THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
EMPLOYEE,	) OEA Matter No. 1601-0081-13R18R22
	)
	) Date of Issuance: October 25, 2023
v.	)
	) JOSEPH E. LIM, ESQ.
METROPOLITAN POLICE DEPARTMENT	) Senior Administrative Judge
Agency	)

Ted Williams, Esq., Employee Representative
Connor P. Finch, Esq., Agency Representative

THIRD INITIAL DECISION ON REMAND

PROCEDURAL BACKGROUND

On April 24, 2013, Employee, a Police Officer with the Metropolitan Police Department ("Agency" or "MPD") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office"), contesting Agency's action terminating his employment for "Failure to Obey Orders and Directives and Untruthful Statements." An Adverse Action Hearing Panel ("Panel") was convened on January 17, 2013.

On April 6, 2015, I issued an Initial Decision ("ID") overturning Agency's removal of Employee on the ground that it violated the mandatory 90-day rule embodied in D.C. Code §5-1031(a).[1] Agency appealed, and on September 13, 2016, the OEA Board reversed the ID citing that the 90-day rule was not violated, and remanded the matter back to the undersigned with instructions to review the issue of whether there was substantial evidence to support Agency's action.[2] The OEA Board did not address Agency's forfeiture argument, which asserted that Employee forfeited his right to raise the 90-day rule as a defense since he failed to raise the issue before the adverse action panel. After Employee indicated that he had appealed the matter to the District of Columbia Superior Court ("DCSC") on October 19, 2016, I issued the first ID on Remand dismissing the appeal as moot on December 20, 2016.[3]

1 *Employee v. MPD*, OEA Matter No. 1601-0081-13 (April 6, 2015).
2 *Employee v. MPD*, OEA Matter No. 1601-0081-13, *Opinion and Order on Petition for Review* (September 13, 2016).
3 *Employee v. MPD*, OEA Matter No. 1601-0081-13R16 (December 20, 2016).

On October 13, 2017, the DCSC remanded this matter to the undersigned after the parties filed a consent motion to remand the matter to OEA.[4] I held a Status Conference on December 19, 2017, and ordered the submission of legal briefs. On June 29, 2018, in a Second ID on remand, I upheld Agency's adverse action against Employee after I found that Agency's charges against Employee were supported by substantial evidence.[5]

Employee petitioned for review in the DCSC, where his only argument was that MPD had violated the 90-day rule. The DCSC affirmed OEA's decision.[6] Employee timely appealed the decision of the DCSC to the District of Columbia Court of Appeals ("DCCA"). On June 10, 2022, the DCCA issued a Memorandum Opinion and Judgment vacating the DCSC's judgment and remanding the matter back to OEA for further proceedings.[7] The DCCA remanded to OEA because it determined that OEA might be able to decide the case on other grounds. First, although the DCCA noted MPD's forfeiture argument, it declined to address forfeiture because the "OEA ALJ appears to have overlooked it."[8] Second, the DCCA noted that one of the three charges for which Employee was terminated, his untruthfulness to IAD, "appeared plainly timely under D.C. Code §5-1031(a)," but declined to address whether Employee's removal might be proper under Charge No. 3 alone.[9]

On June 29, 2022, and November 1, 2022, I convened a Status Conference and subsequently ordered the submission of briefs on the questions posed by the DCCA. After a requested extension of the deadline and the addition of another issue due to the intervening amendment to D.C. Code § 5-1031 enacted through the Comprehensive Policing and Justice Reform Amendment Act of 2022, D.C. Act 24-781, 70 D.C. Reg. 953 (Jan. 27, 2023) ("Reform Act"), the parties have submitted their briefs. The record is closed.

JURISDICTION

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

ISSUE

What effect, if any, does the recent amendment to D.C. Code § 5-1031 enacted through the Comprehensive Policing and Justice Reform Amendment Act of 2022, D.C. Act 24-781, 70 D.C. Reg. 953 (Jan. 27, 2023) ("Reform Act") have on the issue(s) identified by the D.C. Court of Appeals.

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4 *Employee v. D.C. Office of Employee Appeals, et. al. & D.C. Metropolitan Police Department*, 2016 CA 007680 (D.C. Super. Ct. Oct. 13, 2017).
5 *Employee v. MPD*, OEA Matter No. 1601-0081-13R18 (June 29, 2018).
6 2019 CA 004909 P(MPA) (December 2, 2019).
7 *Employee v. D.C. Office of Employee Appeals, et. al. & D.C. Metropolitan Police Department*, No. 19-CV-1223 (D.C. Ct. of Appeals, Jun. 10, 2022).
8 *Id.* Memo Op. at 6.
9 *Id.* Memo Op. at. 4.

FINDINGS OF FACT

Employee, a member of the Fraternal Order of Police (the "Union"), was employed as a Police Officer by Agency for six (6) years. Employee's discipline arose out of misconduct initially reported to MPD's Office of Internal Affairs ("IAD") in December 2008 by Lillian Colter while she was being interviewed in an unrelated matter. Based on this information, between December 15, 2008, and January 6, 2009, IAD agents conducted a preliminary surveillance of the Calvert Woodley Liquors Store ("CWL"). The investigation revealed that three officers, one of whom was identified as Employee, were providing security for the store during closing time.

On January 13, 2009, Agent RM met with Assistant United States Attorney ("AUSA") Steven Durham and briefed him regarding the criminal allegations against Employee and the other two officers, NA and MR.[10] AUSA Durham assigned the criminal investigation to AUSA Michael Atkinson. Meanwhile, surveillance of the store continued until May 9, 2009.

On March 18, 2010, the Federal Bureau of Investigation ("FBI") and Agency's internal affairs interviewed Employee. On November 21, 2010, Officer A pled guilty to a charge of illegal supplementation of salary and agreed to debrief as part of his plea agreement. On January 21, 2011, the United States Attorney's Office indicted Employee and Officer R in the U.S. District Court for the District of Columbia on charges of receipt of illegal gratuities and illegal supplementation of salary.[11] Officer R was subsequently terminated on an unrelated matter. On November 29, 2011, the United States District Court for the District of Columbia Judge Reggie B. Walton signed an Order dismissing the Indictment against Employee.

An undated MPD Internal Affairs Memorandum changed Employee's duty status from Suspension Without Pay ("SWOP") to Full Duty after an investigation was issued. (Employee Exhibit 3). On January 4, 2012, a signed MPD Human Resource Management Memorandum formalized Employee's change of duty status from Indefinite Suspension Without Pay ("SWOP") to Full Duty based on the recommendation of the Internal Affairs Division. (Employee Exhibit 4). On January 4, 2012, Employee returned to work. On February 12, 2012, Employee was again interviewed by Internal Affairs. On February 17, 2012, AUSA Durham issued a Letter of Declination for Employee, stating that Employee appeared to be on his lunch break during the times he was providing security for the store.

On June 14, 2012, IAD completed its investigatory report and recommended that the charges against Employee be sustained. Agency issued Employee a Notice of Proposed Adverse Action on June 26, 2012, charging Employee with the following Charges and its respective Specifications:[12]

Charge No. 1: Violation of General Order Series 120.21, Part A-16, which states: "Failure to Obey Orders and Directives Issued by the Chief of Police." This misconduct is further defined in General Order

10 Initials of the officers are used to protect their identity.
11 Initials of the officers are used to protect their identity.
12 Agency Tab 2.

Series 201.17, Part IV, which states: "Members shall not engage in outside employment without proper authorization from their Assistant Chief/Senior Executive Director." Further, Part V, G, 2, (b), which states: No member shall engage in outside employment if the "second job" would interfere with the member's scheduled tour of duty on the Department." Part V, G, 4, which states: "Members shall not accept any compensation for services rendered while on duty."

Specification No. 1: In that, between December 15, 2008, and May 4, 2009, you worked outside employment without authorization, providing security for Calvert Woodley Liquor Store, while on duty with the Metropolitan Police Department. Further, you were paid by a store employee on approximately 30 separate occasions for providing security for the liquor store.

Charge No. 2: Violation of General Order Series 120.21, Part A-16, which states: "Failure to Obey Orders and Directives Issued by the Chief of Police." This misconduct is further defined in General Order Series 201.26, B-24, which states in part, "A member shall not accept a gift, or gratuities from organizations, business concerns, or individuals, with whom he/she has, or reasonably could be expected to have official relationship on business of the District Government. Similarly, members are prohibited from accepting personal or business favors such as social courtesies, loans, discounts, services, or other considerations of monetary value…"

Specification No. 1: In that, on February 12, 2012, you admitted during your interview with the Internal Affairs Division, that you received discounts from the Calvert Woodley Liquor Store and purchased wine, while on duty with MPD.

Charge No. 3: Violation of General Order 120.21, Attachment A, Part A-6, which states: "Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Department Officer to, or in the presence of, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing." As further specified in General Order Series 201, Number 26, which states in part, "…Additionally during the course of an investigation, all members shall respond truthfully to questions by an agent or official of the Internal Affairs Division (IAD)…"

Specification No. 1: In that, on February 22, 2012, during an interview with the Internal Affairs Division (IAD), you denied being paid for providing

> security services at Calvert Woodley Liquor Store. You made this statement knowing it to be untrue. However, during an IAD interview with Kevin Ehrman, store manager, of Calvert Woodley Liquor Store, he stated that he has paid you in cash, approximately 20 to 30 times.

Employee appeared before the Adverse Action Hearing Panel on January 17, 2013, for an administrative hearing. Agency submitted a complete transcript of the hearing.[13] Employee was represented by Attorney Donna Rucker. At the hearing, Employee did not raise the defense of whether Agency violated the mandatory 90-day rule embodied in D.C. Code §5-1031(a). After the presentation of evidence and closing arguments, the Hearing Panel sustained all specifications of the three charges and recommended termination. Specifically, the Hearing Panel recommended that Employee be found guilty of Charge 1, Specification 1, Charge 2, Specification 1, and Charge 3, Specification 1. The Hearing Panel recommended that Employee be removed for being found guilty of all Charges.[14] The Hearing Panel's Findings and Recommendations recited that the selection of the proposed penalties was made after considering the *Douglas* Factors[15] and Employee's past record.

Employee was notified of the Panel Recommendations by a Final Agency Decision document dated March 1, 2013.[16] Employee appealed to the police chief in a letter dated March

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13 Agency Tab 3.

14 Agency Tab 5.

15 In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), 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 where 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.

16 Agency Tab 6.

11, 2013.[17] The Findings and Recommendations were accepted as Agency's Final Decision on March 22, 2013, by Cathy Lanier, then Police Chief for Agency.[18]

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 (the "Agreement") that specifically restricts the scope of this Office's review in adverse actions to the record previously established in the Adverse Action Hearing Panel's administrative hearing. Based on *D.C. Metropolitan Police Department v. Pinkard,* 801 A.2d. 86, the parties agree that this Office may not conduct a *de novo* hearing in an appeal before the Office but must rather base the decision solely on the record, provided that the conditions are met:

1. The appellant (Employee) is an employee of either the Metropolitan Police Department, or the D.C. Fire & Emergency Medical Services Department;
2. The employee has been subjected to an adverse action;
3. The employee is a member of a bargaining unit covered by a Collective Bargaining Agreement;
4. The Collective Bargaining Agreement contains language essentially the same as that found in *Pinkard*, *i.e.*: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, Trial Board] has been held, any further appeal shall be based solely on the record established in the Departmental hearing"; and
5. At the agency level, Employee appeared before a Trial Board that conducted an Evidentiary Hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action (employee's removal, suspension, demotion, or personal performance rating) or a reduction-in-force.

The parties agree that all these conditions are met in this matter. Thus, my review of the final Agency decision to terminate Employee is limited "to a determination of whether [the final Agency decision] was supported by substantial evidence,[19] whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations."[20] Further, I "must generally defer to the agency's credibility determinations."[21] My review is restricted to "the record made before the trial board."[22]

In the April 6, 2015, ID, I held that Agency committed a harmful procedural error when it

17 Agency Tab 7.
18 Agency Tab 8.
19 According to OEA Rule 628.3, 59 D.C. Reg. 2129 (2012), an agency has the burden of proof in adverse action appeals. Pursuant to OEA Rule 628.1, *id*., that burden is by "a preponderance of the evidence", which is defined as "[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." In *Pinkard*-type cases previously decided by this Office (including the initial decision in *Pinkard* itself that resulted from the remand), we have held that there must be substantial evidence to meet the agency's preponderance burden. *See, e.g.; Hibben, supra; Davidson, supra; Kelly, supra; Pinkard v. Metropolitan Police Department*, OEA Matter No. 1601-0155-87R02 (December 20, 2002); *Bailey v. Metropolitan Police Department*, OEA Matter No. 1601-0145-00 (March 20, 2003).
20 See *D.C. Metropolitan Police v. Pinkard,* 801 A.2d 86, at 91.
21 *Id.*
22 *Id.* at 92.

violated the mandatory 90-day rule as embodied in D.C. Code §5-1031(a).[23] The subsequent remand by the OEA Board held that Agency had not violated the 90-day rule and specifically instructed me to address only the issue of whether Agency's action was supported by substantial evidence.[24]

Forgoing review by the OEA Board, Employee timely petitioned for review in the DCSC, where he argued only that MPD had violated the 90-day rule. The DCSC affirmed OEA's decision.[25] It concluded that treating the declination letter as the end of the criminal investigation was consistent with Ebert and Jordan and was not arbitrary, capricious, or clearly erroneous.[26]

On October 13, 2017, the DCSC remanded this matter back to the undersigned after the parties filed a consent motion to remand the matter back to OEA.[27] I held a status conference on December 19, 2017, and ordered the submission of legal briefs. On June 29, 2018, in a Second ID on remand, I upheld Agency's adverse action against Employee after I found that Agency's charges against Employee was supported by substantial evidence.[28]

Employee timely appealed the decision of the DCSC to the District of Columbia Court of Appeals ("DCCA"). Before the DCCA, the parties briefed two specific questions:

> 1. Whether the OEA correctly held that the declination letter—rather than either the indictment or the dismissal of the indictment without prejudice— marked the conclusion of the criminal investigation for purposes of Section 5-1031.
>
> 2. Whether Employee's termination should be upheld on alternative grounds where (a) he failed to preserve the Section 5-1031 argument that he presented to the OEA because he never raised it during the MPD proceedings, and (b) the disciplinary charge for making false statements was timely even without tolling and by itself could justify his termination.

On June 10, 2022, the DCCA issued a Memorandum Opinion and Judgment vacating the DCSC's judgment and remanding the matter back to OEA for further proceedings.[29] The DCCA answered neither question on the above two specific questions because "it is not clear to us that this case turns on when the conclusion of the investigation of" Employee occurred under D.C. Code § 5- 1031(b).[30] Rather, the DCCA remanded to OEA to address an issue that had never been in controversy and thus had not been expressly addressed by OEA – when did the criminal investigation begin.[31] But while the DCCA declined to address the issues presented because it

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23 *Evans v. MPD*, OEA Matter No. 1601-0081-13R16 (December 20, 2016).
24 *Evans v. MPD*, OEA Matter No. 1601-0081-13, *Opinion and Order on Petition for Review* (September 13, 2016).
25 2019 CA 004909 P(MPA) (December 2, 2019).
26 *Id.*
27 *Employee v. D.C. Office of Employee Appeals, et. al. & D.C. Metropolitan Police Department*, 2016 CA 007680 (D.C. Super. Ct. Oct. 13, 2017).
28 *Employee v. MPD*, OEA Matter No. 1601-0081-13R18 (June 29, 2018).
29 *Employee v. D.C. Office of Employee Appeals, et. al. & D.C. Metropolitan Police Department*, No. 19-CV-1223 (D.C. Ct. of Appeals, Jun. 10, 2022).
30 *Id.* Memo Op. at 5.
31 *Id.*

determined OEA might be able to decide the case on other grounds, the DCCA made clear that the outcome of the instant case did not necessarily depend on the answer to when the criminal investigation began. First, the DCCA noted MPD's argument that the DCCA should affirm because Employee forfeited his right to challenge the timeliness of the action because he did not raise the issue before the adverse action panel but declined to address forfeiture because the "OEA ALJ appears to have overlooked it."[32] Second, the DCCA noted that one of the three charges for which Employee was terminated, his untruthfulness to IAD, "appeared plainly timely under D.C. Code §5-1031(a)," but declined to address whether Employee's removal might be proper under Charge No. 3 alone.[33]

On April 21, 2023, the District of Columbia Council repealed the 90-day provision, *see* Comprehensive Policing and Justice Reform Amendment Act of 2022, D.C. Law 24-345, § 117(a), 70 D.C. Reg. 953 (Apr. 21, 2023), ("Reform Act") and made the repeal retroactive to "any matter pending, before any court or adjudicatory body[.]" *Id.,* § 301(b). In its briefs, Agency argues that the Council of the District of Columbia ("Council") has repealed the 90-day rule for MPD employees, and it explicitly made that repeal retroactively applicable to cases pending before any adjudicatory body, including OEA. Agency posits that Employee forfeited his right to challenge the timeliness of proceedings by failing to raise the argument before the Agency and that one of the three charges was "plainly timely" and served as an independent basis for termination.

In his briefs, Employee declined to address Agency's forfeiture argument. Instead, he argues that the Reform Act does not compel this Office to do anything. He states that this Office held in *Employee v. D.C Metropolitan Police Department*, OEA Matter No. 1601-0046-22 (June 28, 2023) that there is a presumption against statutory retroactivity based upon the inherent unfairness of imposing new burdens on people after the fact. Employee urges that the legal effect of one's conduct should be assessed under the law that existed when the conduct took place. He concludes that Agency's adverse action should be reversed due to its violation of the 90-day rule.

I find that the DCCA has made its position clear regarding the retroactivity of the 90-day rule in *Employee v. D.C. Metropolitan Police Department, et. al*.[34] In that matter, the appellant employee had challenged an order reversing OEA's conclusion that MPD failed to provide notice within 90 days as required by then-D.C. Code § 5-1031(a-1) (Repl. 2015) and upholding her termination. DCCA noted that the District of Columbia Council has since repealed the 90-day provision,[35] and made the repeal retroactive to "any matter pending, before any court or adjudicatory body[.]"[36] The DCCA disagreed with the appellant's argument that the retroactivity provision does not apply to her appeal. The DCCA held that the provision does not compel "specific results under old law,"[37] but rather "direct[s] courts to apply newly enacted, outcome-altering legislation in pending civil cases," which the legislature may constitutionally

32 *Id.* Memo Op. at 6.
33 *Id.* Memo Op. at. 4.
34 *Employee v. D.C. Metropolitan Police Department, et. al.*, 2018-CA-003991-P(MPA) (D.C. Ct. of Appeals, Oct. 4, 2023).
35 *see* Comprehensive Policing and Justice Reform Amendment Act of 2022, D.C. Law 24-345, § 117(a), 70 D.C. Reg. 953 (Apr. 21, 2023).
36 *Id.,* § 301(b).
37 *See Robertson v. Seattle Audubon Soc.,* 503 U.S. 429, 439 (1992).

do.[38] The DCCA further held that its deferential standard of review applicable to OEA decisions does not prevent it from applying the repeal retroactively.[39] The DCCA goes on to state that while the new statute did not become law until after the trial court's decision, it was nevertheless required to obey its commands.[40]

Accordingly, I find that the DCCA has upheld the retroactive provision of the Reform Act. Consequently, because this instant matter was pending before OEA when the Reform Act became law, Employee's argument that Agency violated the repealed provisions of the 90-day rule no longer holds. As a result, I find that Agency's removal of Employee must be upheld.

ORDER

It is hereby ORDERED that Agency's decision to remove Employee for cause is UPHELD.

FOR THE OFFICE: *s/Joseph Lim, Esq.*
Joseph Lim, Esq.
Senior Administrative Judge

38 *See Bank Markazi v. Peterson,* 578 U.S. 212, 229 (2016); *see also D.C. Metro. Police Dep't v. D.C. Pub. Empl. Reis. Bd., et al.,* No. 19-CV-1161, 2023 D.C. App. LEXIS 260 at *13 (D.C. Sept. 7, 2023) ("[T]he Council's directive to apply the repeal of§ 5-1031(a-1) to pending cases does not violate the restrictions imposed on legislative action by separation of powers principles.").

39 *Cf. D.C. Metro. Police Dep't*, 2023 D.C. App. LEXIS 260 at *6-7 (explaining, in the context of an arbitration award, that this court's deferential standard of review is irrelevant where an award can be set aside if there is a clear violation of law).

40 *Employee v. D.C. Metropolitan Police Department, et. al.*, 2018-CA-003991-P(MPA) *supra*, citing *George Washington Univ. v. D.C. Bd. of Zoning Adjustment*, 831 A.2d 921, 941 n.16 (D.C. 2003).