**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

| | | |
|---|---|---|
| In the Matter of: | ) | |
| | ) | |
| Michael Sims | ) | OEA Matter No. 1601-0155-09 |
| Employee | ) | |
| | ) | Date of Issuance: October 1, 2010 |
| v. | ) | |
| | ) | Joseph E. Lim, Esq. |
| D.C. Fire & Emergency Medical Services | ) | Senior Administrative Judge |
| Agency | ) | |

Charles Tucker, Esq., Agency Representative
Lathal Ponder, Esq., Employee Representative

## INITIAL DECISION

### PROCEDURAL BACKGROUND

On July 9, 2009, Employee, a Fire Fighter with the D.C. Fire and Emergency Medical Services Department (the "Agency" or "D.C. F&EMSD") filed a Petition for Appeal with the Office of Employee Appeals (the "Office") pursuant to *D.C. Official Code* § 1-606.03(a) (2001), appealing Agency's action demoting him from the rank of sergeant to firefighter, effective June 22, 2009. The charge that generated Employee's adverse action was a finding as a result of an evidentiary hearing conducted on March 30, 2009, and April 6, 2009, by the Fire Trial Board (the "Trial Board") which sustained the charges against Employee of "any on-duty or employment-related act or omission that employee knew or should have reasonably known was a violation of law" in Case # U-08-301 and "any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations" in Case # U-09-16.

Agency was served with a copy of Employee's Petition for Appeal on July 14, 2009, and filed a comprehensive reply document on August 13, 2009, which document contained 15 attachments, including the complete transcript of the Trial Board hearing and all of the underlying documents which Agency maintained were supportive of the charges and Agency's election to take action against Employee. The matter was assigned to the undersigned administrative judge (the "AJ"), on February 3, 2010. After Agency showed good cause for non-appearance, I held a Prehearing Conference on March 10, 2010, and I closed the record after receiving legal briefs and final arguments from the parties on April 22**,** 2010.

### JURISDICTION

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

## ISSUE

The issues to be decided by the AJ are: a) Whether Agency's decision to demote Employee, based on the Trial Board's recommendation, was supported by substantial evidence; b) Whether Agency committed harmful procedural error; and c) Whether the decision was in accordance with law or applicable regulations.

Agency's Position: Based on two separate incidents, Agency charges Employee with several specifications under the "any on-duty or employment-related act or omission that employee knew or should have reasonably known was a violation of law" in Case # U-08-301 and "any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations" in Case # U-09-16. Specifically, in Case # U-08-301, Employee was found guilty of a misdemeanor possession of marijuana. In Case # U-09-16, Employee failed to notify Agency of his two prior arrests in violation of Article VI, Section 4 of the D.C. Fire and EMS Order Book. Agency cites three specifications to support the charges. A Trial Board found Employee guilty of all charges.

Employee's Position: Employee denies all of Agency's charges, and asserts that Agency's charges are not supported by substantial evidence, that Chief Lee's testimony was not credible, and that Employee was a victim of disparate treatment.

Employee is a member of the International Association of Firefighters, Local 36 (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 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 International Association of Firefighters, Local 36 (the "Union"), was employed as a firefighter by Agency for 19 years, and became a sergeant for the last 2 years before his current demotion to the rank of Firefighter.
2. On charges that Employee disobeyed several longstanding orders, Employee appeared before the Fire Trial Board on March 30 and April 6, 2009, for an administrative hearing. Agency submitted a complete transcript of the hearings on August 13, 2009. (Agency Tab #4 & 5) He was represented by Lathal Ponder, Esq., while Agency was represented by Charles Tucker, Esq. The Trial Board sustained all specifications of the charge and recommended three penalties: a reprimand, a 12-hour suspension, and a reduction in rank. The Findings and Recommendations were accepted as Agency's Final Decision by

Fire and EMS Chief Dennis Rubin. Employee was notified of the Fire Trial Board Recommendations by a Final Agency Decision document dated June 17, 2009.

3. 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.

---

[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;
>
> 3) The employee's past disciplinary record;
>
> 4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
>
> 5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
>
> 6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
>
> 7) Consistency of the penalty with any applicable agency table of penalties;
>
> 8) The notoriety of the offense or its impact upon the reputation of the agency;
>
> 9) The clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
>
> 10) Potential for the employee's rehabilitation;
>
> 11) Mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
>
> 12) The adequacy and effectiveness of alternative sanctions to deter such

SUMMARY OF MATERIAL TESTIMONY RECEIVED DURING THE MARCH 30, 2009, and APRIL 6, 2009, TRIAL BOARD PROCEEDINGS

Agency's Case:

Officer William Turner: (Transcript, Page 23-39, hereafter *"Tr., 23"*, etc.) Turner was the undercover officer who, together with partner, Officer Brown, noticed Employee purchase illegal drugs from a drug dealer. After they arrested him, they found the drugs and cash on Employee and his dealer.

Sergeant Keith Hoffman: Tr. 39- 81. Hoffman authored the investigative report on Employee for Internal Affairs. He obtained Employee's criminal court records which showed that on September 11, 2008, Employee admitted criminal responsibility and agreed to perform 16 hours of community service and abide by drug testing conditions in an agreement with the United States Attorney. In addition, after being pressed, Employee admitted to having two other criminal records, one for illegal gun possession and the other for illegal drug possession

Deputy Fire Chief Michael Reilley Tr. 81-140. Reilley, the shift commander for the Operations Division, testified that Agency's Order Book Article 7, Section 4 commands employees to notify management anytime they are arrested, injured, or hospitalized. Employee failed to report any of his 3 arrests.

Dsheanta Peterson: Tr. 142-162. Peterson, an associate of Employee, testified that on July 30, 2008, she asked Employee to purchase marijuana for her. Employee agreed, and got arrested.

Captain Henry Smalls: Tr. 167-175. Internal Affairs Captain Smalls learned of Employee's arrest and went on to talk to him about it. Employee tested negative for drugs.

Assistant Fire Chief Brian Lee: Tr. 299-358. Among other things in the Internal Affairs Division, Chief Lee oversees compliance and professional standards. Lee discussed the factors that go into the decision to hold a trial board hearing.

Employee's Case:

Lieutenant Wallace Gooding: Tr. 176-190. Lt. Gooding as Employee's supervisor, testified that he had no problems with Employee. However, he was not aware that Employee violated Agency' order to report his arrests.

Sergeant Ryan Bourassa: Tr. 190-202. Bourassa stated that Employee was a good worker.

Battalion Fire Chief Sean Carter: Tr. 212-227. Chief Carter said Employee was a diligent firefighter.

---

conduct in the future by the employee or others.

Employee: Tr. 227-299. Employee testified before the Board on his own behalf. He admitted buying marijuana, getting arrested, and performing community service for it. However, he insisted he was innocent because he did not do it during duty hours as he was charged with an on-duty act. With regards to his arrest on gun possession, Employee said that the arresting officer advised him that since the crime was not a felony or a driving infraction, he did not have to report it. He claimed that he did not read closely the rule that he had to report to his superior every time he got arrested. Employee admitted that he knowingly disobeyed the order to report his criminal conviction.

## FINDING OF FACTS, LEGAL ANALYSIS, AND CONCLUSIONS OF LAW

In *D.C. Metropolitan Police Department v Pinkard*, 801 A.2d, 86, the District of Columbia Court of Appeals overturned a decision of the D.C. Superior Court that held, *inter alia*, that this Office had the authority to conduct *de novo* hearings in all matters before it. Although the *Pinkard* case was initiated by the Metropolitan Police Department, because there is a precluding collective bargaining agreement negotiated between Employee's union and Agency, the holding likewise applies to Fire Trial Board proceedings. According to the Court:

> On this appeal from the Superior Court, the MPD contends (1) that an evidentiary hearing before the OEA administrative judge was precluded by a collective bargaining agreement between the MPD and the Fraternal Order of Police, a labor union to which Pinkard belongs, [and] (2) that the OEA administrative judge abused her discretion in ordering a second [and *de novo*] evidentiary hearing. . .
>
> As a general rule, this court owes deference to an agency's interpretation of the statute under which it acts. There is, however, an exception to this general rule, which is that we will not defer to an agency's interpretation if it is inconsistent with the plain language of the statute itself. This case falls within the exception because the OEA's reading of the [Comprehensive Merit Personnel Act or CMPA] is contrary to its plain language and inconsistent with it. We therefore hold that, under the statute, the collective bargaining agreement controls and supersedes otherwise applicable OEA procedures, and consequently, that the OEA administrative judge erred in conducting a second hearing.
>
> 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.
>
> The MPD contends, however, that this seemingly broad power of the OEA to establish its own procedures is limited by the collective

bargaining agreement in effect at the time of Pinkard's appeal. The relevant portion of the collective bargaining agreement reads as follows:

> [An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing has been held, *any further appeal shall be based solely on the record established in the Departmental hearing.* [emphasis added]. . . .

It is of course correct that a collective bargaining agreement, standing alone, cannot dictate OEA procedures. 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 (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 the language refers, subchapter VI, contains the statutory provisions governing appellate proceedings before the 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 procedures outlined in the collective bargaining agreement, namely, that the 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 the 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, must generally defer to the agency's credibility determinations. Mindful of these principles, we remand this case to the OEA to review once again the MPD's decision to terminate Pinkard, and we instruct the OEA, as the collective bargaining agreement requires, to limit its review to the record made before the trial board.

See *Pinkard* at 90-92. (citations omitted).

Thus, pursuant to *Pinkard*, an AJ of 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 below, when all of the following 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.

All of these conditions are met in this matter. Thus, according to *Pinkard*, my review of the final Agency decision to impose a demotion upon Employee is limited "to a determination of whether [the final Agency decision] was supported by substantial evidence,[2] whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations."[3] Further, I "must generally defer to the agency's credibility determinations."[4] My review is

---

[2] According to OEA Rule 629.3, 46 D.C. Reg. 9317 (1999), an agency has the burden of proof in adverse action appeals. Pursuant to OEA Rule 629.1, *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), __ D.C. Reg. ____( ); *Bailey v. Metropolitan Police Department*, OEA Matter No. 1601-0145-00 (March 20, 2003), _ D.C. Reg. ( ).

[3] See *D.C. Metropolitan Police v. Pinkard*, 801 A.2d 86, at 91.

[4] *Id.*

restricted to "the record made before the trial board."[5]

The Trial Board unanimously concluded that Employee committed each of the specifications under the "any on-duty or employment-related act or omission that employee knew or should have reasonably known was a violation of law" and "any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations" as charged.

1. Whether the Trial Board's findings were supported by substantial evidence.

According to *Pinkard*, I must determine whether the Trial Board's findings were supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[6] Further, "[i]f the [Trial Board's] findings are supported by substantial evidence, [I] must accept them even if there is substantial evidence in the record to support contrary findings."[7]

As noted earlier, *Pinkard* counsels me, as the "reviewing authority", to "generally defer to the agency's credibility determinations." Based on my own review of the several witnesses' testimony, as well as Employee's own admissions of guilt, I can find no reason to disturb the Trial Board's credibility determinations. As to the Trial Board's findings regarding the charges brought against Employee, my review shows that there was certainly substantial evidence to support those findings. I note that the Trial Board often relied on Employee's own admissions of not following Agency's orders to convict him. Thus, there is no reason to overturn them.

As for Employee's allegation of disparate treatment, he has not put forward sufficient credible evidence to support his allegation.

2. Whether Agency committed harmful procedural error, or 3) Whether the decision was in accordance with law or applicable regulations.

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the agency, but is simply to assure that "managerial discretion has been legitimately invoked and properly exercised."[8] When the charge is upheld, the Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation or guidelines and is clearly not an error of judgment."[9]

Under the circumstances, I see no basis to conclude that Agency acted capriciously in deciding to demote Employee. Based upon my review of the record below, I conclude that the

---

[5] *Id.* at 92.
[6] *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)).
[7] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).
[8] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).
[9] *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

penalty was reasonable and should not be disturbed. Since Agency's action was not in error, there is no harmful error to remedy. I further conclude that substantial evidence exists to support Agency's final decision and thus find no reason to overturn its findings.

## ORDER

It is hereby ORDERED that Agency's decision to demote Employee from the rank of sergeant to firefighter is UPHELD.

FOR THE OFFICE:

**JOSEPH E. LIM, ESQ.**
**Senior Administrative Judge**