THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
NELSON VALDES	) OEA Matter No. 1601-0009-04
Employee	)
	)
v	) Date of Issuance: May 25, 2007
	)
METROPOLITAN POLICE	) Muriel A. Aikens-Arnold
DEPARTMENT	) Administrative Judge
Agency	)
	)

Harold M. Vaught, Esq., Employee's Representative
Kevin J. Turner, Esq., Assistant Attorney General, D.C.

INITIAL DECISION

INTRODUCTION AND BACKGROUND

On November 12, 2003, Employee, a Detective, Grade II, filed a Petition for Appeal of Agency's action to remove him effective October 17, 2003 for: 1) Conduct Unbecoming an Officer; and 2) Conviction. On December 10, 2003, this Office notified Agency regarding this appeal and instructed Agency to respond thereto within thirty (30) days. Agency so responded.

This matter was assigned to this Judge on September 24, 2004. On December 6, 2004, an Order Scheduling a Prehearing Conference on January 18, 2005 was issued.[1] On February 17, 2005, an Order to Stay Proceedings, in this matter, pending disposition of an appeal on Employee's criminal conviction before the U.S. Court of Appeals, D.C. Circuit, was issued.[2] On November 15, 2005, this Judge issued an Order directing the parties to report the status of the appeal in order to update the record in this matter.[3]

On March 10, 2006, Employee's Counsel filed notice that the Federal Court had issued a

[1] On 1/11/05, an Order to Continue Prehearing Conference was issued (pursuant to a joint request by the parties) rescheduling said conference on 2/18/05.
[2] The parties represented that the instant adverse action was based, in part, on said criminal conviction.
[3] On 11/23/05, the parties filed a joint statement advising that oral argument was heard on 11/1/05 in the U.S. Court of Appeals.

decision which resolved the criminal conviction in Employee's favor; and requested placement of this matter back on the calendar of this Office. Pursuant to that request, this Judge scheduled a status conference on May 26, 2006 to discuss further proceedings in this matter.[4] In response to the Judge's query regarding Employee's position, he advised: 1) that he desired a review of Agency's action based on the record; and 2) that Agency failed to comply with the "55-day rule."

On June 15, 2006, a Briefing Schedule was issued directing the parties to file their respective procedural arguments regarding the "55-day rule" no later than August 14, 2006.[5] The parties, thereafter, filed their respective briefs and the record closed effective September 15, 2006.[6] On February 5, 2007, an Order and Briefing Schedule was issued. Employee was directed to file his brief regarding the merits of Agency's action no later than March 9, 2007; while Agency was given an opportunity to respond no later than April 9, 2007.[7] Employee did not file a Brief; nor did Agency. The record is closed.

JURISDICTION

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

ISSUES

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

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

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[4] Due to the unavailability of Employee's Counsel on 5/26/06, this Judge conducted a teleconference with the parties on 5/12/06 to inquire about Employee's current position in view of the Court decision. Employee previously requested a review of this matter based on the record. As a result of the teleconference discussion, Employee was directed to file a written response addressing three (3) issues: 1) whether or not Employee's prior request for a review of the record has changed; 2) if so, whether Employee requests an evidentiary hearing; and 3) if Employee requests an evidentiary hearing, the factual disputes must be identified, along with prospective witnesses and the relevancy of their testimony.

[5] *See* Article 12, Discipline, Section 6 of the collective bargaining agreement between Agency (MPD) and the Fraternal Order of Police (FOP) which reads, in pertinent part, "[T]he employee shall be given a written decision and the reasons therefore no later than fifty-five (55) days after the date the employee is notified in writing of the charges or the date the employee elects to have a departmental hearing, where applicable . . ." The parties agreed to bifurcate the issues in order to initially resolve the procedural issue.

[6] The Judge reopened the record, on 9/7/06, in accordance with OEA Rule 631.1 to grant Employee's request to file a reply to Agency's Opposition to Employee's Appeal since Agency's brief.

[7] This Judge concluded that Agency did not violate the 55-day rule and directed the parties to file briefs regarding their respective positions.

PROCEDURAL HISTORY AND STATEMENT OF CHARGES

By memorandum (Amended Notice of Proposed Adverse Action) issued April 3, 2003, Employee was notified of a proposal to terminate his employment based on the following misconduct:

Charge No. 1: Violation of General Order Series 1202, Number 1, Part I-B-12, which provides: "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively, or violations of any law of the United States or any law, municipal ordinance, or regulation of the District of Columbia." This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.

Specification No. 1: In that on July 2, 1999, you distributed powder cocaine to Sergeant Michael Thornton, an undercover agent for the Metropolitan Police Department, while inside the MCCXXIIII Club located at 1223 Connecticut Avenue, NW.

Specification No. 2: In that on July 30, 1999, you distributed powder cocaine to Sergeant Michael Thornton, an undercover agent for the Metropolitan Police Department, while inside the MCCXXIIII Club located at 1223 Connecticut Avenue, NW.

Specification No. 3: In that on March 24, 2001, you accepted $200.00 from an FBI confidential source to obtain and disseminate confidential information from a restricted law enforcement database.

Specification No. 4: In that on March 31, you accepted $100.00 from an FBI confidential source to obtain and disseminate confidential information from a restricted law enforcement database. Your actions during the above dates were in violation of General Order Series 1202, Number 1, Part I-B-12, as well as in violation of your official duties as a Metropolitan Police Officer.

Charge No. 2: Violation of General Order Series 1202, Number 1, Part I-B-7, which provides: "Conviction of any member of the force in any court of competent jurisdiction of any criminal or quasi-criminal offense or of any offense in which the member either pleads guilty, receives a verdict of guilty or is deemed to have been involved in the commission of any act which would constitute a crime whether or not a court record reflects a conviction. This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.

Specification No. 1: In that on May 2, 2001, you were indicted by the United States Court for the District of Columbia Grand Jury on three (3) Counts of "Bribery" with the lesser-included charge of "Gratuities", 18 U.S.C. Section 201 (b), in violation of General Order Series 1202, Number 1, Part I-B-7.

Specification No. 2: In that on October 11, 2002, you were found "Guilty of three (3) Counts of Felony Gratuities", U.S.C. Section 201 (b), in violation of General Order Series 1202, Number 1, Part I-B-7.[8]

On September 16, 2003, Assistant Chief Shannon P. Cockett issued a decision, based on consideration of the evidence of record, finding Employee guilty of all charges and specifications and imposing removal as the penalty for Employee's misconduct. Chief Cockett found that Employee chose a standard of behavior that was unacceptable and contrary to the expectations of the community, as well as showed disregard for the responsibilities and standards of conduct he accepted as a law enforcement officer. On October 6, 2003, Chief of Police Charles H. Ramsey affirmed the removal effective October 17, 2003, based, in part, on Article 12, Section 10 of the collective bargaining agreement which "allows the Department to take administrative action against a member even if he has been acquitted of a criminal charge." Further, "[T]he termination is warranted since a preponderance of the evidence supports the allegation that Detective Valdes engaged in criminal activity."[9]

ANALYSIS AND CONCLUSIONS

Whether Agency's Action Was Taken For Cause.

D. C. Official Code §1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority to "issue rules and regulations to establish a disciplinary system that includes," *inter alia*, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The action herein is under the Mayor's personnel authority. Such regulations were published at 47 D.C. Reg. 7094 *et seq*. (September 1, 2000).[10] Here, Employee engaged in criminal activity

[8] See attachment to Employee's PFA. The remainder of the proposed notice provided Employee's right to request a departmental hearing, rights to representation, to offer evidence and witness names, and to submit any response to the Director, Human Services Section.

[9] Chief Ramsey responded to a Step 2 grievance appeal filed 9/26/03 on Employee's behalf. See Agency Answer filed 1/8/04 (hereinafter referred to as "AA") at Tabs B and C.

[10] Section 1603.3 set forth the new definition of cause which, in pertinent part, is as follows: " . . . cause means a conviction . . . of a felony . . . A conviction of another crime (regardless of punishment) at any time . . . when a crime is relevant to the employee's position, job duties, or job activities . . . any on-duty or employment-related act or omission that the employee knew or should have known is a violation of law; any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment related reason for corrective or adverse action that is not arbitrary or capricious."

which constituted cause to initiate adverse action.

In an adverse action, this Office's Rules and Regulations provide that an agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." OEA Rule 629.1, 46 D.C. Reg. 9317 (1999).

Based on the evidence of record, Employee violated General Order Series 1202, Number 1, Parts I-B-7 and I-B-12 of Agency's regulations (see preceding Charges numbered 1 and 2). Relative to Charge numbered 1, Employee disputes the distribution of powder cocaine and claims that his acquittal was based on the lack of credible witness testimony. Yet, credible testimony can only be properly weighed and evaluated, along with other evidence, by the trier of fact.[11] Since Employee withdrew his request for a Police Trial Board hearing, there was no opportunity for testimony to be heard and credibility determinations made at the agency level. Likewise, this Judge has not had an opportunity to hear witness testimony and to make credibility determinations. Moreover, Agency's internal investigation reflects that the two (2) drug transactions were monitored using concealed audio recording equipment as well as FBI undercover agents, in addition to Sergeant Thornton, who Employee claims was *not* a credible trial witness. Based on the preponderance of evidence standard, Agency officials asserted that Employee committed said offenses.[12] This Judge agrees and, therefore, concludes that Agency met its burden of proof regarding Charge No. 1.

Based on the evidence of record, this Judge concludes that Agency also met its burden of proof relative to Charge No. 2. Employee's belief that reversal of his conviction exonerates him is misplaced.[13] Although Employee's conviction for "receipt of illegal gratuities" was reversed based on the lower court's erroneous interpretation of the statute, he does *not* dispute that he disclosed driver's license and warrant information obtained from "a government data base."[14] In

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[11] *See Stevens Chevrolet, Inc. v. Commission on Human Rights*, 498 A.2d at 440-450 (D.C. 1985) where the Court emphasized the importance of credibility evaluations by the individual who sees the witness "first-hand."

[12] See Final Investigative Report and Recommendation for Adverse Action, dated 12/30/02, located in AA at Tab J. The standard of proof in a criminal proceeding is "beyond a reasonable doubt"(entirely convinced; satisfied to a moral certainty), which is a higher standard than the "preponderance of evidence" standard that is required in an administrative matter. *Black's Law Dictionary*, Fifth Edition.

[13] Agency's regulation in General Order Series 1202, Number 1, Part I-B-7 reads, in part, "Conduct unbecoming an officer [includes] . .. any criminal offense . . . in which the member . . . is deemed to have been involved in the commission of any act which would constitute a crime whether or not a court record reflects a conviction."

[14] See AA at Tabs H (Motion for New Trial and/or Judgment of Acquittal) and K (Department memorandum dated 10/15/02); also Tab J, attachment 9, U.S. District Court for the District of Columbia, Grand Jury Indictment which reflects, *inter alia*, that Employee was authorized to use the Washington Area Law Enforcement System (WALES), a computerized database (restricted to law enforcement personnel) used by the Department and other law enforcement agencies to store and retrieve information about individuals, including, but not limited to, arrest warrant files, and driver/vehicle information. WALES also interfaces with a nationwide system containing millions of records regarding persons and

fact, Employee asserted, *inter alia*, an "entrapment" defense when he was criminally charged with disclosing confidential information from a restricted law enforcement database and accepting money therefore.[15] Further, the Court stated, in part, " . . . one or more of Valdes' disclosures may have been unethical, sanctionable , or even criminal independently" of the statute and that " . . . disclosure of an outstanding arrest warrant might have an indirect effect on its execution . . ." As a detective, who was authorized access to a confidential department database in the performance of his duties, Employee's acceptance of money for said information constitutes total disregard for the responsibilities entrusted to him.

The agency's burden is met when an employee admits to the factual allegations underlying the charges. Notwithstanding Employee's admission, in this instance, Agency's internal investigation documented the aforesaid activities through such means as, consensual telephone calls and face-to-face meetings with an FBI informant, which supported said charge by a preponderance of the evidence.[16]

Whether the Penalty Was Appropriate Under the Circumstances.

When assessing the appropriateness of the 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 exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).

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property as well as criminal records of over 24 million people. The use of information obtained through WALES for other than law enforcement purposes is prohibited by federal regulations.

[15] See footnote 11; and Employee statement dated 7/23/03 in AA at Tab F. On 2/24/06, the U.S. Court of Appeals for the District of Columbia Circuit reversed Employee's conviction, under 18 U.S.C., Section 201 (c)(1)(B) of three counts of receipt of illegal gratuities "for or because of an official act" and noted that "[S]ave for information about the non-existence of an arrest warrant . . . the information was, according to uncontradicted testimony, publically available." The Court found, *inter alia*, that Agency "failed to show that the acts for which Valdes received compensation were official acts within the meaning of Section 201."

[16] See AA at Tab J.

Here, Employee's misconduct undermined the trust and confidence needed to warrant his retention. Employee violated a known duty of confidentiality concerning agency records, as well as nationwide law enforcement information. His involvement in the distribution of illegal drugs and the acceptance of money in exchange for confidential law enforcement information is inconsistent with Agency's mission as he violated the laws he was sworn to uphold.

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Based on a review of the record and the totality of circumstances, this Judge concludes that the penalty promoted the efficiency of the service, was within the parameters of reasonableness, and should be upheld.

ORDER

It is hereby Ordered that Agency's action in removing Employee is UPHELD.

FOR THE OFFICE:

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MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge