THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 1601-0360-10
Tommie Reed,	)	
Employee	)	
	)	Date of Issuance: August 1, 2013
v.	)	
	)	
Metropolitan Police Department	)	Joseph E. Lim, Esq.
Agency	)	Senior Administrative Judge
	)	

Gregory Lattimer, Esq., Employee Representative
Kevin Turner, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Tommie Reed ("Employee"), worked as a Police Officer with the Metropolitan Police Department ("Agency") in Career Service status. The events which formed the basis for Employee's termination occurred between approximately March 2, 2005 and March 9, 2005. Specifically, Employee's termination was based on the following charges: 1) Misuse of Official Position, or unlawful coercion of an employee for personal gain or benefit; and 2) 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 of law of the United States or any law, municipal ordinance, or regulation of the District of Columbia.

On April 10, 2010, Agency's Adverse Action Panel ("the Panel" or the "Trial Board") held a hearing regarding the administrative charges against Employee in accordance with the Collective Bargaining Agreement ("CBA") between Agency and Employee's union. On June 2, 2010, the Panel issued its Final Notice of Adverse Action, finding Employee guilty on all charges and recommended that he be terminated. Employee's termination became effective on July 16, 2010.

On August 10, 2010, Tommie Reed ("Employee"), filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the D.C. Metropolitan Police Department's ("Agency") action of terminating his employment.

The matter was assigned to the undersigned Administrative Judge on July 17, 2012. A Status Conference was held on September 14, 2012, for the purpose of assessing the parties' arguments with respect to Employee's appeal. I subsequently ordered the parties to submit briefs

on the issue of whether or not the decision of the Trial Board should be overturned. Employee and Agency submitted written briefs by June 13, 2013. Because the Undersigned is precluded from conducting a de novo examination on the merits of this appeal, as discussed *infra*, an evidentiary hearing was not held. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether the Trial Board's decision was supported by substantial evidence.

2. Whether there was harmful procedural error, or whether Agency's action was done in accordance with applicable laws or regulations.

STATEMENT OF THE CHARGES

Charge No. 1: Violation of General Order 120.21, Attachment A, Part A-20, "Misuse of Official Position, or unlawful coercion of an employee for personal gain or benefit."

Specification No. 1: In that, on March 2, 2005, you used your position as a Metropolitan Police Officer, having access to the Washington Area Law Enforcement System (WALES) and the National Crime Information Center (NCIC), to run an unauthorized inquiry on an individual, at the request of former Metropolitan Police Department Officer Natwan Logan, for $200.00.

Charge No. 2: Violation of General Order 120.21, Attachment A, Part A-12, "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 of law of the United States or any law, municipal ordinance, or regulation of the District of Columbia."[1]

Specification No. 1: In that, on March 2, 2005, you, processed a name through NCIC not knowing whether or not the information would be used for a legitimate law enforcement purpose. On March 9, 2005, you accepted $200.00 from a former MPD officer in exchange for a copy of the NCIC report.

SUMMARY OF THE TESTIMONY

[1] Misconduct under this section is further expounded upon in MPD's General Order 201.26, Part I-B-22.

On April 15, 2010, Agency held a Trial Board Disciplinary hearing. The following represents a summary of the testimony given during the hearing as provided in the transcript[2] (hereafter denoted as "Tr.") which was generated following the conclusion of Employee's proceeding. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their positions.

Special Agent Robert Schwinger testified (Tr. 10-59) in relevant part as follows:

Special Agent Robert Schwinger ("Schwinger") works with the Public Corruption Unit of the Federal Bureau of Investigation ("FBI") Washington, D.C. Office. Schwinger testified that he was involved in an investigation of Metropolitan Police Officer Logan in 2004 and 2005 for counterfeit checks. In 2005, he arrested Officer Logan and charged him with Conspiracy and Bank Fraud. Officer Logan began cooperating and disclosed that Employee and another officer were involved with an organization which applied for federal grants with the criminal intention of using such funds for personal use. Schwinger testified that he had Officer Logan ask Employee to obtain the criminal background of an individual using a database accessible only to law enforcement for a fee. Later, Officer Logan returned to the District of Columbia area and met with Employee who provided him with the computer printout of the criminal background search and Officer Logan gave Employee an envelope that contained $200.00. Special Agent Schwinger indicated that both conversations were secretly recorded.

James McGuire testified (Tr. 60-76) in relevant part as follows:

Agency's Internal Affairs Division ("IAD") Agent McGuire testified that he investigated Employee's conduct. He reviewed the recordings, the letter of declination from the U.S. Attorney's Office, contacted Agent Schwinger and he interviewed Officer Logan and Employee. Agent McGuire testified that in his investigation he specifically sustained the charge of misconduct, specifying that Employee took $200.00 in cash for a criminal background printout at the request of Officer Logan for non-law enforcement purposes. Over the objections of Officer Reed, the Trial Board accepted into evidence the Investigative Report. Exhibit 2.

Lieutenant Anthony White (Tr. 77-80) testified in relevant part as follows:

Lieutenant Anthony White, a character witness for Employee, testified that he found Employee to be honest, dependable and a hard working while working with him in the Fifth District.

Officer Lloyd G. Murphy testified (Tr. 81-86) in relevant part as follows:

Officer Murphy testified that he had known Employee for 15 years, and that he was a great employee. Part of Employee's many tasks included NCIC criminal record checks.

Employee testified (Tr. 87-129) in relevant part as follows:

[2] The transcript pages are provided as approximations as the copy provided to the undersigned had no page numbers.

Employee testified that he was assigned to the Fifth District and performed WALES and NCIC searches as part of his assigned duties, duties he performed for four years. He had known Officer Logan for years and thought nothing of giving him a printed NCIC report for any individual he requested. Employee testified that he conducted a criminal background search for an officer and that it was not obvious to him that it was for a non-law enforcement purpose. He testified that officers often require background searches of individuals while out in the field. Employee testified that he did not question why officers were asking for WALES checks. He indicated that it was his duty to assist these officers the best he can. He indicated that he normally provides the information to officers over the phone, even when he does not know the reasons the request was made.

Employee testified that during the time he has known Officer Logan, he never had any reason to suspect that he was involved in criminal conduct. When he received a call from Officer Logan in March 2005, he was just thinking that Officer Logan wanted to run a guy's name to see if he was wanted. He added that he was not sure what he was thinking at the time. Employee further stated that he did not think Officer Logan's request was inappropriate.

Employee acknowledged that he took the $200.00 but stated that he never requested payment. Employee had no explanation for his actions except that he wasn't thinking. Employee stated that he believed that the recording was altered. Employee said he took full responsibility for his mistake but that he felt it was unfair that he was targeted.

ANALYSIS, AND CONCLUSIONS OF LAW

Employee is a member of the Fraternal Order of Police (the "Union"), and is covered by a provision of the collective bargaining agreement that specifically restricts the scope of this Office's review in adverse actions to the record previously established in the Trial Board's administrative hearing. Therefore, based on the holding in *District of Columbia Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002), my role as the deciding Administrative Judge is limited to reviewing the record previously established, and determining whether the Trial Board's decision was supported by substantial evidence; whether there was harmful procedural error; or whether it was in accordance with applicable law or regulation.[3]

In *Elton Pinkard v. D.C. Metropolitan Police Department*[4], the D.C. Court of Appeals limited the scope of OEA's review in certain appeals. The Court of Appeals in *Pinkard* overturned a decision of the D.C. Superior Court holding that, *inter alia*, this Office had the authority to conduct *de novo* evidentiary hearings in all matters before it. In its decision, the Court held in pertinent part that:

> The OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives the OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings. *See* D.C. Code §§ 1-606.2 (a)(2), 1-606.3 (a),

[3] *See Pinkard*, 801 A.2d at 91.
[4] 801 A.2d 86 (D.C. 2002).

> (c); 1-606.4 (1999), recodified as D.C. Code §§ 1-606.02 (a)(2), 1-606.03 (a), (c), 1-606.04 (2001); *see also* 6 DCMR § 625 (1999).
>
> It is of course correct that a collective bargaining agreement, standing alone, cannot dictate OEA procedure. But in this instance the collective bargaining agreement does not stand alone. The CMPA itself explicitly provides that systems for review of adverse actions set forth in a collective bargaining agreement must take precedence over standard OEA procedures. D.C. Code § 1-606.2 (b) (1999) (now § 1-606.02 (b) (2001)) states that "any performance rating, grievance, adverse action, or reduction-in-force review, which has been included within a collective bargaining agreement . . . *shall not be subject to the provisions of this subchapter*" (emphasis added). The subchapter to which this language refers, subchapter VI, contains the statutory provisions governing appellate proceedings before OEA. *See* D.C. Code § 1-606.3 (1999) (now § 1-606.03 (2001)). Since section 1-606.2 (b) specifically provides that a collective bargaining agreement must take precedence over the provisions of subchapter VI, we hold that the procedure outlined in the collective bargaining agreement -- namely, that any appeal to the OEA "shall be based solely on the record established in the [trial board] hearing" -- controls in Pinkard's case.
>
> The OEA may not substitute its judgment for that of an agency. Its review of an agency decision -- in this case, the decision of the trial board in the MPD's favor -- is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. The OEA, as a reviewing authority, also must generally defer to the agency's credibility determinations. Mindful of these principles, we remand this case to the OEA to review once again the MPD's decision to terminate Pinkard, and we instruct the OEA, as the collective bargaining agreement requires, to limit its review to the record made before the trial board.[5]

Thus, pursuant to the holding in *Pinkard*, an AJ 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;

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

> 2. The employee has been subjected to an adverse action;
>
> 3. The employee is a member of a bargaining unit covered by a collective bargaining agreement;
>
> 4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard*, *i.e.*: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, Trial Board] has been held, any further appeal shall be based solely on the record established in the Departmental hearing"; and
>
> 5. At the agency level, Employee appeared before a Trial Board that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.

Based on the documents of records and the position of the parties as stated during the Status Conference held in this matter, I find that all of these criteria are met in the instant appeal. Therefore my review is limited to the issues as previously mentioned. In addition, according to *Pinkard*, I must generally defer to the Trial Board's determinations of credibility when making my decision.

1. Whether the Trial Board's decision was supported by substantial evidence.

In reviewing Agency's decision to terminate Employee, this Office will evaluate the Trial Board's findings under a "substantial evidence" test.[6] Substantial evidence defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[7] "If the administrative findings are supported by substantial evidence, we must accept them even if there is substantial evidence in the record to support contrary findings."[8] Accordingly, Agency must present substantial evidence before this Office to support its conclusions at Employee's hearing before the Trial Board.

Agency contends that there is substantial evidence in the record to support the Trial Board's findings that Employee committed the misconduct for which he was charged. First, Employee admitted to providing the Informant the NCIC printout and receiving $200 for doing so when he was interviewed by the IAD investigator. Employee's discussions with the IAD investigator is as follows:

> Q. Once again, did you, do you have anything to offer regarding the transactions that I saw on the, on that DVD, in which it appears, once

[6] *Staton v. Metropolitan Police Department*, OEA Matter No. 1601-0152-09 (December 17, 2010).
[7] *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)).
[8] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).

> again you giving a former officer an NCIC printout? And, in fact, in that car, you even stated that it was an NCIC printout. 'I have the NCIC printout.' And, then he gave you a white envelope with two hundred dollars in it, which you put in your pocket, and then got out of the car. Do you have any explanation for that? I know what we've said before, but maybe we will start over.
>
> A. Sarge, I don't mean I don't have no explanation for it. I just wasn't no intention that when I ran the NCIC printout for him to take any money from him.
>
> Q. I understand that it wasn't your intention. But in the video, you did.
>
> A. And, it's just a misjudgment.

Agency Attachment 6.

A review of the audio and video recordings in the record support the Trial Board's findings and conclusions. Exhibit 2 consists of an audio tape of a telephone recording by the FBI where Officer Logan calls Employee and asks him to perform a (NCIC) check for Thomas Raymond McDougald. Officer Logan tells Employee that he will pay him $200 in exchange for the NCIC report. While talking to Officer Logan, Employee searches the NCIC database and tells Employee that no information was available on Mr. McDougald. The informant then asks Employee to provide him with a copy of the written report. Exhibit 3 records a second telephone conversation between Employee and Officer Logan where they made arrangements to exchange the NCIC report in front of Employee's workplace.

Exhibit 4 and Exhibit 5 are video recordings of the meetings between Employee and Officer Logan. These show that at approximately 10:45 on the recoding, Employee gets in the car with Officer Logan and exchanges the NCIC report for $200 in cash. Exhibit 5 depicts the informant, Officer Logan, driving the automobile to the FBI Special Agent. Finally, the record includes photocopies of the cash that was provided to Employee and the NCIC report Officer Logan received in exchange for the cash. Accordingly, the Trial Board's findings are supported by Employee's admissions during the IAD investigation, and audio and video recordings of Employee's misconduct.

In this case, Employee does not deny that he ran a criminal records check on a man that was not for law enforcement purposes, and then received payment for it. He could not deny it as all this was captured on video and audio tape. However, Employee argues that he did not ask for the payment. Employee testified at the Trial Board hearing that he ran the inquiry for Officer Logan because he was an officer and that at the time he did not believe that it was for an unauthorized reason. Moreover, he had advised Officer Logan that he did not need the money but he could not explain why that exchange between him and Officer Logan was not on the recordings of their interaction.

Instead, Employee alleges that the Trial Board's failure to consider Employee's testimony and failure to produce Officer Logan at the Trial Board Hearing constitutes harmful error in that this violated Employee's due process rights under the United States Constitution. Employee complains that he was deprived of the chance to cross examine Officer Logan. Specifically, Employee argues that because he denied conducting the search requested by Officer Logan for money, Agency should have presented Officer Logan as its witness. Employee further complains that Agency relied upon the hearsay testimony of Agent McGuire and Special Agent Schwinger.

Thus Employee takes issue with the fact that the Trial Board, as it stated in its decision, strongly credited the sworn testimony of Special Agent Robert Schwinger of the Federal Bureau of Investigation and the sworn testimony of Sergeant James McGuire of the Internal Affairs Division. Essentially, Employee complains that the Trial Board did not find his testimony to be credible.

There are several problems with Employee's argument. First, as the trier of fact, it is the Trial Board's job and prerogative to determine who is credible and who is not. Simply because Employee disagrees with the Board's credibility findings does not mean he was denied a fair trial. And in an administrative hearing, hearsay evidence is admissible.

With regards to Employee's contention that his right to confront and cross examine Officer Logan was denied, this argument is likewise unpersuasive. Whether for strategic litigation purposes or some other consideration, Agency had the right to choose not to present Officer Logan as one of its witnesses. In addition, there is nothing on the record to suggest, and Employee himself does not allege, that Agency prevented Employee from contacting Officer Logan or calling him as his own witness. Employee's own failure to present Officer Logan as an adverse witness does not mean he was denied a fair trial.

The Court in *District of Columbia Metropolitan Police Department v. Elton L. Pinkard*[9] held that OEA may not substitute its judgment for that of an agency, and it must generally defer to the agency's credibility determinations made during its trial board hearings. Similarly, the Court in *Metropolitan Police Department v. Ronald Baker* ruled that great deference to any witness credibility determinations are given to the administrative fact finder.[10] In this case, Agency would be the administrative fact finder.[11] The Court in *Baker* as well as the Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board* found 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.[12]

Based on Employee's own admission, and the video and audio recordings, there is substantial evidence in the record to support the Board's findings. As previously mentioned, *Pinkard* advises the Undersigned, as the "reviewing authority," to "generally defer to the

[9] 801 A.2d 91-92 (D.C. 2002).
[10] 564 A.2d 1155 (D.C. 1989).
[11] *Id*. at 1717.
[12] 527 A.2d 313 (D.C. 1987).

agency's credibility determinations."[13] Based on my own review of the witnesses' testimony, I can find no reason to disturb the Board's credibility determinations. It should be noted that the Board relied on Employee's own admissions of receiving payment for running an unauthorized criminal records search. Accordingly, there is no reason to overturn them.

Next, Employee takes issue with Agency's choice of termination as the appropriate penalty and asserts that the way it weighed the Douglas factors was arbitrary and capricious. In *Douglas v. Veterans Administration*[14], the Merit Systems Protection Board, this Office's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Although not an exhaustive list, the factors are as follows:

1. The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;

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 the 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 matter; and

[13] *See Pinkard*, 801 A.2d 86 (D.C. 2002).
[14] 5 M.S.P.R. 280, 305-306 (1981).

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

In the instant matter, the following are the Trial Board's determination listed along with Employee's objections:

1. The nature and seriousness of the offense, and its relation to the employee's duties, position and responsibilities, including whether the offense was intentional or technical or inadvertent, or committed maliciously or for gain or was frequently committed.

The Panel found this to be an aggravating factor.

Employee: While it is true that inappropriate use of NCIC could have egregious consequences, Employee states that he simply made the mistake of trusting a fellow officer and therefore failed to gain assurance that what he was being asked to do was for legitimate law enforcement purposes. Moreover, he never solicited anything from anyone and as far as is known, his lapse occurred on only one occasion.

2. The employee's job level and type of employment including supervisory or fiduciary role, contacts with the public, and prominence of the position.

The Panel found this to be an aggravating factor because Employee is a law enforcement officer and sworn to uphold the law.

Employee: Employee insists that he was not found to have violated any law, was not a supervisor, had very little contact with the public and there was no prominence associated with his position. At best, this should have been a neutral factor.

3. The employee's past discipline record.

Employee: The Panel rightfully found this to be a mitigating factor.

4. The employees' past work record, including length of service, performance on the job, ability to get along with fellow officers, and dependability.

Employee: The Panel also rightfully found this to be a mitigating factor.

5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its efforts on supervisor confidence in the employee's ability to performed assigned duties.

The Panel found this to be an aggravating factor.

Employee: Employee disagrees with the Panel's determination and points out that his fellow officers found him to be an excellent worker and that he continued to occupy his same position after the alleged incident involving Officer Logan as he did before. Employee also disputes being aware of the NCIC security protocol that the Panel alleges that Employee failed to follow.

6. Consistency of the penalty with those imposed upon other employees for the same or similar offense.

The Panel found this to be an aggravating factor.

Employee: There is no rationale to support this position. At best, this is a neutral factor.

7. Consistency of the penalty with any applicable agency tables of penalties.

Employee: The Panel rightfully found this to be neither an aggravating nor mitigating factor.

8. The Notoriety of the offense or its impact upon the reputation of the agency.

The Panel found this to be an aggravating factor. Even though the Panel conceded that there was no media coverage and/or notoriety it nonetheless concluded that "the panel agrees termination from employment is the appropriate disciplinary action due to the message it sends to other members, other agencies, and the general public."

Employee: The Panel's finding with respect to this Douglas Factor is without basis, because the subject of this proceeding occurred over five (5) years ago; because Employee was working at the same job, at the same times, with the same people, other members have little or no information about what occurred; other agencies have little or no information about what occurred and the general public has absolutely no information about what occurred. This incident garnered no notoriety and the Agency has not been affected at all by anything that Employee has done. If anything, Officer Reed, who suffered life threatening gunshot wounds in the line of duty, and still carries lead in his body from that shooting, has enhanced the reputation of the agency by returning to duty and earning the respect of his colleagues.

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.

Employee: Employee concedes that the Panel correctly found this to be an aggravating factor because of his job duties and responsibility.

10. Potential for employee's rehabilitation

Employee: The Panel's determination that this is an aggravating factor defies all reason as he suffered a lapse in judgment in March 2005 in dealing with Officer Logan but otherwise had over nineteen (19) years of unblemished service. That the Panel finds that he cannot be rehabilitated and that the only effective action is termination is wholly without basis.

11. Mitigating circumstances surrounding the offense such as unusual job tension, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter.

Employee: Incredulously, the Panel held this to be an aggravating factor based on alleged accusations by Employee. He expressed how he felt that he had been targeted but that is entirely understandable. At best, this Douglas Factor should be neutral.

12. The adequacy and effectiveness of alternative sanctions to deter conduct in the future by the employee and others.

Employee: The Panel apparently never considered the effectiveness of any alternative sanctions. Employee's non-existent prior disciplinary record and his subsequent functioning in his job for a period of four (4) years after the subject incident, without incident, proves that no basis exists for the contention that he cannot be rehabilitated and that no discipline short of termination will deter him from any similar misconduct.

The legal standard for the appropriateness of a penalty was established by the Merit Systems Protection Board in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981). In *Douglas*, the MSPB set forth a list of factors to be considered when assessing the appropriateness of a penalty. *Douglas*, at 331-332. The reasoning and factors established in *Douglas* have been adopted by the District of Columbia Court of Appeals in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). The Court in *Stokes* stated:

> 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...to specify how the Agency's penalty should be amended. *Stokes*, at 1010.

The court in *Stokes* goes on to state that the reviewing tribunal, may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate. *Stokes*, at 1011.

In *Gregory Miller v. Department of Public Works*, OEA Matter No. 1601-0113-98 (2002), this Office held "Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office."

Here, Agency balanced the Douglas Factors and concluded that termination was an appropriate penalty. Employee has not argued that removal is not within the Department's table of penalties for the charged misconduct. Employee's disagreement with Agency's conclusions regarding the penalty do not provide a basis to reverse the decision to remove Employee, a police officer who has admitted to using his position as a police officer to accept a bribe. Accordingly, Agency's decision to terminate Employee was within management's discretion and will be affirmed.

2. Whether there was harmful procedural error, or whether Agency's action was done in accordance with applicable laws or regulations.

Lastly, Employee argues that Agency failed to propose its adverse action within 90 Days as mandated by D.C. Code § 5-1031 and therefore his termination must be reversed.

D.C. Code § 5-1031 (2001) states:

> (a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.

Employee points out that the FBI's Public Corruption Unit investigated Officer Logan in 2004 and 2005 for conspiracy and bank fraud and then used him as a member of MPD with respect to Employee in March 2005. Employee finds it implausible for the FBI not to have alerted Agency regarding Employee's criminal conduct in the performance of his police duties. Thus, Employee asserts that Agency knew, or should have known of Employee's alleged misconduct and should have notified him of the proposed adverse action at some point prior to four (4) years after the alleged misconduct had occurred. Employee asserts that the District of Columbia Court of Appeals held in *District of Columbia Fire and Medical Services Department v. District of Columbia Office of Employee Appeals*, 986 A.2d 419 (D.C. 2010), that the 90 day period begins to run when the agency first becomes aware of the acts which formed the basis for the adverse action. Employee asserts that the failure of MPD to commence adverse action within 90 days of Officer Reed's alleged misconduct renders its proposed adverse action void and in violation of the law.

Agency disputes this argument and states that it learned of Employee's misconduct on December 30, 2008. Thus, pursuant to D.C. Official Code § 5-103 (b) the 90-day period for commencing the adverse action was tolled pending the completion of the Office of the United States Attorney for the District of Columbia ("OUSA")'s investigation. The OUSA issued its

Letter of Declination on January 12, 2009. Thus, the 90-day period for commencing an adverse action began. Agency served Employee with the Proposed Notice of Adverse Action on May 1, 2009. Agency asserts that there are no more than 76 business days between January 12, 2009, and May 1, 2009. Accordingly, Agency contends that it did not violate the 90-Day rule and Employee's arguments must be rejected.

Below is the chronology of events as presented by the parties:

1. Employee accepts $200 from Officer Logan in exchange for a criminal report on an individual on March 9, 2004. This transaction and the related conversations were captured on audio and video recordings.

2. Agency states that it learns of Employee's misconduct on December 30, 2008. However, the matter was already the subject of a criminal investigation by the FBI and the OUSA. (Agency's 6/13/2013 brief.)

3. On January 6, 2009, the FBI provided Agency a copy of its report regarding Employee's March 9, 2004, transaction, along with the recordings of the transaction.

4. On January 12, 2009, the Office of the United States Attorney for the District of Columbia sent a letter declining a criminal prosecution of Employee. (Employee's Exhibit 3, Attachment 3.)

5. On March 3, 2009, Agency's Internal Affairs Bureau submitted its final investigative report to its director. (Employee's Exhibit 3.)

6. On May 1, 2009, Agency served Employee with the Proposed Notice of Adverse Action.

7. On April 10, 2010, Agency's Adverse Action Panel held a hearing and found Employee guilty of all charges and recommended termination.

8. Agency sent its Final Notice of Adverse Action to Employee on June 6, 2010. (Employee's Exhibit 2.)

There are two problems with Employee's argument. First, Employee misrepresents the Court's holding when he insists that the Court held that the 90 day period begins to run when the agency first becomes aware of the acts which formed the basis for the adverse action. The Court of Appeals in *District of Columbia Fire and Medical Services Department v. District of Columbia Office of Employee Appeals, id.*, merely stated that the ninety-day period for Fire and Emergency Medical Services Department to propose removal of emergency medical technician for alleged mishandling of an emergency call began to run on date that panel of Department leaders interviewed technician in an investigation of the incident, not on subsequent date after release of report on incident by Office of the Inspector General (OIG), since grounds for technician's removal were clear on date of interview; even though during interview, technician was more evasive in her answers than her partner, the differences between their answers did not give rise to uncertainty about whether misconduct had occurred.

The OIG is a D.C. government agency while the FBI is a Federal agency and thus an entirely separate body. There is no legal requirement that a Federal agency inform a city agency of its investigation. Indeed, at times the target of an FBI investigation is a State or other local agency's employee and thus will not inform said agency until its investigation is completed.

In the instant case, apart from Employee's speculation that the FBI must have informed Agency or any other D.C. government agency of Employee's misconduct earlier than December 30, 2008, Employee does not provide any evidence to back up its assertion.

Secondly, Employee fails to mention the second part of the statute which it relies on. D.C. Official Code § 5-1031 provides as follows:

> (a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.
>
> (b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the *Office of the United States Attorney for the District of Columbia*, or the Office of Corporation Counsel, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation. (*Emphasis provided*.)

Here, the Office of the United States Attorney for the District of Columbia, a Federal body, was actively investigating Employee before and after it informed Agency of Employee's misconduct. D.C. Official Code § 5-1031 (b) clearly states that this tolls the 90-day period.

The record does not reflect that harmful procedural occurred at the Trial Board level of the instant appeal. Thus, if any procedural error occurred, it was harmless in nature. Based on the foregoing analysis, I find no credible reason to disturb Agency's action of terminating Employee. Agency's adverse action is backed up by substantial evidence and it properly considered the *Douglas Factors* in choosing the appropriate penalty to level against Employee. I find no credible reason to support a finding that Agency failed to act in accordance with all applicable laws or regulations.

ORDER

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

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge