THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,	)	OEA Matter No. 1601-0054-24
	)	
	)	Date of Issuance: January 29, 2025
v.	)	
	)	JOSEPH E. LIM, ESQ.
METROPOLITAN POLICE DEPARTMENT	)	SENIOR ADMINISTRATIVE JUDGE
Agency	)	

Daniel McCartin, Esq., Employee Representative
Michelle McGee, Esq. Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Employee, a Police Officer, filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") on May 23, 2024, challenging the District of Columbia Metropolitan Police Department's ("Agency" or "MPD") decision to terminate him effective April 26, 2024, based on four (4) charges dealing with intoxication, criminal conduct, conduct unbecoming an officer, and any conduct detrimental to the reputation of the Metropolitan Police Department. In response to OEA's May 24, 2024, letter, Agency filed its Answer on June 24, 2024. This matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on June 25, 2024.

Pursuant to the June 27, 2024, Order Convening a Telephone Prehearing Conference which was initially set for July 11, 2024, the parties were required to submit Prehearing Statements by July 9, 2024. Based on the Agency's Consent Motion, I postponed the Prehearing Conference and held it on July 25, 2024. At the Prehearing Conference, I directed both parties to address the following issue: whether the Adverse Action Panel's ("AAP") decision was supported by substantial evidence, whether there was harmful procedural error, or whether Agency's decision was done in accordance with applicable laws and regulations with a submission deadline of October 22, 2024. Because this matter is being reviewed under the

analysis set forth in *Pinkard v. D.C. Metropolitan Police Department*[1], no Evidentiary Hearing was convened. The record is now closed.

JURISDICTION

This 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 AAP's decision was supported by substantial evidence, whether there was harmful procedural error, and whether Agency's action was done in accordance with applicable laws or regulations.

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 procedures for handling such appeals and to conduct evidentiary hearings."[2]

In *Pinkard,* the Court held 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:

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[1] 801 A.2d 86 (D.C. 2002).

[2] *See* D.C. Code §§ 1-606.02 (a)(2), 1-606.03 (a), (c); 1-606.04 (1999), recodified as D.C. Code §§ 1-606.02 (a)(2), 1-606.03 (a), (c), 1-606.04 (2001); *see also* 6B DCMR § 625 (1999).

[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.*[3]

The Court noted that the Comprehensive Merit Personnel Act ("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, the Court held 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 the Pinkard case.

Not only did *Pinkard* dictate that the OEA's review of the case be constrained to the record produced as a result of the hearing, but it also noted:

> 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]*.[4]

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;

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[3] *Pinkard*, 801 A.2d at 91 (emphasis in original).
[4] *Id.* at 90-92. (citations omitted).

> 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
>
> 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 prehearing 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 Adverse Action Panel's] credibility determinations when making my decision. *Id.*

Whether the Adverse Action Panel's decision was supported by substantial evidence

According to *Pinkard*, I must determine whether the Adverse Action Panel'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."[5] 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."[6]

After Employee challenged his termination, an Adverse Action Hearing Panel ("AAP") Hearing was held on January 30, 2024. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their position. The AAP assessed witness testimony and other evidence regarding Employee's alleged misconduct and found Employee to be guilty of all charges.[7]

Following the Hearing, the AAP issued its Findings of Fact and Recommendation on March 13, 2024, unanimously finding Employee guilty and recommending termination for each charge:[8]

Disciplinary Review Division ("DRD") # 309-23, Incident Report ("IS") # 23-001011:

Charge 1, Violation of General Order Series 120.21, Attachment A, 1, which prohibits, *"Alcohol: On-duty drinking and/or under the influence; Off-duty drinking while in uniform and/or under the influence."*

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[5] *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).
[6] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).
[7] *See* AAP Findings of Fact and Recommendation ("AAP Findings").
[8] Agency's Response to Employee's Appeal ("AR") at Tab 7.

Specification 1**:** In that, on March 17, 2023, the Fairfax County Police Department ("FCPD") responded to your residence in McLean, Virginia where your wife[9] reported to Officers Dianna Agyeman and Marian Nedeltchev that you were drunk, and that you had threatened to kill her. You admitted to the FCPD officers that you had consumed a couple of beers. Reportedly, you had trouble balancing and articulating coherent answers to the responding officers. You also admitted to the MPD Internal Affairs, that you were so intoxicated that you did not fully remember the events of March 17, 2023.

Charge 2, Violation of General Order Series 120.21 Attachment A, 6, which states, *"Engaging in conduct that constitutes a crime."*

Specification 1**:** In that, on March 17, 2023, Officers Dianna Agyeman and Marian Nedeltchev, determined probable cause existed that you violated Virginia Code 18.2-388, Intoxication in Public. Intoxication in Public is a misdemeanor offense in the Commonwealth of Virginia. According to the Virginia Code, a law enforcement officer may authorize the transportation, by police or otherwise, of public inebriates to a court detoxification center in lieu of arrest. In this instance, Officers Agyeman and Nedeltchev used their discretion not to arrest you. Instead, the Fairfax County officers allowed you to take an Uber to your cousin's home.

Charge 3, Violation of General Order Series 120.21, Attachment A, 11, which states, *"Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia."*

Specification 1**:** In that, on April 3, 2023, a Fairfax County Circuit Court Judge issued a Substantial Risk Order ("SRO") against you. This SRO prohibits you from purchasing, possessing, or transporting a firearm until October 3, 2023.

Charge 4, Violation of General Order Series 120.21, Attachment A, 24, which states, *"Any conduct not specifically set forth in this order, which is detrimental to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force."*

Specification 1**:** In that, on March 17, 2023, you were identified as a District of Columbia (D.C.) police officer to Fairfax County 911 and over the Fairfax County police radio. You were previously known to FCPD as a D.C. police officer, therefore, your actions were detrimental to the reputation of the Metropolitan Police Department. Additionally, you admitted in your interview with IAD, that "your actions made the department look extremely bad."

Specification 2**:** In that, on March 17, 2023, you used the derogatory slang term "cerota" to describe Officer Nedeltchev while speaking to the Uber driver. You also referred to Officer Nedeltchev as "crazy," while speaking with the Uber driver. These terms are derogatory and unprofessional.

[9] Wife's name omitted for privacy.

Specification 3**:** In that, on March 17, 2023, during an argument with your wife, while in the presence of her twelve (12) year old son and her three (3) year old daughter, you threatened to kill her.

DRD # 481-23, IS # 23-001522:

Charge No. 1: Violation of General Order Series 120.21, Attachment A, 6, which states, *"Engaging in conduct that constitutes a crime."*

Specification No. 1: In that, on April 27, 2023, probable cause was established by PFC Kyoung Pak of the Fairfax County Police Department (FCPD) to arrest you for Driving Under the Influence (DUI) of Alcohol in violation of Virginia Code 18.2-266.

Specification No. 2: In that, on April 27, 2023, you refused to submit to a breathalyzer test to determine your level of impairment. You were subsequently charged with Breath Test refusal in violation of Virginia Code 18.2- 268.3.

Charge No. 2: Violation of General Order Series 120.21, Attachment A, 1, which prohibits, *"Alcohol: On-duty drinking and/or under the influence; Off-duty drinking while in uniform and/or under the influence."*

Specification No. 1: In that, on April 27, 2023, probable cause was established by PFC Kyoung Pak of the Fairfax County Police Department to arrest you for Driving Under the Influence (DUI) of Alcohol in violation of Virginia Code 18.2-266, and Refusal: Breath in violation of Virginia Code 18.2-268.3. You were issued a warrant of arrest for DUI and Breath Test Refusal. Your intoxication is directly related to your involvement in a domestic incident and subsequent DUI arrest.

Charge No. 3: Violation of General Order Series 120.21, Attachment A, 16, which states, *"Failure to Obey Orders and Directives issued by the Chief of Police."* This misconduct is further defined as Violation of General Order 201.26, V, B.3. which states, *"Sworn members and reserve Corp members, in addition to Part V.A of this order, shall: Maintain a valid operator's license issued by the jurisdiction in which they reside. Members who are authorized to use MPD vehicles shall notify their Commanding Official, through the chain of command, immediately, but no later than the next scheduled tour of duty or any change in the status of their driver's license, including suspension or revocation."*

Specification No. 1: As a result of your arrest, your driving privileges were suspended completely in Virginia and you are unable to drive in the District of Columbia as well, which means that you cannot fulfill your duties as a police officer. As such, you will be unable to maintain a valid driver's license issued by the jurisdiction in which you reside for a period of six (6) months.

Charge No. 4: Violation of General Order Series 120.21, Attachment A, 24, which states, *"Any conduct not specifically set forth in this order, which is detrimental to the reputation and good*

order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force."

Specification No. 1: In that, on April 27, 2023, you consumed alcoholic beverages, entered the driver's seat of your black Audi, drove away from your residence, and were subsequently arrested by PFC Kyoung Pak in Fairfax County, Virginia. Your actions have brought discredit to yourself and the Metropolitan Police Department (MPD).

On April 25, 2024, Police Chief Pamela Smith notified Employee that she had accepted the AAP's Findings of Fact and Recommendation, and that Employee would be removed from employment effective April 26, 2024.[10] The AAP's findings of fact underlying its decision include: Employee has worked for Agency as a Police Officer for 16 years.[11] With regards to DRD #309-23, both in his April 3, 2024, Appeal of Final Notice of Adverse Action and before the AAP, Employee admitted to being intoxicated, driving while intoxicated, refusing to take a breathalyzer, and other facts connected to DRD 309-23. Specifically, Employee pled guilty to Charge 1, Specification 1; Charge 3 Specification 1, and all 3 Specifications of Charge 4. He pled not guilty to Charge 2, Specification 1.

With regards to DRD #481-23, Employee also admitted to many of the alleged underlying facts. Specifically, he pled guilty to Charge 2, Specification 1 and Charge 4, Specification 1. He pled not guilty to Charge 1 Specification 1 and Specification 2. He also pled not guilty to Charge 3, Specification 1.

Consequently, after receiving these and other evidence produced at the hearing, the AAP found Employee guilty of all charges and recommended the penalty of termination after considering the Douglas Factors.

In arguing that there was substantial evidence found by the AAP, Agency asserts that Employee had admitted to the facts underlying his charges. First, at the January 30, 2024, Hearing and during the investigation, Employee admitted to being intoxicated on March 17, 2023.[12] Employee admitted to MPD Internal Affairs Agent Gallagher that when he returned to work on March 18, 2023, he was aware there was a Protective Order against him but that he failed to notify his superiors.[13] Employee admitted to MPD Internal Affairs Agent Gallagher that he called Fairfax County Police Officer Nedeltchev "cerota" and admitted that this term means "piece of shit" or "motherfucker" in Spanish.[14] Employee admitted to MPD Internal Affairs Agent Gallagher and at the Hearing that his actions on March 17, 2023 were an "extremely bad" look for MPD and embarrassing to MPD.[15]

Also at the Hearing, Employee admitted he lost the right to possess and carry a

[10] AR at Tab 9.
[11] AR at Tab 8.
[12] Agency Answer, Tab 6, 8:3-7, 170:12-171:14, 172:13-16. Agency Answer, Tab 5, Exhibit 3.
[13] *Id*. at p. 10.
[14] *Id*. at p. 9-10.
[15] *Id*.; Agency Answer, Tab 6, 186:15-17.

firearm, which is a requirement of his employment.[16] Regarding the April 27, 2023, incident, Employee admitted to MPD Internal Affairs Agent Joseph LaFrance that he was charged with DUI and refusal to take a breathalyzer.[17] Employee admitted at the Hearing that as part of his plea deal, he pleaded guilty to the crime of disorderly conduct.[18] Employee admitted at the Hearing that he was drinking prior to driving his vehicle and that his performance on the field sobriety tests was such that it warranted his arrest.[19]

Employee admitted that if he had been in Officer Pak's shoes, he would have effectuated an arrest.[20] At the Hearing, Employee admitted his license was suspended for seven (7) days beginning on the date of his arrest.[21] Employee also admitted at the Hearing that his behavior placed members of the public in danger.[22] Employee admitted that Fairfax County police officers took his driver's license and returned it to him by mail after his suspension ended.[23]

Agency points out that Employee admitted to most of the charges against him during the Hearing. Specifically, he plead guilty of the following charges:

DRD# 309-23

Charge 1, Specification 1. Violation of General Order 120.21 Attachment A, 1: Intoxicated off duty.

Charge 3, Specification 1. Violation of General Order 120.21, Attachment A, 11: Conduct unbecoming for the Substantial Risk Order.

Charge 4, Specification 1. Violation of General Order 120.21, Attachment A, 24: Conduct detrimental to the reputation and good order of MPD for being identified as a District of Columbia (D.C.) police officer to Fairfax County 911 and over the Fairfax County police radio.

Charge 4, Specification 2. Violation of General Order 120.21, Attachment A, 24: Conduct detrimental to the reputation and good order of MPD for using the derogatory slang term "cerota" to describe Officer Nedeltchev and calling Officer Nedeltchev as "crazy."

Charge 4, Specification 3. Violation of General Order 120.21, Attachment A, 24: Conduct detrimental to the reputation and good order of MPD when, during an argument with his wife and in the presence of her twelve (12) year old son and her three (3) year old daughter, Employee threatened to kill his wife.

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[16] *Id*. at 186:17-187:1.
[17] Agency Answer, Tab 5, Exhibit 4 at p. 14.
[18] Agency Answer, Tab 6, 162:18-19.
[19] Agency Answer, Tab 6, 187:15-189:2.
[20] *Id*. at, 188:10-22.
[21] Agency Answer, Tab 6, 206:14-22.
[22] *Id*., at 189:3-13.
[23] *Id*. at 206:19- 207:5.

DRD# 481-23

Charge 2, Specification 1. Violation of General Order 120.21, Attachment A, 1: Intoxicated off duty.

Charge 4, Specification 1. Violation of General Order 120.21, Attachment A, 23 Conduct detrimental to the reputation and good order of MPD for consuming alcoholic beverages, driving and then being subsequently arrested by Fairfax County Police Officer Kyoung Pak in Fairfax County, Virginia for DUI.

As for the charges and specifications that Employee did not admit to, Agency points out that the AAP found Employee guilty of all charges in both cases. Agency points out that the AAP's fact findings were made based on witness testimonies and other evidence produced at its evidentiary hearing. The AAP examined the *Douglas* factors[24] and determined the appropriate penalty to be termination. The Chief of Police adopted the AAP's recommendations, and Employee was terminated effective April 25, 2024.

In his brief, Employee does not deny his conduct. Instead, he believes he should receive a less severe penalty because of his remorse at his actions, his cooperative attitude towards the cops that arrested him, his walking away from the quarrel he had with his wife to go to his cousin's house, the steps he took to address his alcohol abuse disorder, that his refusal to take a breathalyzer test was a civil and not a criminal offense, that his driving license was not suspended, and other mitigating circumstances. All of this, according to Employee, justifies a less severe penalty.

Employee testified to this effect at the AAP Hearing, but the AAP did not find that this excused Employee or found his testimony credible. Because evidence was presented and found credible by the AAP to support the charges of inefficiency and insubordination, Employee's contrary evaluation of the evidence is insufficient for me to discard the fact findings of the AAP. I defer to the AAP's fact finding and thus I find that there is substantial evidence to support the AAP's findings. Accordingly, I find that there is substantial evidence in the record to support Agency's "guilty" finding for all charges and specifications.

Whether there was harmful procedural error.

Agency asserts that it effectuated Employee's discipline wholly in adherence with applicable laws, regulations, policies and procedures. In his brief, Employee does not allege that harmful procedural error occurred in this case.[25]

Whether Agency's action was done in accordance with applicable laws or regulations.

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[24] *Douglas v. Veterans Affairs*, 5 MSPR 313 (1981).
[25] Employee brief (September 30, 2024).

Agency reiterates that its disciplinary action against Employee was wholly in accordance with applicable policies and procedures. Agency adds that its chosen penalty of termination is appropriate on the grounds that it was made after a thorough "*Douglas* factors" analysis[26] and is within the acceptable range of discipline under the District Personnel Regulations.

It is uncontroverted that Agency considered the *Douglas* factors when determining Employee's penalty.[27] However, Employee counters by saying that Agency did not follow applicable laws or regulations when it incorrectly applied the *Douglas* factors analysis by failing to consider mitigating circumstances. Employee states that Agency mischaracterizes his actions when it labeled them as aggravating when they should actually be deemed as mitigating. Employee then provided several reasons for his argument. He indicated that if Agency had not performed such a perfunctory analysis of the *Douglas* factors, it would have realized that a lesser penalty was appropriate.

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[26] In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth "a number of factors that are relevant for consideration in determining the appropriateness of a penalty." Although not an exhaustive list, the factors are as follows:

> 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
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> 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
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> 3) the employee's past disciplinary record;
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> 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
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> 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
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> 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
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> 7) consistency of the penalty with any applicable agency table of penalties;
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> 8) the notoriety of the offense or its impact upon the reputation of the agency;
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> 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;
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> 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
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> 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[27] AR at Tab 7. AAP Findings and Recommendation.

The OEA may overturn the agency decision only if it finds that the agency "failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness."[28] "Not all of [the *Douglas*] factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the [petitioner's] favor while others may not or may even constitute aggravating circumstances."[29] Although the OEA has "'marginally greater latitude of review' than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate."[30] The "primary discretion" in selecting a penalty has been entrusted to agency management.[31]

> Selection of an appropriate penalty must ... involve a responsible balancing of the relevant factors in the individual case. The OEA's role in this process is not to insist that the balance be struck precisely where the OEA would choose to strike it if the OEA were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the OEA's review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the OEA finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the OEA then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.

Id. (quoting *Douglas*, 5 M.S.P.R. at 300) (internal quotations marks and bracketing omitted).

The D.C. Superior Court noted that *Douglas* outlines the factors that must be considered but it does not require a certain level of consideration be devoted to each factor.[32] I find that Employee's objections to the AAP's *Douglas* factor analysis are simply disagreements with the AAP's evaluation of said factors in his case. There is no requirement that the Agency must conform its *Douglas* factor analysis to Employee's satisfaction.

I note that Employee does not deny that Agency weighed the *Douglas* factors in determining his penalty; rather, Employee disagrees with the way Agency weighed the *Douglas* factors. In Employee's view, Agency should have considered the factors in a way that wholly rebounds to his benefit, without regard to other considerations that reflect upon Agency's ability to achieve its mission. I therefore find Employee's objections does not indicate that Agency failed to follow the appropriate regulations and policies.

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[28] *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985).
[29] *Douglas, supra*, 5 M.S.P.R. at 306.
[30] *Stokes*, 502 A.2d at 1011 (citing *Douglas*, 5 M.S.P.R. at 300).
[31] *Id*.
[32] *Eugene Goforth v. Office of Employee Appeals, et. al.,* Case No. 2020 CA 005084 (D.C. Super. Ct. July 9, 2021).

Any review by this Office of an agency decision of selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[33] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."[34] 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."[35]

In its brief, Agency states that its chosen penalty for the charges it found substantiated is consistent with its Table of Penalties.[36] The penalty for the first offense for violations of Agency's Tier 4 General Orders indicate removal.[37] Since the AAP found that Employee was guilty of four Tier 4 violations, Agency argues that its penalty for Employee's misconduct should be upheld.

In this matter, the record shows that Agency's decision was based on a full and thorough consideration of the nature and seriousness of the offense, as well as any mitigating factors present. I find that Agency exercised its primary responsibility for managing and disciplining its workforce by electing to terminate Employee for his actions which demonstrated several instances of neglect of duty and insubordination. For the foregoing reasons, I conclude that Agency's decision to select removal as the appropriate penalty for Employee's infractions was not an abuse of discretion and should be upheld.

ORDER

It is hereby ORDERED that Agency's action of removing Employee is UPHELD.

FOR THE OFFICE: /*s/Joseph Lim, Esq.*
JOSEPH E. LIM, ESQ.
Senior Administrative Judge

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[33] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).
[34] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).
[35] *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).
[36] Agency brief (August 30, 2024).
[37] *Id*.