

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
JAMES PEGUES,)	OEA Matter No. 1601-0126-09
Employee)	
)	Date of Issuance: October 1, 1010
)	
)	Joseph E. Lim, Esq.
D.C. FIRE & EMERGENCY MEDICAL)	Senior Administrative Judge
SERVICES DEPARTMENT,)	
Agency)	
_____)	

Lathal Ponder, Esq., Employee Representative
Thelma Chichester, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

James Pegues (“Employee”) filed a petition for appeal with this Office on May 29, 2009. Employee is a firefighter with the D.C. Fire & Emergency Medical Services Department (“Agency”). Employee is appealing an Agency Trial Board decision to suspend him for 120 hours.

On November 30, 2009, I was assigned to this case. At a Prehearing Conference on February 19, 2010, both parties agreed that this matter will be decided pursuant to a *Pinkard* analysis. Based on the decision in *District of Columbia Metropolitan Police Dep’t v. Pinkard*, 801 A2d. 86 (D.C. 2002), this Office is limited to reviewing the record established in the trial board’s hearing and determining whether the decision by the Trial Board was supported by substantial evidence, whether there was harmful procedure or whether it was in accordance with applicable law or regulation. *Pinkard*, 801 A2d. at 91. During this Prehearing Conference, both parties agreed to submit legal briefs on the sole issue of whether the Fire Trial Board’s decision should be upheld or overturned. Both parties have submitted their briefs and the record is now closed.

JURISDICTION

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

ISSUES

Whether the Agency's decision to suspend Employee for 120 hours, as based on the Trial Board's recommendation, was: (1) supported by substantial evidence; (2) whether Agency committed harmful procedural error, or (3) whether the decision was in accordance with applicable laws or regulations.

Undisputed Facts

On November 5, 2007, Engine 25 and Engine 32 responded to a box alarm at the 400 block of Newcomb Street, S.E. Washington, D.C. Employee was the driver of Engine 25 for this particular service call. Sergeant Daniel McCoy ("McCoy") was the officer in charge of Engine 32. As McCoy exited the building at the scene, he made a comment regarding the layout and operations of Engine 25. This comment was overheard by another firefighter, who in turn, informed Employee about the comments made by McCoy. Employee then requested to speak with McCoy concerning his remarks. The severity and nature of these remarks vary according to statements given by witnesses. After being approached by Employee, McCoy approached Employee's superior, Lieutenant Linwood Johnson (Lt. Johnson), and indicated that he was threatened by Employee's words.

Employee's suspension was a result of the following charges:

- | | |
|---------------|--|
| Charge 1 | Violation of Article VII, Section 2.2 of the District of Columbia Fire and EMS Department Order Book which states in part, "Any on-duty act or omission that interferes with the efficiency or integrity of government operations." Specifically, Firefighter Pegues violated Article VI, Section 5 of the Rules and Regulations which state in part: "Members shall...refrain from the use of harsh, violent, abusive, coarse or insolent language..." This misconduct is defined as cause in 6 DCMR, Section 1603.3. |
| Specification | Employee allegedly used profane language during a verbal altercation with Sergeant Daniel McCoy. |
| Charge 2 | Violation of Article VII, Section 2.2 of the District of Columbia Fire and EMS Department Order Book which states in part, "Any on-duty act or omission that interferes with the efficiency or integrity of government operations." Specifically, Firefighter Pegues violated Article VI, Section 5 of the Rules and Regulations which state in part: "Members shall...be respectful and obedient to their superior officers..." This misconduct is defined as cause in 6 DCMR, Section 1603.3. |
| Specification | During a verbal altercation with Firefighter Pegues, on November 5, 2007, Sergeant McCoy felt threatened by the words and actions of Firefighter Pegues, and thereafter, reached for the microphone |

on his portable radio so that he could summon help. Firefighter Pegues then allegedly went to Engine 25's apparatus and retrieved his portable radio and made gestures mocking Sergeant McCoy's actions.

Charge 3 Violation of Article VII, Section 2.2 of the District of Columbia Fire and EMS Department Order Book which states in part, "Any on-duty act or omission that interferes with the efficiency or integrity of government operations." Specifically, Firefighter Pegues violated Article VI, Section 5 of the Rules and Regulations which states in part: "Members shall...refrain from unnecessary altercations..." This misconduct is defined as cause in 6 DCMR, Section 1603.3.

Specification On November 5, 2007, while on response in the 400 block of Newcomb Street, S.E., Firefighter Pegues, who was driving Engine 25, alleges that Sergeant McCoy, the officer of Engine 32, made disparaging remarks about Engine 25's crew. Firefighter Pegues felt slighted by the alleged remarks and confronted Sergeant McCoy directly, opposed to going and speaking with the officer of Engine 25, Lieutenant Linwood Johnson. In confronting Sergeant McCoy, Firefighter Pegues allegedly used profane language and mocking gestures.¹

The Trial Board for Agency found Employee guilty on charges two (2) and three (3) and imposed a 120-hour suspension. Employee was found not guilty on charge one. Employee has appealed his suspension on the grounds that: (1) the evidence presented at the Trial Board indicated that he was not guilty of any of the charges; (2) Agency violated its own rules and regulations in administering punishment and; (3) Agency failed to take any corrective action against individuals that knowingly committed perjury at the Trial Board.²

Agency's Position:

After Employee sought to speak with Sergeant McCoy about his alleged remarks, a verbal altercation ensued. Agency characterizes Employee's exchange of words with McCoy as a one sided verbal altercation led by Employee. Employee made several comments to McCoy in defense of Engine 25's operations. After hearing these comments, McCoy approached Lt. Johnson in hopes of defusing the situation and indicated that Employee had threatened him.

Employee disagreed with McCoy's characterization to Lt. Johnson of the situation and continued to spew his vulgarities at McCoy. Agency also alleged that Employee spat on McCoy during this verbal altercation. Concerned about these vulgarities, McCoy backed away from Employee, and clutched his microphone in the event of an emergency. Seeing this, Employee allegedly grabbed his radio from the apparatus and began to mock McCoy.³

¹ The specification of each charge has been summarized in an objective fashion.

² *Petition for Appeal*, p. 3 (May 29, 2009).

³ Agency's Brief, p. 2

Employee's Position: Employee was placed on suspension for a total of 120 hours after a Trial Board hearing. Employee contends that the evidence during this hearing clearly indicated that he was not guilty of the charges brought against him. Employee denies all allegations made by Agency. Employee was told by a member of Truck 8 that McCoy stated "Engine 33 should respond to all of Engine 25's calls because the company doesn't know where they're going."⁴ Employee stated he felt professionally slighted by McCoy's comments. After McCoy agreed to speak with Employee, Employee stated that "the negative comments regarding Engine 25's performance were slanderous, inflammatory, and unwarranted."

He also stated that if McCoy had anything to criticize Engine 25 about, then he would prefer to hear it from McCoy directly instead of his causing conflict, slander and gossip between members of the companies.⁵ Employee stated that McCoy became visibly upset after he voiced his concerns to him. He also claims that the spitting accusations are false and offers to clarify this particular matter. Employee said during the verbal exchange, his mouth became dry at which time he spat on the ground. Employee also claims that McCoy is exaggerating his statements and continuously creating a hostile work environment towards him. Employee was unable to give his account of the incident to anyone in management at the Agency, and he was eventually placed on administrative leave.

Employee further alleges that Agency violated its own rules and regulations in administering punishment and that the suspension was far more than the regulations allowed. Lastly, Employee alleges that Agency failed to take corrective action against those who knowingly committed perjury at the Trial Board.⁶

Summary of Material Testimony Received During The Trial Board Proceedings

Agency's Case:

Captain Gary Danley ("Danley"): (Transcript Vol. I, Pages 19-38). Captain Danley testified that he received a phone call from McCoy regarding the incident between Employee and McCoy. Danley was also told that McCoy was possibly spit upon. Danley ordered all members of Engine 32 to submit special reports concerning the incident. He also spoke with the Lt. Johnson of Engine 25 and informed him that he needed special reports from everyone regarding the verbal exchange between Employee and McCoy. Danley ordered that Employee be removed from the apparatus and placed on administrative leave; his rationale was that the severity of the situation called for Employee to be removed from his current duties. No one else was removed in connection with this incident. When Employee told Danley that he knew why he was being placed on leave, Danley did not respond. Danley simply reiterated that everyone was to submit special reports to him. Ultimately, Danley received an account of the events from McCoy in person, and a special report from Employee.

⁴ Special report by FF Pegues.

⁵ *Id.*

⁶ *Petition for Appeal*

Firefighter Dominic Nicholson (“Nicholson”) (Transcript Vol. I, pages 40-98). Nicholson did not see Employee mimic McCoy with his microphone. He also testified that he never saw McCoy react to Employee’s comment nor argue back with Employee. Nicholson confirmed that he heard Employee call McCoy several derogatory terms, including “fag” and “pussy.” Nicholson felt Employee was showing company pride when he went to confront McCoy about the negative remark about engine 25. He testified that he did not feel as if any threats were made during the verbal exchange.

Firefighter Matthew Smith (“Smith”) (Transcript Vol. I, pages 100-116). Smith saw Employee approach McCoy and asked to speak with him. He testified that an argument ensued. He heard curse words and rude language from Employee, but not McCoy. His testimony also provides that McCoy was calm and never lost his temper. Smith did not see a spitting incident.

Lieutenant Linwood Johnson (Transcript Vol. I, pages 212-245). Johnson testified that he saw McCoy put his hand up to his radio microphone as if to make a transmission. He also testified that Employee said “I have a radio” and went to retrieve his radio. Johnson also acknowledged the incident that surrounded closing the gate that involved Employee and McCoy that may have lead up to some tension between the two prior to this incident. Johnson stated that he has heard discussions like this between an officer and firefighter before during his 22 year tenure at the Fire Department and ranked this discussion as a 4 on a scale of 1-10 (10 being the worst). Johnson testified that Employee asked to speak with Chief Geoffrey Gambo about the incident on November 6, but he was told he would have to speak with the battalion chief, Captain Danley. Danley had already denied Employee’s request for a conference. There were at least two occasions when Employee asked through the chain of command to give his side of the story concerning the incident on November 6, 2007, but both were denied.

Firefighter Daniel McCoy (“McCoy”) (Transcript Vol. II, pages 252-454). McCoy gave an account of the events that is similar to most of the witnesses for Agency. After being approached by Employee about his comments, he went to Lt. Johnson to let him know he felt threatened. McCoy testified that Lt. Johnson did nothing to defuse the situation. McCoy indicated to Johnson that Employee spit on him and that he was calling the Metropolitan Police Department (MPD) to report the incident. While leaving the scene of the fire and incident, McCoy stated Employee blew kisses to him in a mocking fashion. McCoy also acknowledged the gate incident that drew tension between Employee and McCoy. McCoy also testified to other instances that drew tension between the two.

Firefighter Rodney Taylor (“Taylor”) (Vol. II, Transcript pages 459-470). Taylor had a conversation with McCoy in which McCoy appeared to be upset with how Company 25 was operating its layout. Taylor then informed all the members of company 25 about McCoy’s comments, including Employee.

Firefighter Keanne Arnette Jackson (“Jackson”) (Transcript Vol. II, pages 473-481) Jackson testified about the gate incident between McCoy and Employee. He heard McCoy make statements that led him to believe there was tension between McCoy and Company 25. This tension extended to Employee and existed prior to the November 5, 2007, incident.

Firefighter Christopher Cunningham (Transcript Vol. III, pages 6-55) Cunningham testified that he saw Employee approach McCoy in an aggressive manner. He also heard Employee use vulgarities towards McCoy. He did not witness the incident for longer than five minutes. Cunningham had been on the service for four years and had never seen any other unprofessional acts.

Employee's Case:

Firefighter Bradley Nesbitt ("Nesbitt") (Transcript Vol. I, pages 175-211). Nesbitt testified that they were coming from a fire when he heard a verbal argument between Employee and McCoy. Nesbitt stated that he did not hear any language that could be considered rude. He also stated that he did not believe McCoy was a fair person; however, he did not have any specific examples to support this statement. Nesbitt also testified that he did not hear Employee use any foul language. Nesbitt further testified about the incident in which Employee's bunk room was trashed and stated that he suspected McCoy had something to do with it but did not offer anything further to support these allegations.

Firefighter Jadonna Sanders ("Sanders") Transcript Vol. I, pages 127-171). Sanders did not consider the incident an argument, but rather Employee expressing his concerns about the way McCoy treated him and his company. She never saw Employee imitating McCoy with his radio. She also testified that she was aware of some previous negative history between Employee and McCoy. Specifically, she testified that she was told McCoy has previously tried to put Employee on charges. One incident described was when McCoy asked Employee to close a gate at the station in which Employee felt he was being singled out. Sanders also described an instance when McCoy instructed Employee not to move the vehicle until he put his seat belt on. While Sanders acknowledged this was proper protocol, she stated that McCoy did not enforce this policy with others. She described another incident when Employee's bunk room was trashed and toilet paper was thrown on his bed. Sanders also acknowledged that this claim against McCoy can not be substantiated but only alleged. She also said McCoy made unprofessional comments about Employee and firefighter Nesbitt. Sanders said she never heard Employee use any profanity or inappropriate language during the verbal discussion with McCoy.

Deputy Chief Geoffrey Grambo (Transcript Vol. III, page 55-95). Deputy Chief Grambo testified that he did not interview or speak with Employee about the incident. Grambo in fact did not speak to anyone from Engine 25 prior to making his determination that Employee should face a Fire Department Trial Board. He made this recommendation based on the incident as described by McCoy and other firefighters of Engine 32. However, he did not interview Employee. Grambo justified this move based on his 30 years of experience interviewing people. He believed Engine 32's special reports to be more credible than that of Engine 25's because of their length.

Lieutenant Bernard Roach ("Lt. Roach") (Transcript Vol. III, pages 96-131). Diversity and EEO Office for the D.C. Fire Department for 18 years, Lt. Roach testified that he was aware of some previous tension between Employee and McCoy arising from the gate incident. He stated that Employee came to him on three different occasions to get the tension between himself and McCoy resolved. He testified that he felt that Employee and Lt. Johnson should not have

been detailed to the Facilities Management as no other members of Engine 32 were detailed there. Management initially put in a request for termination of Employee but rescinded it.

Captain Alan Noznesky (Transcript Vol. III, pages 131-135). Noznesky testified to Employee's truthfulness and of his high level of respect for him.

Captain Gerald Blanks (Transcript Vol. IV, pages 4-18). Blanks testified that when he heard Chief Grambo ask Lt. Johnson if he wanted his special report to remain as he had originally written it, he got the notion that Grambo wanted Johnson to change his statement of facts. He was also aware of the previous tension between Employee and McCoy.

Lieutenant Thomas Rinker (Transcript Vol. IV, pages 18-22). Rinker testified that he never had any problems with Employee and considered him a good employee. He also testified that McCoy was a nice guy.

Firefighter James Pegues ("Employee") (Transcript Vol. IV, pages 22-225). Employee testified that the first time he introduced himself to McCoy, McCoy did not seem to be very welcoming towards him. Employee also testified to the incidents that he feels led to the deterioration of his relationship with McCoy. He also talked about incidents when McCoy enforced the seat belts rules more so when he was the driver. Employee believed McCoy was harassing him.

As for the night in question, Employee said he took offense when McCoy told another firefighter that Engine 25 was going to get somebody killed. He felt this statement was a bit over the top. Employee stated that McCoy antagonized the situation in that he did not leave the scene once they completed their duties while Engine 25 still had to rack their hose. Employee vehemently denies spitting on McCoy. The spitting comments and the comments regarding getting someone killed by McCoy pushed him over the edge. Employee also testified that his 5-month detail assignment at Facilities Maintenance was demeaning and felt like punishment.

He also testified that he received papers that he could be terminated prior to being interviewed by anyone. He felt that you should not put someone on charges and then investigate. Employee feels that he has already been reprimanded by being detailed out of his division and losing over 48 hours of holiday pay.

FINDINGS OF FACTS, LEGAL ANALYSIS, AND CONCLUSIONS ON LAW

In *D.C. Metropolitan Police Department v Pinkard*, 801 A.2d, 86, the District of Columbia 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* hearings in all matters before it. Although the *Pinkard* case was initiated by the Metropolitan Police Department, because there is a precluding collective bargaining agreement negotiated between Employee's union and Agency, the holding likewise applies to Fire Trial Board proceedings. According to the Court:

On this appeal from the Superior Court, the MPD contends (1) that an evidentiary hearing before the OEA administrative judge was precluded by a collective

bargaining agreement between the MPD and the Fraternal Order of Police, a labor union to which Pinkard belongs, [and] (2) that the OEA administrative judge abused her discretion in ordering a second [and *de novo*] evidentiary hearing. .

As a general rule, this court owes deference to an agency's interpretation of the statute under which it acts. There is, however, an exception to this general rule, which is that we will not defer to an agency's interpretation if it is inconsistent with the plain language of the statute itself. This case falls within the exception because the OEA's reading of the [Comprehensive Merit Personnel Act or CMPA] is contrary to its plain language and inconsistent with it. We therefore hold that, under the statute, the collective bargaining agreement controls and supersedes otherwise applicable OEA procedures, and consequently, that the OEA administrative judge erred in conducting a second hearing.

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.

Agency contends, however, that this seemingly broad power of the OEA to establish its own 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]. . . .

It is of course correct that a collective bargaining agreement, standing alone, cannot dictate OEA procedures. 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 (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 the 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 procedures outlined in the collective bargaining agreement, namely, that the appeal to the OEA "shall be based solely on the record established in the [trial board] hearing", controls in Pinkard's case.

The OEA may not substitute its judgment for that of an agency. Its review of the agency decision in this case, the decision of the trial board 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, 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 trial board.

See *Pinkard* at 90-92. (citations omitted).

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

1. The appellant (Employee) is an employee of either the Metropolitan Police Department, or the D.C. Fire & Emergency Medical Services Department;
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.*, Trial Board] 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 a Trial Board 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 (employee's removal, suspension, demotion, or personal performance rating) or a reduction-in-force.

I find that all of these conditions are met in this matter. Thus, according to *Pinkard*, my review of the final Agency decision to impose a suspension upon Employee is limited “to a determination of whether [the final Agency decision] was supported by substantial evidence,”⁷

⁷ According to OEA Rule 629.3, 46 D.C. Reg. 9317 (1999), an agency has the burden of proof in adverse action appeals. Pursuant to OEA Rule 629.1, *id.*, that burden is by “a preponderance of the evidence”, which is defined as “[t]hat 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.” In *Pinkard*-type cases previously decided by this Office (including the initial decision in *Pinkard* itself that resulted from the remand), we have held that there must be substantial evidence to meet the agency's preponderance burden. See, *e.g.*; *Hibben, supra*; *Davidson, supra*; *Kelly, supra*; *Pinkard v. Metropolitan*

whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations.”⁸ Further, I “must generally defer to the agency’s credibility determinations.”⁹ My review is restricted to “the record made before the trial board.”¹⁰

The Trial Board unanimously determined that Employee was not guilty of the Charge 1. However, the Trial Board found Employee guilty of Charges 2 and 3.

1. Whether the Trial Board’s findings were supported by 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.”¹¹ 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.”¹²

Based on my review of the four days of testimony during the Fire Trial Board Hearing, I find that the Trial Board’s findings are supported by substantial evidence. Several witnesses had testified to Employee’s hostile, abusive, and aggressive attitude towards Sergeant McCoy.

2. Whether Agency committed harmful procedural error.

After a thorough examination of the record, I find that there was no substantive procedural error by the Fire Trial Board. At the trial board hearing, Employee was represented by counsel and was able to confront the witnesses against him. Thus, he got due process throughout the proceedings.

3. Whether the decision was in accordance with law or applicable regulations.

Employee contends that Agency violated its own rules and regulations in administering punishment.¹³ Specifically, Employees believes the 120-hour suspension was far more than the regulations allowed.¹⁴ The misconduct described in the charges against Employee call for an appropriate action of suspension for up to 15 days or 120 hours pursuant to the *Table of Appropriate Penalties*.¹⁵ Therefore, I conclude that Agency did not violate its rules or regulations in administering punishment.

Police Department, OEA Matter No. 1601-0155-87R02 (December 20, 2002), D.C. Reg. __ (); *Bailey v. Metropolitan Police Department*, OEA Matter No. 1601-0145-00 (March 20, 2003), D.C. Reg. __ ().

⁸ See *D.C. Metropolitan Police v. Pinkard*, 801 A.2d 86, at 91.

⁹ *Id.*

¹⁰ *Id.* at 92.

¹¹ *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)).

¹² *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).

¹³ Petition for Appeal at 3

¹⁴ *Id.*

¹⁵ DPM § 1619.1, Section 7

Based on my analysis of the Trial Board's hearing, I must affirm the Agency's decision to suspend Employee for a total of 120 hours.

ORDER

It is hereby ORDERED that Agency's decision to suspend Employee for 120 hours is UPHELD

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge