hazard to children, underscored by Agency's inaction for about 16 months, before summarily terminating Employee.

That Agency was slow to act, and indeed might not have ever taken any removal action, does not bode well for Agency's efficiency in that respect. However, the ultimate decision was not Agency's to make. The wheels of the bureaucracy move very slowly, but once DCHR became fully enmeshed in the situation, it was determined by personnel authorities at DCHR that Employee must be terminated. This was a management decision, fully comporting with the D.C. Government's actions with regard to some other Agency employees who had likewise made material misrepresentations and falsifications on their job applications.

The key here is whether the misrepresentation was "material." Agency asserted that it was indeed material, as a job applicant has the absolute duty to truthfully answer all questions on the job application. To answer, "No!" to the question of a prior felony conviction, was a material misrepresentation at the most, and gross negligence at the least. In either event, the failure to disclose a critical bit of information, rendered

[47] Formerly referred to as D.C. Code § 33-549.

Employee untrustworthy from the outset. Had there been a full disclosure, there was no pre-ordained conclusion that would have automatically prevented him from being considered for the position. Beyond the denial on the job application, Employee also executed an Affidavit on August 8, 2005, in which he stated at item 5 (ii), that he had never even been convicted of as much as a misdemeanor, which was not true. This component on the employment affidavit should have raised an issue in Employee's mind that mandated that he come forth and disclose critical information in his background. Instead, he tried to conceal the information, thus exposing himself to being publically cited and disciplined, neither of which might have occurred had he taken the correct approach and disclosed the conviction in the first place.

Despite the DCHR directive to terminate, the record herein reflects that Agency still deliberated, and weighed the effect of the *Douglas Factors* as a component in its merit-based governmental employment action. Brown enumerated several mitigating factors as a component of her Report. Further, she deliberated what recommendation to make to management about this matter.

> Not 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.[48]

Schiraldi testified that he too considered several mitigating factors, focused on how good a worker Employee was. But in the end, the decision to terminate was based upon a violation of trust, the very core of the job, and the damage to that trust element, coupled with the seriousness of the offense. All of the above contributed majorly to the decision to release Employee.

As the deciding AJ, I am satisfied that in the end, the seriousness of the offense, and the need to preserve integrity of the department and the District government, outweighed everything else. Therefore, Agency did not err in balancing the appropriate factors in considering Employee's removal.

In review of Agency's decision to terminate Employee, OEA may determine the appropriateness of the penalty the employee underwent. This court will not substitute its judgment for that of the agency if it finds the basis of the charges(s) sustained, that the penalty is within the range allowed by law, regulation, or guideline, and is not clearly an error of judgment.[49] In such cases, OEA may look to the Table of Appropriate Penalties, 6 DCMR, Chapter 16 of the DPM, General Discipline and Grievances, or other statutory guidelines which dictate the appropriate penalty for the commission of certain illegal

[48] *Douglas v. Veterans Admin. Supra.*
[49] OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review,* 32 D.C. Reg. 2915, 2916 (1985).

actions.

Even in *Douglas*, which emphasizes mitigation, the court held that, "certain misconduct may warrant removal in the first instance." In considering the nature of Employee's offense, especially one regarding the issue of trust, this AJ finds Agency acted within the confines of the law, regulations, and employed sound judgment in its determination to remove Employee.

When assessing Agency's judgment, OEA will uphold an agency decision unless it is unsupported by a preponderance of the evidence, there was a harmful procedural error, or it was not in accordance with law or applicable regulations.[50] In this case, Agency was able to establish cause by a preponderance of the evidence. There was no procedural error which imposed a substantial affect upon Agency's decision to impose adverse action, and the penalty enacted by Agency is in accordance with the applicable laws and regulations. For the aforementioned reasons, Agency's decision should be upheld.

ORDER

This matter having been fully considered, it is hereby ORDERED that Agency's action of removal for cause is UPHELD.

FOR THE OFFICE:

/ S /
ROHULAMIN QUANDER, Esq.
Senior Administrative Judge

[50] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 -1010 (D.C.,1985).