THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JAMES A. PAGE	)	OEA Matter No. 1601-0015-01
Employee	)	
	)	
v	)	Date of Issuance: October 7, 2005
	)	
DC FIRE & EMS DEPARTMENT	)	Muriel A. Aikens-Arnold
Agency	)	Administrative Judge
	)	

James A. Page, *Pro se*
Frank McDougald, Esq., Office of the Attorney General, DC

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 29, 2000, Employee, a Firefighter, filed a Petition for Appeal from Agency's action to remove him effective December 16, 2000 based on: 1) Discourteous Treatment of the public, a supervisor or other employee; and 2) Conviction of a misdemeanor when the crime is relevant to the employee's position, job duties, or job activities. Agency was notified by this Office regarding this appeal on February 26, 2001 and directed to respond by March 16, 2001. Agency filed its response on April 30, 2001 after being granted two (2) extensions of time.

This matter was assigned to Judge Blanca Torres on February 19, 2003. On August 12, 2003, an Order Scheduling a Prehearing Conference was issued scheduling said conference on August 21, 2003 and ordering the parties to submit arguments regarding Employee's misdemeanor conviction. Employee was further directed to state specifically, at the prehearing conference, why Agency erred when it held a trial board hearing and what violations were committed at that hearing. After Employee was granted two (2) extensions of time, an Order dated October 2, 2003 was issued directing Employee to submit arguments supporting his position(s) by October 14, 2003. Employee made his submission on October 14, 2003; Agency submitted a response on November 7, 2003.[1]

On May 3, 2005, this matter was reassigned to the undersigned Judge who reviewed the record to determine its status.[2] On May 31, 2005, A Record of Status in this Matter was issued advising the parties that this Judge would review the record, including the parties' submissions to Judge Torres, and make a decision. Accordingly, the record was closed effective May 31, 2005.

JURISDICTION

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

ISSUE

Whether the Agency action, based on the Fire Trial Board (FTB) hearing, was supported by substantial evidence, whether there was harmful procedural error, or whether

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[1] The DC Fire and EMS Department's collective bargaining agreement with its firefighters contains an alternative disciplinary process including provisions for a trial board hearing and an appeal to this Office solely on the record. Accordingly, the parties were given the opportunity to argue their respective positions through briefs.

[2] Administrative Judge Blanca Torres who was originally assigned to this matter is no longer with this Office.

it was otherwise contrary to law or applicable regulations.[3]

FINDINGS OF FACT

Statement of the Charges

By memorandum dated September 13, 2000, Employee was notified regarding amended charges as follows:

> **Charge 1: Discourteous Treatment of the public, a supervisor, or other employee: Fighting, threatening, or inflicting bodily harm on another, or physical resistance to competent authority.**
>
> **Specification 1**: In that Firefighter James A. Page, an employee of the District of Columbia Fire and Emergency Medical Services Department and subject to the rules and orders governing this Department, did, nevertheless, on or about June 22, 1999, while at the Police and Fire Clinic in Examination Room No. 7, physically assault Captain Mark E. Bloom, Medical Services Officer.
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> Specifically, according to Captain Bloom's report dated June 24,

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[3] A DC Court of Appeals decision in *District of Columbia Metropolitan Police Department v Elton L. Pinkard*, 801 A.2d 86 (D.C. 2002)(hereafter referred to as *Pinkard*) held that this Office erred in conducting a second evidentiary hearing when a Police Trial Board (PTB) hearing had previously been held in a disciplinary matter; and violated the Department's labor agreement which provided *solely* for a review of the PTB record on appeal. The Court remanded Pinkard's appeal to this Office to determine whether Agency's action was supported by substantial evidence, whether there was harmful procedural error or whether it was in accordance with law or applicable regulations. Although *Pinkard* involved an employee of the Metropolitan Police Department covered by a collective bargaining agreement, the holding pertains to employees of Agency, such as Employee herein, who are likewise covered by a collective bargaining agreement. *See Hibben v D. C. Fire and Emergency Services Department*, OEA Matter No. 1601-0138-99 (April 21, 2003), __ D.C. Reg. __ ( ); *Davidson v. D.C. Fire and Emergency Services Department*, OEA Matter No. 1601-0063-99 (November 20, 2002) __ D.C. Reg. __( ); *Kelly v. DC Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0023-98 (November 6, 2002), __D.C. Reg .__ ( ).

1999, he ordered Firefighter Page to provide a urine specimen, via a "shy bladder routine," but Firefighter Page became loud and angry toward him. As Firefighter Page proceeded to throw away the bottle of water given to him for the test, he was told by Captain Bloom to drink the water, provide the sample and leave. However, after this statement was made to Firefighter Page, he approached Captain Bloom and punched him in his left eye. Firefighter Page continued his assault on Captain Bloom and hit him three (3) more times on the left side of his face as Captain Bloom attempted to defend himself. Captain Bloom was treated for his injuries at Providence Hospital.

[Charge 2: Specification 1 is omitted as it was not proven or considered by the FTB panel.]

Charge 3: Conviction of a misdemeanor when the crime is relevant to the employee's position, job duties, or job activities.

Specification 1: On or about July 13, 2000, you were convicted of simple assault in the Superior Court of the District of Columbia in M-15158-99. The crime for which you were convicted relates to your employment as it concerns your assault on Captain Mark Bloom, Medical Services Officer, in Examination Room No. 7 at the Police and Fire Clinic on or about June 22, 1999.[4]

Based on the evidence and testimony presented, the FTB panel found Employee guilty of Discourteous treatment of the public, a supervisor or other employees and Conviction of a misdemeanor and recommended removal to the Fire Chief Ronnie Few, who made the final decision. After

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[4] This letter superseded an August 9, 2000 Amended Proposed Disciplinary Action notifying Employee to appear before a Fire Trial Board for three (3) violations of Chapter 16 of the District Personnel Manual (DPM).

reviewing the Board's findings and recommendations, the Fire Chief issued a final decision, on November 1, 2000, to remove Employee effective November 4, 2000.[5]

Employee's Position.

Employee contends that Agency's action should be reversed based on: 1) that Employee was precluded "from presenting any defense to assault charges in the administrative proceeding because of his conviction" based on the use of a new law that violates the Ex Post Facto Clauses of the US Constitution; and 2) that Agency's decision, specifically Charge 3 (Conviction of a misdemeanor . . .) was not supported by substantial evidence.[6]

Agency's Position.

Agency contends: 1) that Employee's argument that enactment and use of DPM §1603.3 and §1603.10 violates the Ex Post Facto Clauses of the US Constitution is without merit as said clauses only apply to criminal or penal legislation and do not apply to civil and administrative regulations; 2) that the retroactive application of §1603.3 and §1603.10 which, Employee contends, precluded him from presenting any defense to the assault charges in the administrative hearing is also without merit because he was not deprived of a defense by the application of those provisions of the DPM[7]; and 3) that this Office is limited to a review of the record on which the FTB based its findings and recommendation which were supported by substantial evidence, were not inconsistent with applicable law and there was no

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[5] See Agency's adverse action file at Tabs #4, #5 and #17.

[6] See Employee's Brief at pp.4, 6-7.and Attachment 1 (DC Personnel Regulations, § 1612.3 and 1612.4, (January 10, 1991) Employee cites the District Personnel Manual (DPM) § 1603.10, 47 [D.C. Reg. 7097] (2000) which reads, in part: A criminal conviction shall estop the convicted party from denying the facts underlying the conviction .

[7] See Agency's Brief at pp. 7-8 which reflects that the Chairman of the FTB permitted Employee, despite objections of the Agency representative, to testify about the events that led to his conviction and his defenses therefor. See also Transcript at pp. 123-124.

harmful procedural error.[8]

ANALYSIS AND CONCLUSIONS

Whether Agency's Action Was Taken For Cause.

D.C. Official Code §1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority to "issue rules and regulations to establish a disciplinary system that includes," *inter alia*, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The action herein is under the Mayor's personnel authority. Such regulations were published at 47 D.C. Reg. 7094 et seq. (September 1, 2000).[9]

The FTB panel (or Board) relied upon the evidence of record, including the divergent accounts of events given by Employee and Captain Bloom in evaluating Charge 1. In fact, the Board states in its recommendation that "certain inconsistencies in F/F Page's testimony stand out" while the testimony of events given by Captain Bloom "seemed reasonable considering the circumstances."[10] As previously stated, this Judge is guided by the *Pinkard* decision which requires this Office, as a reviewing authority, to "generally defer to the agency's credibility determinations."[11] Here, the Board found Captain Bloom more credible.

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[8] See Agency's Brief at pp. 9-10.

[9] Section 1603.3 set forth the new definition of cause which, in pertinent part, is as follows: " . . . cause means a conviction . . . of a felony . . . A conviction of another crime (regardless of punishment) at any time . . . when a crime is relevant to the employee's position, job duties, or job activities . . . any on-duty or employment-related act or omission that the employee knew or should have known is a violation of law; any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment related reason for corrective or adverse action that is not arbitrary or capricious."

[10] See Board's recommendation at p.1.

[11] See footnote 9 and *Gunty v Department of Employment Services,* 502 A.2d at 1197 (D.C. 1987).

Regarding Charge 3, the Board considered the relationship of the crime to Employee's job; the fact that the incident "occurred at the Police and Fire clinic while being attended to by clinic staff and being directed to complete a portion of his annual physical exam." In light of the Board's recommendation and its finding that Employee was guilty of Charge 1 which is actually based on the underlying facts of the misdemeanor conviction, this Judge concludes that Agency's charges were both supported by substantial evidence.[12] Further, the Board recommended removal as the penalty for each charge.[13] In fact, the agency file reflects that the initiation of an adverse action was in process shortly after the incident and before the court conviction which shows that the misdemeanor conviction, even though later added to the original notice of adverse action, was irrelevant to the adverse action.[14]

Employee's contention that he was precluded from presenting any defense to the assault charges during the administrative hearing due to the misdemeanor conviction is without merit. Although this Office is not authorized to address and interpret constitutional questions, that issue was addressed and resolved by the Board. Specifically, the Board's recommendation reflects that Employee was allowed every available defense to explain his actions in spite of §1603.10.[15]

Based on a review of the record, this Judge concludes that Agency's action was supported by substantial evidence, there was no harmful procedural error, and the charges were consistent with law and applicable regulation.

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[12] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

[13] See Board's recommendation at p. 2.

[14] See agency adverse action file at Tabs 1, 2 and 3 which reflect statements and recommendations by Department officials to convene a Trial Board; and the initial Notification of Charges dated 9/17/99. The notice contained the first two charges regarding discourteous treatment . . of a supervisor.

[15] See the Board's recommendation at p. 2 and the FTB transcript at pp. 120-134 reflecting Employee's testimony.

Whether the Penalty Was Appropriate Under the Circumstances.

The infliction of bodily harm on a superior, under the circumstances herein, constitutes discourteous treatment. Specifically, the Board found that Captain Bloom was *not* the aggressor as Employee maintained.[16]

When assessing the appropriateness of the 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." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).

In making its recommendation, the FTB panel addressed the *Douglas* factors and their effect upon determination of the penalty.[17] The panel considered, *inter alia*, the nature and seriousness of the offense, the adverse effect that Employee's behavior had on his supervisor's confidence in his ability to perform his assigned duties, and the ineffectiveness of alternative sanctions. Further, the Board believes that removal serves as a deterrent to others and that a "physical attack on a fellow employee is unacceptable within this Department . . . "[18]

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. Based on this Judge's review of the record, Agency's action was supported by substantial evidence, there was no harmful procedural error, and it was consistent with law and applicable regulations. Therefore, this Judge concludes that the

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[16] See the Board's findings and recommendation at p. 1.
[17] The Merit Systems Protection Board (our Federal counterpart) established a 12-prong test for evaluating the appropriateness of the penalty in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).
[18] See Agency's adverse action file at Tab #17.

penalty was not an error in judgment, was within the parameters of reasonableness and should be upheld.

ORDER

It is hereby ORDERED that the removal is UPHELD.

FOR THE OFFICE:

Muriel Aikens Arnold

MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge