DISTRICT OF COLUMBIA

BEFORE THE

THE OFFICE OF EMPLOYEE APPEALS

IN THE MATTER OF	)	
	)	
RICHARD HAIRSTON	)	OEA Matter No. 1601-0047-08
EMPLOYEE	)	
	)	
V.	)	Date of Issuance:
	)	December 15, 2008
D.C. DEPARTMENT OF CORRECTIONS	)	
AGENCY	)	Joseph E. Lim, Esq.
	)	Senior Administrative Judge

Alan Banov, Esq., Employee Representative
Mitchell J. Franks, Agency Representative

INTIAL DECISION

BACKGROUND

On February 12, 2008, Employee filed a Petition for Appeal with the D.C. Office of Employee Appeals (the "Office"), challenging his demotion from the position of Correctional Officer, DS-8, with the D.C. Department of Corrections (the "Agency") to Correctional Officer, DS-7, based upon a charge of "Malfeasance," in the performance of his job-related duties.

I held a prehearing conference on May 16, 2008. On June 11, 2008, Employee submitted a motion for summary judgment. Agency submitted its response on June 23, 2008.

JURISDICTION

The Office has jurisdiction over Employee's appeal
pursuant to D.C. Official Code § 1-606.03(a) (2001).

ISSUE

The issue to be decided is:

> Whether the evidence of alleged "Malfeasance" will support a finding of "cause", to justify Employee's demotion from the position, Correctional Officer, DS-8, to Correctional Officer, DS-7, as that term is defined by District of Columbia Office of Personnel (the "DCOP") Rule 1603.3, 47 D.C. Reg. 7094, 7096 (2000).

By its terms, the definition of "cause" set forth in Rule 1603.3 includes "Malfeasance", which is defined as any on duty or employment related act or omission that interferes with the efficiency or integrity of government operations. Therefore, Agency must prove that Employee committed Malfeasance in the performance of his job-related duties.

FINDINGS OF FACT

Based upon the documents submitted on the record, the following facts are undisputed:

1. Employee was a Correctional Officer, DS 8, Step 10, with the Agency since November 1986.

2. On April 6, 2005, Employee drove his private vehicle to a visitor's parking lot before his own shift working hours. When he entered his work site, he possessed no illegal drugs on the job. The lot was situated in front of one of Agency's Central Detention Facility where Employee worked. Because the visitor's lot was under Agency's control, Agency controlled which vehicles could remain on this lot. Agency was known to impound a vehicles that overstayed on the lot after work hours.

3. That day, Employee was arrested, while on duty at the D.C. Jail, for a Maryland bench warrant regarding marijuana-related possession and distribution offenses.

4. In his presence, Metropolitan Police Department (MPD) detectives saw no marijuana or any other illegal controlled substances in his car. Nor did they smell any marijuana in his car.

5. Later, Employee's car was impounded and transported to the D.C. 4th District, MPD found a remnant of a marijuana cigarette in the passenger-door compartment of Employee's car.

6. Following that arrest by MPD, Appellant was charged with misdemeanor possession of a controlled substance by the District of Columbia.

7. On April 14, 2005, Employee was placed on paid Administrative Leave pending an Internal Affairs Investigation.

8. Prior to April 6, 2005, Employee had no arrest record, no significant discipline and a very good, to outstanding performance evaluation. Employee Exhibits A-D.

9. On July 21, 2005, the Superior Court of the District of Columbia found Employee guilty of possessing marijuana, a misdemeanor. However, Judge Mitchell-Rankin found that he did not "knowingly possess an illegal controlled substance on Agency property." The Agency property the judge referred to was the visitor's parking lot of the Central Detention Facility.

10. On August 10, 2005, Employee received a proposed notice to place him on enforced leave, pursuant to provisions set forth in DPM Chapter 16, Section 1619.1 (c).

11. On August 16, 2005, Employee was issued a Final Notice of Decision to place him on enforced leave for being convicted for a crime. The notice indicated that the enforced leave was to commence on August 18, 2005. He was advised of his right to appeal to the Office of Employee Appeals (OEA).

12. On September 8, 2005, the District Court of Maryland, Prince Georges County (Judge Hassan Ali, El-Amin, presiding) heard State of Maryland v. Richard Hairston, Case No. 1E00245918, and entered a verdict of *nolle prosequi*, or no prosecution, for all Maryland criminal actions against Appellant. See Employee Exhibit F.

13. On September 9, 2005, the Superior Court of the District of Columbia sentenced Employee to nine months' probation without judgment.

14. On September 30, 2005, Dennis Harrison, Acting Warden, proposed to remove Appellant, for the cause of "A conviction (including a plea of nolo contendere) of another crime regardless of punishment at any time following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or job activities." The notice informed Employee of his due process rights and that Keith Godwin had been assigned as his administrative review Hearing Officer.

15. On November 1, 2005, Hearing Officer Godwin submitted a report recommending to the Deciding Official S. Elwood York that Employee be returned to duty and any action to terminate him be stayed until one of the following conditions has been met: (1) Successful appeal; (2) Adjudication of guilty; (3) Discharge of dismissal of order.

16. On November 21, 2005, Deciding Official York concurred with Godwin's recommendation and stayed action on Employee's termination pending final action by the Superior Court.

17. In February 2006, Devon Brown was appointed as Director for Agency.

18. On March 16, 2006, Appellant successfully completed his probation and the D.C. Superior Court expunged Employee's conviction record in accordance with D.C. Official Code §48-904.01(e)(2). The statute provides as follows:

> The effect of such [an expungement] order shall be to restore such person, in the contemplation of this law, to the status he or she occupied before such arrest or indictment or information. No person to whom such order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of failure to recite or acknowledge such arrest or indictment, or trial in response to inquiry made of him or her for any purpose. (emphasis added)

19. Employee successfully completed his probation from the D.C. Superior Court by March 2006, and on March 16, 2006, the Superior Court dismissed his charge of possession of marijuana and expunged his criminal record, in accordance with D.C. Code § 48-904.01(e)(2).

20. During the year before Appellant filed his first appeal to OEA, the Agency notified him or his prior counsel that he would be reinstated to his prior position.

21. On July 7, 2006, Assistant Attorney General Frank McDougald rendered an opinion to the Agency that it would violate D.C. Code § 48-904.01(e)(1) by removing Mr. Hairston from his position, since the statute "restor[ed]" him "to the status he . . . occupied before [his] arrest" and his conviction for possession, having been expunged from his record, could not be used against him "for any purpose." See Employee's Exhibit N.

22. Thus, on July 20, 2006, Mr. Fred Staten Jr. wrote one of Appellant's prior counsel that "the Agency has made a decision to reinstate [Appellant] to his official position of Correctional Officer and that "the Agency's objective is to reinstate [him], effective Monday, July 24, 2006." Employee Exhibit N.

23. However, notwithstanding Mr. Staten's letter and other requests on Employee's behalf, the Agency did not reinstate Appellant Hairston to his official position or any position until after it initiated the instant adverse action.

24. On September 26, 2006, one of Mr. Hairston's prior attorneys filed a Complaint in the Superior Court for the District of Columbia against multiple defendants, including against Devon Brown in his Official Capacity as Director of the Department of Corrections.

25. From April 6, 2005, until December 13, 2006, Appellant waited for the Agency to issue a final decision on the proposal to remove him.

26. On December 13, 2006, Agency withdrew Employee's September 30, 2005, Advance Notice of Termination for the cause of "conviction of another crime…" On December 13, 2006, Mr. Devon Brown, Director of the Agency, dismissed the first proposal to remove Mr. Hairston with prejudice, without any mention of lost backpay, sick, or vacation leave, or any reinstatement. See Employee's Exhibit O.

27. On the same day of December 13, 2006, Agency replaced its September 30, 2005, notice with a new 20-day advance notice of termination for the cause of "malfeasance." The notice specifies several incidents that support its charge of malfeasance: Employee's April 6, 2006, arrest for an outstanding Maryland warrant; the presence of marijuana inside Employee's car after it was impounded pursuant to his arrest; Employee's being charged under the D.C. Code Statute with Possession of Marijuana; Employee's criminal conviction in D.C. Superior Court for marijuana possession. The notice also mentions the expunging of this conviction but maintains that Agency still has valid grounds for the charge of malfeasance.

28. The notice indicated that Segum Obebe has been appointed the Hearing Officer who will conduct the administrative review of the proposed removal action. It also indicated that Employee's enforced leave since 2005 remained in force.

29. On January 19, 2007, the D.C. Superior Court dismissed Appellant's suit without prejudice, "because Plaintiff has failed to exhaust his administrative remedies."

30. It was not until April 18, 2007, that Employee first received Mr. Brown's December 13, 2006, removal proposal as Exhibit 13 of Agency's Prehearing Statement and Supporting Documents in Hairston v. D.C. Dept. of Corrections, OEA Matter No. 1601-0059-07.

31. On May 14, 2007, Employee responded to this removal proposal (Agency Appeal file, Exhibit 4).

32. On May 23, 2007, Employee presented an oral reply to Mr. Oluwasegun Obebe, the designated Agency Hearing Officer.

33. Later, on June 5, 2007, pursuant to Mr. Obebe's request, Employee provided documents showing that the Maryland criminal action was not prosecuted. See Employee's Exhibit Q.

34. On June 11, 2007, Mr. Obebe submitted to Mr. Brown a Report and Recommendation, which recommended that Employee be "not removed, but be demoted, and that he forfeit any back pay entitlement or leave benefits that he may claim."

35. On January 8, 2008, the Agency issued a decision to demote Employee from DS-8/10 Correctional Officer to DS-7/1 Correctional Officer. Agency Appeal File, Exhibit 6.

36. The effective date of the demotion was January 20, 2008.

37. The Employee filed this timely appeal on February 11, 2008.

Positions of the Parties

Employee argues that D.C. Code § 48-904.01(e)(1) forbids Agency from implementing any adverse action against him. Agency argues that its malfeasance charge against Employee stems from his D.C. possession of marijuana as well as his April 6, 2005, arrest on the Maryland warrant, not just on the expunged conviction.

ANALYSIS AND CONCLUSIONS OF LAW

There are two distinct set of facts that occurred involving Employee. The first was his April 6, 2005, arrest while on duty at the D.C. Jail for a Maryland bench warrant regarding marijuana-related possession and distribution offenses. While on trial before the Maryland District Court on September 8, 2005, the judge entered a verdict of *nolle prosequi* on Employee's Maryland charges. This constitutes the first set of facts.

Because of the April 6, 2005, arrest, Employee's vehicle was removed from Agency's parking lot and impounded for inventory and safekeeping.[1] After impounding Employee's vehicle, Agency conducted a customary search and found a bit of marijuana inside the vehicle.

1 Whether the parking lot was owned or not by Agency was irrelevant as it was clear that said lot was used exclusively for visitors to Agency's correctional facility and thus was under its control.

This development then resulted in the second set of facts, that of Employee being involved in the District of Columbia's criminal justice system as a defendant.

The discovery resulted in Employee being charged with misdemeanor possession of marijuana by the District of Columbia. The subsequent trial resulted in Employee's July 21, 2005, guilty verdict. However, the judge gave Employee a chance and handed out probation instead of a sentence. Later, after Employee successfully completed his probation, his criminal record was expunged in accordance with D.C. Official Code §48-904.01(e)(2).

D.C. Official Code §48-904.01(e)(2) clearly states, "The effect of such [an expungement] order shall be to restore such person, in the contemplation of this law, to the status he or she occupied before such arrest or indictment or information." (*Emphasis supplied*.) "We must first look at the language of the statute by itself to see if the language is plain and admits of no more than one meaning." *Davis v. United States, 397 A.2d 951, 956 (D.C. 1979)*. "The primary and general rule of statutory construction is that the intent of the lawmaker is to be found in the language that he has used." *Varela v. Hi-Lo Powered Stirrups, Inc., 424 A.2d 61, 64 (D.C. 1980)* (en banc) (quoting *United States v. Goldenberg, 168 U.S. 95, 102-03, 42 L. Ed. 394, 18 S. Ct. 3 (1897))*. Moreover, in examining the statutory language, it is axiomatic that "the words of the statute should be construed according to their ordinary sense and with the meaning commonly attributed to them." *Davis, supra, 397 A.2d at 956; United States v. Thompson, 347 A.2d 581, 583 (D.C. 1975).*

Thus, the plain meaning and intent of §48-904.01(e)(2) clearly places Employee "to the status he or she occupied before such arrest or indictment or information." Since Employee's D.C. criminal record was expunged, he is brought back to the status he occupied before Agency obtained the information that led to his being charged by the District. Thus, Agency could no longer use the following facts as its basis for an adverse action: the presence of marijuana inside Employee's car after it was impounded; Employee's being charged under the D.C. Code Statute with Possession of Marijuana; and Employee's criminal conviction and subsequent successful probation in D.C. Superior Court for marijuana possession.

Moreover, the aforementioned D.C. Code only applies to charges brought by the D.C. government, and not to charges brought by other jurisdictions such as Maryland. Therefore, his arrest by Maryland authorities based on his Maryland criminal charges are not covered by §48-904.01(e)(2) and can still serve as a basis by Agency to support an adverse action against Employee.

Section 1603.3 of the regulations, 46 D.C. Reg. at 7096, sets forth the definitions of cause for which a disciplinary action may be taken.[2] Here, Employee was removed for

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2 The entire list of causes in § 1603.3 is as follows:

> [A] conviction (including a plea of *nolo contendere*) of a felony at any time following submission of an employee's job application; a conviction (including a plea of *nolo contendere*) of another crime (regardless of punishment) at any time following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or job activities; any knowing or

Malfeasance. "Malfeasance" is one of the causes set forth in § 1603.3. Black's Law Dictionary (1990 edition) defines malfeasance as "The commission of some act which is positively unlawful; the doing of an act which is wholly wrongful and unlawful; the doing of an act which a person ought not to do at all or the unjust performance of some act which the party had no right or which he had contracted not to do." Agency defines Malfeasance more narrowly as "any on duty act that interferes with the integrity of government operations."

Here the only on duty act that Employee committed on April 6, 2005, was possessing marijuana in his vehicle while on duty. This record, however, was expunged due to §48-904.01(e)(2). This then leaves Employee's arrest at the D.C. Jail on a Maryland bench warrant regarding Maryland criminal charges as the sole ground for his demotion. Agency's December 13, 2006, advance notice of adverse action mentions only his arrest, not the outcome of his trial on the Maryland charges or the Maryland misconduct that led to the arrest, as a basis for its proposed action. The question then, is whether a mere arrest is enough to sustain a charge of malfeasance.

It is well established that an employee in a law-enforcement position is held to a higher standard of conduct than other employees. *Jones v. Department of the Army*, 52 M.S.P.R. 501, 506 (1992). *See also Mojica-Otero v. Department of the Treasury*, 30 M.S.P.R. 46 (1986). Being a uniformed corrections officer authorized to carry firearms, it is undisputed that Employee is in a law-enforcement position.

In *District of Columbia v. Richard A. Green*, 687 A.2d 220 (D.C. 1997), the District of Columbia Court of Appeals was presented with the question of whether the arrest of an officer upon a warrant, together with consideration by police officials of the investigative documents underlying the warrant, may similarly provide cause for suspension under the statute. The Court held that it may, and that in the circumstances of this case the police had reasonable cause to suspend employee, who had been arrested on charges of sexual assault, while the criminal process took its course. The Court further held that subsequent events did not undermine, but rather confirmed, the validity of the suspension decision.

The instant case is distinguishable from *Green* in that there is no indication that Agency relied upon investigative documents underlying the Maryland warrant. Indeed, apart from the cursory mention of the arrest upon a Maryland warrant, Agency relies most heavily upon the subsequent D.C. misdemeanor drug charge, which was expunged under D.C. Official Code §48-

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negligent material misrepresentation on an employment application or other document given to a government agency; any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the 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. This definition includes, without limitation, unauthorized absence, negligence, incompetence, insubordination, misfeasance, malfeasance, the unreasonable failure to assist a fellow government employee in performing his or her official duties, or the unreasonable failure to give assistance to a member of the public seeking services or information from the government.

904.01. In addition, the penalty in *Green* is a suspension with a determinate end. In the instant matter, the penalty is the more severe penalty of a demotion.

The Merit Systems Protection Board, this Office's Federal counterpart, has held that, "An arrest is insufficient cause, by itself, for indefinitely suspending an employee because it does not provide sufficient evidence that the employee has committed a crime." *See Dunnington v. Department of Justice, 45 M.S.P.R. 305, 306 (1990),* citing *Martin v. Department of the Treasury, 12 M.S.P.R. 12, 18-19 (1982); Larson v. Department of the Navy, 22 M.S.P.R. 260, 262 (1984)* ("an arrest or investigation . . . is not, *per se*, sufficient to give rise to reasonable cause and must be accompanied by other supporting circumstances.) Presumably, then, if an arrest alone is not sufficient cause for an indefinite suspension, it cannot be a sufficient basis for a demotion. *See Schware v. Board of Examiners of the State of New Mexico, 353 U.S. 232, 241 n.6 (1957)* ("arrest, by itself, is not considered competent evidence at either a criminal or civil trial to prove that a person did certain prohibited acts").

Based upon the evidence presented in this entire record before me, I conclude that Agency did not have probable cause to discipline Employee on a charge of Malfeasance, as defined at DCOP Rule 1603.3, as "… any on duty or employment related act or omission that interferes with the efficiency or integrity of government operations", and that the Agency has not met its burden of proof by a preponderance of the evidence submitted, pursuant to OEA's Rules and Regulations.

ORDER

It is hereby ORDERED:

1. Agency's decision is to demote Employee from his position is reversed.

2. Agency is directed to reinstate Employee to his last position of record, issue him the back pay to which he is entitled and restore any benefits he lost as a result of the demotion, no later than 30 calendar days from the date of issuance of this Decision.

3. Agency is directed to document its compliance by filing with OEA a Statement of Compliance Report no later than 45 calendar days from the date of issuance of this Decision.

FOR THE OFFICE:

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JOSEPH E. LIM, ESQ.
Senior Administrative Judge