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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0048-14
RICHARD MERRITT,)	
Employee)	
)	Date of Issuance: August 26, 2015
v.)	
)	
DISTRICT OF COLUMBIA)	
METROPOLITAN POLICE DEPARTMENT,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
James Maloney Esq., Employee Representative		
Eric Huang, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On February 3, 2014, Richard Merritt (“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” or “MPD”) action of terminating his employment. Employee, who worked as a Police Officer with Agency was charged with: 1) Commission of any act which would constitute a crime, whether or not a court record reflects a conviction; and 2) Conduct Unbecoming of an Officer. The charges stemmed from a February 3, 2014 incident, wherein Employee was arrested, and subsequently charged with Second Degree Assault for allegedly assaulting his wife during a Super Bowl party at his residence.

The matter was assigned to the Undersigned in July of 2014. On September 4, 2014, I held a Prehearing Conference Order for the purpose of assessing the parties’ arguments. I subsequently ordered the parties to submit briefs on the issue of whether the Panel’s decision should be upheld. Both parties submitted written briefs in response to the Order. 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 Agency Adverse Action Panel'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.

Uncontested Facts

1. Employee worked as a Police Office with MPD for approximately twenty-three (23) years.
2. On February 3, 2013, Employee hosted a party at his residence in Maryland during the Super Bowl football game.
3. On the evening of February 3, 2013, Employee was involved in a physical altercation at his residence. The incident involved Employee, his wife, Adrienne Brown Merrit, and his twenty-four (24) year old son, Damond Merrit.
4. As a result of the altercation, Adrienne Brown Merrit sustained a fracture to her left wrist.
5. On February 4, 2013, Employee was arrested by the Montgomery County Police Department. He was charged with Second Degree Assault.
6. On February 7, 2013, Adrienne Brown Merrit was granted a Temporary Protection Order ("TPO") from the Montgomery County Circuit Court. The Protective Order remained in effect until February 14, 2013.¹
7. Employee was indicted on the aforementioned charge on March 7, 2013. He subsequently pleaded guilty to the assault charge on October 31, 2013.
8. On May 14, 2013, Agency's Internal Affairs Division issued its Final Investigative Report Concerning the Allegation of Misconduct Against Officer Richard Merritt of the Fourth District.² The report concluded that there was sufficient evidence present to sustain the allegation that Employee committed a Second Degree Assault against his wife during the February 3, 2013 Super Bowl party at his residence.
9. On September 17, 2013, the MPD Adverse Action Panel ("Panel") held a disciplinary hearing, during which documentary evidence was submitted by both parties.
10. After the September 17, 2013 hearing, the Panel requested an Amendment of the Charges, recommending that one of the specifications enumerated in Charge Number 2

¹ The TPO was subsequently extended to February 21, 2014. A Final Protective Order was issued by Judge Robert Allen Greenberg on February 21, 2014. The FPO was valid until February 20, 2014.

² Agency Answer to Petition for Appeal, Tab 1 (March 26, 2014).

be dismissed. The Panel recommended that another charge to be levied against Employee.

11. A second Panel hearing was held on October 31, 2013 for the purpose of assessing the evidence in light of the amended charges. The Panel subsequently issued its Findings of Fact and Conclusions of Law, holding that Employee was guilty of Charge 1 (Specifications 1 and 2) and Charge 2 (Specifications 1 and 2).
12. Employee was subsequently served with a Final Notice of Adverse Action on December 3, 2013. Agency's Director of Human Resource Management, Diana Haines-Walton, sustained the Panel's findings, and held that termination was the appropriate penalty for Employee's actions.
13. On December 17, 2014, Employee filed an Appeal of Final Notice of Adverse Action with Agency, arguing that Agency's amendment of Charge 2, Specification 2, violated D.C. Official Code § 5-1031, commonly referred to as the "90-day rule." Employee further asserted that Agency failed to prove that the his termination was supported by substantial evidence in the record.³
14. On January 8, 2014, MPD Chief of Police, Cathy Lanier, issued a response, denying Employee's appeal, in part. After reviewing the record, Chief Lanier administratively dismissed Charge 2, Specification 2 against Employee. The remaining findings of misconduct were left undisturbed, and the decision to terminate Employee based on the remaining charges and specifications was upheld.⁴
15. Employee's termination became effective on January 24, 2014. He subsequently filed a Petition for Appeal with this Office.

STATEMENT OF THE CHARGES

An Amendment to Notice of Proposed Adverse Action was issued by Agency's Human Resource Management Division after the conclusion of the September 17, 2013 Panel hearing. The following represents a recitation of the amended charges levied against Employee:

Charge No. 1: Violation of General Order Series 120.21...which provides, in part, "...or is deemed to have been involved in the commission of any act which constitutes a crime, whether or not a court record reflects a conviction. Members who are accused of criminal or quasi-criminal offenses shall promptly report, or have reported their involvement to their commanding officers."

Specification No. 1: In that, on February 4, 2013 while off duty you were arrested by the Montgomery County Police and charged with Second Degree

³ Agency Answer to Petition for Appeal, Tab 9 (March 26, 2014).

⁴ *Id.* at Tab 10.

Assault for allegedly assaulting your wife, Mr(s). Adrienne Brown Merritt.

Specification No. 2: In that, on March 7, 2013, you were indicted in the Circuit Court of Montgomery County for Second Degree Assault.

Charge No. 2: Violation of General Order 120.21...which states, "Conduct Unbecoming of [an] Officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia." This conduct is further defined in General Order Series 201.26...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 to an offers and a professional..."

Specification No. 1: In that, on February 4, 2013, you were arrested by the Montgomery County Police and charged with Second Degree Assault for allegedly assaulting your wife, Mrs. Adrienne Brown Merritt.

Specification No. 2: In that, on February 4, 2013, you engaged in misconduct by grabbing your twenty-four (24) year old son, Mr. Damond Jarrod Meritt and taking him down to the floor. Thereby creating an emotionally charged atmosphere where upon Ms. Adrienne Merritt felt compelled to intercede in your physical contact with Mr. Damond Jerrod Merritt.⁵

SUMMARY OF THE TESTIMONY

On September 17, 2013, the Panel held an administrative disciplinary hearing. A second hearing was held on October 31, 2013. The following represents a summary of the testimony adduced during the hearings, as provided in the transcript (hereafter denoted as "Tr."). Both Agency and Employee were afforded the opportunity to present both documentary and testimonial evidence during the course of the hearings in support of their positions.

Lieutenant Sheila Sugrue (Transcript pages 10-123)

Lieutenant Sheila Sugrue ("Sugrue") is currently employed by the Montgomery County Police Department and is assigned to the Fifth District Station. She has been working there since February of 1995. On the night of the incident involving Employee, Sugrue was assigned to the

⁵ As previously stated, Charge 2, Specification 2 was administratively dismissed by Chief Lanier on January 8, 2014, following Employee's December 17, 2014 Appeal of Final Notice of Adverse Action. Accordingly, the Undersigned's discussion will be limited to a review of: Charge 1, Specification 1; Charge 1, Specification 2; and Charge 2, Specification 1.

Family Outreach Section, which covers domestic violence and runaway juveniles. She was assigned to the Family Services Division, which was housed at 7300 Calhoun Place, Rockville, Maryland.

On February 3, 2013, Sugrue responded to a domestic violence incident involving Richard Merritt ("Employee") and his wife, Adrienne Merritt. One of her duties was to respond to domestic violence incidents involving police officers in any jurisdiction. She testified that she was never at Employee's place of residence; however, her contact was made at Montgomery General Hospital. Sugrue collected statements from Employee's two sons. She also obtained a statement from another individual who was present at the party. Sugrue was also the charging officer at Central Processing regarding Employee's assault.

When Sugrue first received the call, she responded to the hospital in Olney, Maryland. Her first contact was with Employee's oldest son, Damond Merritt. Sugrue subsequently ended up interviewing him again. Initially, when she came to the hospital, Damond was upset. She explained that she had to smooth over the situation between him and the hospital's security in the Emergency Room. Sugrue explained to him that she was there to do an investigation and at that point, she told him that she was going to need a statement. Damond allowed Sugrue to interview him.

During Damond's interview, he informed Sugrue that there was a Super Bowl party at Employee's home, located on Tynewick Terrace. Damond testified that his father's coworker, Officer Barnhill ("Barnhill"), disrespected Mrs. Merritt and continued disrespecting her throughout the evening. Damond stated that Employee was not interceding or instructing Barnhill to stop. Damond stated he got annoyed with the situation because his father was not doing anything. He stated that his mom and Barnhill were going back and forth throughout the party. Damond told Sugrue he eventually told everyone to shut the 'F' up. He stated that at that point, there was a physical altercation between Barnhill and Employee. Damond's mother attempted to break up the altercation. During the course of the fight, items in the house were damaged. As a result, the fight continued outside. Damond stated that the argument escalated outside and his mother was injured. According to Damond, his younger brother, Richard Merritt Jr., convinced him that their mother needed medical attention. They subsequently put their mother in the car and drove her to the hospital. Sugrue stated that the hospital was about a ten minute drive away.

Sugrue's second contact was with Employee's youngest son, Richard Merritt, Jr. Sugrue testified that she received a written statement from him. Richard Merritt, Jr. indicated to her that he was present at the party on February 3, 2013, and that he went upstairs at about 8:30 p.m. He stated that he was awakened by the sounds of breaking glass coming from downstairs. He went downstairs to see what was happening, and stated that he saw his dad sitting on the floor and his mother face down. He stated that his father had his mother in a choke hold. He told his father to let go of his mother and his father eventually let go. Richard tended to his mother, and took her out to the car. When he started to take his mother to the hospital, the second altercation between his mother and father began. Richard then ran back in the house and grabbed his cell phone before traveling to the hospital.

According to Sugrue, Richard stated that, prior to going to the hospital, Officer Barnhill tried to argue with Damond. He stated that at one point, his father tried to hit Damond with Barnhill's crutches. Richard indicated that his parents had prior altercations.

Sugrue testified that she documented the prior incident in her notes. She stated that she was required to complete a domestic violence supplemental, which references prior incidents. In her notes, she indicated that during a prior incident, Employee came home and struck his wife while she was asleep. She wrote that the two brothers took their mother to the hospital for treatment. Damond explained that this was not the first time that he had to take his mother to the hospital for an injury cause by Employee.

Sugrue also made notes to herself regarding what happened in the yard. The notes indicated that Mrs. Merritt had to take pain medication. Mrs. Merritt explained that there had been an argument between her, Employee, and their son, which ended up getting physical. Mrs. Merritt tried to intercede with the men fighting. When it was just Employee and his wife in the room, he punched her in the eye and dragged her across the table that was in the living room area. Once Mrs. Merritt got punched, she was hazy, unconscious, and was not sure what had occurred in the past couple of minutes.

Sugrue testified that also received a statement from Sergeant Frey, who was the supervisor that responded to the scene on the evening of February 3, 2013. The statement indicated that Employee stated that there was no prior domestic violence between him and his wife. Employee also stated that his wife was intoxicated and that there was an altercation between him and his son. The statement provided that Employee's wife jumped in the altercation, and the son fell down. Employee told Frey that when his son fell, they all fell down together and she got hurt. Sugrue testified that she received Sergeant Frey's statement on the evening of the incident.

Sugrue stated that there were pictures of Mrs. Merritt's injuries and that she provided an accurate statement of her injuries. Sugrue prepared a Statement of Probable Cause at the Central Processing Unit. She also prepared a Statement of the Charges. The statement was based on the interviews and statements she obtained from the witnesses. Sugrue stated that Employee was eventually indicted by the Montgomery County Courts. She stated that she was considered a witness to a criminal case in Maryland. In this case, Sugrue completed the initial charges and was subsequently notified of any protective orders issued by the court. Sugrue stated that she had daily interaction with Christina Miles from the Montgomery County State Attorney's Office. She consistently met with Miles to get updates about Employee's case. Ultimately, Sugrue was notified that the case would not be going forward.

Sugrue testified that Mrs. Merritt was transferred to Washington Hospital Center. During Mrs. Merritt's interview with Detective Wiltshire of the Family Justice Center, she relayed in greater detail what happened on the night of February 3, 2013. Mrs. Merritt's interview statements were consistent with her initial statement. According to Mrs. Merritt, Employee dragged her across the table, threw her down to the ground, and punched her in the eye. She also reconfirmed that there was a back and forth discussion between her and officer Barnhill. She relayed that the discussion ultimately became an altercation involving her, her husband, and their

son. She stated that the assault was committed by her husband (Employee) and there was also an assault occurring outside as she left to go to the hospital. The assault outside was between Employee and his son Damond. Mrs. Merritt also stated that Employee struck the back window of the car with a crutch as they left to go to the hospital. Mrs. Merritt indicated during the interview that there were prior domestic violence incidents between her and her husband, including an incident where she was treated at Montgomery General Hospital.

Sugrue stated that she was the officer to arrest Employee. She testified that he turned himself in. She also stated that Employee was the person who made the 911 calls. According to Sugrue, Damond told her that everyone at the Super Bowl party was drinking alcohol. Damond also indicated that, in his opinion, his mother appeared to be wobbly and that she wanted to get something to eat.

On February 4, 2013, Sugrue obtained a statement from Catina Watts, the wife of a detective who attended the party. Sugrue stated that Employee was charged early in the morning and her follow up interview with Mrs. Watts occurred after she charged Employee. Mrs. Watts indicated that during the party, Mrs. Merritt fell in the kitchen. Sugrue stated that the fall was significant. Mrs. Watts testified that the floors of the townhome were ceramic.

Sugrue recalled that Mrs. Merritt stated that she was thrown across a table and then she was punched. In her narrative of probable cause, Sugrue noted that the injury was not specifically communicated to her because Mrs. Merritt could not account for the arm injury. Mrs. Merritt could only account for the fact that the injury occurred on the ceramic floor. She also testified that she recalled getting information regarding broken bottles and liquid on the floor. She stated that Mrs. Merritt indicated to her during the interviews that the floors in her home get slippery. According to Mrs. Merritt, the floors could be dangerous because they were made out of ceramic tile.

Sugrue testified that the officer at the scene indicated that he or she observed the coffee table in question and that the items on top of the table were not in disarray and did not appear as if someone was dragged across the top of the table. She did not receive any witness statements indicating that they actually observed Employee punching his wife. During Sugrue's investigation, it was conveyed to her that Employee was right handed.

Sugrue testified that Mrs. Merritt sustained opposite injuries. However, Sugrue stated that she did not understand how the left arm and the right side of Mrs. Merritt's face could be injured. She also testified that Mrs. Merritt did not acknowledge the injury. She stated that, in looking at Mrs. Merritt's eye and the top of her cheek, she believed that the injury came from a punch and stated that Employee is a large individual with large hands.

Sugrue recalled that, during her interview with Damond, he admitted to assaulting his father. Damond also indicated to her that once he got word that his mother's arm was broken, he approached Barnhill and physically assaulted him. Sugrue testified that there were approximately eight (8) people at the Super Bowl party. She stated that if Mr. and Mrs. Merritt were included in this number, it could have possibly been ten (10) people.

After speaking with the responding officers, Sugrue determined that the Employee was going to be arrested. Once it was determined that he would be arrested, there were limited people that were willing to speak to Sugrue because they knew that the incident was going to be investigated by Agency's internal affairs department. Sugrue stated that the potential witnesses did not openly provide information known to them about the incident and that these persons were not overly helpful with giving her a statement. Sugrue testified that Employee was charged with assault approximately six (6) hours after the altercation. When Sugrue spoke to the officers who were at the scene, they indicated to her that everyone had been drinking. She determined that the initial aggressor could not be identified at that time. She felt as though Employee was not a flight risk and that she could get ahold of Employee, if needed.

When the officers arrived, Employee, Officer Barnhill, and a female who was with Barnhill were present. Sugrue testified that at one point she was informed that Mrs. Merritt requested to have a protection order issued against Employee. A TPO was issued initially, and a final protective order was subsequently issued. However, the final protective order was voluntarily lifted by Mrs. Merritt. Sugrue testified that she did not see any documentation regarding the protective order being lifted. Sugrue was in charge of the Domestic Violence Unit and has received domestic violence training. She is considered to be one of the more experienced domestic violence investigators with Montgomery County. In her career, she has investigated several hundred incidents.

Sugrue stated that Employee was cooperative with her. However, she did not conduct an interview with him. She explained that she took Employee to central processing to charge him, but Employee did not have anything to say to her. She testified that Employee told Officer Fray, who responded to the scene of the altercation, that his wife jumped on his back during the incident and as a result, his son and wife fell down. Sugrue took a picture of Employee at central processing, but the photo did not capture his hands. She explained that she did not see any obvious injuries on Employee's person.

When Sugrue went to the hospital to speak with Mrs. Merritt, she noted that there was nothing that led her to believe that the injuries she sustained were old injuries. She noted that Mrs. Merritt appeared to be in considerable pain. Mrs. Merritt stated that all of her injuries occurred at her residence. Sugrue testified that Mrs. Merritt admitted to having consumed alcohol that night; however, she did not indicate how much alcohol she ingested. Sugrue obtained Mrs. Merritt's medical records from the hospital. However, she did not review the toxicology screening form for Mrs. Merritt. She testified that Mrs. Merritt's eyes appeared to be blood-shot, but there was no evidence of hemorrhaging.

Based on the information she received, Sugrue believed that there was probable cause to arrest Employee. However, she stated that there were no visible injuries on Mrs. Merritt's neck. According to Sugrue, the right part of Mrs. Merritt's wrist was rotated towards the left part of her wrist. She indicated that she saw some of the wrist injury because she looked at Mrs. Merritt's X-rays. Sugrue further noted that there was some bleeding. Sugrue did not testify before the grand jury. The case against Employee was ultimately dismissed based on the assertion of marital privilege.

James Lee (Transcript pages 123-145)

Officer James Lee ("Lee") has worked for the Montgomery Police Department since January of 2013. He began working for the police academy in July of 2012. Lee was a part of the investigative team that responded to the incident at Employee's residence. He responded to a domestic violence call and was the second or third officer on the scene. Lee wrote an incident report and based it on information he received from Sugrue. Lee testified that Officers Poulos, Frey, and Rea were also at the scene.

When Lee arrived at Employee's residence, he entered the door of the house. He did not go inside because of where all of the officers were standing. Lee briefly spoke with Employee and eventually went to the hospital. He did not have a chance to look inside the house. Lee received information regarding the state of the living room from Officer Boggs. Officer Boggs told him that the living was not too cluttered. Lee saw Employee being interviewed by the officers.

Lee spoke to Officer Barnhill's friend, Renee Quarrels-Johnson, who stated that Mr. and Mrs. Merritt got into a heated argument and Employee's son intervened. She told Lee that the argument got physical. Lee asked Ms. Quarrels-Johnson if she could stay, but she stated that she had to leave. Quarrels went to her car and left the scene. She subsequently called Officer Barnhill and told him that she left the house because she got scared.

Lee did not have a chance to observe Mrs. Merritt or her son because when he arrived on the scene, they were already gone. Lee testified that Employee and Barnhill admitted that they had been drinking; however, he did not believe that the two were heavily intoxicated.

Lee testified that, although he was the third officer to respond to the scene, he was the one who created the incident offense report. He was advised that he should create it because he was in training. However, Lee testified that he spoke with the other officers and made sure he had the right information.

Lee further stated that he spoke to Ms. Quarrels-Johnson first because Barnhill and Employee told him to. They explained to Lee that Ms. Quarrels-Johnson was the person who witnessed everything. They also told him that the information would not sound good coming from them because they were officers.

In Lee's report, he indicated that Damond Merritt intervened during the fight between his mother and father. This resulted in a physical altercation with between Damond and his father. Lee indicated that they fell to the ground and that Mrs. Merritt attempted to separate the two and jumped on Employee's back. As a result, everyone fell onto the floor and Mrs. Merritt's arm was injured. When Lee drafted the statement regarding Barnhill, Ms. Quarrels-Johnson had already left the scene.

Jeffrey Rea (Transcript pages 145-156)

Jeffrey Rea (“Rea”) has worked for the Montgomery Police Department since 2003. He heard the 911 call go out on the radio for the incident involving the Merritts. Rea knew Employee’s son from previous encounters.

Rea received information from one of the officers on the scene regarding Damond’s whereabouts. He was informed that Damond was possibly at the hospital with his mother. When Rea arrived, he saw Damond walking away from his parked car. Rea spoke with Damond in the parking lot and subsequently went inside the hospital to speak with Mrs. Merritt and Damond in further detail.

Rea spoke with Mrs. Merritt for roughly five (5) minutes. He also recorded a video of the conversation. He indicated in his observation that she had blood on her wrist. According to Rea, Mrs. Merritt sounded as if she was in pain. However, he did not know if she had been drinking or doing any drugs. After the interview, he spoke with Sugrue and filled her in on what he learned.

James McGuire (Transcript pages 156-222)

James McGuire (“McGuire”) is employed by the Metropolitan Police Department (“MPD”). He has worked for MPD for twenty-five (25) years and has worked with the Internal Affairs department for twelve (12) years. McGuire is familiar with the incident involving Employee because he prepared a report regarding the matter. He also took audio statements from Officer Barnhill and Employee.

McGuire’s report was based on communications with the Montgomery General Police, Sugrue, recordings and photographs. McGuire testified that a temporary protective order was taken out by Mrs. Merritt against Employee. The order was effective until February 14, 2013. McGuire testified that Mrs. Merritt was granted another protective order against Employee that was effective through February 21, 2013. A final protective order was effective through February 20, 2014. The conditions of the order provided that Employee immediately surrender all firearms to the Montgomery General County Sheriff’s department and refrain from the possession of any firearms for the duration of the order. McGuire testified that the order was eventually dismissed.

McGuire stated that he did not interview Employee when he wrote his report because the case was pending in criminal court. McGuire testified that Employee made the 911 call and stated in the call that Mrs. Merritt fell down and hurt herself, but he did not see what happened.

McGuire conducted an interview with Officer Barnhill. Barnhill told him that there was a Super Bowl party and that Mrs. Merritt was highly intoxicated and fell down. Barnhill believed that the fall was the cause of the injury to her hand. Barnhill stated to McGuire that the fall happened before the altercation. Barnhill explained that Mrs. Merritt slipped and fell. Barnhill told McGuire that he did not observe her in any physical altercation and that he had a good view of what was happening because he was in a seated position due to a leg injury. McGuire stated that Barnhill informed him that at some point, Damond Merritt got involved and used one of his

crutches to hit his father. Damond also tried to strike his father with his fist. Then, when Employee went outside, his son jumped in the car and drove his mother to the hospital.

Barnhill told McGuire that the cause of the incident was because Mrs. Merritt felt disrespected at the party. Her son also believed that his mother was being disrespected. Barnhill made it clear to McGuire that Employee did not assault his wife. During the altercation between Employee and his son, they hit a coffee table and spilled fluid, which caused the floor to be slippery. Barnhill stated that Mrs. Merritt fell again and stated that he heard her moaning.

Barnhill also told McGuire that Employee became aware of his wife's eye injury during the court proceedings. McGuire asked Employee specific questions regarding the substance of his wife's statements to the Montgomery County Police officers and detectives. Employee denied all of the allegations. Employee did not know how his wife's injuries occurred. He also did not know how the liquid got on the floor. Employee admitted that he and his son, Damond, had gotten into a physical altercation.

McGuire testified that the statements provided by Employee were consistent with the statements provided by Officer Barnhill. Employee stated that he did not assault his wife. Barnhill also stated that when Mrs. Merritt tried to intervene in the fight, she was kicking and striking Employee. Employee also explained in his statement that his son grabbed his 'good' leg and then all three people fell to the floor. When they fell to the floor, his wife was saying "Get off my son." Both Employee and Barnhill indicated that Mrs. Merritt fell multiple times; she fell once in the living room and another time in the kitchen.

McGuire stated that he sustained the administrative charges against Employee based on the final protective order, him being arrested for probable cause, and because Employee was indicted on assault charges. He stated that he did not interview Employee's son or any other witnesses because they were not cooperative in the investigation. However, McGuire did not specifically ask Damond or Mrs. Merritt for statements. McGuire stated that he had known officer Barnhill for twenty five (25) years and had no reason to not believe the statements that he provided. He did believe that Barnhill was a liar.

McGuire testified that he spoke with Sugrue during his investigation. He was also kept abreast of the status of the criminal case against Employee and was aware of Employee's whereabouts via GPS tracking. McGuire knew that Employee could not be near his wife because of the protective order. He spoke with the supervisor assigned to observe Employee's GPS tracking. McGuire stated that Merritt never violated the terms of the protective order.

Van Crawford (Transcript pages 222-227)

Van Crawford ("Crawford") is a Lieutenant for MPD and has been with the department since June 29, 1987. He is currently assigned to the Fourth District station and knows Employee very well. He explained that he was Employee's sergeant from 1992 until approximately 1996, also served as his supervisor.

Crawford testified that Employee has always been a very conscientious officer. He stated that Employee is very respectful and works very well with minimal supervision. He stated that he did not have any issues with Employee. Crawford stated that there were never any complaints of excessive force and that he never saw Employee get upset. Crawford stated that Employee is very even keeled. Crawford opined that he would supervise Employee again in the future if he was given the opportunity. Crawford stated that he never saw anything that would lead him to believe that there was another side to Employee.

Michael Whiteside (Transcript pages 227-234)

Michael Whiteside (“Whiteside”) has been with MPD for thirteen and a half years. He is currently a Lieutenant assigned to the Fourth District. He has worked there since December of 2009. Employee was one of the officers who worked with him at the department.

Whiteside stated that he supervised Employee. He did not have any problems with Employee; however, he had very little contact with Employee. Whiteside explained that Employee was very quiet and calm, and handled his business. Whiteside did not notice whether Employee was easily angered. He testified that Employee’s performance evaluation reflected that he received an “exceeds expectations” rating. Whiteside would work with Employee in the future because he did what he was supposed to do.

Moses Vines (Transcript pages 234-237)

Moses Vines (“Vines”) has worked for MPD for thirty (30) years. He is currently a Lieutenant for the Fourth District. Vines worked with Employee and stated that he worked well and with minimal supervision. Vines stated that he never had to discipline Employee and described him as nice and quiet. Vines stated that Employee was a good guy and that his demeanor was even keeled.

Vines testified that he observed Employee in situations where he displayed restraint. He explained that Employee had a good relationship with his coworkers. If given the opportunity, Vines would supervise Employee in the future because he is a good officer. He explained that Employee followed directives, provided feedback, and came up with ideas of how to curb crime.

David Brock (Transcript pages 237-246)

David Brock (“Brock”) is an MPD officer and worked for the department for approximately twenty-four (24) years. He is currently assigned to the Fourth District. Employee was his coworker and a close friend. He explained that Employee was professional at all times while conducting police duties. He explained that Employee handled every scene with care and was protective of both his coworkers and victims. Brock described Employee’s interactions with citizens as very good. He stated that Employee is mild tempered and knows how to keep things going in the right direction.

Outside of work, Brock stated that Employee is a family man. Brock stated that his family and Employee's family interact very well with each other. Brock spoke to Employee's wife on occasions and nothing ever came up regarding abuse, nor has he ever witnessed it. Brock also stated that he had the opportunity to spend time with Mrs. Merritt and never observed any bruises or swelling on her body. If given the opportunity, Brock would work with Employee in the future because he conducted himself professionally. Brock stated that he trusts Employee. Brock has been to Employee's residence and stated that they have polished tile floors from the front door to the living room area.

Linwood Barnhill (Transcript pages 246-278)

Linwood Barnhill ("Barnhill") has worked for MPD for ten (10) years and is currently assigned to the Seventh District. On February 3, 2013, Barnhill attended a Super Bowl party at Employee's house. He testified that there were eight (8) people present at the party, including Employee and Mrs. Merritt.

According to Barnhill, there were no issues in the beginning of the party and everyone was having a nice time. He explained that Mrs. Merritt was calling him a 'Baltimore man.' He told Mrs. Merritt that he was not from Baltimore. Then, Barnhill's friend was preparing food for him and Mrs. Merritt stated to the friend "why are you kissing his butt?" Mrs. Merritt started saying that Employee was Barnhill's bitch. Barnhill stated that Mrs. Merritt was under the influence of alcohol. He explained that everyone was drinking, but he did not drink that much because he was taking medication. Barnhill stated that Mrs. Merritt was drinking white wine before he arrived.

Barnhill stated that some people participated in drinking games, and that Mrs. Merritt fell in the kitchen prior to the start of the drinking games. At one point, Employee asked Mrs. Merritt to go upstairs and lay down. Barnhill indicated that Mrs. Merritt did not want to go upstairs, so she came into the living room. Barnhill's friend suggested that they play a drinking game, and Mrs. Merritt started to lose. However, instead of stopping, she kept losing and became even more intoxicated. Barnhill explained that Mrs. Merritt was taking shots during the game.

With regard to the fall in the kitchen, Barnhill stated that he heard a thumping noise and his friend and her son went to the kitchen to help Mrs. Merritt off of the floor. He did not know if she passed out or fell. Eventually, Mrs. Merritt started getting very aggressive towards Barnhill, and her speech was slurred. Barnhill stated to Employee that his wife was messing up the party, and according to Barnhill, Employee stated that Mrs. Merritt would be quiet. Then, Damond Merritt stood up and said "I wish both of you would shut the 'F' up." Damond proceeded to walk toward Employee and brushed him. Barnhill testified that Employee grabbed Damond and they started tussling. At that point, everyone started running and getting out of the way. He stated that Employee was not angry with his wife.

In Barnhill's opinion, Damond attempted to make contact with his father. Employee put his son down by his arms, sitting on top of him so he could not move. Then, Mrs. Merritt got off the couch and went over and started kicking and hitting Employee in the back. Mrs. Merritt then fell again. Barnhill opined that Mrs. Merritt suffered an injury at that time. He stated that she fell

pretty hard against the floor. Barnhill testified that Employee went to help his wife and then Damond got up and ran out of the house. Employee started to pick his wife up and get her on the couch. Barnhill explained that the younger son was helping his mother as well. Barnhill stated that everyone was there, but they left the house because of Damond. Barnhill explained that he could not get up to assist anyone because he was on crutches and they were across the room. During the fight, a couple of bottles were knocked off the table.

Barnhill stated that Employee was trying to get his wife off of the floor because she was complaining of pain. He was able to get her off the couch and at that point, Damond's little brother came downstairs and asked what was going on. Barnhill stated that Employee did not grab his wife around the chin and throw her across the table. He explained that Employee's arms were wrapped underneath his wife's arms and he was trying to get her off the floor. Barnhill did not observe Mrs. Merritt get punched in the face. When Mrs. Merritt fell for the second time, Barnhill explained that she landed on her side. Barnhill stated that he did not see Employee choke his wife. After Mrs. Merritt got up, Damond took her out to the car to take her to the hospital. Barnhill subsequently went outside. When Barnhill got outside, Damond got out of the car and came towards him and snatched his crutches. Barnhill stated that Damond swung on him with the crutch and grazed him. He stated that he brushed it off because he knew that Damond was hot-headed. Barnhill stated that Damond was not trying to hurt him.

Prior to the situation outside, Employee called the Montgomery County police. Employee eventually went upstairs. While Barnhill was being confronted by Damond, he called Employee, who came out of the house. At that point, Damond got in the car and drove off.

Barnhill stated that four (4) Montgomery County police arrived at the scene. Barnhill testified that he provided a statement to the officers. Barnhill got a chance to look at the pictures Mrs. Merritt's injuries. He stated that there were no broken blood vessels in her eye. According to Barnhill, if someone the size of Employee hits another person, the injured person would have a marble or a busted blood vessel in their eye.

Barnhill did not testify during Employee's criminal court proceeding; however, he knew that Employee could possibly go to jail and lose his job. He also knew that the case against Employee was dismissed. Several months later, MPD Internal Affairs contacted Barnhill to conduct an interview. Barnhill testified that the information he provided during the interview with Internal Affairs was consistent with the information he provided during the hearing before the Adverse Action Panel.

Barnhill testified that he did not see Damond pull out a knife, but he may have had something in his hand. Barnhill testified that he believed that Employee called 911 so that a report could be taken. He explained that this was for Employee's benefit and for his job. Barnhill explained that Employee wanted to make sure everything was documented. When Employee called the police, he explained that he had an altercation with his son. He explained to them that when he had his son pinned down, his wife was kicking and hitting him. Employee told the police that his wife slipped and fell, sustaining an injury.

Barnhill testified that he was shocked that Employee was placed under arrest. He stated that the situation was one-sided and the detective never asked any questions. The police also stated that it would not be best for Employee to stay at the house that night, so he stayed with Barnhill. When they got to Barnhill's home, two officers came and advised them that they needed to call Internal Affairs. Employee subsequently contacted Internal Affairs and was told that he needed to go to Seven Locks. When they got to Seven Locks, Employee was put in handcuffs and the detective had a discussion with Barnhill.

Barnhill testified that the Montgomery County police did not ask him anything. He testified that the police did a less than stellar investigation. He explained that although Mrs. Merritt stated that he instigated the altercation, the police did not ask him anything. Prior to the incident, Barnhill had been to Employee home about eight times. He never observed any abuse or an attempt by Employee to harm his wife.

Richard Merritt (Transcript pages 279-330, and pages 15-33)⁶

Richard Merritt ("Employee") worked for MPD for twenty-three (23) years. In the first two years of his employment, he was stationed at the Fifth district, and was transferred to the Fourth district in 2000.

On February 3, 2013 Employee had a Super Bowl party. He decided to have a few friends over, so he invited Barnhill. Barnhill brought a female friend with him. Officer Watt's wife also attended. Watt's wife brought her two children and a friend of theirs. Also in attendance were Watkins and his wife. Employee's son Damond and his wife were also present.

Employee stated that he started cooking around five o'clock. His guests started to arrive around 6:00 p.m. When everyone got there, they started drinking beer. Employee explained that there was a lot of liquor and wine at the party. According to Employee, everyone was drinking alcohol; however, he did not drink that much because he was the host and didn't want to over-do it. Employee's younger son was also present.

Employee stated that the night started off fine. The guests continued drinking and his wife started to get really intoxicated. While everyone was drinking, Barnhill stated that Employee's wife fainted in the kitchen. Employee, Damond, and Mr. Watt's wife went into the kitchen and had to help Mrs. Merritt off the floor. Employee instructed his son to take his mother upstairs so she could lie down. He wanted to clear people out of the house and check on her to see if she should go to the hospital. When Employee went back to the living room, he assumed that his wife and son went upstairs. However, he saw his wife come back downstairs and noticed that she was drinking again.

During the party, the guests participated in drinking games. Employee's wife lost every round during the drinking games. He stated that as a result of her drinking, she started to 'go off.' Mrs. Merritt started talking 'trash' to Barnhill and the other guests. She called Barnhill a 'Baltimore Bammer.' She also called Barnhill Employee's 'bitch.' Employee started to get

⁶ The following testimony was given during the second day of hearings before Agency's Adverse Action Panel.

embarrassed. He said that he was not angry, but rather embarrassed because he wanted people to meet his family.

Eventually, Damond told Employee and Barnhill to “shut the fuck up.” His son subsequently walked by Employee and brushed him. Employee grabbed Damond and said “look don't do this disrespecting thing” and that he was “lucky to be living here.” According to Employee, Damond threw a drink in his face and Employee pushed him in response. When Employee pushed his son, his son fell on the table, and everything fell on the floor, including the liquor. Damond got up off the floor and assumed a fighting position. Employee grabbed his son, but Damond grabbed Employee's ‘bad’ leg and flipped him over. As a result, Employee fell back and his son fell on top of him. Employee grabbed Damond and told him to get out of the house.

During the altercation between Employee and Damond, Mrs. Merritt began kicking Employee. Employee stated that he was lying on her back while his wife was kicking him. He stated that they tried to get up, but the floor was wet. Employee's wife was able to get up before him and proceeded to run across the floor, but fell again. Employee tried to grab his wife and they both fell down. Employee's son, Richard, came down the stairs to see what was happening. Richard told his mom to stop. Employee released his wife at that time. Employee stated that he is 6 feet 6 inches tall and weighs 340 pounds and that his wife weighs over 300 pounds.

After releasing his wife, Employee went in the kitchen and heard a commotion and Barnhill calling his name. He looked out of the kitchen and saw that his son was standing over Barnhill with a knife in his hand. Employee picked up the phone and dialed 911 because he knew nothing good was going to come out of the situation. According to Employee, this was not the first time his eldest son aggressed against him.

When Employee called 911, he told the operator that he was involved in an altercation with his son and that his wife intervened and may have hurt herself. Employee also stated that his friend Barnhill was assaulted. He explained to the operator that his wife was headed to the hospital. He also told the operator that his son stole his vehicle and that his son was in possession of a knife.

The officers interviewed Employee after arriving to the scene. He directed a few officers towards the hospital. Employee explained that the officers could not get any legitimate answers, so they decided to take an incident report. Barnhill stated that he would stay with Employee. Employee and Barnhill went to Barnhill's house. Two Sergeants from the Seventh District came to Barnhill's home and instructed Employee to call internal affairs. Employee was also instructed to call Sugrue. When Employee called Sugrue, she stated that she was going to arrest him. Sugrue asked Employee when could he turn himself in, and he informed her that he could do so the following morning.

When Employee met with Sugrue, she explained to him that his wife had a bump on her head. Sugrue told Employee that he was being charged with assaulting his wife. She also informed him that his wife had a broken wrist. Employee stated that he was not sure how that happened. Sugrue informed Employee that his son told her that Employee put his wife in a chokehold. Employee was then transferred to the processing center.

Employee had to wear a GPS from February 6th until June 28th. Employee also had to volunteer with the Abused Persons Program. He explained that the class was for criminal defendants. Employee also participated in the Employee Assistance Program while going back and forth to court. He explained that there was a charge against him in Prince George's County. Employee completed all the required classes. Employee noted that he received recognition for an outstanding job with MPD.

Employee denied that he assaulted his wife. According to Employee, he has a fairly civil relationship with Mrs. Merritt because of their 15 year old son that is in high school. He also stated that they have a twenty (20) year old in college in New Mexico. Employee testified that the allegations against him were "hogwash." He admitted to having disagreements with his wife, but they were never physical. Employee explained that the incident during the Super Bowl party was the first time the police had ever been called to that residence. Employee believed that his son lied and reiterated that he would never hit his wife.

Employee stated that on the night of the incident, he was concerned about his wife. He stated that when he heard about her hurting her arm he was upset and in disbelief. He stated that he did not go to the hospital to check on his wife because the police were at the house. After Employee turned himself in, he received a \$10,000 bond.

Although Employee told the 911 operator that he was injured, he admitted that he was not in fact injured and only just wanted his son to be dealt with. Eventually, Mrs. Merritt called the court and requested that the restraining order be lifted. He stated that the matter was dismissed. During the criminal proceeding, Employee's wife asserted her marital privilege. According to Employee, the GPS tracking device that he was required to wear was removed on the day that the matter was dismissed.

In 2012, Employee was arrested in Prince Georges County. According to Employee, the matter was dismissed because of lack of probable cause. As a result, Agency suspended Employee for twenty (20) days based on his alleged commission of a crime.

Employee testified that after the incident at the Super Bown party, he and Damond's relationship got better. He explained that Damond moved out, got a job and had a child. He stated that he and Damond discussed expectations of being a father. Employee and his wife also went to marriage counseling. He stated that he encourages his sons to go to church. Employee stated that everything is getting back on track. Employee noted that if a situation like the party incident happened again, he would walk away. He stated that he would talk man to man with his son privately. He has also made a requirement for there to be no alcohol in the house.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

In *Elton Pinkard v. D.C. Metropolitan Police Department* the D.C. Court of Appeals limited the scope of OEA's review in certain appeals.⁷ 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), (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

⁷ 801 A.2d 86 (D.C. 2002).

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.⁸

Thus, pursuant to the holding in *Pinkard*, an AJ of this Office may not conduct a *de novo* hearing in an appeal before him or her, but must rather base his or 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.*: “[A]n 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 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 Panel’s decision was supported by substantial evidence; whether there was harmful procedural error; or whether it was in accordance with applicable law or regulation.⁹ Employee argues that the holding in *Pinkard* does not preclude this Office from conducting a *de novo* hearing. Specifically, Employee submits that Agency violated D.C. Official Code § 5-1031, which is commonly referred to as the “90-day rule” by allegedly failing to issue its proposed adverse action against Employee within the required statutory time limit. Employee requests that this tribunal grant him a new Evidentiary Hearing for the purpose of determining whether Agency violated the 90-day rule and whether termination was the appropriate penalty to levy against Employee. Employee’s request for a *de*

⁸ *Id.* at 90-92. (citations omitted).

⁹ *See Pinkard*, 801 A.2d at 91.

novo hearing before OEA is denied, and for the reasons discussed herein, I find that *Pinkard* is the appropriate standard to apply in the instant case. I further find that Agency did not violate the 90-day rule, in spite of Employee's position to the contrary.

At the time he was terminated, Employee worked as an officer with MPD. On February 4, 2013, Employee was arrested by the Montgomery County Police Department and was charged with Second Degree Assault. As a result, Agency instituted adverse action proceedings against Employee, charging him with violating General Order ("GO") 120.21, Attachment A, Part A-7 (Conduct Constituting a Crime), and Part A-12 (Conduct Unbecoming of an Officer). Employee further exercised his right to have an administrative hearing before Agency's Adverse Action Panel. Two days of hearings were held on September 17, 2013 and October 31, 2013, during which both Agency and Employee were afforded the opportunity to present evidence before the Panel. The Panel subsequently issued its Findings of Fact and Conclusions of Law and recommended that Employee be terminated based on the evidence presented during the hearings. It should be noted that Employee does not argue that he was not a member of a collective bargaining unit at the time he became subject to an adverse action, nor does he submit that the Collective Bargaining Agreement ("CBA") between Agency and his union contained an exception to the application of *Pinkard* in cases where it is alleged that an employee's procedural due process rights were violated.

I find that the conditions as provided above have been satisfied, thus the holding in *Pinkard* precludes the Undersigned from conducting a *de novo* hearing before OEA. My review is therefore limited to determining whether the Panel's decision was supported by substantial evidence, whether Agency committed harmful procedural error; and whether Employee was terminated in accordance with all applicable laws and regulations. In addition, according to *Pinkard*, I must generally defer to the Panel's determinations of credibility when making my decision.

Whether the Panel's decision was based on substantial evidence.

In reviewing Agency's decision to terminate Employee, this Office will evaluate the Trial Board's findings under a "substantial evidence" test.¹⁰ Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."¹¹ "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."¹² Accordingly, Agency must present substantial evidence before this Office to support its conclusions at Employee's hearing before the Panel.

¹⁰ *Staton v. Metropolitan Police Department*, OEA Matter No. 1601-0152-09 (December 17, 2010).

¹¹ *Davis-Dodson v. D.C. Department of Employment Services*, 697 A.2d 1214, 1218 (D.C. 1997) (citing *Ferreira v. D.C. Department of Employment Services*, 667 A.2d 310, 312 (D.C. 1995)).

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

Charge No. 1, Specification No. 1

Employee was charged with violating General Order Series 120.21, which states in pertinent part: "...or is deemed to have been involved in the commission of any act which constitutes a crime, whether or not a court record reflects a conviction. Members who are accused of criminal or quasi-criminal offenses shall promptly report, or have reported their involvement to their commanding officers." Specifically, Agency states that, on February 4, 2013, while off duty, Employee was arrested by the Montgomery County Police and charged with Second Degree Assault for assaulting his wife. With respect to Charge 1, Specification 1, the Panel made the following pertinent findings of fact:

1. The panel reviewed the criminal case information for Officer Richard Merritt that was obtained from the Circuit Court for Montgomery County—Criminal System. This document reflects that Officer Richard Merritt was arrested for Second Degree Assault in the state of Maryland, Montgomery County. The Criminal Case Number 122333C [and] has a District Court Number 5D00306213.
2. The panel also considered the testimony from Montgomery County Police Department Lieutenant Sheila Sugrue, who identified herself as the arresting officer. The complainant in this criminal case was Officer Merritt's wife, Ms. Adrienne Brown—Merritt.

Regarding this charge and specification, the Undersigned has determined that there is substantial evidence in the record to support a finding that Employee's conduct on the evening of February 3, 2013 constituted a crime under Maryland law. According to Statement of Probable Cause issued by the District Court of Maryland for Montgomery County, Employee was charged with Second Degree Assault, in violation of CR 3-203 of the Criminal Law Article. Section 3-203 of the Maryland Code states the following:

- (a) A person may not commit an assault.
- (b) Except as provided in subsection (c) of this section, a person who violates subsection (a) of this section is guilty of the misdemeanor of assault in the second degree and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding \$2,500 or both.
- (c) (1) In this subsection, "physical injury" means any impairment of physical condition, excluding minor injuries.

(2) A person may not intentionally cause physical injury to another if the person knows or has reason to know that the other is:
 - (i) a law enforcement officer engaged in the performance of the officer's official duties; or

- (ii) a parole or probation agent engaged in the performance of the agent's official duties.
- (3) A person who violates paragraph (2) of this subsection is guilty of the felony of assault in the second degree and on conviction is subject to imprisonment not exceeding 10 years or a fine not exceeding \$5,000 or both.

In general, probable cause exists “where the facts and circumstances within knowledge of the officers and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed.”¹³ Moreover, “probable cause provides legal justification for arresting a person suspected of crime.”¹⁴

In this case, Lieutenant Sugrue collected statements from witnesses to the altercation that occurred at Employee's residence on the evening of February 3, 2013. Employee's eldest son, Damond Merritt, did not witness the incident; however, he told Sugrue that there was a physical altercation between Barnhill and Employee. According to Damond, his mother (Adrienne Merritt) attempted to break up the altercation and was injured in the process. In his statement, Damond observed his mother's injuries, and decided to take her to the hospital for medical attention. Employee's youngest son, Richard Merritt, Jr., witnessed part of the altercation between his mother and Employee. In his statement to Sugrue, Richard Jr. stated that he was awakened by the sounds of breaking glass coming from downstairs. He went downstairs and saw that Employee had his mother face down in choke hold. Richard Jr. demanded that Employee release his mother and subsequently took her to the hospital with his brother. Employee's wife, Adrienne Merritt, further told Sugrue during her videotaped interview at the hospital that she was injured when she attempted to intervene in a fight between Employee and Damond. Adrienne stated that she was struck in the eye and that Employee dragged her across the room. Photographs of her injuries were taken at the hospital.

While it is true that there are varying accounts of what transpired during the February 3, 2013 incident at Employee's residence, the Undersigned nonetheless finds that there is substantial evidence in the record to uphold Charge 1, Specification 1. In the narrative section of the Statement of Probable Cause, Sugrue noted that Adrienne Merritt could not account for the exact cause of her arm injury—only that she was injured by Employee when she was alone with him in the living room. In its decision, the Panel held that Adrienne Merritt's injuries were sustained as a result of Employee's actions on the evening of February 3, 2013. After investigating the matter and conducting interviews, Sugrue determined that there was sufficient probable cause to arrest Employee based on the statements she received from Damond, Richard Jr., and Adrienne Merritt. Accordingly, the Undersigned finds that the Panel's decision regarding Charge 1, Specification 1 should be upheld, despite the existence of conflicting testimony in the record. It should further be noted that a conviction is not required under General Order Series 120.21, which states “...or is deemed to have been involved in the commission of any act which constitutes a crime, whether or not a court record reflects a conviction, *supra*. Thus, Agency's

¹³ U.S.C.A.Const. Amend. 4.; *See Brinegar v. United States*, 338 U.S. 160, 69 S. Ct. 1302, 93 L. Ed. 1879 (1949).

¹⁴ *Maryland v. King*, 133 S. Ct. 1958, 1970, 186 L. Ed. 2d 1 (2013).

ability to levy Charge 1 against Employee is not affected by the subsequent dismissal of the criminal charges against him based on Adrienne Merritt's assertion of marital privilege.

Charge No. 1, Specification No. 2

After reviewing the evidence and testimony adduced during the hearing, the Panel determined that there was sufficient evidence in the record to support Charge 1, Specification 2, stating that Employee was indicted in the Circuit Court of Montgomery County for Second Degree Assault on March 7, 2013. In support of its conclusion, the Panel cited to Employee's True Bill of Indictment. The document provided in pertinent part:

COUNT ONE: ASSAULT – FIRST DEGREE

The Grand Jurors of the State of Maryland, for the body of Montgomery County, upon their oaths and affirmations, present that Richard A Merritt, on or about February 3, 2013, in Montgomery County, Maryland, di[d] assault Adrienne Merritt in the first degree, in violation of section 3-202 of the Criminal Law Article against the peace, government and dignity of the state.

COUNT TWO: ASSAULT – SECOND DEGREE

“The Grand Jurors of the State of Maryland, for the body of Montgomery County, upon their oaths and affirmations, present that Richard A Merritt, on or about February 3, 2013, in Montgomery County, Maryland, di[d] assault Adrienne Merritt in the second degree, in violation of section 3-202 of the Criminal Law Article against the peace, government and dignity of the state.”¹⁵

I find that the Panel did not err in upholding Charge 1, Specification 2 against Employee, and that there is substantial evidence in the record to support a finding that Employee was indicted for Second Degree Assault on March 7, 2013. An indictment is a charging instrument that serves two primary purposes: 1) to apprise the accused of the charges against him, so that he may adequately prepare his defense; and 2) to describe the crime with which he is charged with sufficient specificity to enable him to protect against future jeopardy for the same offense.¹⁶ In *Ex parte United States*, the Supreme Court stated that “[i]t reasonably cannot be doubted that, in the court to which the indictment is returned, the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer.”¹⁷

¹⁵ See Agency Exhibit 6 (Adverse Action Panel Hearing).

¹⁶ *Russell v. U.S.*, 369 U.S. (1962).

¹⁷ 287 U.S. 241 (U.S. 1932).

Here, Employee's indictment (Criminal Number 122333) relied upon the information of arresting officer Sugrue as a basis for establishing probable cause. On its face, the indictment apprised Employee of the criminal charges against him for assault in the first and second degree. The document was signed by the foreperson of the grand jury as well as the State's attorney for Montgomery County, Maryland. The Panel considered the testimony submitted at the Adverse Action hearing, in addition to the probable cause statement and the interviews conducted by Sugrue. In its Findings of Fact and Conclusions of Law, the Panel concluded that there was enough evidence in the record to uphold Charge 1, Specification 2 against Employee. Based on a review of the record, I find that Employee was indicted in the Circuit Court of Montgomery County for Second Degree Assault on March 7, 2013. Accordingly, Specification 2 is supported by substantial evidence in the record.

Charge No. 2, Specification No. 1

Employee was also charged with violating General Order 120.21, which states, "Conduct Unbecoming of [an] Officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia." This conduct is further defined in General Order Series 201.26...which provides that, "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 to an officers and a professional...." In reaching its decision, the Panel considered the following relevant court documents and testimony that was submitted into evidence:

1. Officer James Lee's Incident—Offense Report, which stated that Employee's wife, Adrienne Merritt, became involved in a verbal argument with Employee. The argument escalated, and Adrienne reported that Employee punched her in the right eye then dragged her across the top of a coffee table and threw her down on the tile floor.
2. Officer Jeffrey Rea's video statement from Adrienne Merritt.
3. Adrienne Merritt's report to urgent medical care professionals at the Washington Hospital that Employee punched her in the eye and dragged her across a table.
4. Richard Merritt's written statement.
5. Officer Linwood Barnhill Jr.'s statement.
6. The probable cause statement prepared by Montgomery County Police Department officer Sugrue.

The Panel weighed all of the relevant documents and testimony submitted by both Employee and Agency in reaching its decision regarding Charge 2, Specification 1. As previously stated, probable cause existed to arrest Employee and charge him with Second Degree Assault, following the February 3, 2013 super bowl party. Employee's arrest for assaulting his wife constituted a criminal offense under Maryland law. The Panel therefore determined that Employee's actions constituted conduct unbecoming to an officer and violated GO 120.21. The

Undersigned finds that there is substantial evidence in the record to support a finding that Employee's actions were unbecoming to an officer, thus Charge 1, Specification 2 is upheld.

Douglas Factors

As previously mentioned, *Pinkard* advises the Undersigned, as the "reviewing authority," to "generally defer to the agency's credibility determinations."¹⁸ In *Douglas v. Veterans Administration*¹⁹, 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;

¹⁸ See *Pinkard*, 801 A.2d 86 (D.C. 2002).

¹⁹ 5 M.S.P.R. 280, 305-306 (1981).

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.

The Court in *District of Columbia Metropolitan Police Department v. Elton L. Pinkard*²⁰ 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.²¹

In considering the *Douglas Factors*, the Panel found that several factors were aggravating in nature. The Panel affirmed that Employee's actions on the night of February 4, 2013 constituted a criminal offense in the state of Maryland. In addition, the Panel noted that Employee's position as a law enforcement officer required him to function in highly stressful situations with the public, thus his misconduct was deemed significant. While Employee's actions did not result in media coverage, his actions were documented in court reports and police reports in Montgomery County. The Panel opined that Employee's misconduct adversely impacted Agency's reputation and may erode the public's ability to cultivate trust in the Department.

According to the Panel's analysis, Employee's conduct directly contradicted the discipline necessary to perform the duties of the police officer. The Panel unanimously agreed that Employee's chances for rehabilitation were highly unlikely, in part, because this was his second arrest by two different law enforcement agencies in the state of Maryland. It should be noted that *Douglas Factor Number 7, Consistency of the Penalty with Those Imposed Upon Other Employees For the Same offenses*, was held to be a neutral factor. According to the Panel, Agency has imposed penalties ranging from suspension to termination for employees who have committed similar offenses. Regarding its decision to terminate Employee, the Panel stated the following in pertinent part:

²⁰ 801 A.2d 91-92 (D.C. 2002).

²¹ 564 A.2d 1155 (D.C. 1989).

“...Officer Merritt’s blatant disregard for the rules and regulations of the Department cannot be tolerated and...a recommendation for severe sanctions would send a clear and concise message that would serve as a deterrent to other members of the Department...In reaching this decision, the Panel took into consideration the testimony of the witnesses for the prosecution, the witnesses for the defense, and the testimony of Officer Richard Merritt...The Panel considered ‘reasonableness’ in rendering its opinion. The panel members believe that Officer Merritt cannot be rehabilitated....”²²

Agency’s Table of Offenses and Penalties, as enumerated in MPD General Order 120.21, provides mandatory guidelines for imposing disciplinary sanctions against members of the Department. The penalty for a first violation of GO 120.21 (Attachment A, Part A-7), which states “...or is deemed to have been involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction...” is removal. A first violation of Conduct Unbecoming of an Officer (Attachment A, Part A-12) may result in discipline ranging from Suspension for three (3) days to removal.

Based on the foregoing, I find that the Board properly considered the *Douglas Factors* in choosing the appropriate penalty to levy against Employee. I further find that the penalty of termination fits squarely within the range of disciplinary actions allowed under the Table of Offenses and Penalties. As such, there is no credible reason to support a finding that Agency abused its discretion in analyzing the *Douglas Factors* or that the penalty imposed upon Employee was beyond the range allowed by all applicable laws, rules, or regulations.

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

Pursuant to *Pinkard* and OEA Rule 631.3, I find that in the instant matter, the Undersigned is required to make finding of whether or not MPD committed harmful error. OEA Rule 631.3, states that “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. 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.”

D.C. Official Code § 5-1031, commonly referred to as the “90 day rule” states the following:

- (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

²² Findings of Fact and Conclusions of Law, pg. 30.

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.

Employee argues that “there is no doubt that the Metropolitan Police Department was aware, or should have been aware not later than February 26, 2013, of the misconduct—including the criminal conduct—committed by Officer Merritt which was later the subject of the adverse action.”²³ In response, Agency states that the 90-day rule was not violated, stating the following:

Even using the date of the actual arrest of the Employee, February 4, 2013, a date twenty two (22) days earlier than that proposed by the Employee, a count of 90 business days from that date is June 10, 2013. After adding three more days to account for the holidays of Presidents’ Day, Emancipation Day, and Memorial Day, the 90th day after the Employee’s arrest is June 13, 2013. Therefore, the service date of June 11, 2013 is not violative of the 90-day rule even when using a date earlier than that proposed by the Employee himself.”²⁴

I concur with Agency’s analysis and find that the 90-day rule was not violated in this case. The Undersigned concedes that the Panel amended Charge 2, Specification 2 after the September 17, 2013, thereby arguably creating a new date within which Agency was required to commence an adverse action against Employee. However, Chief Lanier administratively dismissed this charge on January 8, 2014, and the remaining findings of Employee’s misconduct were left undisturbed. Accordingly, the remaining charges (Charge 1, Specification 1; Charge 1, Specification 2; and Charge 2, Specification 1) were served on Employee within the required ninety (90) day period. As previously stated, this Office was not required to hold a *de novo* hearing because requirements of *Pinkard* were satisfied. Employee also fails to cite to any case law, statute or regulation to support his position that Agency’s alleged violation of the 90-day rule required OEA to vacate the Panel’s decision and conduct a new hearing. As such, I find that Agency did not commit harmful error in reaching its decision to terminate Employee.

²³ Employee Brief at 7 (November 17, 2014).

²⁴ Agency Reply Brief at 3 (December 11, 2014).

Based on the foregoing, I find that Agency's decision to terminate Employee was based on substantial evidence. I further find that Agency did not commit any harmful procedural errors, and that Employee's termination was done in accordance with applicable laws and regulations. Accordingly, Agency's action of terminating Employee should be upheld.

ORDER

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

FOR THE OFFICE:

SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE