THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,	)	
Employee	)	OEA Matter No. 1601-0006-24
	)	
v.	)	Date of Issuance: June 12, 2025
	)	
D.C. FIRE & EMERGENCY MEDICAL SERVICES DEPARTMENT,	)	
Agency	)	ERIC T. ROBINSON, ESQ.
	)	SENIOR ADMINISTRATIVE JUDGE

Employee *Pro-Se*
Timothy J. McGarry, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On October 27, 2023, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the District of Columbia Fire and Emergency Medical Services Department action of removing him from service due to a confirmed positive drug test result.[1] Employee's last position of record was Firefighter/Emergency Medical Technician, E-271-1. On that same date, the OEA issued a notice to FEMS requiring it provide an Answer to Employee's petition for appeal no later than November 26, 2023. On November 22, 2023, FEMS filed its Answer in a timely manner. This matter was assigned to the Undersigned on November 27, 2023. On November 28, 2023, the Undersigned issued an Order Convening a Prehearing Conference. The conference was held on January 4, 2024. During the conference, it was determined that the process for litigating this matter before the OEA would be dictated by the parameters set forth pursuant by *Elton Pinkard v. D.C. Metropolitan Police Department*.[2] On January 25, 2024, the Undersigned issued an Order that dictated the briefing deadlines for this

[1] D.C. Official Code § 1-620.35(a).
[2] 801 A.2d 86 (D.C. 2002). This case will be discussed in further detail below.

matter. The parties complied with the aforesaid briefing schedule. After reviewing the documents of record, I have determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

> The burden of proof for 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 631.2 id. States:

> For appeals filed under §604.1, 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.

ISSUES

Whether the Trial Board's decision was supported by substantial evidence, whether there was harmful procedural error, or whether Agency's action was done in accordance with applicable laws or regulations.

Statement of the Charges

> **Charge 1** Violation of D.C. Official Code § 1-620.35(a), which states,
>
> "[A]ny confirmed positive drug test results, positive breathalyzer test, or a refusal to submit to a drug test or breathalyzer shall be grounds for termination of employment in accordance with this chapter." Further violation of DPM § 428.1, which states: "An employee shall be deemed unsuitable and immediately subject to separation from a covered position as described in Subsections 439.3 and 439.4 for: (a) A positive drug or alcohol test result; [or] (b) A refusal to submit to a drug or alcohol test". Further violation of D.C. Fire and Emergency Medical Services Department Bulletin 5, § 7.2, which states: In accordance with Chapter 39 of the District Personnel Manual (DPM), 6 D.C.M.R. 3900 *et seq.*, the following conduct shall subject covered employees to disciplinary action:
>
> * * *

g. Testing positive under this policy for alcohol, controlled substances and/or drugs Further violation of D.C. Fire and Emergency Medical Services Department Bulletin 5, § 13.3, which states: If, at any time during his/her career, after the one post hiring opportunity, an employee receives another positive result on any confirmation test duly administered for alcohol at a concentration of 0.020 or greater, controlled substances and/or drugs under this Bulletin, the employee shall be charged with violation of the Substance Abuse Policy and shall be terminated. This misconduct is defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(i), which states: "Use of illegal drugs, unauthorized use or abuse of prescription drugs, use of alcohol while on duty, or a positive drug test result." *See also* DPM § 1603.3(i). This misconduct is further defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(f)(3), which states: "Any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations, to include: Neglect of Duty." *See also* DPM § 1603.3(f)(3).

Specification 1 Deputy Fire Chief / Medical Services Officer Brian T. Rudy describes FF/EMT [Employee's] misconduct in his Special Report (dated11/1/2021), as follows:

On May 19, 2021, Firefighter [Employee] (E-27-1) reported to the Police and Fire Clinic (PFC) for a random alcohol and drug screening. The sample that Firefighter [Employee] submitted returned positive for marijuana metabolite. . . . Subsequently, Firefighter [Employee] participated in a rehabilitation program through Kaiser and was under the care and supervision of Doctor Mary Kenel, Ph.D., at the PFC. On September 7, 2021, at the direction of Dr. Kenel, I requested a Fitness for Duty evaluation for Firefighter [Employee] to get the member back to full duty. On October 26, 2021, Firefighter [Employee] reported to the PFC for the medical portion of the Fitness for Duty evaluation. Part of the medical evaluation involves testing for alcohol and drugs. Firefighter [Employee] tested positive for alcohol. Dr. Jennifer Lund, D.O., M.P.H., verified the positive result. According to Bulletin 5, it is the mission of the Fire and Emergency Medical Services Department to fully protect the safety of the public and its employees, and to provide the residents of (and visitors to) the District of Columbia with the best possible services available. Substance abuse is in direct contradiction of that mission and will not be accepted. The use of illegal drugs and abuse of controlled substances or alcohol by Department employees will not be tolerated because such conduct jeopardizes not only the safety of the public whom we are sworn to protect, but also the safety of our employees. FF/EMT [Employee's] failure to follow instructions and observe precautions regarding safety constitutes both a positive alcohol test result and neglect of duty. Accordingly, this termination action is proposed. The Department convened a Fire Trial Board on April 20, 2023. The

> Employee, represented by counsel, pleaded not guilty. After receiving both documentary and testimonial evidence, the Fire Trial Board made the following finding and penalty recommendation with respect to the charge:
>
> On September 29, 2023, Fire and EMS Chief John A. Donnelly notified Employee that he accepted the findings and recommendation of the Fire Trial Board.

ANALYSIS AND CONCLUSIONS

This Office's review of this matter is limited pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). In that case, the D.C. Court of Appeals overturned a decision of the D.C. Superior Court that held, *inter alia*, that this Office had the authority to conduct *de novo* evidentiary hearings in all matters before it. According to the D.C. Court of Appeals:

> The OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives the OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings. *See* D.C. Code §§ 1-606.2 (a)(2), 1-606.3 (a), (c); 1-606.4 (1999), recodified as D.C. Code §§ 1-606.02 (a)(2), 1-606.03 (a), (c), 1-606.04 (2001); *see also* 6 DCMR § 625 (1999).
>
> The MPD contends, however, that this seemingly broad power of the OEA to establish its own appellate procedures is limited by the collective bargaining agreement in effect at the time of Pinkard's appeal. The relevant portion of the collective bargaining agreement reads as follows:
>
> [An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing has been held, *any further appeal shall be based solely on the record established in the Departmental hearing.* [Emphasis added.]
>
> Pinkard maintains that this provision in the collective bargaining agreement, which appears to bar any further evidentiary hearings, is effectively nullified by the provisions in the CMPA which grant the OEA broad power to determine its own appellate procedures. A collective bargaining agreement, Pinkard asserts, cannot strip the OEA of its statutorily conferred powers. His argument is essentially a restatement of the administrative judge's conclusions with respect to this issue.
>
> It is of course correct that a collective bargaining agreement, standing alone, cannot dictate OEA procedure. But in this instance the collective bargaining agreement does not stand alone. The CMPA itself explicitly provides that systems for review of adverse actions set forth in a collective

> bargaining agreement must take precedence over standard OEA procedures. D.C. Code § 1-606.2 (b) (1999) (now § 1-606.02 (b) (2001)) states that "any performance rating, grievance, adverse action, or reduction-in-force review, which has been included within a collective bargaining agreement . . . *shall not be subject to the provisions of this subchapter*" (emphasis added). The subchapter to which this language refers, subchapter VI, contains the statutory provisions governing appellate proceedings before the OEA. *See* D.C. Code § 1-606.3 (1999) (now § 1-606.03 (2001)). Since section 1-606.2 (b) specifically provides that a collective bargaining agreement must take precedence over the provisions of subchapter VI, we hold that the procedure outlined in the collective bargaining agreement -- namely, that any appeal to the OEA "shall be based solely on the record established in the [Adverse Action Panel] hearing" -- controls in Pinkard's case.
>
> The OEA may not substitute its judgment for that of an agency. Its review of an agency decision -- in this case, the decision of the Adverse Action Panel in the MPD's favor -- is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. The OEA, as a reviewing authority, also must generally defer to the agency's credibility determinations. Mindful of these principles, we remand this case to the OEA to review once again the MPD's decision to terminate Pinkard, and we instruct the OEA, as the collective bargaining agreement requires, to limit its review to the record made before the Adverse Action Panel.[3]

Thus, pursuant to *Pinkard*, an Administrative Judge of this Office may not conduct a *de novo* Hearing in an appeal before him/her, but must rather base his/her decision solely on the record below, when all of the following conditions are met:

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
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> 2. The employee has been subjected to an adverse action;
>
> 3. The employee is a member of a bargaining unit covered by a collective bargaining agreement;
>
> 4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard*, *i.e.*: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, Adverse Action Panel] has been held, any further appeal shall be based solely on the record established in the Departmental hearing"; and

[3] *Id.* at 90-92. (citations omitted).

> 5. At the agency level, Employee appeared before an Adverse Action Panel that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.

Based on the documents of record and the position of the parties as stated during the conference held in this matter, I find that all of the aforementioned criteria are met in the instant matter. Therefore, my review is limited to the issues set forth in the Issue section of this Initial Decision *supra*. Further, according to *Pinkard*, I must generally defer to the Fire Trial Board's ("Trial Board") credibility determinations when making my decision. *Id.* After multiple continuances, a Trial Board hearing was held on April 20, 2023. On September 27, 2023, the Trial Board issued its Findings and Recommendations for the charge and specification outlined above. Ultimately, Employee was found guilty and the Trial Board recommended that he be removed from service. On September 29, 2023, Agency Chief John Donnelly, Sr., provided written notice to Employee that he was adopting the finding and recommendation.

Substantial Evidence

According to *Pinkard*, I must determine whether the Trial Board's findings were supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [4] Further, "[i]f the Trial Board's] findings are supported by substantial evidence, [I] must accept them even if there is substantial evidence in the record to support contrary findings." [5] In support of this rubric, Agency notes that Employee failed a mandatory drug test on May 19, 2021, by testing positive for marijuana. This test was administered at the Police and Fire Clinic ("PFC"). Employee was then allowed to participate in a rehabilitation program in an attempt to avoid further sanctions. However, as part of the rehabilitation program, Employee was required to submit himself for a Fitness for Duty evaluation at the PFC on October 26, 2021. During this exam, Employee tested positive for alcohol.[6] A Trial Board was convened in this matter and during it Dr. Malomo testified that she personally conducted Employee's failed marijuana test, and she testified about the procedures regarding his failed alcohol test. Citing to the record, Agency notes that during the Trial Board, Employee also admitted that he consumed marijuana prior to the positive test result and that he consumed "significant amount of alcohol" the night before his failed alcohol test.[7] During the Trial Board, Employee explained that both instances were social gatherings where the consumption of these substances was commonplace and encouraged by his friend group.[8]

The following excerpt from Employee's brief is his total argument as submitted in his brief contesting Agency's action on the grounds of lack of substantial evidence:

> The Agency's decision was not supported by substantial evidence. The Agency had a certain amount of time to process, act on, and notify the Employee on Initial Written Notifications, disciplinary actions, trail board

[4] *Davis-Dodson v. D.C. Department of Employment Services*, 697 A.2d 1214, 1218 (D.C. 1997) (citing *Ferreira v. D.C. Department of Employment Services*, 667 A.2d 310, 312 (D.C. 1995)).
[5] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).
[6] Agency's Brief pp. 2 -3 (February 7, 2024).
[7] *Id*. pp. 5 – 7.
[8] *Id*.

> dates. The department failed to serve the IWN within the alleged infraction, "Collective Bargaining Agreement Art. 32 Sec. (b)". The department failed to schedule a hearing with within 180 days following the receipt of the IWN, "Collective Bargaining Agreement Art 31. Sec. (b). The department claimed to have scheduled a Trail (*sic*) Board hearing for November 8th, 2022 but no records substantiate, and it would be far too late: November 8th, 2022 was more than 100 days after the 180 day deadline.[9]

Upon review, I note that Employee's argument does not readily contest whether FEMS had sufficient evidence (either in volume or significance) in the record to support a removal action. What is particularly illuminating in this matter is that Employee admitted to all of the specifications in this matter as part of his Trial Board testimony. I find that Employee admitted to the salient facts that are the subject of the instant adverse action. The Board of the OEA has previously held that an employee's admission is sufficient to meet Agency's burden of proof.[10] I find that Employee's admission of misconduct before the Trial Board constituted cause.[11] I also find that Agency has established that the Trial Board had substantial evidence to support its removal recommendation.

Harmful Procedural Error

Pursuant to *Pinkard* and OEA Rule 631. 3, the Undersigned is required to make a finding of whether or not FEMS committed harmful error. OEA Rule 631. 3, provides as follows: "Notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action." Agency asserts that Employee has not suffered any harmful procedural error. The following excerpt from Employee's brief is the bulk of his argument contesting Agency's action on the grounds of harmful procedural error:

> Yes, the Agency's committed harmful procedural error. The department not only didn't follow their own guidelines and rules, they also never kept in contact with the Employee about disciplinary actions or Trail (*sic*) Board hearing for more than a year.[12]

Agency notes that *Pinkard* mandates that for an error to merit reversal of an Agency action, it must be harmful. FEMS further asserts that Employee has only provided a "bare" statement of harm and has failed to articulate the actual harm that was suffered despite being given the opportunity to do so before the Undersigned.[13] In support of this, FEMS notes that during the pendency of the Trial Board Hearing process, Employee requested multiple continuances, all of

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[9] Employee's Pinkard Brief March 12, 2024.
[10] *Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987).
[11] *Employee v. MPD*, OEA Matter No. 1601-0036-17 (June 11, 2018).
[12] *See* footnote 9 above.
[13] Agency's Reply pp. 1 – 3 (March 28, 2024).

which were granted. Agency also noted that when the Trial Board was finally held, Employee admitted to all of the salient acts that support its removal action.[14]

I have examined the record, and I do not find Employee's complaints to be valid. I agree with Agency's assessment that the mere assertion of harmful error cannot suffice to upend an adverse action pursuant to *Pinkard*. If any error occurred, I find that it was *de minimis* (harmless) in nature. I further find that Employee's assertion of harmful procedural error is lacking in specificity. Accordingly, I find that Agency did not commit harmful procedural error in this matter.

Adverse Action Done in Accordance with Applicable Rules and Regulations

Agency asserts that Employee's removal did not violate any applicable rules or regulations. Employee's counter of whether Agency's action was done in accordance with applicable laws and regulations is as follows:

> The Agency's actions were not in accordance with applicable laws and regulations, the department placed the Employee back to full duty for multiple months after the alleged infraction. The department was supposed to place the Employee on a weekly testing program with the PFC but the Employee was never placed on it after the alleged infraction.[15]

FEMS argues that given Employee's last position of record, D.C. Fire and EMS Department Bulletin Book, Bulletin #5, Substance Abuse Policy, § 13.3, mandates Employee's termination for his failed drug and failed alcohol test. Agency further notes that Employee's inability to abstain from imbibing drugs and alcohol was a direct violation of rules that Employee should have been acutely aware of and that termination on these grounds is consistent with its past practices.[16] Considering as much, I find that Employee did not credibly allege that Agency's action was not done in accordance with applicable laws or regulations.

Conclusion

When an Agency's charge is upheld, this Office has held that it will leave the Agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment.[17] I conclude that given the totality of the circumstances as enunciated in the instant decision, the Agency's action of removing Employee from service should be upheld. [18]

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[14] *Id*.
[15] *See* footnote 9 above.
[16] Agency's Brief pp. 11 – 12 (February 7, 2024).
[17] *See Stokes*, *supra*; *Hutchinson*, *supra*; *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995).
[18] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin,* 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater,* 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

ORDER

Based on the foregoing, it is ORDERED that the Agency's action of removing Employee from service is hereby UPHELD.

FOR THE OFFICE: /s/ Eric T. Robinson

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE