THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
WILBERTO FLORES,	)	
Employee	)	OEA Matter No. 1601-0131-11
	)	
v.	)	Date of Issuance: August 18, 2014
	)	
METROPOLITAN POLICE DEPARTMENT,	)	
Agency	)	STEPHANIE N. HARRIS, Esq.
	)	Administrative Judge
	)	

Marc Wilhite, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On October 31, 2010, the Metropolitan Police Department ("Agency" or "MPD") issued a Notice of Proposed Adverse Action ("Proposed Notice" or "Proposed Action Notice") to remove Employee from his position with the Metropolitan Police Department. On March 8, 2011, an Adverse Action Panel ("Panel") was convened for an evidentiary hearing to hear evidence, make findings of fact, and determine conclusions of law. The Adverse Action Panel found Employee guilty on one count and recommended a sixty (60) day suspension. However, on May 18, 2011, in its Final Notice of Adverse Action ("Final Notice" or "Final Action Notice"), Agency found Employee guilty of the two (2) original counts and found that this warranted Employee's termination.

On July 14, 2011, Wilberto Flores ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting Agency's action of terminating him from his position as a Police Officer. Agency filed its response to Employee's Petition for Appeal on August 18, 2011.

This case was originally assigned to Administrative Judge ("AJ") Lois Hochhauser on October 19, 2012. After discussion with the parties, AJ Hochhauser determined that this matter

would be adjudicated based on the standard outlined in *Elton Pinkard v. D.C. Metropolitan Police Department*.[1] Accordingly, the parties were provided with a briefing schedule to address the merits of this matter and respond to the opposing parties' arguments. Subsequently, this matter was reassigned to the undersigned AJ in April 2013. The undersigned held Telephonic Status Conferences on April 10, 2014 and May 23, 2014 with the parties to address outstanding issues. As of the date of this Order, both parties have complied with the briefing schedule and all of the required documents have been submitted. 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 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to 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 628.2 *id.* states:

> 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

1) Whether the Adverse Action Panel's decision was supported by substantial evidence;
2) Whether there was harmful procedural error; and
3) Whether Agency's action was done in accordance with applicable laws or regulations.

STATEMENT OF THE CHARGES

In the Advanced Notice of Proposed Adverse Action dated October 31, 2010, Agency proposed to remove Employee from his position as an Officer with the Metropolitan Police Department based on the following:

> **Charge No. 1:** Violation of General Order Series 120.21, Attachment A Part A-7 which provides in part, "Conviction of any member of the force in any court of competent jurisdiction of any criminal or quasi-criminal

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

offense, or of any offense in which the member either pleads guilty, receives a verdict of guilty or a conviction following a plea of *nolo contendere*…

Specification No. 1: In that on October 5, 2010, during your criminal trial in the General District Court for Caroline County, Virginia, Judge Benser upon hearing all evidence, found you *guilty* of Indecent Exposure, a Class 1 Misdemeanor in the state of Virginia. Consequently, you were sentenced to thirty days incarceration (suspended), with three years of probation conditioned upon keeping the peace, obeying the court order and paying fines and cost.

Charge No. 2: Violation of General Order Series 120.21, Part A, A-12, which reads "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively, or violations of any law of the United States or any law, municipal, ordinance, or regulation of the District of Columbia." This misconduct is further defined in General Order Series 201.26, Part I-B-23 which provides, "Members shall not conduct themselves in an immoral, indecent, lewd, or disorderly manner…They shall be guilty of misconduct, neglect of duty, or conduct unbecoming of an officer and a professional…"

Specification No. 1: In that, on June 24, 2010, you were arrested and charged with Indecent Exposure (Class I Misdemeanor) in the state of Virginia. You were released on your own personal recognizance pending trial that was scheduled for October 15, 2010. According to an eye witness, you allegedly exposed your penis to this witness at the Food Lion parking lot located at 17501 Jefferson Davis Highway, Caroline County Virginia.

Having determined that Employee engaged in misconduct, MPD weighed each of the relevant *Douglas Factors*[2] for consideration in determining the appropriateness of the penalty

[2] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). 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;

and proposed that Employee be terminated. Subsequently, Employee elected to have an evidentiary hearing before an Adverse Action Panel.

SUMMARY OF THE TESTIMONY

On March 8, 2011, Agency held an evidentiary before an Adverse Action Panel. During this hearing, testimony and evidence was presented for consideration and adjudication relative to the instant matter. The following represents what the undersigned has determined to be the most relevant facts adduced from the findings of facts as well as the transcript,[3] generated and reproduced as part of the evidentiary hearing held before the Panel.

Sergeant Stacy Cary (Transcript pages 9-60)

Sergeant Stacy Cary ("Sergeant Cary") is currently employed by the Caroline County Sheriff's Office, and has worked there for fourteen (14) years. His current rank is Sergeant and he has been in this rank for seven (7) years. Caroline County Sheriff's Office is located in Bowling, VA, which is about 75-80 miles south of Washington, D.C.

On June 24, 2010, Sergeant Cary worked from 6:00 a.m. to 4:00 p.m. At approximately 7:33 a.m., he responded to a radio dispatcher regarding a male that had exposed himself to a woman near a Food Lion in a strip mall parking lot. A dispatcher informed Sergeant Cary that the caller stated that the male was in a white car and provided the license plate number. The information was given to the dispatcher by the complainant, Susan Cain ("Ms. Cain" or "complainant").

Sergeant Cary went to the location and saw a 2008 white Chevrolet four door sedan, which was parked in front of a Family General, near the Food Lion. When the car left the parking lot, Sergeant Cary followed it until it was safe to stop it. Sergeant Cary, with the assistance of another deputy, stopped the car and found that the driver of the vehicle was Wilberto Flores ("Employee").

Sergeant Cary informed Employee that the traffic stop was based on a complaint that he had exposed himself to a woman in the Food Lion parking lot. Employee told Sergeant Cary that he had just gotten off work and was waiting for the Family Dollar to open.[4] Sergeant Cary noted that Employee's demeanor was very calm and collected. He further stated that Employee was cooperative. Employee told Sergeant Cary that he did not expose himself to anyone. Sergeant Cary noticed that Employee had a Metropolitan D.C. uniform shirt hanging in the back of his vehicle and asked if he could call someone to verify his position. Employee gave Sergeant Cary

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

[3] Transcript will be denoted herein as Tr.
[4] Throughout this proceeding, Family Dollar is also referred to as Family General and Dollar General.

the information and he called the Metropolitan Police Department to confirm who Employee was. Once he received confirmation, Sergeant Cary told Employee that he would speak with him a little later on. At that time, Employee was not arrested because Sergeant Cary needed to obtain further information and speak with the complainant.

Sergeant Cary subsequently went to the complainant, Ms. Cain's house to interview her. The complainant provided Sergeant Cary with a written statement and explained that while she was making her grocery list in her Ford Expedition truck, she noticed a car pull up beside her. When she got out of her vehicle, she looked at Employee and saw that he had his genitals in his hand. Ms. Cain told Sergeant Cary that Employee was not masturbating and she believed Employee's actions were intentional. The complainant explained to Sergeant Cary that the driver's side of her vehicle was next to the passenger side of Employee's vehicle and the vehicles were one to two feet apart. Ms. Cain proceeded to go into the Food Lion and kept a watch on her vehicle. The complainant stated that she also wrote down Employee's license plate number. When she went into the Food Lion, she relayed that another lady came up to her and told her that a guy pulled up beside her and exposed himself. She also provided Sergeant Cary with a description of Employee, noting that he was a white male, wearing a blue shirt with white checkers on it. The complainant's description was consistent with the person that Sergeant Cary had stopped earlier in the day.

After the interview, Sergeant Cary went back to the office to speak with a Magistrate about obtaining a warrant against Employee for indecent exposure. The Magistrate signed off on the warrant. Later that evening, another deputy served Employee with the warrant. Employee was subsequently arraigned in court and a trial date was set. Sergeant Cary charged Employee with intentionally making an obscene display of the accused person or showing private parts in a public place or in a place where others are present, which is a Class 1 misdemeanor. In Virginia, a Class 1 misdemeanor is punishable by twelve (12) months in jail and/or a $2,500.00 fine. However, the offender must go to court and the judge has to make this determination. Sergeant Cary based his charge on Ms. Cain's written statement that she did not see Employee changing his shirt; Employee's uniform shirt was hanging in the back of his car; and that Employee had on another blue shirt that was checkered or striped in white. Sergeant Cary further noted that Employee was wearing his blue work pants. Additionally, the complainant told Sergeant Cary that Employee had his genitals in his hand and looked right at her when she got out of her vehicle.

The date of the trial was October 15, 2010. Sergeant Cary did not have any contact with Employee between the time he was charged and the date of trial. Sergeant Cary, Ms. Cain, and Employee testified at the trial. The hearing lasted approximately thirty (30) to forty-five (45) minutes. The verdict for Employee at trial was guilty, and was based on Ms. Cain and Sergeant Cary's testimony. Employee was sentenced to thirty (30) days in jail, with a two (2) year suspended sentence, and was instructed not to have any contact with Ms. Cain. The evidentiary hearing was not recorded and transcripts were not provided for this type of proceeding. After the trial, Sergeant Cary did not have any contact with Employee.

Detective Leon Epps (Transcript pages 61-127)

Leon Ronnie Epps, Jr. ("Detective Epps") is currently employed by MPD, and has worked

with Agency for twenty one and a half (21.5) years. His current rank is Detective, Grade 2. Detective Epps is presently assigned to the Internal Affairs Bureau and has held this assignment for about a year.

Detective Epps, who conducted an investigation of Employee, reached out to Sergeant Cary to get a basis of the complaint. Sergeant Cary expounded on the complaint with Detective Epps; however, he explained that he could not go into detail because the case was ongoing. With regard to the incident, Sergeant Cary explained to Detective Epps that Employee told him that he may have been changing his uniform shirt. Detective Epps also reached out to the complainant but did not interview her because of the ongoing criminal case. Additionally, prior to the trial date, Detective Epps talked briefly with Employee to let him know that he was investigating his case and that he would interview him at the conclusion of the criminal case.

Detective Epps followed the criminal case and was present at the evidentiary hearing for Employee's, Sergeant Cary's, and the complainant's testimony. Detective Epps relayed that Employee testified that he was in the parking lot, engaged in an irate conversation with his wife using the Bluetooth on his cell phone, and he was eating something. Employee testified that he was going to go into the Family General and while he was waiting for the store to open, he moved his vehicle once. Without entering any store, Employee left the parking lot. Detective Epps explained that Employee stated that he did not know Ms. Cain and had no explanation as to why she made the complaint against him.

Detective Epps stated that Ms. Cain's testimony provided that she was parked in her vehicle, when she observed a white vehicle parked beside her in the opposite direction. Ms. Cain stated that she continued to make her grocery list and when she finished, she exited her vehicle. She explained that because she previously had knee surgery, she had to hold onto her vehicle to maintain her balance while getting out of the car. When she looked down into Employee's vehicle, she observed that he had a Bluetooth in his ear and he was engaged in an irate telephone conversation with his genitals exposed. Detective Epps noted that there was testimony stating that Employee had his hand on his genitals and then there was testimony that he had his Bluetooth in both of his hands. However, Detective Epps did not follow up about this discrepancy.

Detective Epps relayed that Sergeant Cary's testimony provided that he had received a radio assignment and responded to the area of the Food Lion and Family General parking lot. Detective Epps stated that Sergeant Cary's testimony regarding the time he responded to the radio assignment may have been wrong. Using the description of the vehicle provided to him by the radio dispatcher, Sergeant Cary observed a white vehicle exiting the parking lot. Sergeant Cary followed the vehicle and executed a traffic stop. He observed Employee driving the vehicle, with no other passengers. Employee identified himself as Wilberto Flores and as a police officer for Metropolitan Police Department. Employee explained to Sergeant Cary that he had just gotten off of work at 6:00 a.m., drove to the Family General, and waited for the store to open. Employee also explained to Sergeant Cary that he was engaged in a conversation with his wife that became hostile, but he did not pull his genitals out. Detective Epps noted that Sergeant Cary testified at trial that he released Employee and went back to the scene to speak with the complainant. From Detective Epps' understanding, Sergeant Cary had an opportunity to speak with the complainant at the parking lot subsequent to his discussion with Employee. Afterward,

Sergeant Cary prepared a police report and arrest warrant.

After the trial, Detective Epps interviewed the complainant and noted that her version of the incident was consistent with the report she provided to Sergeant Cary. The interview occurred in a witness room at the courthouse and was tape recorded and transcribed. However it was not authenticated by the complainant. Detective Epps did not interview Sergeant Cary or the officer who assisted Sergeant Cary.

Detective Epps testified that he did not interview Employee because he was found guilty at trial. Detective Epps explained that any questions he would have asked Employee would have made things worse for Employee. He relayed that there was no reason for Employee to have moved his car because one could have gone to both stores from where he was parked. Further, he explained that he reached out to Employee via email and telephone, but Employee did not respond to these efforts.

When asked what a "garrity warning" is, Detective Epps provided that this is issued to someone when the police department asks questions based on allegations, and the statements provided by the person cannot be used against them in a criminal proceeding. A "reverse garrity" is issued after the criminal case is over and the person is compelled to provide a statement for administrative purposes. This investigation was the first that led Detective Epps to a trial board hearing. In previous investigations, he stated that he only had to prove or disprove the allegations, and that he disproved complainants allegations in previous cases.

Officer Jeffrey Ramirez (Transcript pages 129-134)

Officer Jeffery Ramirez ("Officer Ramirez") has worked for Agency since September 2004, and is stationed at the Third District. While Officer Ramirez was in training, Employee was his Field Training Officer. He also worked with Employee on power shifts from 2006 to 2009, where they worked in the Adams Morgan section of D.C. and dealt with a lot of disorderly, drunk citizens and handled fights. Employee also assisted Officer Ramirez with traffic stops and was there for Officer Ramirez when he lost a partner. Officer Ramirez believes that Employee is a good officer and he would like to work with him in the future. He also testified that he believes that Agency should retain Employee.

Officer Tonya Mack (Transcript pages 135-140)

Officer Tonya Mack ("Officer Mack") has worked for Agency since March 1999, and is currently assigned to the Third District. She met Employee in 2003, and has worked with him on several power shifts and on midnight shifts in the Northwest section of D.C. Officer Mack provided that she and Employee worked well together, noting that Employee was quiet and acted like her bodyguard. Officer Mack trusted Employee and would work with him again in the future. Officer Mack testified that she believes that Employee should be retained by Agency because he is a good officer.

Detective Brian Bradol (Transcript pages 141-144)

Detective Brian Bradol ("Detective Bradol") has worked for Agency for six (6) years and

has been a detective for almost two (2) years. He is currently assigned to the Third District and has been there for the majority of the time that he has been with Agency. Detective Bradol testified that he knows Employee from working on patrol in the Third District. He stated that they worked together on the power shift tour in the Adams Morgan section of D.C. and rode together in the same scout car. Employee and Officer Bradol became friends throughout their time working together. Detective Bradol relayed that Employee seemed responsible, was professional to the citizens in the area, and never appeared to do anything out of the ordinary. If given the opportunity, Detective Bradol testified that he would like to work with Employee in the future. He stated that he believes that Employee is a great asset to Agency because he had prior experience before working for Agency, he is a Latino Officer, and is fluent in Spanish.

Officer Rogers (stipulated facts on record – Transcript pages 145-147)

Officer Rogers worked with Employee in 2008 on power shifts and patrol in the Third District. Officer Rogers relayed that he answered many radio runs and did routine patrol with Employee. He also stated that they were detailed to work in areas where there were a lot of clubs and restaurants, and established a lot of good relationships with different establishments. Officer Rogers believes that Employee is s good officer and testified that Employee was soft spoken, laid-back, and responsible.

Officer Roberto Flores (Transcript pages 147-182)

Wilberto Flores Acosta ("Employee") has been employed with Agency for nine (9) years and was assigned to the Third District, where he was stationed for the entire time he worked for Agency. Employee stated that he primarily worked on power shifts and was a part of the 'Street Crimes' unit for one year.

On June 24, 2010, Employee was working the midnight tour from '2200' to '0630' (10:00 p.m. to 6:30 a.m.). After Employee finished his tour, he testified that he bought a Coke and a Twinkie cake from the machine store at the station. He finished working at approximately 6:15 a.m. and proceeded to head home to Caroline County, VA.

While Employee was on his way home, he stated that he was talking to his wife and decided to stop at the mini strip mall Family General to pick up plates and cups for a cookout. Although the Family General opens at 8:00 a.m., Employee testified that he knows the person who works there and normally, they open a little early. He stated that he arrived at the strip mall at around 7:25 a.m.

When Employee arrived at the strip mall, the main road was closed and he decided to stop in front of Food Lion to finish eating his snack, including a Twinkie snack cake, which was placed in the middle console of his car. Employee further stated that his Twinkie was in the middle console of the car but could not remember if it was open and unwrapped in his lap. One of the Panel members questioned whether Employee's Twinkie, if sitting in his lap, could have been mistaken by someone walking by as exposure of genitals, to which Employee responded "ca be. I don't know."

Employee testified that the front of his vehicle was facing the side of the front of the Food

Lion, approximately fifty (50) feet from the entrance of the store. Employee stated that there were five (5) other vehicles in the parking lot, including Ms. Cain's white SUV, which was one parking space away. Employee stated that his vehicle was facing east and the complainant's vehicle was facing west. Employee noted that he did not recall seeing the complainant exiting her vehicle and that he was in front of the Food Lion for less than five (5) minutes.

Employee denied Ms. Cain's allegation that he had his genitals exposed. He also testified that he was not changing clothes, but instead he was eating his snack and listening to music. Employee relayed that he was not on the telephone or gesturing during the time he was parked at the Food Lion and did not confront anyone while he was parked.

Employee subsequently moved his vehicle to the front of the Family General and was there for approximately fifteen (15) minutes. Employee stated that he started to fall asleep, so he decided to go home. On his way home, he saw a police cruiser behind him, but they did not put on any lights. Subsequently, Sergeant Cary stopped Employee in his police cruiser.

Sergeant Cary approached Employee's vehicle and asked what he was doing at the strip mall. Employee explained that he was going to the Family General. Sergeant Cary relayed that a woman said that he had exposed himself. Employee denied the allegation and stated to the officer "I'm not going to do that. I mean, I know the consequence. I'm not that stupid." Sergeant Cary asked for Employee's ID and focused on his backpack, which was one that police officers normally use. Employee told Sergeant Cary that he was a police officer and at that point, Sergeant Cary asked Employee if he could contact Agency to verify his identification. Sergeant Cary called someone at the Third District of Agency and was on the phone the majority of the traffic stop. He was standing at the back of Employee's vehicle while checking his credentials. When this was complete, Sergeant Cary asked for Employee's contact information and told him that he was going to be released. Sergeant Cary explained that if he found anything, he would call Employee. After the traffic stop, Employee went home and went to sleep. He stated that his wife was upset that he did not bring home the paper plates. Later that day, around 3:00 p.m., a different police officer came to Employee's home with a warrant for his arrest, charging Employee with indecent exposure.

Employee was subsequently required to participate and testify in a bench trial. He recalled that Ms. Cain and Sergeant Cary also testified. Employee saw Ms. Cain for the first time at trial. The proceeding was approximately twenty-five (25) minutes long. Employee was present for the entire proceeding and noted that although the complainant testified that he was wearing brown pants, he was actually wearing blue pants. Further, Employee disputed Ms. Cain's testimony that she was looking inside his vehicle for a minute, because when asked to count by clock, it was actually fifteen seconds.

At the conclusion of the bench trial, Employee was found guilty and the judge stated that there was not enough doubt to find him not guilty. He received three (3) years of probation and was ordered to stay away from Ms. Cain. He was also banned from the shopping mall. Further, because Ms. Cain did not know Employee, the judge provided that her word overruled any other proof. It appeared to Employee that the judge was making a credibility determination and Sergeant Cary's testimony also factored into the judge's determination. Employee did not appeal the decision because his attorney instructed him that in Virginia, if someone appeals a guilty

verdict and is found guilty on the appeal, the penalty may not be the same; it could result in a worse penalty. Employee explained that he was trying to maintain his job and did not have additional money to pay his attorney for the appeal.

Employee testified that he received a "Meets Expectations" for his 2008- 2009 performance evaluation. He also noted that he received "Exceeds Expectations" for professionalism. While Agency charged him with conviction, Employee asserted that he was not guilty and his attorney did not provide him with good representation. He also reiterated his denial of the indecent exposure allegations. Employee testified that he understood that based on his conviction, he could be facing termination.

Trial Board Finding

On April 6, 2011, Agency's Adverse Action Panel issued its findings from the March 8, 2011 evidentiary hearing. Regarding Charge #1, Specification #1 (Conviction of a criminal offense), the Panel found that there was sufficient evidence to support a charge that Employee was convicted of a Class I Misdemeanor in the state of Virginia and found him guilty. Regarding Charge #2, Specification #1 (Conduct unbecoming an officer), the Panel found that there was insufficient facts to support this charge.

With regard to the guilty finding for Charge #1, Specification #1, the Panel weighed the offenses according to the relevant *Douglas Factors*. The Panel concluded that the nature and seriousness of the offense; Employee's job level and type of employment; consistency of the penalty with those imposed upon other employees for the same or similar offense; the notoriety of the offense and its impact upon the reputation of Agency; and the clarity with which Employee was on notice of any rules that were violated were aggravating factors. While Employee's misconduct did not reach media proportions, the Panel found that it did pose a concern where others may question or ignore the directives of supervisors and departmental guidelines. In addition, with this conviction, Employee's conduct had the potential to bring credibility questions as a member of MPD. Additionally, the Panel noted that termination was within Agency's recommended Table of Penalties for the first instance of the specific guilty violation. The penalty was also found to be consistent with any applicable Agency Table of Penalties and was consistent with that imposed against other members for like or similar misconduct.

The effect of the offense upon employee's ability to perform at a satisfactory level, potential for rehabilitation, and the effect on supervisor's confidence in Employee's ability to perform assigned duties were held to be a neutral factors. The Panel explained that even though Employee was found to have violated departmental orders and directives, his actions were not in the performance of his duties and at no time during this case did his position with Agency come into light. Further, the testimony of Employee's character witnesses indicated that they believe Employee could continue to be an asset to Agency.

The Panel found that the mitigating factors included Employee's past discipline, work record, and mitigating circumstances. Specifically, the Panel noted that outside of Sergeant Cary's testimony, who was acting in the course of his duties, it was apparent that this court case was solely decided on the word of the complainant. There were no additional witnesses to

corroborate the statements made or to refute Employee's testimony. Additionally, the statement presented to Detective Epps from the complainant was never authenticated and contained minor discrepancies. Further, the Panel stated that at no time during this hearing did the investigative detective or Sergeant Cary prove that there was any overt act by Employee to commit indecent exposure and due to the panel's inability to interview the complainant, no clarification was ever obtained. The Panel also assessed the adequacy and effectiveness of alternative sanctions to deter conduct in the future by Employee and other members of MPD.

After consideration of the *Douglas Factors*, the Panel reviewed and evaluated all witness testimony and all of the items admitted into evidence and considered reasonableness in rendering its opinion. The Panel also weighed heavily on Employee's character witnesses that consisted of an assistant chief, a detective, and three officers who work or have worked with Employee on an almost a daily basis. All of these character witnesses stated that Employee was an exemplary officer. Due to the nature of this misconduct and the totality of the ensuing court proceedings, the Panel found that Employee should be suspended, in lieu of the proposed discipline of termination, as an appropriate and effective sanction and deterrent. The Panel recommended that Employee be reprimanded for his violation of General Order 120.21, Charge #1, Specification #1 (Conviction of a criminal offense) and held that Employee's penalty would be suspension for sixty (60) days.

Agency Final Decision

Subsequently, on May 18, 2011, Agency issued its Final Notice of Adverse Action in this matter. Upon consideration of the Panel's decision and a review of the record, Agency agreed with the Panel's finding that Employee was guilty of Charge 1, but disagreed with the Panel's finding that there were insufficient facts to sustain Charge Two. Agency argues that the Panel erred in their recommendation of the sixty (60) day suspension and notes that this penalty is not consistent with the disciplinary procedures and the Table of Offenses. Agency affirmed the initial penalty of termination, which was originally proposed in the Notice of Proposed Adverse Action, dated October 31, 2010.

In Agency's assessment of the *Douglas factors*, the nature and seriousness of the offense; Employee's job level and type of employment; the effect of the offense on the ability to perform effectively; impact of Employee's conduct in damaging Agency's reputation; clarity of notice of any rules and regulations that were required to be followed; consistency of penalty; and the adequacy of and effectiveness of alternative sanctions to deter future conduct. Agency noted that the Panel relied heavily on the testimony of character witnesses in coming to their conclusion, despite the fact that Employee was convicted in a court of law. Agency explains that as a police officer, Employee was expected to exercise good judgment and behave in a decent manner and his behavior was extremely inappropriate and unbecoming of an MPD officer. Agency states that Employee displayed an overall lack of professionalism and set a poor example for fellow officers. Employee's actions, as found by Agency, demonstrate that he cannot be trusted to properly carry out the duties of a sworn officer and it is too much of a precarious situation to allow him to continue interacting with citizens, thus rendering him unable to perform the essential functions of a police officer. Further, Agency asserts that any future arrests, affidavits, or reports prepared by Employee would automatically be subject to question and doubt. Given the nature and seriousness of the offenses, Agency asserts that termination is merited because the

aggravating factors outweigh the mitigating factors. In conclusion, Agency found Employee guilty of Charge One and Charge Two, and determined that Employee's conduct merited termination.

Employee's Argument

In his Petition for Appeal, Employee states that Agency's action of terminating him was arbitrary, capricious, unsupported by substantial evidence, not in accordance with the law, and taken in violation of his procedural due process rights.[5]

In his Brief, Employee asserts that Agency Human Resources Director Diana Haines-Walton, who authorized Agency's Final Notice of adverse action, had no authority to either find Employee guilty of conduct unbecoming an officer or to terminate him. Employee notes that the Panel concluded that there were "insufficient facts" regarding the conduct unbecoming an officer charge and only recommended a sixty (60) day suspension for the conviction of a crime charge. Employee explains that even if it is believed that the Panel erred in its ruling, Agency does not possess the power to ignore the Panel's finding and impose their own, more strict, findings of termination. Pursuant to 6A DCMR 1001.5, Employee contends that Agency only had the power to accept the Panel's findings, reduce the recommended penalty, or reject the Panel's findings and schedule another Trial Board hearing. Employee also argues that if Agency disagreed with the Panel's recommendation, it only had the power to remand the decision back to the Panel for reconsideration or declare the decision to be void and have the matter heard by another Trial Board Panel. Employee argues that an administrative fact-finder's credibility determinations are entitled to greater weight because the examiner has heard live testimony and observed the demeanor of the witnesses.[6] Further, Employee notes that allowing Agency the authority to impose their own findings and/or increase the Panel's recommended penalty, defeats the purpose of a hearing before a panel.[7]

Employee also disagrees with Agency's contention that MPD General Order ("GO") 120.21, Part IV gives it authorization to make factual findings. Employee argues that even if GO 120.21, allowed Agency to set aside the Panel's decision and make new findings, such authority would be a clear violation of 6A DCMR §1001.5, which is a municipal regulation that MPD must follow because it takes precedence over internal guidelines. Employee further states that MPD General Orders are subservient to regulations and GOs serve merely as an internal operating manual.[8]

Additionally, Employee argues that Agency is erroneously trying to make a distinction between the procedures of a police trial board and those of an adverse action hearing before a hearing tribunal. He argues that this alleged distinction is contradicted by Agency's own

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[5] Petition for Appeal (July 14, 2011).
[6] *See Dell v. Dep't of Employment Servs*, 499 A.2d 102, 206 (D.C. 1985); *Hillen v. Dep't of the Army*, 3 M.S.P.R. 453, 458 (1987); *see also Metro. Police Dep't v. Baker*, 564 A.2d 1155, 1159 (D.C, 1989); *Stevens Chevrolet Inc. v. Comm'n on Human Rights*, 498 A.2d 546, 549-50; *Gunty v. Dist. Of Columbia Dep't of Employment Servs.*, 524 A.2d 1192, 1198 (D.C. 1987).
[7] *See* Employee Brief (March 11, 2013).
[8] Employee cites to *District of Columbia v Henderson*, 710 A.2d 874, 877 (D.C. 1998); *Abney v. District of Columbia*, 580 A.2d 1036, 1041 (D.C. 1990); *District of Columbia v. Walker*, 689 A.2d 40, 47 n13 (D.C. 1997).

regulation, GO 120.21 (III) (9), which states in part "the term 'tribunal' includes Trial Boards as defined in D.C. Code §5-133.06 (Trial Boards), Adverse Action Panels, and Department Hearing Panels as contemplated by the FOP/MPD Collective Bargaining Agreement." Further, Employee notes that while D.C. Code §1-632.03 of the CMPA rescinded D.C. Code §5-133.06 (Trial Boards), the CMPA "made no effort to modify or rescind the Trial Board procedures" in 6A DCMR §1001.[9] Employee also argues that GO 120.21 refers to hearing panels as "boards" or "hearing boards," and that there is no distinction made between the terms board, trial board, hearing board, or adverse action panel. Further, employee contends that although D.C, Code § 5-133.06 was rescinded in 1978, Agency adopted versions of GO 120.21 in 1983 and 2006, which demonstrates that the provisions of 6A DCMR §1001 were still in effect for Agency.[10]

Agency's Argument

In its brief, Agency argues that it had authority to increase the penalty from the Panel's recommended sixty (60) day suspension to termination, pursuant to GO 120.21, Part IV, K, 8, which provides that "after reviewing the Hearing Tribunal's proposed decision, the Assistant Chief, Office of Human Services ("OHS"), may remand the case to the same, or a different tribunal, or issue a decision (Final Notice of Adverse Action) affirming, reducing, or setting aside the action, as originally proposed in the Notice of Proposed Adverse Action." Agency notes that the position encumbered by Diana Haines-Walton, who issued the Final Notice, serves the same function as the OHS Assistant Chief. Agency also specifies that GO 120.1, Part IV, K, 8 clearly authorizes the issuance of a Final Notice of Adverse Action that affirms the actions, as originally proposed in the Notice of Prosed Adverse Action.

In response to Employee's argument that 6A DCMR § 1001.5 is applicable, Agency contends that this regulation refers to an outdated provision. Specifically, D.C. Code §5-133.06 (Trial Boards), states in relevant part that the Mayor is authorized and empowered to create one or more trial boards for the police force and the D.C. Council is authorized and empowered to make and amend the rules of procedures for trial boards. However, Agency argues that 6A DCMR §1001.5 is no longer applicable to Employee or any other police officer after January 1, 1980. In enacting the Comprehensive Merit Personnel Act ("CMPA"), D.C. Law 2-139, D.C. Code §1-632.03, the Council identified provisions that would no longer apply to police officers and fire fighters. As a result of this statutory change, Employee did not appear before a trial board, as referenced in 6A DCMR §1001.5. Instead, Employee appeared before a departmental tribunal in accordance with the regulations set forth in GO 120.21, entitled Disciplinary Procedures and Processes.[11]

Specifically, GO 120.21, Part VI, sets forth the procedural guidelines regarding disciplinary actions. When a termination is proposed, Agency relays that an employee is advised that he has a right to a hearing conducted by a Hearing Tribunal, not a Trial Board. Agency contends that the Hearing Tribunal's findings and recommended penalty are reviewed by the OHS Assistant Chief, who is authorized to issue a Final Notice of Adverse Action that *inter alia*, may affirm the action put forth in the Proposed Notice, notwithstanding the recommendation for punishment made by

[9] Employee Reply Brief, p. 3 (July 15, 2013).
[10] *See* Employee Reply Brief (July 15, 2013).
[11] Agency Errata Brief (June 18, 2013).

the Hearing Tribunal.

Further, Agency states that 6A DCMR §1001.5 does not take precedent over GO 120.21 because the DCMR regulation does not apply to police officers appointed to Agency after January 1, 1980. Agency notes that the following DCMR provisions are described as follows: Title 6A is entitled Police Personnel; Chapter 10 of 6A is entitled Disciplinary Procedures; Sections 1000 and 1001 of Chapter 10 are entitled Rules of Procedures Before Trial Boards and Investigations ad Findings, respectively. Agency argues that the authority and source cite for 6A DCMR Chapter 10 refers directly to and was promulgated pursuant to D.C. Code §5-133.06, which was repealed with the enactment of D.C. Code §1-632(a)(1)(Z) and provided that trial boards no longer applied to police officers after January 1, 1980.[12]

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*,[13] that OEA has a limited role where a departmental hearing has been held. According to *Pinkard*, the D. C. Court of Appeals found that OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings.[14] The Court of Appeals held that:

> "OEA may not substitute its judgment for that of an agency. Its review of the agency decision…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."

Additionally, the Court of Appeals found that OEA's broad power to establish its own appellate procedures is limited by Agency's collective bargaining agreement. 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;
>
> 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

[12] *Id.*
[13] 801 A.2d 86 (D.C. 2002).
[14] *See* D.C. Code §§ 1-606.02(a)(2), 1-606.03(a),(c); 1-606.04 (2001).

> 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.

In this case, Employee is a member of the Metropolitan Police Department and was the subject of an adverse action; MPD's collective bargaining agreement contains language similar to that found in *Pinkard*; and Employee appeared before an Adverse Action Panel, which held an evidentiary hearing. Based on the documents of records and the position of the parties as stated during the Status Conferences held in this matter, the undersigned finds that all of the aforementioned criteria are met in the instant matter. Thus pursuant to *Pinkard*, OEA may not substitute its judgment for that of Agency and the undersigned's review of Agency's decision is limited to the determination of whether the trial board's finding was supported by substantial evidence; whether there was harmful error; and whether the action taken was done in accordance with applicable law or regulations.

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

According to *Pinkard*, the undersigned must determine whether the Adverse Action Panel's findings were supported by substantial evidence.[15] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[16] Further, "[i]f the [Adverse Action Panel's] findings are supported by substantial evidence, [the undersiged] must accept them even if there is substantial evidence in the record to support contrary findings."[17]

After reviewing the record and the arguments presented by the parties, the undersigned concludes that the Panel met its burden of substantial evidence. The undersigned finds that the parties had a full and fair opportunity to present testimonial and documentary evidence. Employee's Representative had the opportunity to present its full case to the Panel and was also able to cross examine witnesses and challenge evidence. Further, a review of the transcript from the evidentiary hearing shows that the Panel was actively engaged at the hearing, asked relevant questions, and raised pertinent concerns to resolve pending issues. The Panel also made credibility determinations and the undersigned finds that there was sufficient evidence to support those determinations. Moreover, in reaching its conclusion, the Adverse Action Panel considered the *Douglas factors*.[18]

Further, there was ample documentary and testimonial evidence in the record to support the Panel's conclusion that Employee was guilty of Charge #1 (Conviction of a criminal offense)

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[15] *See Pinkard*, 801 A.2d at 91.
[16] *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)).
[17] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).
[18] *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981).

and that there were insufficient facts to support Charge #2 (Conduct unbecoming an officer). However, the undersigned notes that the Panel's decision to recommend that Employee be suspended for sixty (60) days was properly based on their findings and conclusions from the evidentiary hearing. Thus, the undersigned finds that there was substantial evidence in the record to support the Panel's findings and recommended penalty.

Whether there was harmful procedural error.

Pursuant to *Pinkard* and OEA Rule 631. 3, the undersigned is required to make a finding of whether or not MPD 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*** (emphasis added). 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." Here, Employee is alleging that the undersigned should reverse Agency's action because it failed to uphold the Panel's recommendation for a sixty (60) day suspension, and instead Agency terminated Employee. The issue of whether Agency's action of terminating Employee constituted harmful procedural error rests on several issues regarding conflicting statutes, regulations, and general orders.

In this matter, Employee relies on 6A DCMR § 1001, *et seq.* to assert that Agency cannot disregard the findings of the assigned Panel and increase the recommended penalty.[19] Specifically, Employee states that under this provision of the DCMR, Agency via the MPD Chief has three options: (1) confirm the Panel's findings and impose the penalty recommended; (2) reduce the penalty; or (3) declare the board's proceedings void and refer the case to another regularly appointed trial board. On the other hand, relying on GO 120.21, Agency argues that it was authorized to issue a Final Notice of Adverse Action that affirmed the action as originally proposed in the Notice of Adverse Action.[20]

In response to Employee's contention regarding 6A DCMR § 1001, *et seq.*, Agency submits that after January 1, 1980, this provision was no longer applicable to Employee or any police officer. It explains that the D.C. Council enacted the Comprehensive Merit Personnel Act ("CMPA"), and in doing so, it identified provisions that would no longer apply to police officers. Specifically, Agency states that D.C. Code § 1-632.03 (a)(1)(z) repealed certain provisions, including D.C. Code § 5-133.06, the relevant section pertaining to Trial Boards, and found that this section no longer applied to police officers. Therefore, Agency asserts that 6-A DCMR § 1001, *et seq.,* the relevant section that pertains to Investigations and Findings conducted by Trial Boards, also no longer applied to Employee.

Regarding whether there was harmful procedural error, there is a conflict between 6A DCMR § 1001 and General Order 120.21. The relevant section, 6-A DCMR § 1001.5 states that Agency via the MPD Chief may either 1) confirm the trial board's finding and impose the recommended penalty; 2) reduce the penalty; or 3) declare the board's proceeding void and refer

[19] *See* Employee's Reply Brief, p. 2 (July 15, 2013).
[20] *See* General Order 120, No. 21, Part VI (K)(8).

the matter to the another trial board. In contrast, General Order 120.21 states that Agency via the MPD Chief may 1) remand the case to the same tribunal or another tribunal; or 2) issue a Final Notice of Adverse Action which either (a) affirms the action as originally proposed in the Notice of Adverse Action; (b) reduces the action as originally proposed in the Notice of Adverse Action; or (c) sets aside the action in the Proposed Action Notice. General Order 120.21 provides Agency more authority than 6A DCMR §1001.5, by allowing Agency to affirm the action originally recommended in the Proposed Notice, regardless of whether a tribunal recommends a lesser penalty than what is provided in the proposed notice. In this case, the Panel recommended a penalty of sixty (60) days suspension, and subsequently, the Chief affirmed the proposed termination action pursuant to General Order 120.21 and increased the penalty recommended by the Panel. This conflict raises an issue regarding whether 6A DCMR §1001.5 or GO 120.21 controls in this case. Thus, in order to assess whether there was harmful procedural error, the undersigned must first assess another prong of the *Pinkard* analysis, which is whether Agency's action was done in accordance with applicable laws or regulations.

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

Is 6-A DCMR § 1001.5 still applicable to Police Officers?

6-A DCMR § 1001.5 provides the following:

> Upon receipt of the trial board's finding and recommendations, and no appeal to the Mayor has been made, the Chief of Police may either confirm the finding and impose the penalty recommended, reduce the penalty, or may declare the board's proceedings void and refer the case to another regularly appointed trial board.

Agency argues that 6A DCMR § 1001.5 no longer applies to Employee and reasons that this provision was a trial board procedure adopted pursuant to Trial Boards, as identified in D.C. Code § 5-133.06, which is no longer applicable to police offers. An initial review of D.C. Code § 5-133.06 shows that this law was enacted over one hundred years ago and was essentially repealed by D.C. Code § 1-632.03 (a)(1)(z), which states that this statute no longer applies to police officers.

The legislative history for D.C. Code § 5-133.06 reveals that in 1901, Congress adopted an Act regarding Trial Boards, and amendments were made to that Act in 1906.[21] Then, later in 1972, 6A DCMR § 1000 *et seq.* reveals that Congress adopted regulation sections for Rules of Procedures Before Police Trial Boards and Investigations and Findings.[22] Several years later on October 31, 1978, the Council adopted a new District personnel system: the Comprehensive Merit Personnel Act ("CMPA"), which was enacted on March 3, 1979.

However, with regard to 6A DCMR § 1001.5, which is a more recent law enacted in 1972 (amended in 1980), there is no clear indication that its procedures are tied to the Trial Boards as

[21] *See* Credits, D.C. Code § 5-133.06.
[22] 6A DCMR § 1000 *et seq.* was adopted on February 7, 1972 at 18 DCR 417, and then amended on November 21, 180 at 27 DCR 5127, 5143. 6-A DCMR § 1001.5 is included in the adoption.

identified in D.C. Code § 5-133.06. Agency argues that the authority and source cite for 6A DCMR Chapter 10 refer directly to and were promulgated pursuant to D.C. Code §5-133.06, which was repealed with the enactment of D.C. Code §1-632(a)(1)(Z) and provided that trial boards no longer applied to police officers after January 1, 1980. However, this cite and source authority is only applicable to 6A DCMR §1000 (Rules of Procedure Before Police Trial Boards) and does not extend to 6A DCMR §1001 (Investigations and Findings), which has a different source listed.[23] While these provisions are listed in DCMR Chapter 10, sections §1000 and §1001 *each have different cite and authority sources* (emphasis added). The undersigned finds no authority indicating that the authority and cite source for one chapter section should extend to another chapter section. Thus, the undersigned finds that 6A DCMR §1001.5 is not sourced or authorized from D.C. Code § 5-133.06.

Further, even if the trial board procedures identified in 6A DCMR § 1001.5 were related through cite and source authority to the same trial board identified in D.C. Code § 5-133.06, D.C. Code § 1-632.03 (a)(1)(z) does not specifically state that 6A DCMR § 1001.5, or any section of DCMR Chapter 10 no longer applies to police officers. The fact that D.C. Code §5-133.06 was repealed for police officers hired after 1980 does not necessarily mean that this repealed or eliminated 6A DCMR §§1000, 1001. Without explicit language stating that a regulation, or specifically that a section of DCMR Chapter 10 has been repealed, the undersigned finds that each of these regulations are independent and still in effect, despite where they may have been sourced from.

Additionally, while Agency is correct in asserting that pursuant to D.C. Code § 1-632.03 (a)(1)(z) (a section within the CMPA), D.C. Code § 5-133.06 no longer applies to police officers, D.C. Code § 1-616.51, which is also within the CMPA, states that:

> The District of Columbia government finds that a radical redesign of the adverse and corrective action system by replacing it with more positive approaches toward employee discipline is critical to achieving organizational effectiveness. To that end***, the Mayor, the District of Columbia Board of Education, and the Board of Trustees of the University of the District of Columbia shall issue rules and regulations to establish a disciplinary system***…(emphasis added).

Pursuant to D.C. Code § 1-616.51, rules and regulations were established in Chapter 16, Title 6 of the DCMR, and titled General Discipline and Grievances. Specially, 6-B DCMR § 1600.1 states:

> The rules for the adverse and corrective action system specified in sections 1601 through 1619 of this chapter are established in accordance with the provisions of sections 604 and 1651 of the District of Columbia Government Comprehensive Merit Personnel

[23] 6A DCMR §1001 only lists the following source cite: Regulation No. 72-2, approved January 14, 1972, 18 DCR 417 (February 7,1972), as amended by § 10(f)(2) of the District of Columbia Civilian Complaint Review Board Act of 1980, D.C. Law 3-158, 27 DCR 5127, 5143 (November 21, 1980).

> Act of 1978 (CMPA), effective March 3, 1979 ***(D.C. Law 2-139; D.C. Official Code §§ 1-606.04 and 1-616.51) (2006 Repl.)*** (emphasis added).

6-B DCMR § 1601.5(a) goes on to provide that:

> ***Any procedures for handling corrective or adverse actions involving uniformed members of the Metropolitan Police Department***, or of the Fire and Emergency Medical Services Department (FEMSD) at the rank of Captain or below ***provided for by law, or by regulations of the respective departments in effect on the effective date of these regulations, including but not limited to procedures involving trial boards, shall take precedence over the provisions of this chapter to the extent that there is a difference.*** (Emphasis added)

Essentially, this section of the DCMR provides that the procedures involving MPD, *including procedures involving trial boards*, shall take precedence over the rules and regulations provided in 6B DCMR § 1601 *et seq.* (emphasis added).[24] Additionally, pursuant to Mayor's Order 2000-83 ("Mayor's Order"), the MPD Chief of Police was delegated rulemaking authority under the CMPA. Specifically, the Mayor's Order states in part that "the Chief of Police is delegated personnel and rule making authority vested in the Mayor over the Metropolitan Police Department ***under the CMPA***." Pursuant to this authority, Agency adopted General Orders, namely, General Order 120.21. However, because the Mayor's Order expressly states "***under the CMPA***," this indicates that the Chief's authority is guided by what is provided in the CMPA, and does not provide for unlimited discretionary authority. Thus, General Order 120.21, an order adopted by Agency pursuant to the rulemaking authority under the CMPA, cannot then go above what is provided in the CMPA.

Moreover, since there is no law reflecting that 6A DCMR §§ 1000, 1001 *et seq.* were inapplicable to police officers when 6B DCMR § 1601 *et seq.* became effective in 1979, I find that 6A DCMR §§ 1000, 1001 *et seq.* are applicable, and as noted above, would take precedence over 6B DCMR § 1601 *et seq.* Therefore, the provisions in 6A DCMR §§ 1000, 1001 *et seq.* are still applicable to police officers, and these regulations did not explicitly give Agency the authority to issue a Final Notice affirming the action of termination as originally set forth in the Proposed Notice, or increase the penalty recommended by the Panel. Specifically, 6A DCMR § 1001.5 only allows the Chief to confirm the findings of the trial board and impose the penalty recommended; reduce the penalty; or declare the board's proceedings void and refer the case to another regularly appointed trial board.

In regards to Agency's argument that the Adverse Action Panel in the instant case is not the equivalent of a trial board, the undersigned finds these arguments unpersuasive. Agency argues that when a termination is proposed, an employee is advised that he has a right to a hearing conducted by a Hearing Tribunal, not a Trial Board. However, Agency's own regulations appear

[24] GO 120.21 conflicts with 6B DCMR 1613.2, a provision enacted pursuant to the CMPA, which prohibits the final decision maker (deciding official) from increasing the penalty recommended by a hearing officer.

to use different terms interchangeably regarding 'Trial Boards'. GO 120.21 (III) (9), states in relevant part, that the term 'tribunal' includes Trial Boards as defined in D.C. Code §5-133.06 (Trial Boards), ***Adverse Action Panels***, and Department Hearing Panels (emphasis added). The undersigned notes that GO 120.21 was adopted in 1983, which postdates D.C. Code §1-632.03, which became effective in 1979. Further, GO 120.21(VI)(K)(5), in part, states that the authority for hearing tribunals shall be consistent with the guidelines set forth in D.C. Official Code 5-133.06 (Trial Boards) and ***6A DCMR, Chapter 10 (Disciplinary Procedures)*** (emphasis added). Additionally, cases including *Pinkard*, refer to adverse action panels as trial boards. Therefore, Agency's own regulation (GO 120.21), which has been amended several times since its adoption in 1983, refers to the very sections, D.C. Code §5-133.06 and 6A DCMR Chapter 10, it argues are inapplicable. Accordingly, the undersigned finds that the Adverse Action Panel in the instant case is equivalent to both a hearing tribunal and a trial board.

Employee also contends that the D.C. Municipal Regulations have priority over MPD General Orders pursuant to D.C. law, specifically under the Administrative Procedures Act (D.C. Code §2-501). The undersigned finds that generally, statutes and regulations take precedence over internal agency procedures. In *Nunnally v. D.C. Metropolitan Police Department*,[25] the D.C. Court of Appeals noted that an MPD General Order "essentially serves the purpose of an internal operating manual," and " do[es] not have the force or effect of a statute or an administrative regulation…"[26] *Nunnally* goes on to provide that the courts "…owe less deference to… MPD policy." Based on this analysis, the undersigned finds that 6A DCMR § 1001.5 is the controlling "administrative regulation" that determines whether Employee's termination was proper. Thus, in this case, MPD General Orders are afforded less deference than 6A DCMR § 1001.5.

Additionally, the Superior Court of the District of Columbia recently opined on a similar issue in *District of Columbia Metropolitan Police Department v. District of Columbia Public Employee Relations Board and D.C. Police Union*.[27] In this case, an MPD officer facing a proposed penalty of termination from Agency appeared before an Adverse Action Panel, who found her guilty and recommended a thirty (30) day suspension. However, Agency concluded that the Panel's recommendation was inconsistent with the employee's misconduct and affirmed the termination penalty in the Proposed Notice, upon which the employee initiated arbitration proceedings. This matter was then heard by an arbitrator and appealed to the Public Employee Relations Board ("PERB) to address, amongst other issues, whether Agency had the authority to impose the penalty in the Proposed Notice rather than the Panel's recommendation. The arbitrator in this matter concluded that 6A DCMR §1001.5 was the applicable regulation and noted that this regulatory provision took precedence over GO. 120.21.[28] On appeal, PERB also found in favor of Employee, explaining that the older regulations involving trial board procedures were still in effect after 1980 and that even if 6A DCMR §1001.5 were adopted pursuant to a repealed statute, it is incorporated by reference via 6B DCMR §1601.5(a), which

[25] 80 A.3d 1004, 1012 (D.C. 2013) (quoting *District of Columbia v. Henderson*, 710 A.2d 874, 877 (D.C.1998)) (quoting *Abney v. District of Columbia*, 580 A.2d 1036, 1041 (D.C.1990))
[26] *Id.* (Quoting *Wanzer v. District of Columbia*, 580 A.2d 127, 133 (D.C.1990)).
[27] 2012 CA 009192 P(MPA) (June 26, 2014).
[28] The arbitrator also noted that MPD's own Trial Board Handbook, which was last updated in 2004, did not make a distinction between trial board procedures and adverse action panel procedures.

was adopted pursuant to statute (CMPA) and has not been repealed.[29] Similarly, the D.C. Superior Court held that MPD General Orders are subservient to regulations.[30] Additionally, the Court found that MPD failed to provide legal authority to contradict PERB's, as well as the arbitrator's interpretation that 6A DCMR §1001.5 was the applicable statute.

Accordingly, based on the preceding analysis, the undersigned finds that Agency's action of terminating Employee was not done in accordance with applicable laws and regulations. Consequently, I find that Agency committed harmful procedural error when it terminated Employee in contradiction to the Adverse Action Panel's recommended penalty of suspension for sixty (60) days.

This Office has ruled that primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.[31] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."[32] However, in this matter, the undersigned finds that Agency did not have the authority to impose the original proposed penalty of termination after the Panel determined that Employee should only be subject to a sixty (60) day suspension.

ORDER

Based on the foregoing, it is **ORDERED** that:

1. Agency's action of removing Employees from service is **REVERSED**;
2. The Adverse Action Panel's penalty of sixty (60) day suspension shall be instituted, with recognition that Employee has served such suspension while appealing Agency's termination;
3. Agency shall reimburse Employee all back-pay, benefits lost as a result of his termination, with proper deductions for the instituted sixty (60) day suspension; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

_____
STEPHANIE N. HARRIS, Esq.
Administrative Judge

[29] PERB also noted in its decision "that MPD General Orders are subservient to regulations," citing *District of Columbia v. Henderson*, 710 A.2d 874, 877 (D.C. 1998).
[30] *See District of Columbia v. Henderson*, 710 A.2d 874, 877 (D.C. 1998).
[31] *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).
[32] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).