THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JERRY BRADDOCK,	)	
Employee	)	OEA Matter No. 1601-0028-17
	)	
v.	)	Date of Issuance: September 25, 2017
	)	
D.C. DEPARTMENT OF PARKS AND RECREATION,	)	
Agency	)	Michelle R. Harris, Esq.
	)	Administrative Judge
	)	

Jerry Braddock, Employee, *Pro Se*
Amy Caspari, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On January 30, 2017, Jerry Braddock ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Parks and Recreation's ("Agency" or "DPR") decision to terminate him from his position as a Roving Leader. The effective date of the removal was January 6, 2017[1]. Agency's Answer was due on or before March 3, 2017. On March 3, 2017, Agency filed a Motion to Dismiss or in the alternative for Summary Disposition. This matter was assigned to the undersigned Administrative Judge ("AJ") on April 5, 2017. On April 13, 2017, I issued an Order Scheduling a Status/Prehearing Conference in this matter. The Status/Prehearing Conference was held on May 22, 2017.

A Post Prehearing Conference Order was issued on May 23, 2017, wherein the parties were ordered to address the issues in this matter and submit briefs in accordance with the briefing schedule agreed upon during the conference. Agency's brief was due on or before June 22, 2017. Employee's brief was due on or before July 24, 2017. Additionally, Agency had the option to submit a Sur-Reply brief on or before August 11, 2017. Agency submitted its response on June 15, 2017. Employee did not submit his brief by the prescribed deadline. As a result, on August 3, 2017, I issued an Order for Statement of Good Cause to Employee. Employee was ordered to submit his brief along with a

[1] It should be noted that the Final Notice reflects a date of "January 6, 2016" as the effective date. Based on other information in the record, including the Employee's Petition for Appeal, the undersigned finds that this is a typographical error and that the date should be reflected as January 6, 2017.

statement of good cause for his failure to submit his response by the July 24, 2017 deadline. Employee had until August 17, 2017, to submit his response. On August 17, 2017, Employee submitted his response. Upon consideration of the briefs submitted by the parties, I determined that an Evidentiary Hearing in this matter was not warranted. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency had cause to take adverse action against Employee; and
2. If so, whether removal was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) 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 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

SUMMARY OF PARTIES' POSITION

Agency's Position

Agency indicates that Employee held a career service position as a Roving Leader at the time of his termination and had worked at Agency since 2008. Agency argues that on April 28, 2016, Employee pled guilty to a felony, and was subsequently convicted of a felony in the Commonwealth of Virginia.[2] As a result, on or around September 19, 2016, Agency placed Employee on enforced leave pursuant to DPM 1617.3(c).[3] Subsequently, on October 6, 2016, Agency served Employee a proposed notice of removal. On November 15, 2017, a hearing officer upheld the removal and on January 6, 2017, Employee was served a final notice of removal, effective close of business that same day.

Agency contends that as a Roving Leader, Employee was responsible to work with local youth to keep them out of conflict and crime. Further, Employee was responsible for overseeing

[2] Agency's Renewed Motion to Dismiss or in the Alternative for Summary Disposition at Exhibit A (June 15, 2017).
[3] *Id.* at Page 4 (June 15, 2017).

government property, including electronic and entertainment equipment.[4] Additionally, Agency avers that Employee's work was rarely supervised and based on an honor system, and he was entrusted to manage his assignments appropriately and ethically. As a result, Agency argues that removal was appropriate.

Agency argues that it does not consider felony convictions on a case-by-case basis, but maintains the policy that any employee subject to a conviction of a felony during their tenure, is subject to removal pursuant to Chapter 16 Table of Penalties 1619.1.[5] As a result, Agency argues that Employee was disciplined as all other DPR employees are disciplined in light of this charge. Further, Agency avers that as a Roving Leader, Employee was required to have the "utmost trustworthiness" and since the felony conviction involved a crime of dishonesty, Agency indicated that it viewed it a serious breach of trust.[6] Accordingly, Agency contends that it had cause to take adverse action, and that the penalty was appropriate under the circumstances.

Employee's Position

Employee believes that his termination should be reconsidered and that he deserves a second chance.[7] Employee does not deny that he pled guilty and has a felony conviction, but argues that his prior work and tenure with this agency, in addition to the impact that he has had on the youth in the community in which he works should be considered. Further, Employee avers that his colleagues and the community speak highly of him and his work. Employee indicates that he has been a part of Agency since 2008, and that he always served in a positive manner.[8] Employee acknowledges that he made a mistake, but argues that this should not be held against him and that he has a lot to offer.[9]

FINDING OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

Employee was employed by Agency as a Roving Leader, Recreation Specialist. Employee pled guilty and was convicted of a felony on April 29, 2016, in the Commonwealth of Virginia.[10] Employee was issued an Advanced Written Notice of Proposed Removal on October 18, 2016. In a Final Written Notice dated January 6, 2017[11], Employee was notified that in accordance with Section 1608 of Chapter 16 of the D.C. Personnel regulations, he would be removed from service due to his felony conviction. The effective date of the termination was January 6, 2017.

ANALYSIS

Whether Agency had cause for adverse action

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

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[4] *Id.*
[5] *Id.*
[6] *Id.*at Page 4 and Page 5.
[7] Employee's Response (August 17, 2017).
[8] *Id.*
[9] Employee's Petition for Appeal (January 30, 2017).
[10] Agency's Renewed Motion to Dismiss at Exhibit A (June 15, 2017)
[11] There was a typographical error which indicated the date as January 6, 2017, however, it is understood to be a typographical error and will be noted as January 6, 2017 in this Initial Decision.

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), *an adverse action for cause that results in removal*, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue. *(Emphasis added).*

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proof by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Additionally, DPM § 1603.2 provides that disciplinary actions may only be taken for cause. In the instant appeal, Employee's removal was levied pursuant to DPM § 1603.3(a)[12] which provides that, "Conviction including a plea of *nolo contendere* of a felony at any time following submission of an employee's job application" warrants removal on a first offense.

Whether Agency Had Cause for Removal

In the instant matter, Employee pled guilty and was convicted of the charge of embezzlement(>=$200) in the Arlington County Circuit Court on April 26, 2016, which is felony in the Commonwealth of Virginia.[13] As a result, Agency maintains that in accordance with the District Personnel guidelines, it had cause to remove Employee from service. Employee does not deny or dispute that he was convicted of a felony, but rather, avers that he made a mistake and that he should be given another chance based on his past service and dedication at Agency. The DPM Table of Penalties § 1619 (1) provides that a "conviction including a plea of *nolo contendere* of a felony at any time following submission of an employee's job application", warrants removal at the first offense. Because Employee pled guilty to, and was subsequently convicted of a felony during his tenure with Agency, I find that Agency had cause to remove Employee from service.

Whether the Penalty of Removal Was Appropriate

Based on the aforementioned findings, I find that Agency's action was taken for cause, and as such Agency can rely on those charges in its assessment of disciplinary actions against Employee. In determining the appropriateness of an agency's penalty, OEA has relied on *Stokes v. District of Columbia*, 502 A.2d. 1006 (D.C. 1985).[14] According to the Court in *Stokes*, OEA must determine

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[12] Agency administered the adverse action pursuant to the "old" DPM §1603.3, (2012), as opposed to the 2016 DPM version, because Employee is a member of a collective bargaining unit (AFGE Local 2741).

[13] Agency's Renewed Motion to Dismiss at Exhibit A – Arlington County Circuit- Criminal Division Case Details (June 15, 2017).

[14] *Shairrmaine Chittams v. D.C. Department of Motor Vehicles*, OEA Matter No. 1601-0385-10 (March 22, 2013). *See also Anthony Payne v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections*, OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services*, OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections*, OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools*, OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department*, OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and

whether the penalty was in the range allowed by law, regulation and any applicable Table of Penalties as prescribed in DPM 1619.1; whether the penalty is based on a consideration of relevant factors and whether there is a clear error of judgment by agency. Further, "the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office."[15] Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercise."[16]

Agency relied on what it considered relevant factors outlined in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), in reaching its decision to remove Employee from service.[17] In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." Further, Chapter 16 § 1619.1 of the District Personnel Manual Table of Appropriate Penalties ("TAP") provides that the appropriate penalty for a first offense for a conviction of a felony is removal"[18] In analyzing the *Douglas* factors in this matter, Agency indicated that it does not "consider felony convictions on a case-by-case basis, but all felony convictions are subject to Chapter 16 Table of Penalties 1619.1-removal for conviction of felony."[19]

Accordingly, I find that Agency properly exercised its discretion, and its chosen penalty of removal is reasonable under the circumstances, and not a clear error of judgment. Moreover, I find that Agency had appropriate and sufficient cause to remove Employee from service. As a result, I conclude that Agency's action should be upheld.

Christopher Scurlock v. Alcoholic Beverage Regulation Administration, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[15] *See Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department*, OEA Matter no. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

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

[17] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and it's 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 employee's 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) 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.

[18] 6-B DCMR §1619.1 (6), Table of Appropriate Penalties (2016).

[19] Agency's Brief at Page 4 (June 15, 2017).

ORDER

Based on the foregoing, it is **ORDERED** that Agency's Motion to Dismiss is hereby **GRANTED,** and it is further **ORDERED** that Agency's action of removing Employee from service is **UPHELD.**

FOR THE OFFICE:

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Michelle R. Harris, Esq.
Administrative Judge