THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Anita Staton	)	Matter No. 1601-0152-09
Employee	)	
	)	Date of Issuance:
v.	)	December 17, 2010
	)	
Metropolitan Police Department	)	Senior Administrative Judge
Agency	)	Joseph E. Lim, Esq.
	)	

Gregory Lattimer, Esq., Employee Representative
Brenda Wilmore, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

Employee, a police officer, pay grade 1 step 9, with the District of Columbia Metropolitan Police Department (Agency), was charged with: 1) being involved with an act which constituted a crime whether or not a court record reflects a conviction; 2) conduct unbecoming an officer; and 3) any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force. Specifically, Employee was charged with leaving the scene after being involved in a vehicular accident.

In accordance with the collective bargaining agreement (CBA) signed by Agency and Employee's union, the Police Trial Panel (Trial Board) of the District of Columbia Metropolitan Police Department (MPD) held a hearing on May 2, 2008. The agency trial board found her guilty of all charges and specifications. Agency suspended employee for sixty days.

On July 6, 2009, Employee filed a petition for appeal with this Office. The matter was assigned to the undersigned judge on January 19, 2010. I held a prehearing conference on February 19, 2010. Thereafter, the parties engaged in mediation in an attempt to settle the matter. Mediation was unsuccessful, so I held a status conference on May 26, 2010. The parties were ordered to submit briefs on the issue of whether or not the trial board decision should be overturned. After the parties submitted their respective briefs on June 21, 2010, the record was closed.

JURISDICTION

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

ISSUE

Whether the Trial Board's decision was supported by substantial evidence, whether there was

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

Positions of The Parties

Agency's Position: Agency charged Employee with violation of three General Orders involving the commission of a crime, conduct unbecoming an officer, and conduct prejudicial to the reputation and good order of the police force. Specifically, Agency alleges that on June 21, 2006, Employee drove a Metropolitan Police Department marked scout vehicle and sideswiped a car owned by a Ms. Anne Chapman, then left the scene of the accident without stopping to conduct an investigation or making her identity known, and then failed to complete a PD 775 (Vehicle Inspection and Daily Radio Run Log), in which Employee failed to document an assignment given by the dispatcher and the vehicle accident she was involved in.

Employee's Position: Employee denies all of Agency's charges, and asserts that Agency's charges are not supported by substantial evidence. Employee points out that: 1) none of the eyewitnesses to the accident testified before the Trial Board; 2) the damage to Employee's patrol car does not demonstrate any unusual accident other than dings typical of the other squad cars; 3) Agency violated the 90-day rule of D.C. Code §5-1031; 4) the Trial Board's decision was not supported by substantial evidence; 5) Agency committed harmful procedural error when it failed to present eyewitness testimony, thereby depriving Employee of her right to confront her witnesses; and 6) Agency failed to prove that Employee violated any applicable laws, general orders, or regulations.

FINDINGS OF FACT

Employee is a member of the Fraternal Order of Police (the "Union"), and is covered by a provision of the collective bargaining agreement that specifically restricts the scope of this Office's review in adverse actions to the record previously established in the Trial Board's administrative hearing. Therefore, and based upon the decision of the District of Columbia Court of Appeals in *District of Columbia Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002), my role, as the deciding AJ, is limited to reviewing the record previously established, and determining whether the Trial Board's decision was supported by substantial evidence; whether there was harmful procedural error; or whether it was in accordance with applicable law or regulation. See *Pinkard*, 801 A.2d at 91.

Uncontested Material Facts:

1. Employee, a member of the Fraternal Order of Police (the "Union"), was employed as a police officer by Agency for 23 years.

2. On charges of being involved in a hit and run accident with a civilian driver on June 21, 2006, Employee was arrested and charged with leaving after colliding/property damage. At a D.C. Superior Court bench trial that concluded on October 10, 2007, the judge acquitted Employee on the ground that there was insufficient evidence demonstrating that the damage to the complainant's vehicle was substantial.

3. On February 20, 2008, Agency served Employee with a Notice of Proposed Adverse Action. The notice proposed the penalty of termination for the following charges: 1) Violation of General Order 120.21, Attachment A, Part A-7, which reads, "If a member 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. Members who are accused of criminal or quasi-criminal offenses shall promptly report or have reported their involvement to their commanding officers." 2) Violation of General Order 120.21, Attachment A, Part A-12, which reads, "Conduct unbecoming 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 violation of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia." 3) Violation of General Order 120.21, Attachment A, Part A-25, which reads, "Any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force." The notice charged Employee with the June 21, 2006, hit and run accident and failure to perform her duties as a police officer in an accident involving a patrol vehicle.

4. In the administrative portion of the above charges, Employee appeared before the Police Trial Board on May 8, 2008, for an administrative hearing. Agency submitted a complete transcript of the hearing. He was represented by Mark Wilhite, Esq., while the Agency was represented by Pamela Smith, Esq. The Trial Board sustained all specifications of the charge and recommended a sixty-day suspension instead of the termination proposed in the Advance Notice of Adverse Action. The Findings and Recommendations were accepted as Agency's Final Decision by Commander Jennifer Greene of the Office of Human Resource Management. The Final Agency Decision document dated May 20, 2008, was served upon Employee on June 2, 2008.

5. The Trial Board's Findings and Recommendations recited that the selection of the proposed penalties was made after considering the "Douglas Factors" [1] and Employee's past record.

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[1] 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;
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> 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;

6. On May 30, 2008, Agency served Employee with its Final Notice of Adverse Action. The notice informed Employee that Agency had found her guilty of all charges and had modified its penalty from a termination to a 60-day suspension from duty.

Summary of Material Testimony Received During The
May 8, 2008, Trial Board Proceedings

Agency's Case:

Sergeant Robert Merrick: (Transcript, Pages 10-25, hereafter *"Tr., 10"*, etc.)

Internal Affairs Sergeant Merrick testified that he received a call about a possible hit and run involving a scout car on June 21, 2006. He interviewed the complainant, Ms. Anne Chapman, who reported that a Metropolitan Police Department (MPD) patrol car's front driver's side struck her vehicle on her rear passenger side at the Virginia Street intersection with Sixth Street, S.E. Chapman pulled over and made eye contact with the patrol car's female black driver, but the patrol car took off without stopping. She noted the license plate number. An eyewitness stopped and corroborated Chapman's account. However, on cross-examination, Merrick admitted that he never actually spoke to the eyewitness.

In his investigation, Merrick found the scout car which had minor damage to the bumpers and quarter panel. He then checked the runs sheet and found that Employee was the only operator for that car that day.

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5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;

7) Consistency of the penalty with any applicable agency table of penalties;

8) The notoriety of the offense or its impact upon the reputation of the agency;

9) The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;

10) Potential for the employee's rehabilitation;

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

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

Agent Dwayne Jackson: (Tr. Pages 26-87)

Internal Affairs Agent Dwayne Jackson testified that he was the lead investigator of the June 21, 2006, incident. Department records show that Employee was the vehicle operator and that Employee had been involved in six patrol car accidents before. He interviewed the complainant, Ms. Anne Chapman, and an eyewitness named Rod Davis who supported the complainant's account. He also interviewed Employee who denied any accident but could not account for the time the accident occurred. Jackson noted the white transfer paint on Ms. Chapman's car which corresponded to the paint color of Agency's patrol car.

Sergeant Mark Robinson: (Tr. Pages 88-106)

Sergeant Robinson prepared the vehicle accident package and inspected the patrol vehicle in question. He did not notice anything unusual because the car had various dings in its body through prior use. He could not tell whether the minor damage to the patrol car corresponded with that of Ms. Chapman's car because he never saw Ms. Chapman's car.

Sergeant Daren Jones: (Tr. Pages 107-113)

Sergeant Jones testified that he prepared the PD 10 accident report but did not view Ms. Chapman's car. It was explained that Ms. Chapman now lives in Arizona and thus did not testify.

Employee's Case:

Employee Anita Staton: (Tr. Pages 119-143, 193-194)

Employee, a 23-year-police veteran, denied ever striking Ms. Chapman's vehicle although she was indeed the operator of the vehicle identified by Ms. Chapman and the location of the alleged accident was within her patrol area. She admitted that she received an assignment from the dispatcher for an accident but forgot to put it in her PD Form 775. Employee admitted that her patrol car had light scratches on the vehicle's rear and front side including the bumpers. She testified that she could not understand why Agency kept trying to pin this accident on her when there was no indication that the accident occurred. She also said she would not have engaged in a hit and run.

Lieutenant Bryon Hope: (Tr. Pages 143-148)

Lieutenant Hope testified as a character witness for Employee, stating that Employee was productive and needed little supervision. As for the accident, he stated that it was not possible for the transfer of paint from one car to the other without the drivers noticing it.

Officer Regina Grier: (Tr. Pages 148-157)

Officer Grier testified that she was Employee's colleague and friend. She agreed that if a patrol car was involved in an accident, the driver is duty-bound to ascertain no one was hurt and to summon another officer to respond to the scene.

Daniel Ramos: (Tr. Pages 158-161)

Ramos testified that maintains the vehicles as part of the Fleet Management Division. He checked Employee's patrol car and noted its minor scratches.

Sergeant Herbert Barnes: (Tr. Pages 162-170)

Sergeant Barnes testified that he knew Employee and recalled that her reports were clear and concise. He recommended that Employee be retained as an officer.

Sergeant Kimberly Taylor: (Tr. Pages 170-175)

Sergeant Taylor characterized Employee as a good officer to work with. She recalled that Employee had a car accident before but that Employee was not at fault and acted responsibly.

ANALYSIS AND CONCLUSION

1. *Whether the Agency Trial Board's findings were based on substantial evidence*.

I reviewed the Trial Board's findings under the "substantial evidence" test. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.[2]" "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."[3]

The Agency was required to prove by a preponderance of the evidence the causes cited for Employee's dismissal. A "preponderance of the evidence" is defined as "that degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue."[4] Thus, Agency must present substantial evidence to meet its preponderance standard.

The Trial Board heard testimony about the alleged June 21, 2006, vehicular accident from Agency's investigators, but none from the complainant or the eyewitness identified in the investigative reports. The evidence that Agency presented against Employee consisted mainly of the four investigators either recounting the verbal statements made by the complainant or recalling the physical damage they observed on the vehicles. No sworn, signed eyewitness statements were presented. One investigator, Lt. Merrick, even admitted that he never actually spoke to the eyewitness. Another investigator, Sergeant Robinson, could not tell whether the minor dings to the patrol car corresponded with that of the complainant's car because he never saw the complainant's car. Robinson also testified that he could not tell whether Employee's patrol car in question was ever involved in an accident as described by the complainant. The third investigator, Sergeant Jones also admitted that he never viewed the complainant's car for signs of any damage. Those who examined the patrol car in question could not say that it was ever involved in a sideswipe accident. Thus, on

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[2] *Davis-Dodson v. District of Columbia Dep't of Employment Services*, 697 A.2d 1214, 1218 (D.C. 1997) (quoting *Ferreira v. District of Columbia Dep't of Employment Servs.*, 667 A.2d 310, 312 (D.C. 1995)).

[3] *Metropolitan Police Dep't v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).

[4] See OEA Rule 629.1, 46 D.C. Reg. 9297, 9317 (1999).

the only issue that Agency's witnesses could present, whether there was vehicular damage on the patrol car that would correspond to the alleged sideswipe, the evidence was inconclusive.

On the question of whether a vehicular accident even occurred, Agency presented no witnesses to corroborate the investigative report. Neither the complainant nor her eyewitness came to testify. Apart from a short statement that the Complainant now lives in Arizona, there was no explanation given for the absence of the eyewitnesses. In short, Agency's allegations against Employee rested solely on uncorroborated hearsay statements.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801, Federal Rules of Evidence (5th ed. 1990). Prior statements by witnesses and admissions by a party-opponent are not hearsay. The statements presented by Agency are not covered under any hearsay exception.[5]

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[5] Hearsay exceptions where the availability of declarant is immaterial are:

1. Present sense impression
2. Excited utterance
3. Then existing mental, emotional, or physical condition
4. Statements for purposes of medical diagnosis or treatment
5. Recorded recollection
6. Records of regularly conducted activity
7. Absence of entry in records kept in accordance with the provisions of paragraph 6
8. Public records and reports
9. Records of vital statistics
10. Absence of public record or entry
11. Records of religious organizations
12. Marriage, baptismal, and similar certificates
13. Family records
14. Records of documents affecting an interest in property
15. Statements in documents affecting an interest in property
16. Statements in ancient documents
17. Market reports, commercial publications
18. Learned treatises
19. Reputation concerning personal or family history
20. Reputation concerning boundaries or general history
21. Reputation as to character
22. Judgment of previous conviction
23. Judgment as to personal, family or general history, or boundaries
24. Other exceptions

Rule 803, Federal Rules of Evidence (5th ed. 1990).

Hearsay exceptions where the declarant must be unavailable are:

1. Former testimony
2. Statement under belief of impending death
3. Statement against interest
4. Statement of personal or family history
5. Other exceptions

Rule 804, Federal Rules of Evidence (5th ed. 1990).

Under the above rule, a witness is considered unavailable if: 1) The declarant is exempted by the Judge from testifying on the ground of privilege; 2) Witness refuses to testify despite orders from the judge; 3) Witness has no memory of the event or events to which the hearsay statements relate; 4) Witness is ill or dead; 5) Witness has been found to be absent from the jurisdiction.

Regarding the admissibility of hearsay in an administrative proceeding, the District of Columbia Court of Appeals held in *Compton v. D.C. Board of Psychology*, 858 A.2d 470, 476 (D.C. 2004) "that duly admitted and reliable hearsay may constitute substantial evidence. See, e.g., *Coalition for the Homeless v. District of Columbia Dep't of Employment Services.*, 653 A.2d 374, 377-78 (D.C. 1995) ("Hearsay found to be reliable and credible may constitute substantial evidence . . . ."); *Wisconsin Avenue Nursing Home v. District of Columbia Commission on Human Rights*, 527 A.2d 282, 288 (D.C. 1987) (explaining that reliable hearsay standing alone may constitute substantial evidence); *Simmons v. Police & Firefighters' Ret. & Relief Bd*., 478 A.2d 1093, 1095 (D.C. 1984); *Jadallah v. District of Columbia Dep't of Employment Servs*., 476 A.2d 671, 676 (D.C. 1984); *see also Richardson*, 402 U.S. at 402; *Hoska v. United States Dep't of the Army*, 219 U.S. App. D.C. 280, 287, 677 F.2d 131, 138 (1982). Thus, nothing in the hearsay nature of evidence inherently excludes it from the concept of "substantial" proof in administrative proceedings."

The Court of Appeals went on to explain that "just because hearsay may constitute substantial evidence does not be mean that it will do so in every case. The circumstances under which hearsay rises to the level of substantiality are not ascertained by any definitive rule of law, but rather by a set of considerations applied to the particular facts of each case." *See Robinson v. Smith*, 683 A.2d 481, 488-89 (D.C. 1996) (citing *Washington Times v. District of Columbia Dep't of Employment Servs*., 530 A.2d 1186, 1190 (D.C. 1997) (stating that even hearsay "that lacks indicia of reliability may be entitled to some weight")). The weight to be given to any piece of hearsay evidence is a function of its truthfulness, reasonableness, and credibility. *See Wisconsin Ave. Nursing Home*, 527 A.2d at 288 (quoting *Johnson v. United States*, 202 U.S. App. D.C. 187, 190-91, 628 F.2d 187, 190-91 (1980)).

The Court said that:

> [A]mong the factors to consider in evaluating the reliability of hearsay evidence are whether the declarant is biased, *whether the testimony is corroborated, whether the hearsay statement is contradicted by direct testimony, whether the declarant is available to testify and be cross-examined, and whether the hearsay statements were signed or sworn*. *Id.; see also Gropp*, 606 A.2d at 1014 n.10." *Emphasis added.*

Compton v. D.C. Bd. of Psychology, 858 A.2d 470, 476-477 (D.C. 2004).

Hearsay is admissible in administrative proceedings, but there are limitations. *Wisconsin Avenue Nursing Home v. District of Columbia Commission on Human Rights*, 527 A.2d 282 (D.C. 1987). In an administrative proceeding, unsworn statements are admissible. However, where witnesses are unavailable for cross-examination, unsworn statements are generally not reliable enough to constitute substantial evidence. *See Dietrich v. District of Columbia Bd. of Zoning Adjustment*, 293 A.2d 470 (D.C. 1972); *Selk v. District of Columbia Dep't of Employment Services*, 497 A.2d 1056 (D.C. 1985); *Hall v. General Services Admin.*, 21 M.S.P.R. 200 (1984); *Mahnken v. United States Postal Serv.*, 34 M.S.P.R. 1 (1987); *Hinton v. Department of Corrections*, OEA Matter No. 1601-0136-92, *Opinion and Order on Petition for Review* (July 10, 1995), __ D.C. Reg. __ ( ) at 5.

In this matter, I find that Agency's case against Employee basically consisted of unsworn statements of unavailable witnesses. I therefore find that Agency has not presented any substantial evidence to support its charges against Employee. Accordingly, I conclude that Agency has not met its burden of establishing cause for taking adverse action. Therefore, I conclude that Agency's action should be reversed.

2. *Whether there was harmful procedural error.*

Next, Employee argues that in issuing its Notice of Proposed Adverse Action on February 20, 2008, Agency violated the 90-day rule mandated by D.C. Code § 5-1031(a).

D.C. Code § 5-1031(a) (2001) states:

> *[N]o corrective or adverse action against any sworn member* or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department *shall be commenced more than 90 days*, not including Saturdays, Sundays, or legal holidays, *after the date that* the Fire and Emergency Medical Services Department or *the Metropolitan Police Department knew or should have known of the act* or occurrence allegedly constituting cause. [Emphasis added.]

Employee points out that February 20, 2008, is more than a year and a half from June 21, 2006, the date of the alleged accident and the date it was first reported to Agency. Employee argues that Agency doubtless knew of the act constituting cause on: 1) June 21, 2006, the date it was reported; 2) July 6, 2006, the date Agency revoked Employee's police powers; 3) October 2006 when Agency concluded its preliminary investigation; and 4) October 10, 2007, the date the D.C. Superior Court dismissed criminal charges against Employee. Employee asserts that at the very latest, Agency's failure to commence adverse action within 90 days of Employee's acquittal clearly renders its proposed adverse action void and in violation of the law.

In its response, Agency does not address D.C. Code § 5-1031(a). Instead, it sidesteps the issue by citing a separate "55-day rule" regarding service of the Final Notice of Adverse Action that is embodied in the parties' CBA. According to the CBA, "The employee shall be given a written decision and the reasons therefore no later than fifty-five (55) business days after the date the employee is notified in writing of the charges or the date the employee elects to have a departmental hearing, where applicable. (a) when an employee requests and is granted a postponement or continuance of a scheduled hearing, the fifty-five (55) business day time limit shall be extended by the length of the delay or continuance, as well as the number of days consumed by the hearing…"

Agency's argument does not address the issue. Employee has not alleged any violation of the 55-day rule, but rather, of the 90-day statute. The history of the 90-day statute closely tracks the language of a prior statute that before its repeal in 1998 had barred any District of Columbia agency from initiating adverse action against an employee more than forty-five days after the agency knew or should have known of the action's cause. *Compare* § 5-1031(a) *with* § 1-617.1 (1979) (repealed 1998). The Committee on Government Operations wrote at the time of repeal that the forty-five-day duration was "unduly restrictive" but would "remain the goal," to be honored "in all but the most unusual circumstances." D.C. Council, Report on Bill 15-194 at 14 (Dec. 9, 2003). In 2004, the

Council imposed on Fire and Emergency Medical Services Department (FEMS) and Metropolitan Police Department (MPD) the specific ninety-day deadline at issue here, expressly rejecting a forty-five-day option. *See* § 5-1031; Report on Bill 15-194 at 15. The change was motivated by the "exorbitant amount of time that the [adverse-action] process" was then taking, such that FEMS and MPD employees had to wait "months or even years to see the conclusion of an investigation against them." Report on Bill 15-194 at 13, 14. The deadline was intended to bring "certainty" to employees over whose heads a potential adverse action might otherwise linger indefinitely. *See id.* at 14-15. In sum, with respect both to the former and the current adverse-action deadline, the Council has consistently articulated a policy of expeditious handling of adverse actions. The comparatively forgiving FEMS and MPD deadline grants those agencies twice as much time to act as under the repealed provision, thus lessening the burden cited at the repeal of the forty-five-day rule and substantially diminishing any justification for untimely adverse actions.

If there was any doubt as to the mandatory provision of D.C. Code § 5-1031(a), the District of Columbia Court of Appeals put that issue to rest in *District of Columbia Fire and Emergency Medical Services Department v. District of Columbia Office of Employee Appeals*, 986 A.2d 419 (D.C. 2010). The Court held that the 90-day period begins to run when the agency first becomes aware of the acts which formed the basis for the adverse action.

Here, Agency was clearly aware of the incident when it was reported on the same day it occurred. I therefore find that Agency committed harmful procedural error in failing to adhere to the mandatory 90-day provision of D.C. Code § 5-1031(a), and thus this is another ground why Agency's action must be overturned.

ORDER

It is hereby ORDERED:

1. Agency's decision is to suspend Employee from her position is reversed.

2. Agency is directed to reinstate Employee, issue her the back pay to which she is entitled and restore any benefits she lost as a result of the removal, no later than 30 calendar days from the date of issuance of this Decision.

3. Agency is directed to document its compliance no later than 45 calendar days from the date of issuance of this Decision.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge