THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No. 1601-0046-22
EMPLOYEE,[1]	
Employee	
	Date of Issuance: June 28, 2023
v.	
	Michelle R. Harris, Esq.
D.C. METROPOLITAN POLICE DEPARTMENT,	Senior Administrative Judge
Agency	

Marc L. Wilhite, Esq., Employee Representative
Bradford Seamon, Jr., Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On March 25, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Metropolitan Police Department's ("Agency" or "MPD") decision to remove him from service. OEA issued a letter on March 28, 2022, requiring Agency to file an Answer to Employee's Petition for Appeal. Agency filed its Answer to Employee's Petition for Appeal on April 18, 2022. Following a failed attempt at mediation, this matter was assigned to the undersigned Administrative Judge ("AJ") on July 5, 2022. On July 12, 2022, I issued an Order Convening a Prehearing Conference in this matter for August 11, 2022. On August 4, 2022, Agency filed a Consent Motion to Reschedule the Prehearing Conference. I issued an Order on August 5, 2022, granting Agency's Motion and rescheduling the Prehearing Conference to August 24, 2022. Prehearing Statements were due on or before August 17, 2022.

On August 24, 2022, both parties appeared for the Prehearing Conference. During the Prehearing Conference, I found that because there was an Adverse Action Panel hearing in this matter, that OEA's review of this appeal was subject to the standard of review outlined in *Elton Pinkard v. D.C. Metropolitan Police Department,* 801 A.2d 86 (D.C. 2002). As a result, the parties were ordered to submit briefs addressing whether: (1) the Adverse Action Panel's decision was supported by substantial evidence; (2) whether there was a harmful procedural error; and (3) whether Agency's action was done in accordance with all laws and/or regulations. Parties were also directed to specifically address whether the "90-Day Rule" pursuant to D.C. Code § 5-1031 was violated in the administration of the instant adverse action.

[1]Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.

On August 24, 2022, I issued an Order codifying the verbal order from the Prehearing Conference and setting the briefing schedule. Accordingly, Agency's brief was due on or before October 17, 2022, Employee's brief was due on or before November 28, 2022, and Agency had the option to submit a sur-reply brief by or before December 14, 2022. On October 6, 2022, Agency filed a Consent Motion to Extend the Briefing Schedule. Agency cited therein that relevant portions of the record were not provided and that it was submitting a supplemental record. Accordingly, on October 6, 2022, I issued an Order granting Agency's Motion. As a result, Agency's brief was now due on or before October 31, 2022, Employee's Brief was due on or before December 12, 2022, and Agency had the option to submit a sur-reply Brief on or before January 13, 2023. Agency filed the supplemental record on October 12, 2022. On October 27, 2022, Agency filed a Motion to Extend the Deadline citing to scheduling conflicts. Accordingly, an Order granting Agency's request was issued on October 28, 2022. Agency's brief was due by November 14, 2022, Employee's brief was due by December 27, 2022, and Agency's sur reply brief was due by or before January 20, 2023. Both parties submitted all briefs in accordance with the prescribed deadlines. On June 9, 2023, Agency filed a Motion to File a Supplemental Brief. Employee filed an Opposition Motion on June 20, 2023. For the reasons outlined in the analysis of this Initial Decision, Agency's Motion is Denied. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether the Adverse Action Panel's decision was supported by substantial evidence;
2. Whether there was harmful procedural error;
3. Whether Agency's action was done in accordance with all applicable laws or regulations.
4. Whether the "90-Day Rule" pursuant to D.C. Code § 5-1031 was violated in the administration of the instant adverse action.

BURDEN OF PROOF

OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021) states:

> The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.[2]

OEA Rule § 631.2 *id.* states:

[2] OEA Rule "Definitions § 699.1."

> For appeals filed under § 604.1, the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

STATEMENT OF THE CHARGES

In a Final Notice of Adverse Action received by Employee on January 21, 2022, and following an appeal to the Chief of Police who issued a determination on February 28, 2022, Agency terminated Employee from service effective March 1, 2022, based on the following:

> **Charge No 1:** Violation of General Order Series 120.21, Attachment A, Part A-7, which provides, "Conviction of any member of the force in any court of competent jurisdiction of any criminal or quasi-criminal offense, or of any offense in which the member either pleads guilty, receives a verdict of guilty or a conviction following a plea of nolo contendere, 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. Members who are accused of criminal or quasi-criminal offense shall promptly report, or have reported their involved to their commanding officers."
>
> Specification No 1**:** In that on or about April 7, 2015, you were found guilty of Theft in the Second Degree by Judge William Jackson of the District of Columbia Superior Court. Subsequently, on May 29, 2015, you were sentenced to six months unsupervised probation.
>
> Specification No 2: In that, on May 2, 2015, you were found guilty of False Impersonation of a Police Officer by Judge Ann Keary of the District of Columbia Superior Court. You were sentenced to 18 months supervised probation and fined three-hundred dollars.
>
> **Charge No. 2:** Violation of General Order Series 120.21 Table of Offenses & Penalties Attached A, Part A-6, which provides "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 Officer to, or in the presence of, any superior officer, or intend for the information of any superior officer, or making an untruthful statement before nay court or hearing."
>
> Specification No. 1: In that, on December 28, 2020, you told Agent Stephen Pappalardo during your interview that you did not know how Lieutenant George Donigian could have mistaken a full size MPD officer's badge with a mini officer's badge. You also told Agent Pappalardo that Lieutenant Donigian also reported the badge in his possession had four numbers, beginning with the number (1), which could not be true because your badge number is 4335 and your brother's badge number is 2513. However, a search of your badge numbers revealed that your first issued badge number was 1887 before being changed to 4355 on June 14, 2007 due to the department changing their badge numbering system.

Charge No. 3: Violation of General Order Series 120.21, Attachment A, #12, which reads "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively, or violations of any law of the United States or any law, municipal ordinance, or regulation of the District of Columbia." This misconduct is further defined in General Order Series 201.26, Part 1-B-23 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 officer and a professional…"

Specification No. 1: In that on July 7, 2014, you were placed under arrest by Fifth District Officer Jerry Holmes after stealing an air conditioning unit from the Home Depot and then fraudulently returning the same air conditioning unit to receive store credit.

Specification No. 2: In that on October 11, 2014, you were pulled over by First District Lieutenant George Donigian. During the traffic stop, you represented yourself as an MPD officer by displaying an MPD officer's badge and Non-Contact MPD ID to Lieutenant Donigian.

Charge No. 4: Violation of General Order Series 120.21, Attachment A, Part A-17, which states "Fraud in securing appointment, of falsification of official records or reports.

Specification No. 1: In that on June 9, 2020, after having been awarded your job jack through arbitration on June 7, 2020, you answered untruthfully on your Personal History Statement (PHS) to the question, "Have you ever impersonated or pretended to be a police officer?" However, on May 26, 2015, you were found guilty following a trial for impersonating a police officer, following an arrest for this offense on November 15, 2014.

Specification No. 2: In that on June 9, 2020, after having been awarded your job back through arbitration on June 7, 2020, you answered untruthfully on your Personal History Statement (PHS) to the question, "Have you ever been investigated or questioned for any reason by an y law enforcement authority?" You acknowledged during your interview with Agency Pappalardo that you should have answered this question as "yes" and did not have a reasonable answer as to why you answered the question "no."

Specification No: 3: In that on June 9, 2020, after having been awarded your job back through arbitration on June 7, 2020, you answered untruthfully on your Personal History Statement (PHS) to the question, "Have the police ever been called to you home for any reason?" However, in 2013, the police responded to your home two times, both for Family Disturbances. Further, you were present both times when responding officers arrived on the scene.

SUMMARY OF THE TESTIMONY

On December 6, 2021, Agency held an Adverse Action Panel hearing.[3] During the hearing, testimony and evidence was presented for consideration and adjudication relative to the instant matter. The following represents what the undersigned has determined to be the most relevant facts adduced from the findings of fact, as well as the transcript (hereinafter denoted as "Tr."), generated and reproduced as a part of the Adverse Action Panel hearing.[4]

George Donigian ("Donigian") Tr. Pg 29 – 80

Donigian was a Lieutenant in the First District and had that role for over two (2) years. Donigian testified that in 2013, he was an officer in the First District and served in that capacity for about seven (7) years. Donigian was working on October 11, 2014, and recalled making a traffic stop at the 1200 Block of South Capitol Street Southeast Washington DC. Donigian noted that during this stop, he encountered Employee and identified him in the hearing. Donigian explained that he stopped the car after it made a left turn against a no left turn sign. Once he stopped the car, he walked up and noticed Employee had a MPD officer badge sitting on his lap. Donigian believes it was in a manner to be displayed to him. Donigian said it was a regular officer's badge like the one he wore with four numbers and the first digit was a "1." Donigian said he thought that was odd because badge numbering had changed in the MPD. Donigian maintained that it was a full-sized badge that he saw. Donigian said that he identified himself and told Employee the reason for the stop and then ask if he had an ID to go with the badge being displayed. He said Employee flipped the ID folder and that there was an MPD ID card in one of the windows and a DC driver's license in the other.

Donigian noted that this ID folder was also identical to his own officer folder and that the card inside looked like a standard MPD ID Card and that the name on the card matched the Employee's name on the driver's license. Donigian testified that he took the driver's license and printed a "NOI"[5] warning for the left turn violation. He went back to the vehicle and told Employee he was giving him a warning. Donigian said Employee responded and started shouting "How can you write another officer." Donigian said he told Employee that it was just a warning and that he could leave, or he would go back and write it as a full ticket. Donigian noted that Employee left. Donigian testified that he though Employee was representing himself as an MPD officer. Donigian reported this incident to his Sergeant. Later, Donigian learned that Employee was not employed by MPD and was a "non-contact officer." Donigian did not know the circumstances of Employee's status other than that he was terminated. After talking with his officials, Donigian drafted an arrest warrant for false impersonation of a police officer. He said he did this approximately two (2) weeks after the traffic stop/incident. Donigian identified Agency's Exhibit 1 as an arrest warrant dated October 29, 2014. Donigian testified that Employee was arrested, but he did not make the arrest. Donigian identified that the date of Employee's arrest in the Report Managing System reflected a date of November 14, 2015.

Donigian explained that this matter went to D.C. Superior Court and that he testified at those proceedings. Donigian said that Employee was found guilty by a judge in those proceedings. Donigian further identified in Agency's Exhibit 1 that Employee was found guilty on May 26, 2015, and that he was sentenced with 90 days confinement-suspended, 60 hours community service, a $300 fine, $50 contribution to VCA and 18 months' probation. This also noted that he was not to carry MPD insignia

[3] Agency asserts that the Panel consisted of three (3) senior MPD officials.
[4] The parties also provided oral closing arguments before the Adverse Action panel. (See Tr. Pages 389-466). The undersigned has reviewed those arguments in review of this matter.
[5] Notice of Infraction.

or identification. Donigian recalled that Employee testified during the proceedings and that his explanation for the badge was that it was a family badge and not the same size or design as a real MPD badge. Donigian testified that while he was familiar with the family badge, that the badge Employee had at the traffic stop was not a mini size family badge. Donigian reiterated that the badge he saw during the stop in October 2014 was an MPD badge. In identifying Agency exhibits, Donigian noted that family badges indicated notations as "officer's wife or officer's father etc." Donigian testified that he would not have mistaken the family badge for a regular badge. Donigian also reiterated that the "1" on the badge number struck him as odd and he specifically remembered that.

Donigian did not know whether Employee's brother's MPD badge number started with a "1". Donigian identified Agency's Exhibit 9 and cited that the badge presented belonged to Anderson Liriano and that his badge number was 2513. Donigian further testified that he later learned that Employee began at MPD in 2005 and at that time there were four-digit badge numbers that started with the number one. Donigian identified Employee's former badge number as 1887, as noted in Agency's Exhibit 1 – the TACYS badge history report for Employee. Donigian opined that he still would've considered it false impersonation for Employee to show an Officer ID Card. He noted that Employee never indicated to him that the ID card was no longer valid. Donigian also iterated that Employee was mad and stated, "how could you write up an officer" and that he did not say "former officer."

On cross-examination, Donigian testified that on October 11, 2014, he was working uniform patrol by himself. Donigian reiterated that he made the stop after the driver took a left turn against the light. There were two occupants in the car, Employee, and a woman in the passenger seat. Donigian did not communicate with the woman. Donigian did not take possession of the MPD badge or ID, and only took Employee's license. He did not take a picture of Employee's badge or non-contact ID. Donigian testified that he did not ask Employee if that was his badge because he did not feel it was a question that needed to be asked. Donigian cited that it would not necessarily be improper to display a family badge during a stop, but that it's not a very common practice in Washington DC. Donigian testified that he did not ask Employee whether his MPD ID was current or active during the stop. Employee never said that he was currently non-contact with MPD, nor did he say he was an active police officer.

Donigian stated that Employee's statement of "how can you write another officer" in the context of the stop was not ambiguous in meaning. On redirect, Donigian testified that at the time of the stop, he believed Employee was a member of MPD. He did not investigate at the time, because Employee appeared to present an active ID card and Donigian did not have a reason to doubt or question that. He had no reason to take a picture of the badge at that time. Donigian reiterated that Employee did not display a family badge. Donigian testified on re-cross examination that he began to question Employee following his response to receiving a NOI warning for the traffic stop. Donigian cited that at the end of the interaction, he felt that "something was off." Donigian testified that his concern regarding the call and why he reported to his Sergeant was that he thought a complaint may come in regarding the stop.

The Panel inquired as to whose idea it was to apply for the arrest warrant. Donigian recalled that days had passed after he had talked to his Sergeant and the Sergeant talk to the Captain Watch Commander and they told him Employee was not employed. Donigian asked what "IAD" would do about it, and was told it wasn't an IAD matter, but a criminal matter. He was unable to recall whether he volunteered but stated that he would apply for the arrest warrant if directed. Donigian did not run

Employee's name through any MPD databases, as he "trusted that my officials had done so and that they were reporting truthfully to me that he was not employed."

Lieutenant Stephen Pappalardo ("Pappalardo") Tr. Pgs. 81- 257

Pappalardo is a Lieutenant in the Seventh District and has been with MPD for approximately 13.5 years. At the time of the Panel Hearing, he had held that position for about six months. In November 2020, he was an agent with the Internal Affairs Division (IAD) and worked in that capacity for about three and half years. He testified that during his time as an IAD agent, he investigated at least 100 matters. Pappalardo was assigned to investigate Employee. He explained that his squad was the "on call squad" and he was the lead agent that day, and as the lead agent, he was responsible for any new incoming investigations. He testified that his Inspector John Newton, stated that he needed to "draw numbers" on Employee. Tr. 83. Newton also gave him an email from Ms. Simpson notifying Chief Manlapaz (who was the IAD chief) that Employee had been awarded his job back through arbitration and then through background investigation, it was found that he had been arrested on two separate occasions while being terminated from MPD. Pappalardo identified in Agency's Exhibit 1 that an email to Ms. Angela Simpson was sent on November 9, 2020, from Officer Sean Savoy. That email included personal data about Employee and the arrest information. Pappalardo also identified in Agency's Exhibit 1 an incident summary sheet. Pappalardo noted that this form is used for tracking misconduct, uses of force and complaints about members of MPD. He also cited that this is where they obtain log numbers or "IS numbers" for tracking purposes. Pappalardo identified the IS number as 20-003258 and that the date of this number was November 12, 2020.

Pappalardo testified that this was the day he was notified about Employee. He also identified page 149 in Agency's Exhibit 1 as the IAD routing slip. Pappalardo explained that this assigned targets for the investigation and also notifies of the "anchor date" which he explained as "the date the Department was notified of the incident, your 90th day and your due date, which is typically the 50th business day." Tr. 88. Pappalardo explained the 90 day was important because if they go beyond the 90 days, then the person could not be disciplined. Based on this, the "anchor date" for Employee's matter was noted as March 26, 2021. Pappalardo identified Agency's Exhibit 3 as a "sign-in" sheet for discipline. Pappalardo noted that from the document, it appears Employee was served with notice of discipline on March 19, 2021, at 1422 hours and that an Agent Delacamera served it to Employee. Pappalardo cited that he believed this fell within the 90-day requirement since it was prior to March 26, 2021.

Pappalardo testified that he conducted the investigation and created an investigative report regarding Employee's matter. Pappalardo explained that he investigated Employee because Agency had received notice that following Employee's return to work post arbitration, that he had been arrested. Pappalardo recalled that Employee had been charged with impersonating a police officer in one matter, and second-degree fraud in another. Tr. 91. Pappalardo said that the officer "may have charged second degree theft, but down through the court system they changed it." Tr. 92. Pappalardo noted they he also investigated Employee for some of his answers in his background check, also known as the "blue book" – personal history statement. Pappalardo identified in Agency's Exhibit 1, that there were questions, namely if he ever impersonated or pretended to be a police officer, and that Employee answered "no." Tr. 93. Additionally, another question asked whether Employee had been investigated or questioned for any reason by any law enforcement authority, Employee said no. Pappalardo said

that there was also an allegation of untruthful statements surrounding the incident with the badge. Pappalardo testified that when he asked Employee about the badge, that Employee said that he had a mini badge that he would get for family members and that one was given to him by his brother. When Pappalardo asked Employee why Officer Donigian would have mistaken the two, Employee responded that he didn't know why, but that his badge number was 4355 and his brother's was 2513. Tr. 94. Pappalardo testified that when he looked in the TACYS system which stores all sworn members, he saw that Employee's first badge issued was 1887. Tr. 95.

Pappalardo further explained in his investigation that the theft/fraud incident at Home Depot occurred first. Identifying Agency's exhibit 1, Pappalardo testified that the date of the second-degree fraud incident was July 7, 2014. Pappalardo explained that this incident arose out of Employee returning an air conditioning unit without paying and then trying to get store credit. This incident was witnessed by a loss prevention officer named Jerry Holmes. Pappalardo noted that Officer Holmes told him that he reviewed the CCTV of Employee and after confirming, he arrested Employee. Pappalardo interviewed other loss prevention officers ("LPOs"), one of which said when he witnessed it Employee was already in handcuffs, and another said he recalled the incident but couldn't provide "particulars" and also declined to give a statement. Tr. 97. Pappalardo noted in review of Agency's Exhibit 1, that he called the other loss prevention officer, Nelson Benton ("Benton"), on November 26, 2020, and that Officer Holmes provided his number. He called again on December 2, 2020, and left another voicemail. On December 4, 2020, he sent a certified letter to Mr. Benton, asking him to contact him to schedule an interview. On December 29, 2020, Pappalardo notes that he spoke to Benton, and that is when he said that when he arrived Employee was already arrested. Pappalardo noted that he contacted the other LPO, Carlos Washington, on December 29, 2020, and he declined to provide an interview.

Pappalardo testified that in the course of his investigation, he spoke with Officer Holmes. Pappalardo said that Holmes told him that he was working part time at Home Depot and that one of the loss prevention officers told him that Employee grabbed an air conditioning unit from a shelf and exited the store. Then, Employee came back through the door customers used for returning purchased items and returned the same one he had walked out without paying and received store credit for the same amount of the cost of the unit. Tr. 105. Holmes stated that after hearing what they said, he arrested Employee. Pappalardo said that Holmes indicated that Employee was very apologetic and said he had been terminated by MPD. Tr. 106. Holmes also told Pappalardo that while he wasn't sure, he thought he went to Employee's trial. Holmes also identified Nelson Benton as another officer there. Pappalardo also noted that Holmes said he watched the CCTV surveillance footage. He testified that because his investigation came six (6) years later, that footage was no longer available. Pappalardo learned that this matter went to court – DC Superior Court, and that the file charged (as identified in Agency's Exhibit 1 page 61) was "theft second degree." Tr. 109. Pappalardo said that during his investigation he learned that this matter resulted in a "deferred prosecution agreement." He identified in Agency's Exhibit 1 page 62, that the date of this agreement was August 28, 2014. Pappalardo testified that he later learned that this agreement was revoked when Employee was arrested for impersonating a police officer. Pappalardo said that case went to trial and Employee was found guilty by Judge William Jackson on April 7, 2015 (as identified in Agency Exhibit 1 Pg 64). Tr 112. Pappalardo further noted that Employee appealed, but that it was affirmed on August 19, 2016 (identified by referencing Agency Exhibit 1 page 67). Tr. 113. Pappalardo said that he didn't find Employee's statements about the air conditioning unit to be credible because he had been found guilty beyond a reasonable doubt in court.

Pappalardo also testified that he interviewed Officer Donigian during his investigation since he was the arresting officer to Employee's impersonating an officer charge. Pappalardo testified that

Donigian told him he remembered Employee's badge because it wasn't consistent with MPD badge numbering system. Tr. 116. Pappalardo also stated that Donigian said that Employee told him he was a police officer when he gave him a warning NOI for the traffic stop. Specifically, Pappalardo said that Donigian told him Employee said something to the effect of "how can you write another police officer." Tr. 118. Pappalardo also noted that Donigian said that he was told by his superiors a few days later that Employee had been fired. Donigian also told Pappalardo that he notified Internal Affairs, but they said there was no jurisdiction since he was not an officer. Donigian wrote the arrest warrant for Employee for impersonating an officer. Ultimately, Donigian told Pappalardo that Employee was convicted in a bench trial for this charge.

Pappalardo also interviewed Employee during this investigation for the charge of impersonating a police officer. Pappalardo testified that Employee stated that he was driving with his wife and her son and made an illegal U-turn and was stopped by Officer Donigian. Employee told Pappalardo that he still had a non-contact ID and a mini badge that was given to him by his brother. Employee said when Officer Donigian returned with the NOI, that he asked, "are you seriously going to give a former officer a ticket?" Tr. 123. Employee denied having a full MPD badge and reiterated that it was a mini badge. Pappalardo did not find Employee's version of the events to be credible. Pappalardo explained that there is no way to mistake a mini badge with an official badge and he also said that the judge also found Officer Donigian to be credible and approved the arrest warrant. Pappalardo also interviewed Officer Sean Savoy, who was assigned to the recruiting division and was responsible for conducting background checks on officers who are awarded their jobs back. Tr. 126. Officer Savoy also sent a "Blue Book" or the background check for Employee and that he obtained this as part of his investigation. Pappalardo identified in Agency's Exhibit 1, page 119 a document that he called a "Wells printout." This included FBI criminal history checks. Pappalardo noted that this document reflected convictions for Employee and included both "fraud second degree" and "false impersonation of an officer." Tr. 130. Pappalardo asserted that Employee did not answer truthfully to all the questions in his background check. Pappalardo testified that Employee answered "No" to the question of whether police had ever been called to his home. However, police were called to Employee's home in 2013 for a family disturbance.

Pappalardo explained through identification of Agency's Exhibit 6, that on November 8, 2013, MPD was dispatched to a home when a woman said she needed help but then hung up. Officers who reported to that scene encountered Employee who was intoxicated and agitated. Tr. 132. The call was to Employee's residence. Pappalardo also noted that Employee was terminated from service in November 2012. Pappalardo also identified in Agency's exhibits that officers responded to another call at Employee's residence on November 11, 2013, and that the report noted a verbal altercation. Pappalardo maintained that both incidents occurred after Employee was terminated by Agency. Tr. 136. Pappalardo identified another report of an incidence where officers were called to Employee's residence in June 2013. A temporary protection order (TPO) was ascertained against Employee on June 25, 2013. Tr. 138. Pappalardo also identified another call to Employee's residence in July 2013 and noted this was after Employee's termination from MPD. Pappalardo testified that Employee's excuse for answering "no" to the question of whether police had been called to his home, was that he thought the question was about the time since he had been terminated. Tr. 141. Pappalardo said Employee stated that MPD knew of his other interactions while he was still employed so he did not think the questions was asking him about those.

Pappalardo cited Employee's context about after termination, didn't make sense. Tr. 141. Pappalardo also testified that Employee was not truthful in answering the question about impersonating

a police officer, because he responded no, but was found guilty of that charge in a trial. Pappalardo cited that Employee's response to why he answered that way was that he never felt he was impersonating an officer, even though he was found guilty. Pappalardo did not find Employee's answer to be credible. Pappalardo also testified that Employee answered "no" when asked whether he was ever investigated or questioned for any reason by any law enforcement agency. Pappalardo asserted that this was untruthful because Employee was investigated for the Home Depot incident and also for threats. Law enforcement also questioned Employee in 2011 for report of physical abuse against his wife. Pappalardo said in his investigation, Employee admitted that he should have answered that question with "yes." Tr. 145.

Pappalardo testified that through his investigation, he sustained the allegation against Employee. Pappalardo noted his reasons for his conclusions and provided summary statements in his report. After he finished his report, he had no further involvement until the trial board. Tr. 154. Pappalardo explained that his investigation is filed in the Internal Affairs Division ("IAD").

On cross examination, Pappalardo explained that the arbitration ruling for June 7, 2020, was an indication of when the arbitrator awarded Employee's job back. Through identification of a document, Pappalardo noted that the date of the arbitration was April 17, 2018. Pappalardo testified that it was his understanding that Employee was returned to work on June 9, 2020. Pappalardo further testified that he was told by John Knudsen to draw IS numbers and that the date of that was November 12, 2020. Pappalardo cited that as a part of the reinstatement process, Employee had a background investigation. Pappalardo noted that the criminal data of the background questionnaire was completed by Employee on June 9, 2020. Tr. 162. Pappalardo also identified a memorandum directed to Angela Simpson from Officer Sean Savoy that was dated November 9, 2020. That memorandum indicated under IAD was notified regarding a post termination arrest on June 24, 2020. Tr. 163. Pappalardo testified that based on the IS sheet that he was made aware of this in November 2020. Pappalardo did not know why there was a time span of almost five months between Officer's Savoy memorandum and IAD actions. Pappalardo explained that it didn't matter when it was given to him, that he would still do the investigation. Pappalardo iterated that in regard to the Home Depot theft incident, he attempted to contact two loss prevention officers, including Mr. Washington and Mr. Benton. Pappalardo explained that Benton noted after the fact that he hadn't really seen anything that day. Pappalardo did not try to obtain any video footage of the incident due to the lapse of time and did not know whether CCTV footage of the incident was available.

In his interview with Officer Holmes during the Home Depot investigation, Pappalardo explained that he did not know whether Holmes was physically standing in the store when he was notified by the other loss prevention officers about Employee. Holmes did not indicate to Pappalardo whether he witnessed Employee's actions but cited that he reviewed the CCTV which confirmed the other loss prevention officers' version of the events – which were that Employee left without paying for an AC unit and then came back in to return that unit. Pappalardo reviewed Employee's Exhibit 1 and cited that it was a sworn affidavit from Ms. Bloom, the attorney who represented Employee for the Home Depot arrest. Pappalardo did not recognize the attorney's name (Carol Bloom) for that arrest. Pappalardo did not speak with Ms. Bloom during his investigation into Employee. In reading Employee's Exhibit 1, Pappalardo acknowledged that Ms. Bloom viewed the CCTV, and her account was very different from what was noted by the loss prevention officers. Pappalardo acknowledged that this exhibit stated that Ms. Bloom's view of the CCTV did not show Employee walking out of Home Depot with an air conditioner. Pappalardo reiterated that he did not attempt to obtain any CCTV footage of the Home Depot incident. Pappalardo also testified that he did not discuss the size of the AC unit

with Employee, other than Employee explaining that it was for his daughter's room. Pappalardo testified that because a criminal investigation had already been done and another officer had found probable cause and Employee was arrested, he didn't need to investigate it for the purposes of the administrative investigation.[6] Pappalardo was unaware that that Employee's theft charge of 2014 was available for expungement.

As it related to the impersonation charge, Pappalardo explained on cross examination that it was his understanding that Employee had displayed his badge, not that Officer Donigian had taken it or that Employee provided it to him. There was no determination of whose badge it was, just that it started with the number one. Pappalardo explained that he did not investigate whether Employee's badge from 2007 was relinquished or submitted to MPD. Pappalardo testified that it was not needed to sustain the allegations, because a court case existed and there was a warrant for Employee's arrest. Pappalardo noted that he relied on the court's findings because the court has a higher standard of proof than for administrative investigations. He said courts have a "beyond reasonable doubt" whereas administrative investigations are preponderance of evidence. Tr. 186. Pappalardo testified that Officer Donigian never told him he feared a complaint being filed against him due to his stop of Employee. Pappalardo noted that he found Officer Donigian's iterations of the events to be reliable. Pappalardo noted that his investigation was to determine whether Employee held himself out to be an officer. Tr. 201. Pappalardo also testified that "family badges" are sold by the FOP[7]. He explained that it's a mini badge and will say underneath who it belongs to like "officer's wife" etc. Tr. 205. He said that if Employee's brother had given him one, then it would have said 'officer's brother.' There is nothing improper about having a family badge. It is a distinctive size difference that could not be confused with an official badge. Pappalardo was not aware that the impersonation charge was available for expungement. Tr. 206.

Pappalardo also explained that the "Blue Book" is a detailed questionnaire for officers and is referenced as the Blue Book due to the color of the cover. Pappalardo testified that he believed Employee provided fraudulent information with intent to deceive Agency. Tr. 208. Pappalardo explained that Employee answered "no" to the question of whether he had "impersonated, pretended to be a police officer or government official." Tr. 211. Pappalardo iterated that Employee was found guilty of impersonating a police officer, though Employee maintained through his trial that he did not. Pappalardo believed that Employee was experienced with the Blue Book to know how to answer the question. He stated that Employee should have answered yes and then written an explanation. Pappalardo also testified that during his investigation, Employee noted that he should have answered 'yes' to the question of whether he had been investigated. Tr. 220.

On redirect, Pappalardo stated that he was not aware of anyone on the "agent" side having information about investigating Employee until November 9, 2020. He received the information after it had gone through the administrative side. Tr. 225. Pappalardo had no direct knowledge of any previous email from an IAD lieutenant. Pappalardo testified that it was his understanding that the 90-day time period began on the day he generated the incident summary number, which was November 12, 2020. Pappalardo cited that he drew the numbers immediately and did not wait. Pappalardo also noted from Employee's exhibit 1 that Carol Bloom cited in her affidavit that she no longer had a copy of the CCTV footage from the Home Depot incident. Tr. 229. He also noted from review of the exhibit

[6] Tr. At 179-180. Pappalardo was asked whether he investigated Employee's daughter age and the statement that he had to leave someone to watch her.
[7] This is believed to reference the Fraternal Order of Police.

that Carol Bloom's affidavit was dated September 2021, a little over six years after the incident. Tr. 230. Pappalardo also noted that the Employee cited he had also purchased a screwdriver and a paintbrush, but Carol Bloom's affidavit cited that he left the store without any other merchandise. Tr. 232.

Pappalardo also testified that it's relatively common for officers to have duplicates made of their badges. Tr. 233. So, it's possible that Employee could have retained an original badge, even though he had been issued a new one. Pappalardo maintained that his review of the impersonation incident cited that Employee mentioned "other officer" in the context of police officer. Tr. 235. Pappalardo also testified that while he relied on Employee's convictions, he also weighed the totality of the circumstances in statements made by Employee. Pappalardo also explained that in interviewing LPO Jerry Holmes, that it was his own independent investigation of the incident at Home Depot. Pappalardo also testified that based on his knowledge and training, displaying a police badge on a lap during a traffic stop is improper because they're controlled items. Tr. 239. It is also improper for someone who is not a police officer to display a non-contact MPD ID during a traffic stop. Tr. 240. Pappalardo also reiterated the difference in the size of a mini badge and an official badge. He testified that a regular badge is about twice the size of a family/mini badge. Pappalardo believed that several of Employee's answers in his personal hearing statement were false. Tr. 244. Pappalardo noted that the purpose of his investigation was to be unbiased, establish facts and make findings. Tr. 246. Pappalardo noted on recross examination that not all false information is necessarily fraudulent. Pappalardo was not sure what time frame Carol Bloom was referencing when she said Employee did not have any other merchandise.

Sean Savoy ("Savoy") Tr Pgs. 276 – 308

Savoy has been an officer with the Agency's recruiting division for approximately seven (7) years. He is responsible for conducting background checks for cadet applicants, reinstatement and arbitration cases. Savoy testified that for reinstatement, it's his responsibility to conduct investigations (eSOPH) from the time the person was separated from MPD to the time they return. Tr. 277. His investigation includes running different background checks and pulling reports. Savoy completed an investigation for Employee. Savoy explained that the criminal questionnaire process for Employee was completed on June 9, 2020. It was completed by Employee and was sent to him via HR. Tr. 280. Savoy cited that he would receive a notification that it was assigned to him. Savoy reviewed Employee's answers and personal history statement (PHS). Savoy recalled that Employee had disclosed that he had been arrested for impersonating a police officer and theft. Savoy also reviewed Employee's explanations for his responses. Savoy testified that he noted the dates for some answers. For the question of "have police ever been called to your house?"; Savoy cited that he made an entry to reflect that police had been called in 2011 to Employee's house.

Savoy noted that 2011 preceded the time before Employee was removed from MPD. Savoy also asked Employee to provide a detailed statement regarding the impersonation incident. Savoy testified that he had no issues getting information from Employee and that he was forthcoming. Tr. 288. Savoy also completed a ROI which is a final write-up for a background investigation. He wrote one regarding his investigation of Employee and directed it to his supervisor who was Kathleen Crenshaw at the time. Savoy testified that in conducting his investigation that he did not believe that Employee was trying to intentionally seclude or secrete information from MPD. Tr. 291. Savoy also identified on page 175 a notation that "ID was notified regarding post termination arrest on 6-24-2020." Tr. 291. Savoy recalled that when he found out Employee had been arrested, he was required to "notify

a new notification to IAD" and let them know what was found. Savoy made those notifications via email to the IAD Admin box. Tr. 292. Savoy noted that typically, once that has been done, that IAD would either call or email him and he would provide whatever was needed. Savoy reiterated that he sent his report on June 24, 2020.

On cross examination, Savoy testified that he is assigned cases from Human Resources and that when he has completed his investigations, it goes back to Human Resources. Savoy noted that this was typical for reinstatement matters. Tr. 294-295. Savoy cited that his investigation is not fully complete until it is sent to his supervisor. In identifying Agency's Exhibit 1 and the date of November 9, 2020, – when asked "is it safe to say that you fully completed your background investigation?" Savoy replied, "that may be." Tr. 295. Savoy explained that November 9, 2020, "may have been sent up to HR, but that it was way out of hands before then." Tr. 296. Savoy cited that once it is out of his hands, his officials still have to complete the investigation. Savoy estimated that the time span may have been attributed to whether IAD had finished their investigation or not. Tr. 297. Savoy recalled being called by someone in IAD who asked him to forward the PHS to them so they could see the entire background and what he did with the case.

Savoy testified that he believed Employee was forthcoming to him during his investigation because he was always straight forward, and he didn't have to pull information out of him. Tr. 299. Savoy cited that he was basing this assessment on his quick responses as opposed to whether Employee's responses were truthful or not. Tr. 300. Savoy confirmed that he made a notation that Employee provided information that contradicted the answers he gave. Savoy could not recall whether he spoke to Employee about the contradiction. Savoy could not recall whether he was aware that police had been called to Employee's home on multiple occasions but noted that it may have changed his opinion about whether Employee had been forthcoming with his answers. Savoy did not conduct an independent investigation into whether Employee impersonated a police officer. Savoy also testified that there was a section called "PHS Clarification" to be used if further explanation was needed. Savoy noted in Agency's Exhibit 1 that Employee had answered that no police officers had been called to his home since he had been terminated.

Savoy cited that had he known officers had responded to his home on at least three different occasions, that he would have found Employee's response to be untruthful. Savoy also confirmed that Employee contradicted answers in his responses about prior arrests. Tr. 304. Savoy also cited that he would have also found Employee to be untruthful if he had been aware of domestic incidents and allegations. Savoy reiterated that he developed his opinion that Employee was not trying to hide anything from him because of how quickly he responded to questions. Savoy did not interview Employee face to face but noted he had seen him around the academy. Savoy said he expected those people he investigated to tell the truth. Savoy testified that he referred to Employee as Applicant or Candidate in his memorandum because he had not been fully reinstated.

<u>Hakim Bouaichi ("Bouaichi") Tr. Pgs. 310 – 315</u>

Bouaichi testified that he was an officer in the First District and had been with MPD for approximately six (6) years. He said Employee lived down the street from him in and around 2007. He testified that Employee resided about a block away from him. Bouaichi testified that he observed Employee on a monthly basis in terms of his life etc. Tr. 312. Bouaichi stated that based on his observations, he thought Employee was reliable, trustworthy and family oriented. Bouaichi also noted that he had been living at the address since he was younger, and that his family trusted Employee, and

that Employee also gave him rides or otherwise. Bouaichi felt that Employee and his family were close knit and that he seemed to take care of them well. Bouaichi testified that there had never been a time where he questioned Employee's truthfulness or candor and that Employee exhibited the traits of an MPD officer.

Employee Tr. Pgs. 316-389

Employee testified that he had been employed with MPD since 2005. He explained that he previously had an Adverse Action Hearing that resulted in his termination, but after arbitration in the appeals process, he was awarded his job back. For his reinstatement, he was required to appear at the police academy. He testified that in March 2020, he received a call regarding his reinstatement and that he was to report to the police academy and the Library on June 6, 2020, to complete all required paperwork. Tr. 319. Employee cited that it was his understanding that the paperwork he was required to complete wasn't supposed to "be asked as in the time that [he] got terminated to the current time…. prior to the termination going back, no questions of [him] were to be asked." Tr. 320. Employee noted that Officer Savoy was the only "point person" in terms of his background check, and that all of their interactions were through email. Tr. 320. In identifying the Applicant's Questionnaire, Employee cited that the criminal data information was completed June 9, 2020, and other items were completed on June 12, 2020. Tr. 321-322. Employee testified that Savoy just emailed him the papers and told him to let him know if he had any questions. Employee cited that the time frame was consistent with his return on June 7, 2020. Employee testified that he disclosed that he was arrested for impersonating an officer and theft. Employee cited that the theft incident occurred first. Employee explained that he had been going to this Home Depot for several years. He cited that he needed an air conditioning unit ("AC Unit'), but the one he purchased had too high of a BTU. So after a month, he decided to return to the AC Unit at the Home Depot.

Employee testified that he did not want to do "double work", so he left the AC Unit in the car with his daughter, while he went in to look for an AC. Not seeing an AC Unit he wanted, he said he saw a friend named "Chulo" and asked him to hold his daughter while he went to get the AC Unit. Tr. 326. He cited that he went and got the unit, put it in a shopping card and came in through customer service to return the unit. He also grabbed some tools, screwdrivers and brushes that he was going to purchase. He said the store personnel asked him for a receipt and he said he didn't have anyone because he always purchased in cash at Home Depot. Employee testified that the store employee told him that he would have store credit, and that with that he came back in, purchased a screwdriver and left with his daughter. Tr. 327. Then, a loss prevention officer approached him and said he had to come to the back and was accusing him of grabbing an AC Unit. Employee cited that he told that officer that he didn't get the unit from the floor but grabbed it from his car. Employee testified that he never saw the CCTV footage. Employee asserted that in preparation for his trial for this matter, his counsel reviewed the CCTV footage, and it was not consistent with the claims Home Depot made. Employee testified that he agreed 100% with his counsel's affidavit regarding the events at Home Depot. Employee maintained that he never grabbed the AC Unit from inside, despite the LPOs citing they saw him do so.

Employee testified that he signed documents regarding this matter but did so because his daughter was hysterically crying and upset, so he didn't read what he was signing. Employee said the LPO never explained to him what it was he was signing, and Employee didn't have the opportunity to review it later. Tr. 331. Employee testified that during his court hearing, he was told that this document indicated that he had admitted to what he had been accused of. Employee maintained that he did not

commit this act. Employee was convicted of Second Degree Theft ("Theft 2) for this incident, but he never took the position that he was guilty of these allegations. Tr. 332. Employee appealed, but the appeal was unsuccessful. Regarding the charge of impersonating a police officer, Employee testified that he was stopped after making a U-Turn to try and get to McDonalds. He was stopped by Officer Donigian. Employee testified that he rolled down his window and had his "night contact ID" and a mini badge that was given to him by his brother. Employee further testified that he put black tape over the badge because it said "Officer White" and he was not Officer White. Employee explained that his brother gave it to him just in case he got pulled over. So, when Donigian approached, Employee told Donigian that "just to let you now, I'm a former officer for your safety you know." Tr. 334-335. Employee stated that Donigian saw the mini badge in the wallet on his lap. Employee said Donigian said "ok" and to take out his personal ID, so Employee gave him his driver's license. Employee said Donigian was gone for about 10 minutes and came back with a ticket. Employee testified that he responded, "oh you still going to give a ticket to a former officer?" Employee said Donigian said, "yes I am" and he said, "oh it's just a warning." Employee replied, "okay okay not a problem." Employee said he went to McDonald's and then left. Employee iterated that he told Donigian he was a former officer and that there was no intent to communicate that he was a current officer. He did not physically hand the badge that was in his lap to Donigian. Employee testified that Donigian did not ask any specific questions about the badge, and he did not get the impression that there was a problem. He did not have any intention of filing a complaint against Donigian.

Employee asserted that maybe it could have been "weird" that he asked Donigian if he was really going to give a former officer a ticket. Tr. 337. Employee said that later on his day off, he was approached by a Seventh District Officer who said he had a warrant for his arrest for impersonating and that was the first time he was made aware of it. The matter went to a bench trial and Donigian provided testimony. Employee and his wife also testified at this trial. The judge convicted him of the claims. Employee testified that he did not believe he was impersonating an officer, and that he just wanted the safety of the officer and that telling him he was a former officer was not impersonation. Tr. 339. Employee maintained that he had a mini badge and that it had badge number 2513. Employee asserted that he used to have a badge number of 1887, but he turned it in, and he never had a duplicate. Tr. 340. In identifying the criminal data sheet of the background check, Employee noted two incidents that occurred while he "was gone from the Department." Tr. 341. Employee said he disclosed he was placed on probation and that he never tried to prevent the Department from knowing his criminal information. Tr. 342.

Employee testified that the reason he put "no" when asked about whether police had been called to his home was because; he believed the incident that happened when [he] got the message for which he was terminated was already over with and that the Department already knew. He also said that he was human and forgot about it and was also unaware of the officers coming to his house for a family disturbance. Tr. 343. Employee asserted that it was only in 2013 (November 8, 9, and 11 2013) that he remembered a time where officers were called because his wife took everything. He cited that he wasn't present but was in New York. Tr. 344. When asked about the officers' notation from the November 9th incident that Employee had a few drinks, Employee cited that he did not recall that interaction. Employee iterated that on November 9, 2013, he was in New York. Tr. 345.

In identifying his response regarding having committed battery, Employee averred that he did not commit battery in 2011 (it was noted that this was the reason for Employee's prior removal). Employee testified that the arbitrator did not believe he had battered his wife. Tr. 348. Employee testified that he answered "no" to impersonation of a police officer because he believes he did not

commit this act and was not impersonating an officer. Tr. 348. Employee avers that he never pled guilty to this charge. Employee also answered "no" to whether he had been investigated, but noted to Pappalardo that he should have said yes. Employee testified that he answered no because he was thinking of it in the context of "since the time he had been terminated, and any investigation had happened, such that he misunderstood the question." Employee asserted that he disclosed the criminal matters regarding theft and the impersonation. Employee explained that he was in the process of having those convictions expunged from his record via DC Superior Court. Tr. 351-352.

Employee also identified prior officer rating forms for himself through the time period of 2009-2010, and that he received ratings of 27 and 28, which were "exceeds expectations." Tr. 358-360. Employee also identified an additional evaluation from 2008 where he was rated with a 31. Employee said that he's been with MPD nearly 17 years and did good work and that he enjoyed his work and helping out his fellow officers and the citizens.

On cross examination, Employee testified that the Home Depot he went to, wasn't the closet to him and that he goes to different Home Depots in the area. Employee cited that he had purchased the AC Unit at a Home Depot in Oxon Hill and not at the Rhode Island location where the incident occurred. Employee testified that on July 7, 2014, that he walked into the Home Depot empty handed and his daughter was in a shopping cart. He went to the section where the AC Units were located to check to see if they had the one he wanted to purchase. After that, he went to the location where brushes and screwdrivers were located and placed a brush and screwdriver set in his shopping cart. From there Employee testified that he decided that he was going to get a credit from the AC Unit that he had in his vehicle since they didn't have the one he wanted. Tr. 366. Employee testified that after he put the brush and screwdriver in his cart, he saw one of his workers "Chulo" and asked him to hold his daughter while he went to his car. Tr. 368. He went to the car and got the AC unit and put it in another shopping cart and re-entered the store to the return section. Employee said he told the employee at the desk that he had purchased the AC Unit at Oxon Hill and that she asked if he had a receipt, and he said no, and that she asked if he used a card, and he said no. It was at this point he was told he'd get store credit. He remained in the area while the store employees took the unit and he got the store credit and purchased the brush and screwdriver, and they gave him back about $180. He proceeded to leave when he was stopped by Loss Prevention. Tr. 371.

Employee testified that Chulo was a man, and that he never stated that he saw a woman in the store. When asked to identify page 175 of exhibit, Employee testified that he recognized having written the narrative. Tr. 372. In reading the exhibit, Employee acknowledged that the narrative he wrote did not mention Chulo, but instead mentioned a woman and/or wife. Employee cited that it should be somewhere in the narrative that Chulo was with his wife. Tr. 373. Employee testified that he did watch the CCTV footage and did not agree with the LPOs version of the incident. Tr. 373. Employee said that he recalled the CCTV footage showing that he came inside with the shopping cart and walking to where the AC Units were and that there was not an AC Unit in the cart at that time. Tr.374. Employee said there was no footage of him coming back into the store, but he did come back in with the AC Unit. Employee said that he was offered a deferred prosecution agreement but maintained his innocence. He had to complete community service as part of that agreement. Employee testified that the deferred agreement was revoked and that it went to trial, and he was found guilty. Tr. 376. The surveillance footage was shown during the trial and entered as evidence. Employee iterated that he did not read the statement submitted before signing it because he was worried about his daughter. Tr. 377. Employee stated that he recalled being apologetic to Officer Holmes at the time for the mistake that was going on, but not because he committed theft. Tr. 378.

Regarding the impersonation incident, Employee reiterated that he was carrying his brother's family badge and that it is smaller than a regular badge. Employee also cited that he put black tape over to cover the "Officer White" because that was his brother and not him, and that he had given it to his brother's wife. Employee said he had the badge for about six months and that he had to give it back to his brother after this incident. He said he decided to give it back because he no longer wanted to carry it on him. Tr. 380. Employee still maintained possession of the non-contact ID. Employee said it was never requested for him to turn it in when he was terminated. Tr. 381. At the time of the incident, Employee had been terminated for nearly three years. He explained that he still carried the non-contact ID so that if he was pulled over that they would know he was a former officer. Employee cited that former officers do not have non-contact MPD IDs. Tr. 381. Employee restated that he told Donigian that he was a former officer.

Employee did not recall a 2013 incident where an Officer obtained a temporary protection order (TPO) against him. Employee asserted that he did not recall that until he saw the paperwork around the time of the instant Adverse Action Hearing. Employee's memory was refreshed, and he recalled that the Officer stated that Employee had threatened to beat him up. Tr. 383. Employee said that the Officer was jealous because Employee was talking to his ex-wife and essentially made a frivolous claim due to jealousy. Tr. 384. Employee maintained that he still doesn't recall the November 8, 2013, incident where officers noted he appeared to be intoxicated when they were called to his home. Employee did recall making a call later in November. Employee testified that he was not aware that his wife made a call on November 9, 2013, for police due to a child custody issue. Employee reiterated that he just forgot about all of these incidents. Tr. 385. Employee wanted to seal his conviction so that it is out of his record and that he did it in this time frame because it was the first opportunity he had to do so. Tr. 386.

Employee testified that his statement regarding not wanting to carry the AC Unit twice was because he had already been to Oxon Hill and they didn't have a replacement, so that is why he went to Rhode Island. Employee maintained that he had a shopping cart and his daughter. The Panel asked Employee about the tape over his brother's badge, and Employee cited that the badge had previously belonged to his brother's wife. Tr. 388.

Panel Findings

The Panel made the following findings of fact based on their review of the evidence presented at the hearing. The Panel found the following[8]:

1. On November 15, 2012, [Employee] was terminated from the Metropolitan Police Department.
2. On October 11, 2014, [Employee] was driving in the 1200 block of South Capitol Street, Southeast, and was pulled over by then First District Officer George Donigian (Lieutenant George Donigian). During the traffic stop, [Employee] displayed a non-contact ID. Lieutenant Donigian issued a written warning to [Employee].
3. On October 29, 2014, Lieutenant Donigian submitted an affidavit in support of an arrest warrant for [Employee] for the charge of Impersonation of a Police Officer.
4. The affidavit was subsequently approved and signed by DC Superior Court Judge and assigned warrant number 2014CRW3852.

[8] Agency Answer at Tab 3 Adverse Action Panel Findings of Fact and Conclusion of Law (May 8, 2017).

5. On November 15, 2014, [Employee] was arrested by Officer Mona Lynch of the First District Warrant Squad under CCN 14-151584 for False Impersonation of a Police Officer.
6. On April 7, 2015, [Employee] was found guilty at trial of Theft in the Second Degree, CCN 14-100041, by Judge William Jackson of the District of Columbia Superior Court.
7. On May 26, 2015, Judge Jackson sentenced [Employee] to six (6) months unsupervised probation.
8. On June 5, 2015, [Employee] appealed his guilty verdict, which was upheld on September 15, 2016, by Honorable Judges Beckwith, McLeese, and Farrell of the District of Columbia Court of Appeals.
9. On May 16, 2016, [Employee] was found guilty of False Impersonation of a Police Officer, CCN 14-151-684 by Judge Ann Keary of the District of Columbia Superior Court following a trial.
10. [Employee] was sentenced to eighteen (18) months supervised probation and received a three hundred dollar fine.
11. On June 7, 2020, [Employee] was awarded his job back after an arbitration hearing finding that was presided over by Arbitrator Kenneth Moffet.
12. On June 9, 2020, [Employee] completed a Personal History Statement (PHS) as part of the required background investigation.
13. [Employee] answered "no" to the question had he ever impersonated or pretended to be a police officer.
14. [Employee] answered "no" to the question if he had ever been investigated or questioned for any reason by any law enforcement authority.
15. [Employee] answered "no" to the question have police ever been called to his home for any reason.
16. The record established that [Employee] is currently assigned to the Metropolitan Police Academy.

Upon consideration and evaluation of all of the testimony and factors, the Panel found that there was preponderance of evidence to sustain all four charges and found Employee "Guilty". However, the Panel found Employee "Not Guilty" for Charge No. 4, Specification 1 and assessed no penalty for this specification.[9] In addition to making the aforementioned findings of facts, the Panel weighed the offenses according to the relevant *Douglas*[10] factors. The Panel concluded that the

[9] Final Charges were:
Charge No. 1, Specification No.1 – Guilty – Termination
Charge No.2., Specification No. 2. – Guilty- Termination
Charge No. 3 Specification No. 1: Guilty – Termination
Charge No. 3., Specification No. 2 - Guilty – Termination
Charge No. 4, Specification No. 1 – Not Guilty – No Penalty
Charge No. 4., Specification No. 2 – Guilty- Termination
Charge No. 4., Specification No. 3 - Guilty- Termination

[10] *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed 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;

nature and seriousness of the offense, the employee's job level/fiduciary duties, the effect of the offense to perform, consistency of penalty, the notoriety of the offense, the clarity of notice of rules, and the potential for rehabilitation were all aggravating factors. The Panel found the remaining *Douglas* factors to be neutral in their considerations. The Panel also asserted that it considered "reasonableness" in its decision and opinion and sustained the termination of Employee.

ANALYSIS AND CONCLUSIONS

This Office's review of this matter is limited pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department.*[11] According to the *Pinkard* decision, OEA has a limited role where a departmental hearing has been held. The D.C. Court of Appeals held that while OEA generally has jurisdiction over employee appeals from a final agency decision involving adverse actions under the CMPA[12], in a matter where a departmental hearing has been held:

> "OEA may not substitute its judgement for that of an agency. Its review of the agency decision…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."

Further, the Court of Appeals held that OEA's power to establish its own appellate procedures is limited by the agency's collective bargaining agreements. As a result, and in accordance with *Pinkard*, an Administrative Judge of OEA may not conduct a de novo hearing in an appeal before them, but rather, must base their decision on the record 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 and Emergency Medical Services Department;
2. The employee has been subject 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.

---

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 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.

[11] 801 A.2d 86 (D.C. 2002)
[12] *See* D.C. Code §§ 1-606.02 (a)(2). 1-606.03(a)(c); 1-606.04 (2001).

In cases where a Departmental hearing has been held, any further appeal shall be based solely on the record established in the Department hearing"; and

5. At the agency level, employee appeared before a panel that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action of the deciding official that resulted in an adverse action being taken against employee.

In this case, Employee is a member of the D.C. Metropolitan Police Department (MPD) and was the subject of an adverse action; MPD's collective bargaining agreement contains language similar to that found in *Pinkard*; and Employee appeared before an Adverse Action Panel, which held a hearing. Based on the documents of record, and the position of the parties as stated during the Prehearing Conference held in this matter and in the briefs submitted herein, the undersigned finds that all of the aforementioned criteria are met in this instant appeal. Accordingly, pursuant to *Pinkard*, OEA may not substitute its judgment for that of the Agency, and the undersigned's review of Agency's decision in this matter is limited to the determination of whether the Adverse Action Panel's findings were supported by substantial evidence, whether there was harmful error, and whether the action taken was done in accordance with applicable laws or regulations.

Whether Adverse Action Panel's Decision was supported by Substantial Evidence

Pursuant to *Pinkard*, the undersigned must determine whether the Adverse Action Panel's ("Panel") findings were supported by substantial evidence.[13] "Substantial evidence" is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[14] If the [Adverse Action Panel] findings are supported by substantial evidence, then the undersigned must accept them even if there is substantial evidence in the record[15] to support findings to the contrary.[16] Employee avers that Agency failed to provide substantial evidence to sustain the adverse action.[17] Specifically, Employee cites that Charges 1 and 3,[18] are duplicative in nature and "essentially allege the same thing – Charge No.1 for being convicted on theft and impersonation and Charge No. 3 for being arrested for theft and impersonation"[19] Employee asserts that this essentially just "stacks" charges against him, and that this is improper and that in accordance with the Adverse Action Handbook, they should be dismissed.[20]

Further, Employee contends that evidence shows he did not steal an AC unit from Home Depot, and the theft allegations have not been proven. Employee avers that there was no video footage produced, the arresting officer at Home Depot – Jerry Holmes – did not respond to the Adverse Action Hearing and that an affidavit from his attorney Carol Blume attest that she did not see Employee take anything off the shelves and walk out of the store.[21] Employee also asserts that there was no evidence shown that proves he impersonated an officer. He asserts that there were no pictures of the badge he had on his lap; that he told Officer Donigian that he had a family badge and that there is no evidence

[13] *Elton Pinkard v. DC Metropolitan Police Department*, 801 A.2d at page 91. (2002).
[14] *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 at 985 (D.C. 2002).
[15] Employee's Brief at Page 19 (December 27, 2022).
[16] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1189 (D.C. 1989).
[17] Employee's Brief at Page 17. (December 27, 2022).
[18] Employee cited that he was addressing those collectively since they were representative of the same charge.
[19] Employee's Brief at Page 19.
[20] *Id.*
[21] *Id.*

that he said he was a current police officer.[22] Employee avers that Agency "rushed to judgment" regarding the impersonation charges. Employee contends that MPD "appears to rely almost entirely on the fact that [Employee] received a criminal conviction for both Second Degree Theft (Theft 2) and impersonating a police officer." Employee argues that this is in violation of his due process rights "as he is entitled to a fair and impartial administrative hearing."[23] Employee asserts that a criminal proceeding does not substitute for an administrative one.

Employee also avers that Charges Nos. 2 and 4 both concern allegations of fraud/untruthfulness.[24] Employee contends that he did not "willfully and knowingly lie to Agent Pappalardo regarding his discussion of MPD badges. Employee argues that Agency has failed to demonstrate that he willfully and knowingly presented false information to a police official. Further, Employee notes that Agency is alleging that he was using his old badge and has produced no evidence to support that assertion.[25] Additionally, Employee asserts that Agency has failed to establish a basis for fraud under DC Code 2-3221. Employee asserts that for both Specifications 2 and 3 that he "did not make either statement with an intention to deceive or with knowledge of its falsity", but that he "misunderstood these questions because he himself had disclosed to MPD that he had been detained by law enforcement for investigation for both impersonating a police officer and for Theft 2."[26] Employee notes that "assuming without conceding" that there were sufficient evidence, that termination was not the appropriate penalty. Employee asserts that comparative discipline shows termination to be excessive.[27] Thus, Employee contends that all charges should be dismissed because Agency lacked substantial evidence to support those charges.

Agency argues that the record is demonstrative that all the charges and specifications were supported by substantial evidence. Regarding Charge No. 1, Specifications Nos. 1 and 2, Agency asserts that it is straightforward. Employee was convicted of Theft in the Second Degree and False Impersonation of a Police Officer and that evidenced is undisputed and incontrovertible.[28] With regard to Charge No. 2, Specification 1, Agency asserts that Employee was charged with willfully and knowingly making untruthful statements to IAD Agent Pappalardo. Agency avers that Employee's representations regarding the mini badge and not a full-size badge was "blatantly false."[29] Agency argues that Donigian' s testimony that he would not have confused the badges were consistent with what he included in the Affidavit for Employee's arrest. Agency also asserts that Employee was untruthful regarding the badge numbers and that it no longer included the number "1." Agency again cites to Donigian' s testimony and the confirmation that Employee's former badge number was "1887."[30] As it relates to Charge No. 3, Specification 1, Agency cites that Employee was properly

---

[22] *Id*. at Page 20.
[23] *Id*. at Page 21.
[24] Again, Employee notes that he discusses these charges collectively due to their similarity.
[25] *Id*. at Page 23.
[26] *Id*.
[27] *Id*. at Pages 25-26. Employee cites to: "Kevin Hines who received a 30 day SWOP for falsifying official records, Alicia Owens who made several WHALES inquiries about herself and was not forthright with MPD when she advise she didn't know her DC license was suspended – received 15 Day SWOP) (Officer Charles Anthony received a 15-day SWOP for 2 untruthful statements; Officer Charles Smith received a 10 Day SWOP for being arrested and convicted of disorderly conduct; Officer Randy Washington received a 35 Day SWOP for being arrested and convicted of DUI and accident resulting from DUI; and Officer Billy Robin received a 45 Day SWOP for being arrested and admitting criminal responsibility for solicitation of prostitution."
[28] Agency's Brief at Page 11 (November 14, 2022).
[29] *Id.*
[30] *Id*. at Page 14.

charged with conduct unbecoming due to his conviction for Second Degree Theft and notes that the evidence supporting this charge is clear.

Further, Agency asserts that Employee admitted to his conduct on the day of the incident.[31] Agency also contends that Employee's criminal conviction supports this charge and specification, noting that the Panel's "deference to Judge Jackson's findings were especially appropriate considering that the preponderance of evidence burden at the AAH is much lower than beyond a reasonable doubt."[32] Regarding Charge No. 3, Specification 2, Agency asserts that conduct unbecoming was appropriate as it related to Employee's being convicted of impersonation of a police officer. Again, Agency reiterates the appropriateness of the Panel's reliance on the testimony of Donigian in sustaining this charge and specification. Further, Agency notes that Employee failed to explain why he was carrying an MPD ID, particularly considering that officers carry those to reflect their current status as officers.[33] As related to Charge No. 4, Specification 2, Agency assert that Employee's untruthful answers on the PHS response constituted fraud and were supported by the record, notably the criminal data section which asked questions about criminal history.

Agency finds Employee's answer that he answered no to the question of whether he was investigated because he believed it as asking about incidents after his initial termination to be false.[34] Agency also avers that it uncovered numerous other instances which also led to charges in this matter. Similarly, Agency also asserts that Employee was not truthful with his answer regarding whether police had ever responded to his home, particularly noting that there were at least three instances where police had been called to his residence, and one where a Temporary Restraining Order was issued against Employee.[35] Again, Agency contends that Employee's answer that he thought these questions were related to a time after he was terminated to be "nonsensical" considering, nor was his explanation about simply haven forgotten about the incidents to be a valid explanation for his answer on the PHS. Agency contends that all the charges are supported by substantial evidence in the record and should be sustained.

After reviewing the record, and the arguments presented by the parties in their briefs submitted before this Office, the undersigned finds that the Adverse Action Panel met its burden of substantial evidence. The parties had an opportunity to present testimonial and documentary evidence and had the ability to call witnesses and to cross-examine witnesses during the Panel hearing. Employee had the opportunity to call any witnesses and was represented by counsel who cross-examined Agency's witnesses. Further, a review of the transcript indicated that the Panel was engaged in the hearing, asked relevant questions and made credibility determinations for the witnesses, supported by sufficient evidence in making those determinations. Additionally, the Panel considered and reviewed the *Douglas* factors in making its determinations and findings, and in sustaining the charges. Further, the Panel's findings and determinations reflect due consideration of all testimonial and documentary evidence presented in the record. There was no evidence in the record to suggest that the Panel's findings were unfounded, nor were they arbitrary or capricious. The undersigned agreed with Panel's assessment of credibility, as related to witnesses Donigian and Pappalardo, and as related to its findings regarding the lack of credibility of Employee's testimony.

---

[31] *Id*. at Page 15.
[32] *Id.* at Page 16.
[33] *Id*. at Page 18 – Footnote 17.
[34] *Id*. at Page 20.
[35] *Id*. at Page 22.

Specifically, in review of the Adverse Action Hearing, the undersigned found Employee's testimony regarding the Home Depot incident to lack consistency. Further, the notion that Employee was unaware of what he was signing at the time of the incident was also implausible; especially considering his experience as a police officer. In that same vein, the undersigned found Employee's lack of memory regarding the police calls to his home also to be conflicting, particularly noting that he did recall one time, but not another when they were only days apart. Additionally, given Employee's experience as an officer, it was also unconvincing that he "misunderstood" the time context that the Blue Book/PHS questions were asking. As related to the badge incident, the undersigned also agreed with the Panel's findings. Employee's version of the badge incident reflected inconsistencies, especially in relating to why he was carrying the non-contact ID. Lastly, I fine that the Panel's considerations and reliance on Employee's convictions for theft and impersonation were reasonable and appropriate under the circumstances. Accordingly, I find the Panel's factual findings to be consistent with the testimony provided during the Adverse Action Hearing. Wherefore, the undersigned finds that Employee's claims that Agency lacked substantial evidence and that the charges should be dismissed to be wholly unsupported by the record presented. For the reasons as previously noted, I find that Agency has met is burden for substantial evidence in the charges against Employee.

Whether there was harmful procedural error.

In accordance with *Pinkard* and OEA Rule 631.3, the undersigned is required to evaluate and make a finding of whether or not Agency committed harmful error. OEA Rule 631.3 provides 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 they agency's final decision to take action."

90-Day Rule

In the instant matter, Employee argues that the undersigned should reverse Agency's decision because Agency committed harmful procedural error by failing to commence the adverse action in accordance with the "90 Day Rule" pursuant to D.C. Code § 5-1031. The "90-Day Rule" requires agencies to initiate adverse actions against sworn members of the police force no later than 90 days from the date that Agency "knew or should have known of the act or occurrence constituting cause."[36] D.C. Code §5-1031 - Commencement of Corrective Adverse Action provides in pertinent part that:

> **(a-1)(1)** Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.
>
> **(2)** ***For the purposes of paragraph (1) of this subsection, the Metropolitan Police Department has notice of the act or occurrence allegedly constituting cause on the date that the Metropolitan Police***

[36] *Alice Lee v MPD*, OEA Matter No. 1601-0087-15 (March 15, 2017).

Department generates an internal investigation system tracking number for the act or occurrence. (Emphasis Added)

> ***(b)*** If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department or any law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of the Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) or (a-1) of this section shall be tolled until the conclusion of the investigation.

The legislative purpose of the 90 Day Rule enacted by the D.C. Council first in 2004, and then updated in 2015, was to ensure that adverse actions against employees were commenced and administered in a timely manner.[37] Specifically, the Council cited that the 90-Day rule "protects employees who are being administratively investigated from working under the threat of disciplinary action for an excessive length of time."[38] Additionally, Council cited that as it relates to MPD, this rule incentivizes the Agency to "follow up on allegations efficiently and to resolve disciplinary cases in a timely fashion."[39] Additionally, the D.C. Court of Appeals has found that the D.C. Council, in enacting this legislation, "sought to expedite the process and provide certainty with some degree of balance and flexibility."[40] As a result, the 90-Day rule provides guidance and timelines for the commencement of adverse actions.

At issue here is whether Agency, in administering the instant adverse action, adhered to the provisions of this law, specifically D.C. Code 5-1031. Here, Employee avers that Agency violated the 90-day rule because they did not issue the Notice of Proposed Adverse Action ("NPAA") until March 19, 2021, but it was on notice of the actions regarding Employee on or around June 24, 2020. Agency argues that it did not violate the 90-Day Rule. Agency asserts that the IAD investigation initiated its internal investigation on November 12, 2020, and it drew its Incident Summary ("IS") numbers on that same day. Agency further asserts that its issuance of the NPAA on March 19, 2021, falls within the 90-Day timeline, and as a result, it did not violate the 90-Day Rule.

In the instant matter, Employee was terminated from MPD in 2012, and following arbitration, was reinstated in June 2020. As a part of the reinstatement process, Employee was required to complete a background check which included the completion of a Personal History Statement ("PHS")[41]. Officer Sean Savoy ("Savoy") was responsible for conducting the background investigation as a part of the reinstatement process. Employee avers that Savoy's findings were reported to the Internal Affairs Division on June 24, 2020.[42] Employee argues that Savoy reported Employee's theft and impersonation charges on that date, which was nearly nine (9) months before he was served with the NPAA. Further, Employee asserts that Agency's reliance on the code provision regarding the issuance of the IS number

---

[37] Employee Brief at Page 21 and Exhibit 5. (December 22, 2017).
[38] *Id.*
[39] *Id.*
[40] *D.C. Fire and Medical Services Department v D.C. Office of Employee Appeals*, 986 A.2d 419, 425-526 (D.C. 2010).
[41] Also referred to as the Blue Book.
[42] Employee's Brief at Pages 8- 9. (December 27, 2022).

is misguided. Employee asserts that Agency has failed to provide any evidence for as to why IS numbers were not issued until November 12, 2020, after Savoy had reported his findings on June 24, 2020. Employee asserts that Agency's fails to acknowledge the legislative history and purpose of the 90-Day rule, and as a result, its actions for the timing of the issuance of the IS numbers could constitute "gross negligence."[43] Employee's counsel also avers that he made an oral motion regarding this matter before the Adverse Action hearing. Employee argues that the record is clear that "MPD knew about Employee's convictions as early as June 9, 2020."[44] Employee cites that he completed the "Blue Book/Personal History Statement" on June 9, 2020, wherein he disclosed his convictions. Employee also notes that Savoy testified at the Adverse Action hearing that "he notified the Internal Affairs Division via email regarding [Employee's] post termination arrests."[45]

Employee also avers that Agency "elected to do nothing for nearly five (5) months until it finally drew IS numbers on November 12, 2020."[46] Employee also argues that the "MPD IS Sheet itself is untruthful." Employee asserts that dates on the sheet are "patently false." Employee identified that the IS sheet reflects that the date of the incident was 11/12/2020, the date notified was 11/12/2020 and that the date MPD was made aware of incident/anchor date was 11/12/20020.[47] Employee argues that it is "unclear why Agent Stephen Pappalardo (who drew the IS numbers) would state that MPD first learned of the arrest and convictions on November 12, 2020, when Office Savoy testified that he report the information to IAD on June 24, 2020. Employee asserts that Agency attempts to "bridge the gap between when it knew of the incident and when it elected to draw IS numbers."[48] Employee avers that Agency's delay violate the legislative intent of the 90-Day rule, and as such the action should not be sustained.

Agency contends that its actions did not violate the 90-Day rule. Agency asserts that is actions fell squarely in with the plain language of the code provisions Specifically, Agency cites that DC Code §5-1031, provides (in pertinent part) that "…the Metropolitan Police Department has notice of the act or occurrence allegedly constituting cause on the date that the Metropolitan Police Department generates an internal investigation system tracking number for the act or occurrence."[49] Agency asserts that this code provision expressly evinces that the MPD's notice is the date IS numbers are drawn. Agency argues that "Employee's mere disagreement with the statute does not invalidate it or render it ineffective."[50] Agency cites that it is undisputed that "the IS Number (#20003258) for the IAD's investigation of Employee's 2014 arrests were generated on November 12, 2020."[51] Agency also notes that pursuant to DC Code § 5-1031, it was required to initiate adverse action against Employee within 90 business days, which was March 26, 2021.

Agency further asserts that it is undisputed that it served Employee with the NPAA on March 19, 2021, which was within the 90-Day timeframe. Agency argues that Employee's contention that the 90-Day Rule began to toll with Officer Sean Savoy's report on June 24, 2020, is incorrect. Agency argues that Savoy conducted the reinstatement investigation and "testified that he only emailed this

---

[43] *Id*. at Page 8.
[44] *Id*. at Page 12.
[45] *Id*.
[46] *Id.*
[47] *Id*.
[48] *Id*. at Page 13.
[49] Agency's Brief at Page 24. (November 14, 2022).
[50] *Id.*
[51] *Id.*

notification to an IAD Administrative Box."[52] Further, Agency asserts that Savoy did not recall speaking with anyone from IAD or receiving confirmation of receipt of what he had sent. Agency argues that "pursuant to MPD's General Order 201.22, "knew or should have known of the act or occurrence in the context of the 90-Day rule is defined as "the date on which a manager or supervisor becomes aware or should have known, or an official is notified of the alleged misconduct."[53] Agency avers that Savoy's "knowledge of the 2014 arrests would not be imputed onto MPD until a proper notification was made to an MPD official." Agency contends that the "evidence demonstrates that such proper notification was *not* made on June 24, 2020."[54]

To support this contention, Agency cites that Agent Pappalardo testifies that "at some point well into his IAD investigation, it was discovered that an "improper notification" had been attempted when "someone from Officer Savoy's office emailed the IAD admin box." Agency further asserts that Agent Pappalardo explained that because no one was made aware of the email, that IAD was not on notice, and that "sending an email to the IAD admin box was not the proper procedure for making this sort of notification." Agency argues that notice was not proper until Savoy's report was sent to Agency's Human Resources Management Division on November 9, 2020, and that following that, Angela Simpson, the Director of Human Resources Management Division, notified the Assistant Chief of the Internal Affairs Bureau and Inspector John Knutsen on November 12, 2020. Pappalardo generated the IS number that same day.[55]

Agency also asserts that Employee relies upon the 2004 version of the DC code to support his theories on legislative intent, but notes that the language was replaced in the 2014 amendment.[56] Agency contends that "when implementing the 2014 amendment, the Council noted that the purpose of the amendment was to "clarify when the timeline will begin and when it will toll." Further, Agency cites that "by specifically designating the date of IS number generation as the date of notice to MPD, the Council undoubtedly contemplated a scenario in which MPD may have known or should have known about an occurrence prior to generating IS numbers.[57] Agency also asserts that *assuming arguendo* that MPD violated the 90-Day Rule that it would not constitute harmful procedural error.[58] Agency contends that the 90-Day rule is "directory in nature, strict adherence to the rule is not required, especially when the prejudice to the aggrieved party due to a minimal violation of the rule does not outweigh the interest of the opposing part or the public interest."[59] Agency avers that Employee had a full opportunity to challenge his termination, with counsel. Further, the delay would also be harmless because whether "IAD had initiated the investigation in June 2020 or November 2020, would have no effect on Employee's due process or ability to defend himself against the allegations that date back to 2014."[60]

As previously referenced, DC Code § 5-1031, known as the '90-Day Rule' is a provision to ensure timely adverse action. This rule specifically notates timeframes as related to both MPD and DC FEMS. Of particular note in this instant matter, Paragraph 2 of this code provides that for MPD the 90

---

[52] *Id*. at Page 25.
[53] *Id.*
[54] *Id*.
[55] *Id.*
[56] Agency's Reply Brief at Page 5-6 (January 20, 2023).
[57] *Id*. at Pages 6-7.
[58] Agency's Brief at Page 26.
[59] *Id.* at 26-27.
[60] *Id.* at Page 27.

Day period beings to toll when IS numbers are issued.[61] Here, in the instant matter, Employee asserts that Agency had an undue and harmful delay in its administration of the adverse action, asserting that MPD had knowledge of the misconduct on June 24, 2020, but didn't issue IS Numbers until November 12, 2020, and that the NPAA issued on March 19, 2021, was untimely. Agency avers that its action was done in accordance with the code, because pursuant to Paragraph 2, the date for which the 90 Day period begins to toll is the issuance of the IS Numbers, which was November 12, 2020, thus its NPAA issuance on March 19, 2021, was timely. As will be explained below, the undersigned agrees with Agency's assertion.

As previously cited, the applicable code provision - D.C. Code § 5-1031-specifies that for MPD matters, the 90-Day time period begins to toll once IS numbers are drawn. Employee contends that Agency was on notice following Savoy's reinstatement background investigation his email to the IAD Admin Box on June 24, 2020. This noted, the undersigned finds that Savoy's reinstatement investigation is separate from the IAD investigation for which IS numbers are drawn. Further, based upon D.C. Code § 5-1031, paragraph (2), I find that even though Savoy submitted his reinstatement background check information; it is the IAD process that initiates the drawing of IS Numbers, and not Savoy's investigation. Here the record reflects that Agency Pappalardo conducted the IAD investigation and drew IS numbers for on November 12, 2020, following notification from MPD Human Resources notifying his department of the need for an IAD investigation. While the IAD investigation and drawing of IS numbers could have possibly occurred contemporaneously with Savoy's email date of June 24, 2020; I find that Savoy's reinstatement investigation does not have to be a date for which IS Numbers are drawn, as that is determined by IAD and their investigations. It is clear that the IAD investigation does not necessarily occur (and did not occur in this matter) contemporaneously with the reinstatement background investigation.

The undersigned notes that the record is void of what caused the delay in communication between the reinstatement background check investigation in June 2020 and the IAD investigation in November 2020; however, in consideration of the specific provision of the DC Code 5-1031 Paragraph (2), I find that Agency's actions in following the procedures for the initiation of the IS Numbers by and through the IAD investigation, and the subsequent issuance of the NPAA to be within the framework of the 90-Day Rule. While the undersigned agrees with Employee that such actions could potentially lead to MPD taking an unreasonable amount of time to issue IS numbers, it does not appear

---

[61] D.C. Code §5-1031 - Commencement of Corrective Adverse Action provides in pertinent part that:

> **(a-1)(1)** Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.
>
> **(2)** ***For the purposes of paragraph (1) of this subsection, the Metropolitan Police Department has notice of the act or occurrence allegedly constituting cause on the date that the Metropolitan Police Department generates an internal investigation system tracking number for the act or occurrence. (Emphasis Added)***
>
> ***(b***) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department or any law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of the Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) or (a-1) of this section shall be tolled until the conclusion of the investigation.

that this instant matter reflects such actions. Given that the reinstatement background investigation and the IAD investigations are different in their purpose, I find that in the instant matter, that Agency acted in a manner evincing cognizance and in compliance with the 90-Day Rule. Pappalardo testified that he was aware that he only had a 90-Day window once he had drawn IS numbers to investigate Employee. Further, Agency's subsequent issuance of the NPAA on March 19, 2021, falls squarely within that timeline following the drawing of IS Numbers on November 12, 2020. Additionally, there is nothing in the record to reflect that Pappalardo's investigation was untimely or took any undue delay in determining whether adverse action was warranted.

The undersigned would also note that Agency's contention that the DC Code §5-1031 is "directory" in nature, is a misguided analysis of the most recent applicable case law pertaining to this matter. In *Alice Lee v MPD*[62], the Superior Court for the District of Columbia upheld OEA's determination that the 90-Day rule is mandatory in nature. This noted, the undersigned finds that once IAD was notified of the action, it issued the IS numbers. The record shows that on November 12, 2020, that the assistant director for IAD was notified, and that same day Agent Pappalardo was assigned the matter and issued IS numbers and initiated his investigation into the allegations of misconduct. He concluded his investigation, and upon review from Agency's officials, an NPAA was issued on March 19, 2021. Therefore, I find that Agency did not violate the 90-Day rule in its administration of the instant matter and that there was no harmful procedural error.

On June 9, 2023, Agency filed a Motion to File a Supplemental Brief in this matter. Agency asserted therein that it wanted to address a recent amendment made to D.C. Code §5 -1031. Specifically, Agency avers that on May 5, 2023, the Comprehensive Policing and Justice Reform Amendment Act of 2022 ("Reform Act")[63], became effective. Agency contends that this act became effective "subsequent to the original briefing schedule in this matter, but prior to a decision being issued by this tribunal…" Further, Agency cites that "by its express terms, the Reform Act applies retroactively to all pending matters" and noted that it was the intention of the D.C. Council for this to be applied retroactively to all disciplinary matters. Thus, Agency asserts that because the Initial Decision had not been issued, the Reform Act should be considered by this tribunal as it is a "material change in the law to determine its effect on the outcome of this case."[64]

On June 20, 2023, Employee filed a Motion opposing Agency' Motion for leave to file. Employee avers that Agency has failed to provide any authority for this proposed supplemental brief. Further, Employee asserts that Agency's request is late such that the Administrative Judge had advised both parties that the Initial Decision was pending issuance. In this same vein, Employee avers that none of "OEA rules explicitly permit the MPD to file its Supplemental Brief."[65] Employee argues that OEA Rule 632.2 states that "once the record is closed, no additional evidence or argument shall be accepted into the record unless determined to be reopened by the administrative judge prior to the issuance of the Initial Decision." Employee contends that the record closed on January 20, 2023, when Agency filed its sur-reply brief. Further, Employee avers that Agency did not refer to the Reform Act in its prior submissions to this Office. Employee argues that "given that the Comprehensive Policing and Justice Reform Amendment Act of 2022 (D.C. Law24-345) was in existence and known to the Agency at the time of its Reply brief filing, as evidenced by the fact that the bill was adopted on December 6,

---

[62] *MPD v District of Columbia Office of Employee Appeals*, Case No. 2017 CA 003525 P(MPA). (February 13, 2018.)
[63] D.C. Act 24-781, 70 D.C. Reg. 953 (January 7, 2023).
[64] Agency's Motion to File Supplemental Brief (June 9, 2023).
[65] Employee's Opposition Motion (June 20, 2023).

2022, and December 20, 2022, respectively, the Employee submits that the Agency has waived its ability to assert its application to this case."[66] Further, Employee avers that the Reform Act is not dispositive of this matter at OEA, noting that there has been legislation introduced by the D.C. Council that would reinstate D.C. §5-1031.[67] Employee also avers that Agency's assertion regarding the retroactive application of this act is unconstitutional and unlawful on multiple fronts. Further, Employee asserts that these issues are currently pending in matters before the District of Columbia Court of Appeals, and notes that if this tribunal were to make considerations regarding the Reform Act, this decision should be held in abeyance pending the decision in one of those cases.[68]

Upon consideration of the parties' submissions regarding this matter, and for the aforementioned analysis and determination regarding the 90-Day rule, I find that Agency's Motion to File a Supplemental Brief must be denied. Based upon the information provided, the undersigned cannot determine with certainty whether Agency's assertions regarding the retroactive nature of the Reform Act would in fact be applicable to the instant matter. The undersigned finds that on its face, that assertion would draw against long standing precedent regarding retroactive application of new legislation. OEA has long held that disciplinary actions are considered under the applicable laws, rules and regulations that were effective at the time of the cause of action. Consistent with the findings of the U.S. Supreme Court in *Landgraf v. USI Film Productions,*[69]OEA has held that there is a presumption in which the "legal effect of one's conduct should be assessed under the law that existed when the conduct took place."[70] Further, OEA has noted that "the presumption against statutory retroactivity has consistently been explained by a reference to the unfairness of imposing new burdens on people after the fact."[71] As a result, without more information regarding the extent of the applicability of the Reform Act made effective, May 5, 2023, I find that I am guided by the established precedent regarding the considerations of the 90-Day Rule in this matter. Accordingly, Agency's Motion is hereby **DENIED.**

Whether Agency's action was done in accordance with applicable laws or regulations.

As outlined previously in this analysis regarding harmful procedural error and the 90-Day Rule, the undersigned finds that Agency's administration of the instant action were administered in accordance with all applicable laws, rules or regulations.

---

[66] *Id.*
[67] *Id.* Employee asserts that this reinstatement would have "full application to all existing police officers." *See.* Police Officer Recruitment and Retention Act of 2023, D.C. Bill No. B25-0142, Sec. 5(a) (introduced February 21, 2023).
[68] *Id.* Employee cited that *Sheila Thomas Bullock v DC Metropolitan Police Department et.al*. 19-CV-1266; and *D.C. Metropolitan Police Department vs. D.C. Public Relations Board*., et.al 19-CV-1161, are currently pending before the DCCA.
[69] 511 U.S. 244, 114 S.Ct. 1482 (1994)
[70] *Dana Brown v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0036-07 *Opinion and Order on Petition for Review* (March 1, 2010 at Page 7). The OE A Board cited that the Supreme Court "reasoned that considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. The Court noted that for that reason, there is a timeless and universal appeal that the legal effect of one's conduct should be assessed under the law that existed when the conduct took place. Therefore, the presumption against statutory retroactivity has consistently been explained by a reference to the unfairness of imposing new burdens on people after the fact."
[71] *Id.*

Whether the Penalty Was Appropriate

Agency asserts that termination was appropriate in this matter because termination was "entirely consistent with the range of penalties outlined in Agency's Table of Offenses and Penalties ("Table").[72] Agency asserts that its table provides that the "only appropriate penalty for Charge No. 1 (Conviction" is removal and that the penalty ranges for the other charges range from suspension to removal.[73] Agency also notes that the Panel "conducted a thorough Douglas factor analysis" in consideration of the assessment of the penalty in this matter. As a result, Agency avers that termination was appropriate and should be sustained. Additionally, Agency asserts that Employee's comparator disciplinary matters were not similar in nature to Employee and that Employee termination was warranted.[74] Employee contends that "assuming without conceding that sufficient evidence exists to support the charges in this case and that each charge was timely brought, that removal is not an appropriate penalty." Employee avers that the discipline decision should be within reasonable limits and argues that MPD's penalty in this matter is vague and ambiguous. Further, Employee asserts that comparative discipline reflected other officers with similar charges were not terminated.[75]

Disparate Treatment

OEA has held that to establish disparate treatment, an employee *must* show that he worked in the same organizational unit as the comparison employees (emphasis added). They *must* also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same

---

[72] Agency's Brief at Page 28 (November 14, 2022).

[73] *Id.* at Page 29. Specifically, Agency notes the range for Untruthful Statements is 15-Day Suspension to Removal; Conduct Unbecoming is a 3-Day Suspension to Removal and for Fraud it ranges from a 30-Day Suspension to Removal.

[74] Agency's Reply Brief at Page 17-19. Agency cites that:

> Kevin Hines was charged with fraud, but he was not accused of fraud in securing employment. Further, Agency cited that Hines' was one instance, wherein Employee had several instances of "bad behavior." Agency asserts that Alicia Owens case did not involve fraud in security employment. Charles Anthony's discipline related to his untruthful reporting about sick leave and was not a charge of making false statements to IAD as Employee was charged. Regarding Officer Charles Smith, Agency proffers that those circumstances are not analogous. While Smith was convicted of Disorderly Conduct, it was he was intoxicated on vacation, whereas Employee had been convicted twice, once for Theft and the other for Impersonation. Agency further noted that Employee's "crimes suggest a pathological dishonesty and lack of integrity." Agency asserts that a similar distinction relates to the case of Randy Washington who was convicted of DUI, as his conviction did not demonstrate a credibility concern. Finally, Agency asserts that Officer Billy Robin was arrested for solicitating a prostitute, but was not convicted. Agency did find "that Robin attempted to solicit sex in exchanged for money" – but that his action was a singular isolated incident, different from Employee's convictions. Agency also asserts that the crimes for which Employee was convicted carry a higher penalty (180 days imprisonment) than the solicitation (90 days imprisonment) which suggest that Employee's crime are "each treated more serious."

[75] Employee's Brief at Page 25. Employee noted the following comparators:

> Kevin Hines who received a 30 day SWOP for falsifying official records; Alicia Owens who made several WHALES inquiries about herself and was not forthright with MPD when she advised she didn't know her DC license was suspended – received 15 Day SWOP); (Officer Charles Anthony received a 15-day SWOP for 2 untruthful statements; Officer Charles Smith received a 10 Day SWOP for being arrested and convicted of disorderly conduct; Officer Randy Washington received a 35 Day SWOP for being arrested and convicted of DUI and accident resulting from DUI; and Officer Billy Robin received a 45 Day SWOP for being arrested and admitting criminal responsibility for solicitation of prostitution.

offense within the same general time period (emphasis added).[76] Further, In *Jordan v. Metropolitan Police Department*, OEA's board set forth the considerations regarding a claim of disparate treatment.[77] The Board held that:

> [An Agency must] apply practical realism to each [disciplinary] situation to ensure that employees receive fair and equitable treatment where genuinely similar cases are presented. It is not sufficient for an employee to simply show that other employees engaged in misconduct and that the agency was aware of it, the employee must also show that the circumstances surrounding the misconduct are substantially similar to [their] own. Normally, in order to show disparate treatment, the employee must demonstrate that he or she worked in the same organizational unit as the comparison employees and that they were subject to [disparate] discipline by the same supervisor [for the same offense] within the same general time period.

If a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue.[78] The consideration of an appropriate penalty must involve a balancing of the relevant factors in the individual case. In the instant matter, Employee has provided (as previously highlighted) some comparators to assert that he did not receive the same penalty treatment as similarly situated employees, and that his termination was unwarranted based on penalties assessed for others. *See also Footnote* 65. This noted, the undersigned finds that Employee has not specifically noted whether the comparators employees were under the same supervisor, organizational unit, or within the same time period.[79] Further, the offenses for which the comparators were charged were under different circumstances. Of particular note, the undersigned finds that there is a distinction between Employee's charge of untruthful statements, as his were done while he sought employment (reinstatement). Wherefore, I find that Employee has not shown that the circumstances surrounding the comparators' misconduct and his misconduct were substantially similar to evince disparate treatment in this matter.

OEA has consistently held that the primary responsibility for the management and discipline of Agency's workforce is a matter entrusted to the Agency, not this Office.[80] As a result, when determining the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."[81] Accordingly, when an Agency charge is upheld, this Office will "leave Agency's penalty undisturbed when the penalty is within the range allowed by law regulation or guidelines, is based on

---

[76] *Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, Opinion and Order on Petition for Review (December 12, 2011), citing *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, Opinion and Order on Petition for Review (May 6, 2009); *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).

[77] *Jordan v. Metropolitan Police Department*, OEA. Matter No. 1601-0285-95, *Opinion and Order on Petition for Review* (September 29, 1995).

[78] *Id*.

[79] The undersigned would note that the comparator employees presented represented time frames that were approximately within one (1) to two (2) years of the initial incidents for which Employee faced charges, but none of those aforementioned comparators had related actions associated with the reinstatement of employment.

[80] *See. Wilberto Flores v Metropolitan Police Department*, 1601-0131-11 (August 18, 2014), citing *Huntley v Metropolitan Police Department*, 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994).

[81] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

consideration of the relevant factors and is clearly not an error of judgement."[82] Based on the aforementioned, the undersigned finds that Agency acted in accordance with all applicable laws, rules and regulations, that its charges were based on substantial evidence and that there was no harmful procedural error. Further, the undersigned notes that pursuant to Agency's Table of Penalties[83], that termination is within the range of penalty for the charges assessed against Employee. Wherefore, I find that termination was an appropriate penalty. Consequently, the undersigned concludes that the Agency's action should be upheld.

ORDER

Based on the foregoing, it is **ORDERED** that Agency's action of terminating Employee from service is hereby **UPHELD**.

FOR THE OFFICE:

/s/ Michelle R. Harris
MICHELLE R. HARRIS, Esq.
Senior Administrative Judge

[82] *Id. See also Sarah Guarin v Metropolitan Police Department*, 1601-0299-13 (May 24, 2013) citing *Stokes supra*.
[83] See. Agency's Brief at MPD General Order 120.21, Attachment A 7. (November 14, 2022).