Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
CHARLES ANTHONY, Employee	
	OEA Matter No.: 1601-0051-18
v.	
	Date of Issuance: November 18, 2020
METROPOLITAN POLICE DEPARTMENT, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Charles Anthony ("Employee") worked as a Police Officer with the Metropolitan Police Department ("Agency"). On September 8, 2017, Agency issued a Notice of Proposed Adverse Action charging Employee with violation of General Order ("GO") Series 120.21, Attachment A, Part A-8 (Inefficiency)[1]; violation of GO Series 120.21, Attachment A, Part A-23 (Refusal/Failure to Submit to Urinalysis or Breathalyzer Testing)[2]; violation of GO Series 120.21, Attachment A, Part A-16 (Failure to Obey Orders)[3]; and violation of GO Series 120.21,

[1] Charge No. 1 contained one specification based on Agency sustaining three adverse actions against Employee within a twelve-month period for failure to obey orders; untruthful statements; and on-duty consumption of alcohol.
[2] Charge No. 2 contained one specification based on a May 11, 2017 incident wherein Employee failed to submit to a breathalyzer test at the Police & Fire Clinic as directed.
[3] Charge No. 3 contained one specification based on Employee's failure to check out of the Police & Fire Clinic as required by Agency's policy related to check-out procedures.

Part A, A-5 (Insubordination)[4]. On January 25, 2018, Agency's Adverse Action Panel ("Panel") held an administrative hearing. The Panel concluded that Employee was guilty of Inefficiency, Failure to Submit, and Failure to Obey Orders.[5] The Panel found Employee to be not guilty on the charge of Insubordination. As a result, it recommended that Employee be terminated. On March 7, 2018, Agency issued its Final Notice of Adverse Action, terminating Employee. He subsequently filed an appeal with the Chief of Police on March 16, 2018. The appeal was denied on April 4, 2018.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on June 8, 2018. In his appeal, Employee argued that Agency's termination action was arbitrary and capricious; unsupported by substantial evidence; and not in accordance with the law. Therefore, he requested to be reinstated with back pay, benefits, and attorney's fees.[6] Agency filed its answer on July 10, 2018. It denied Employee's allegations and requested an oral hearing on the merits.[7]

The matter was assigned to an OEA Administrative Judge ("AJ") in December of 2018. On December 12, 2018, the AJ issued an order convening a prehearing conference.[8] During the conference, the AJ determined that the Collective Bargaining Agreement ("CBA") between Employee's union and Agency, as well as the holding in *Pinkard v Metropolitan Police Department*, 801 A.2d 86 (D.C. 2006), precluded a *de novo* hearing.[9] Thus, the parties were

[4] Charge No. 4 contained one specification based on Employee's willful refusal to respond to the lab for a breathalyzer test as directed by Police & Fire Clinic doctor, Mary Kenel.
[5] *See Agency Brief* at 6.
[6] *Petition for Appeal* (June 8, 2018).
[7] *Agency Answer to Petition for Appeal* (July 10, 2018).
[8] *Order Scheduling Status/Prehearing Conference* (December 12, 2018).
[9] Under the holding in *Pinkard*, 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 is an employee of 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

ordered to submit written briefs addressing whether Agency's termination action was supported by substantial evidence; whether Agency committed a harmful procedural error; and whether Employee's termination was taken in accordance with all applicable laws, rules, and regulations.[10]

In its brief, Agency argued that each charge against Employee was supported by substantial evidence. Regarding the Inefficiency charge, Agency stated that Employee's disciplinary action reflected three prior adverse actions within a twelve-month period.[11] Agency stated that under GO 120.21, A-8, three sustained adverse actions within a twelve-month period constituted *prima facie* evidence of inefficiency. Additionally, Agency opined that Employee's pattern of misconduct undermined the Department's ability to rely upon him. As it related it the Refusal to Submit charge, Agency contended that Employee was directed to submit to a Breath Alcohol Test ("BAT") at the Police and Fire Clinic ("PFC") on May 11, 2017, but refused to do so and left the clinic. It explained that Employee provided untruthful statements during the Panel hearing and that the testimony of PFC physician, Dr. Mary Kenel ("Dr. Kenel"), was credible in establishing that Employee refused to submit to the BAT after being directed to do so.[12]

Concerning whether Agency committed a harmful procedural error, Agency stated that it acted in accordance with D.C. Code § 5-1031 (2015), commonly referred to as the ("90-day rule"), which establishes a time limit for initiating adverse actions against employees. It argued that the issuance of the Notice of Proposed Adverse Action in this case did not violate the 90-day

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essentially the same as that found in *Pinkard*; 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 being taken against Employee.

[10] *Post-Prehearing Conference Order* (January 15, 2019).

[11] Failure to Obey Orders and Directive of the Chief of Police, Incident Summary No. 13-0003642, Penalty – 15 days SWOP/2 days held in abeyance, Disposition Date: 9/2/2016; Untruthful Statements, Incident Summary No. 15-003235, Penalty – 15 days SWOP, Disposition Date: 3/24/2017; On-Duty Alcohol (Report to PFC Under Influence), Incident Summary No. 13-003074, Penalty – 15 days SWOP, Disposition Date: 3/24/2017.

[12] *Agency Brief* (April 26, 2019).

rule. Agency stated that it does not generally charge an officer with inefficiency based solely on three instances of adverse actions within a twelve-month period and that it will only include a charge of inefficiency if the officer is subsequently charged with an additional act of misconduct. It opined that the ninety-day clock began to run in this case when the Internal Affairs Division ("IAD") generated an Incident Summary ("IS") number for the offenses that occurred the day that Employee left the PFC without submitting to a BAT. Since the IS number for the inefficiency charge was generated on May 11, 2017, and the Notice of Proposed Adverse Action was issued on September 8, 2018, Agency submitted that it did not violate D.C. Code § 5-1031 because the notice was issued eighty-three days after it was notified of the act or occurrence allegedly constituting cause. Alternatively, Agency suggested that even if it violated the 90-day rule with respect to the Inefficiency charge, Employee's guilty findings with respect to the remaining charges were independently sufficient to warrant his removal. Finally, Agency submitted that termination was the appropriate penalty under the Department's Table of Offenses and Penalties and an analysis of the *Douglas* factors.[13] As a result, it requested that the AJ

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[13] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

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

dismiss Employee's Petition for Appeal.[14]

In his brief, Employee contended that Agency violated the 90-day rule because it initiated the Inefficiency charge in an untimely manner. It stated that Agency had notice of the three sustained adverse actions as of March 24, 2017, when the third adverse action was sustained. Thus, he reasoned that under D.C. Code § 5-1031, the 90-day clock commenced on March 24, 2017 and that Agency's Advanced Notice of Proposed Adverse Action was issued beyond the ninety-day statutory period. Consequently, Employee opined that Agency was time barred as to all of the charges against him. Additionally, he argued that the Inefficiency and Refusal to Submit charges were not supported by substantial evidence. Lastly, Employee reasoned that the penalty of termination was not in accordance with the *Douglas* factors. Therefore, Employee asked that Agency's termination action be reversed.[15]

The AJ issued an Initial Decision on August 26, 2019. She held that the D.C. Court of Appeal's ruling in *Pinkard* limited OEA to determining whether Agency's decision was based on substantial evidence; whether Agency committed a harmful procedural error; and whether Agency's adverse action was taken in accordance with all applicable laws, rules, and regulations.

Concerning the substantial evidence requirement, the AJ concluded that Agency met its burden of proof in establishing that each charge and specification against Employee was supported by the record. Regarding whether Agency committed a harmful procedural error, the AJ highlighted D.C. Code § 5-1031, which requires that disciplinary actions be commenced within ninety days of when an agency or personnel authority knew or should have known of the misconduct allegedly constituting cause. The AJ agreed with Employee's argument that Agency

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matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[14] *Agency Brief* (April 26, 2019).

[15] *Employee Brief* (August 12, 2019).

violated the 90-day rule with respect to Charge No. 1 because the Notice of Proposed Adverse Action for the Inefficiency charge was served in an untimely manner. She explained that Employee was charged with Inefficiency following the May 11, 2017 incident wherein he left the PFC without submitting to a BAT. Since Employee had three previously sustained adverse actions within a twelve-month period, Agency assessed an additional charge of Inefficiency. The AJ stated that the date of Employee's last adverse action was March 24, 2017. Thus, she opined that the ninety-day period for the current Inefficiency charge under D.C. Code § 5-1031 was triggered on March 24, 2017. Since Employee did not receive notice of the proposed charge until September 8, 2017, 116 business days after the third sustained adverse action, the AJ held that Agency was in violation of the 90-day rule with respect to Charge No. 1.[16]

As it related to the Refusal to Submit and Failure to Obey Orders, the AJ concluded that both charges were supported by substantial evidence. She reasoned that based on the Panel's hearing transcript and the documents of record, it was uncontroverted that Employee left the PFC on May 11, 2017 without submitting to a BAT as directed by Dr. Kenel. Moreover, the AJ provided that Employee failed to notify PFC staff that he was leaving the clinic without taking the test. As a result, she determined that the administrative record supported a finding that Charge No. 2 and Charge No. 3 were administered in accordance with all applicable laws, rules, and regulations, and that Agency did not violate the 90-day rule as it related to the aforementioned charges.[17]

Lastly, regarding whether the penalty of termination was appropriate under the circumstances, the AJ held that, notwithstanding Agency's violation of the 90-day rule for the Inefficiency charge, termination was a permissible penalty with respect to the Refusal to Submit

[16] *Initial Decision* (March 12, 2020).
[17] *Id*.

and Failure to Obey Orders charges. Citing to the holding in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), she noted that OEA was tasked with determining whether the penalty was within the range allowed by law, regulation, and any table of penalties prescribed in the District Personnel Manual ("DPM"). The AJ provided that Agency relied on an analysis of the relevant *Douglas* factors in reaching its decision to terminate Employee. Additionally, she explained that Agency's Table of Offenses and Penalties provided that the penalty for a first offense for Failure to Obey Orders was reprimand to removal, and that the sole penalty for Refusal to Submit was removal. Since Agency was permitted to terminate Employee for each charge, the AJ held that Agency properly exercised its managerial discretion in selecting the penalty. Consequently, Agency's termination action was upheld.[18]

Employee disagreed with the Initial Decision and filed a Brief in Further Support of Petition for Review with the OEA Board on June 19, 2020.[19] He argues that the Initial Decision was based on erroneous interpretation of regulation, policy, and law; the AJ failed to properly address all issues of fact and law raised on appeal; the AJ's findings were not based on substantial evidence; and that the penalty of termination was unreasonable. Specifically, Employee contends that his conduct at the PFC on May 11, 2017 did not constitute a refusal to submit to a BAT. He avers that the Initial Decision fails to discuss how the penalty of termination was reasonable and states that the AJ neither identified nor discussed the relevant *Douglas* factors relied upon by Agency in reaching its decision to terminate him. According to Employee, Agency's Table of Penalties only serves as a recommendation and he opines that evidence of mitigation should have been taken into consideration in order to reach a reasonable

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[18] *Id.*

[19] Employee previously filed a Petition for Review and Motion for Extension of Time to Submit a Statement of Reasons for Appealing the Initial Decision on April 16, 2020. Agency filed an Answer to Employee's motion on June 1, 2020.

penalty. Therefore, Employee requests that the Board grant his Petition for Review.[20]

In response, Agency maintains that each of the charges against Employee is supported by substantial evidence. It disagrees with Employee's argument that he did not refuse to submit to the BAT on May 11, 2017. According to Agency, his conduct at the PFC constituted a violation of GO 120.21, A-23. It reiterates that the AJ properly upheld the penalty because the Panel provided an appropriate analysis of the *Douglas* factors and because termination was within the range of allowable penalties. Thus, it requests that Employee's Petition for Review be denied.[21]

Substantial Evidence

On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[22]

Charge No. 2 (Failure to Submit)

Employee argues that the AJ erroneously concluded that his conduct at the PFC on May 11, 2017 demonstrated a refusal to submit to the BAT. He believes that the AJ failed to establish that Agency demonstrated substantial evidence to sustain Charge No. 2 for Failure to Submit and that the Initial Decision only cited to procedural evidence to support her conclusions. Conversely, Agency contends that despite Employee's admission that Dr. Kenel directed him to take the BAT; he instead left the PFC without signing out or notifying anyone of his departure. It

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[20] *Petition for Review* (June 19, 2020). Employee notes that Charge No. 2, Specification No. 1 is the only charge left to challenge on appeal, as the AJ dismissed Charge No. 1, and Employee pled guilty to Charge No. 3.
[21] *Supplemental Answer to Employee's Petition for Review* (July 31, 2020).
[22] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

maintains that the AJ properly reviewed the relevant documentary and testimonial evidence, ultimately agreeing that the Failure to Submit charge was supported by the record. This Board agrees and concludes that the AJ's finding that Employee's actions at the PFC constituted a failure to submit to a BAT is supported by substantial evidence.

The AJ provided a reasoned consideration of the material facts and issues in her assessment of each charge.[23] As it relates to Employee's argument that the Panel "completely ignored the record evidence which proves that Officer Anthony was not willfully and knowingly refusing to submit to a breathalyzer test, but rather, responding to a family emergency," the AJ stated the following:

> Upon review of the Adverse Action Panel transcript, the briefs and other evidence submitted in the record, I find that it is uncontroverted that Employee left the PFC…without taking the BAT as directed by Dr. Kenel. The undersigned finds that the record shows that Employee did not follow up immediately upon leaving the clinic nor did he notify any staff or Dr. Kenel that he was leaving without taking the test. Additionally…Employee's wife did not testify at the Adverse Action Panel hearing, nor was there any additional documentation or paperwork presented to the [P]anel to attest to the emergency or otherwise.[24]

Further, the AJ noted that the Panel was engaged during the hearing and made appropriate and detailed inquiries regarding the evidence that was presented.

This Board finds that the AJ provided a detailed synthesis of the Panel hearing transcript and thoroughly reviewed Agency's and Employee's documentary evidence. General Order 120.21, A-23 authorizes Agency to impose a disciplinary action for "[t]he refusal of a member to submit to urinalysis testing, Breathalyzer test, or other tests that measure drugs and/or alcohol in the system (e.g. and Intoxilyzer test) when required, at the Medical Services Division." "The

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[23] *See Dietrich v. District of Columbia Board of Zoning Adjustment*, 293 A.2d 470 (D.C. 1972).
[24] *Initial Decision* at 19.

ordinary signification of the word 'refuse' is to deny a request or demand."[25] Refusal can also be defined as "[t]he act of one who has, by law, a right and power of having or doing something of advantage, and declines it…or the omission to comply with some requirement of law, as the result of a positive intention to disobey…or at least a mental determination not to comply."[26]

In this case, during the Panel hearing, Dr. Kenel testified that Employee was on limited duty status when he reported to the PFC for a follow-up appointment as part of efforts to return him to full duty status.[27] Dr. Kenel explained that submitting to a BAT was required to return Employee to full duty status, and that on May 11, 2017, she instructed Employee to go to the lab to take the test.[28] According to Dr. Kenel, Employee first stated that his daughter was ill and that he had to leave right away. However, Dr. Kenel asked the PFC Chief Lab Technician, Dempsey Griffith, if he could perform the BAT immediately, to which he responded "yes." Dr. Kenel further testified that she informed Employee that the test was not an option and stated that she technically retained the authority to give directives to Metro Police Department members as it relates to their mental health.[29] She confirmed that Employee never verbally stated that he would not take the BAT, but noted that Employee left the PFC without submitting to the test and did not inform her that he did not understand her directive.[30]

The AJ agreed with the Panel's conclusion that Employee's conduct constituted a refusal to submit to a BAT as directed by Dr. Kenel. She also concurred with the Panel's finding that Employee willfully failed to notify any staff members or Dr. Kenel that he was leaving the PFC without taking the test and did not immediately follow up with Agency regarding his wife's

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[25] *Burns v. Fox*, 113 Ind. 205, 14 N.E. 541, 542 (1887). *See also People ex rel. Finigan v. Perkins*, 85 Cal. 509, 511, 26 P. 245, 246 (1890)(holding that to 'refuse' is to decline the acceptance of something offered, or to fail to comply with some requirement.
[26] *Black's Law Dictionary* (2nd ed. 1910).
[27] *Panel Hearing Transcript* at 53-54.
[28] *Id.* at 62.
[29] *Id*. at 64 and 99.
[30] *Id*. at 63 and 64.

purported medical emergency. The AJ acknowledged that the Panel questioned the legitimacy of Employee's testimony regarding his emergency and reasoning for leaving the PFC without submitting to the test. Lastly, she noted that the Panel members made detailed inquiries related to the evidence that was presented.[31]

Based on the foregoing, this Board finds that the AJ's conclusions regarding Charge No. 2 for Failure to Submit are supported by the record. Employee was instructed by Dr. Kenel, who retained the authority to issue a directive in this case, to take the BAT on May 11, 2017. Employee admitted that he did not submit to the breathalyzer test, as ordered. Therefore, his conduct violated GO 120.21, Attachment A, Part A-23. The AJ provided a clear and logical analysis for each of her findings based on the administrative record. The D.C. Court of Appeals in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. Agency's Adverse Action Panel was the administrative finder of fact in this case. Thus, the AJ was permitted to rely upon the Panel's determinations regarding witness veracity. Additionally, there is no evidence in the record to support a finding that the AJ simply recited the procedural history as a basis for concluding that Employee failed to submit to the breathalyzer exam. As a result, we find no compelling basis for disturbing the AJ's ruling regarding Charge No. 2.

<u>Penalty</u>

Employee contends that termination is not the appropriate penalty in this case and states that the Initial Decision failed to discuss how the penalty was reasonable. He further contends that the AJ was required to review the relevant *Douglas* factors to determine whether termination was the appropriate penalty. Employee reasons that the AJ should have included an analysis of any mitigating circumstances that existed in the record, such as a family emergency.

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[31] *Initial Decision* at 19.

In accordance with the holding in *Pinkard,* the AJ was required to base her decision solely on the record established at the agency level. Therefore, she was not permitted to conduct her own analysis of the *Douglas* factors, as the scope of her review was limited to determining if the Agency's findings regarding such were supported by the record. Agency conducted a full analysis of each of the twelve *Douglas* factors, ultimately finding that the eleventh factor, mitigating circumstances surrounding the offense, to be a neutral factor. As it relates to Employee's purported family emergency, the AJ noted that Employee's wife did not testify before the Panel, and she determined that Employee failed to provide any additional documentation or paperwork to support his argument regarding the emergency.

This Board concludes that the AJ properly determined that the penalty of termination was reasonable under the circumstances based on the Panel's analysis of the *Douglas* factors and the Table of Offenses and Penalties. The Court of Appeals in *Stokes*, citing to OEA's holding in *Employee v. Agency*, 29 D.C. Reg. 4565 (1982), held that "review of an Agency imposed penalty is to assure that the Agency has considered the relevant factors and has acted reasonably." Only if the agency "failed to weigh the relevant factors or the Agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for [OEA] to specify how the Agency's penalty should be amended."[32] Here, the AJ held that Agency properly exercised its managerial discretion in selecting the penalty of termination. Employee's disagreements with the Panel's analysis of the *Douglas* factors do not serve as a valid basis for a reversal of its findings. Consequently, we find that the AJ's assessment of the penalty is supported by the record.

<u>Conclusion</u>

Based on the foregoing, this Board finds that the AJ's conclusions of law are based on substantial evidence. Employee's failure to submit to the breathalyzer test at the PFC, after being

[32] *Stokes* at 1011.

directed to do so, violated General Order 120.21, A-23 for Failure to Submit. Additionally, the penalty of termination is consistent with Agency's Table of Offenses and Penalties and the *Douglas* factors. As a result, Employee's Petition for Review must be denied.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review **DENIED**.

FOR THE BOARD:

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Clarence Labor, Jr., Chair

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Patricia Hobson Wilson

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Jelani Freeman

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Peter Rosenstein

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Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.