THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
STANLEY BARKER	)	OEA Matter No. 1601-0143-10
Employee	)	
	)	Date of Issuance: November 28, 2012
	)	
METROPOLITAN POLICE DEPARTMENT	)	Lois Hochhauser, Esq.
Agency	)	Administrative Judge
	)	

Robert Deso, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

Stanley Barker, Employee herein, filed a petition with the Office of Employee Appeals (OEA) on November 9, 2009, appealing the final decision of the District of Columbia Metropolitan Police Department (MPD), Agency herein, to remove him from his position as a police officer. The final Agency decision was issued on October 13, 2009. At the time of the adverse action, Employee had a permanent appointment and was in career status.

The matter was assigned to this Administrative Judge on February 16, 2012. The prehearing conference took place on April 11, 2012, and an Order memorializing the briefing schedule agreed upon by the parties was issued on April 13, 2012. Following the filing of the final submission, the record closed on June 15, 2012. It was reopened twice between October 26, 2012 and November 19, 2012. It closed for the final time on November 19, 2012.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUES

1. Did Agency meet its burden of proof regarding its decision to terminate Employee?

2. Did Agency initiate this adverse action in a timely manner?

FINDINGS OF FACT,[1] POSITIONS OF THE PARTIES, ANALYSIS AND CONCLUSIONS

Background and Undisputed Findings of Fact

1. This matter is governed by the standard set forth in *District of Columbia Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002).[2]

2. Employee was first appointed as a uniformed officer with Agency on November 8, 1991.

3. On April 4, 2003, MPD issued a notice of proposed adverse action in which it proposed to remove Employee. He was charged. in pertinent part, as follows:

> Charge No. 1: Violation of General Order Series 1202, Number 1, Part I-B-12 which provides: "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…This misconduct is further defined In General Order Series 201, Number 26, Part I-B-22 which provides: "Members shall conduct their private and professional lives in such a manner as to avoid bringing discredit upon themselves or the department…@
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> Specification No. 1: In that on Friday, April 5, 2002, approximately 0030 hours, you were observed by Officer Alec Corapinski, parked in the rear of the 200 block of N Street, N.W….in a known area of prostitution. You were in the company of a male prostitute. When Officer Corapinski approached the car, he noticed [KJ] a male prostitute who is a "Transvestite," head in the area of your crotch. Once you exited the vehicle, you were observed with a condom in your hand. Your action during this time was in violation of General Order…in that you failed to conduct your private life in a manner as to not bring discredit upon yourself or the department.
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> Specification No. 2: In that on April 5, 2002…while standing outside your vehicle, Officer Alec Corapinski ordered you to remove your hand from your pocket and get back inside your vehicle. By your own admission, you refused to get back into the vehicle. Your action was in violation of General Order…in that your conduct was unbecoming a police officer.
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> Specification No. 3: In that on April 5, 2002…Officer Corapinksi asked if you were a police officer, you stated "NO." Officer Corapinski ordered you to place your

[1] The Administrative Judge relied on the submissions and attachments to the submissions filed by the parties in drafting this section.

[2] The record was reopened on or about October 26, 2012 to allow the parties to submit statements confirming their views that the matter was governed by the standards articulated in *District of Columbia Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002).

> hands on the hood of the car, you refused. You continued to walk towards Officer Corapinski at which time he made a radio transmission requesting units to respond…You were disrespectful to one of your associates…when you disobeyed his order…in violation of General Order…
>
> Charge No.2: Violation of General Order Series 1202, Number 1, Part I-B-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 intended for the information of any superior officer, or making an untruthful statement before any court or hearing. This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.
>
> Specification No. 1: In that on May 7, 2002, you submitted your statement on a P.D. Form 119 detailing your explanation of the incident. You claimed ignorance to the fact that [KJ] was a male…According to Officer Corapinski, it was impossible for a layman (not to know) and especially for an experienced officer. You also stated that you immediately identified yourself as a police officer to Officer Corapinski. According to Officer Corapinski, you first denied you were a police officer and then later admitted you were an officer after Officer Corapinski had obtained your identification folder. This is in violation of General Order Series 1202, Number 1, Part I-B-6, in that you made false statement on your PD 119.

4. Employee challenged the proposed action and a proceeding was held before an Adverse Action Panel (AAP) in 2003. In its Findings of Fact, Conclusions of Law and Recommendations, the Board summarized the testimony of the following witnesses who were present during all or part of the April 5, 2002 incident:

> Officer Alec Corapinski, Third District, testified he… observed a vehicle in an alley, known for prostitution …The driver exited the vehicle and approached the officer who commanded the subject to return to the vehicle. The driver failed to obey the command, seemed kind of confrontational and approached the officer, who was forced to draw his service weapon and request assistance. The driver, later identified as [Employee] failed to comply with Officer Corapinski's commands until back-up units arrived. Officer Corapinski knew the passenger as a male transvestite who frequents the area…
>
> Officer Keith Gilbert, Third District… was present on the night of the incident. He testified Officer Corapinski told him [Employee] did not identify himself at the time of the stop. Officer Gilbert stated as he approached [Employee] that he seemed to remember [Employee] as a police officer and asked him to what district he was assigned, and [Employee] replied…and things began to calm down… Officer Gilbert also stated he believed he recognized the passenger in [Employee's] vehicle as a local prostitute. He stated the passenger was a black male dressed as a woman.

Employee …admitted he was in the alley on the night of the incident but did not know the occupant of the vehicle was a male transvestite prostitute… He stated he was at the intersection of New York Avenue and Florida Avenue, en route to a 'gentlemen's club where they have female dancers, when he agreed to give a female a ride to N Street, N.W. He stated he spoke to the passenger about "personal issues" and the conversation was mainly he was speaking to the passenger, there was little dialogue. Once in the alley, the conversation was ending and the passenger was preparing to leave his vehicle when the police car pulled into the alley… [Employee] further stated he refused Officer Corapinski's order because the passenger in the vehicle was acting suspicious[ly] and he stated he did identify himself as a police officer. [Employee] further denied being involved in any form of sexual or illegal activity while in the alley… [Employee] stated he refused to get back in his car due to the activity of the occupant and concern for Officer Corapinski's safety. He stated he wanted to try to separate himself from his vehicle and get close enough to Officer Corapinski to discretely identify himself as a police officer but could not offer a reason why he did not verbally identify himself as such…

[Employee] testified he was scheduled to work the day tour on the date of the incident yet he still went out from his home in Capital Heights, Maryland at 0030 hours. He took a roundabout route which he testified he believed to be the shortest route to his initial destination. He stated he was in the alley in the 200 block of N Street, N.W., before for "police related purposes" but did not know the area to be frequented by prostitutes…

[Employee] reiterated his claim that [he] identified himself as a police officer to Officer Corapinski prior to back-up units arriving. This contradicts the statements of Officers Corapinski and Gilbert. It appeared unreasonable to the panel, for an on duty uniformed officer to draw his weapon and call for Code-One assistance if a civilian tentatively identifies himself as an off-duty officer, unless the civilian made some overt movements and/or in fact did not identify himself as an officer. …

The panel questioned [Employee] about his lack of foresight in picking up a stranger early in the morning and driving to a dark alley, to which he stated "I was not thinking the best that I should have been." [Employee] admitted transvestites frequent the area of the club to which he was headed and he does not know what transvestites look like. [Employee] stated he was aware of the tentative recognition signal members should use when approached by an on duty uniformed officer but he did not think of using it.

[Employee] offered poor judgment as his excuse for why a veteran officer, referred to as a good police officer, would go out five hours prior to his tour starting, pick up a stranger and drive into a dark alley, an alley to which all [of the Third District] witnesses testified they would not willingly enter while off duty

The Panel recommended that Employee be terminated for "off-duty conduct unbecoming an officer" and for "willfully making an untruthful statement." It stressed its serious concerns regarding Employee's lack of veracity, and pointed out that Agency had found Employee had not been truthful on two earlier occasions. It stated that an essential duty of an officer is to provide testimony and questioned Employee's "dependability" to do so.

> The panel seriously questions [Employee's] veracity, and as entered into testimony, he has in the past provided false statements during his employment on the department. The quality of dependability is a quality for which truthfulness is essential, to lack one is to invalidate the other…Sustaining these charges will mark the third time [Employee] has been deemed to have provided false statements. One duty of an officer is to testify in court and though previous discipline was not considered during the penalty phase of the hearing, it is relevant to the Douglas factors and needed to be mentioned.

5. Agency issued its final notice on September 16, 2003, sustaining the charges. Employee appealed the termination to the Chief of Police, who denied the appeal on October 8, 2003. The termination took effect on October 17, 2003.

6. Pursuant to the collective bargaining agreement between MPD and the union representing its uniformed officers, of which Employee was a member, the matter proceeded to arbitration. The issue presented at arbitration was whether Agency issued the final notice of adverse action within the time required by the collective bargaining agreement. On May 15, 2006, the Arbitrator hearing the matter determined that MPD had violated the relevant contractual provision and as relief, he, ordered Employee's reinstatement. MPD appealed the arbitration award to the Public Employee Relations Board (PERB), which denied the appeal on February 12, 2007.

7. Employee was reinstated on October 17, 2007. There was no evidence or representation made that he was prohibited from performing all of the normal duties of a police officer or that he performed those duties in a less than satisfactory manner.

8. On May 23, 2008, then D.C. Attorney General Peter Nickles of the D.C. Office of the Attorney General (OAG) wrote to Chief of Police Cathy Lanier as "a follow up on [their] recent conversations and in response to [her] concerns regarding reinstatement of members previously fired by the [MPD]." He characterized these officers as individuals who were "determined to have engaged in egregious misconduct, rendering them unfit to serve as law enforcement officers", but who had been reinstated based on "technical and procedural violations related to the timing of the disciplinary process". He concluded, in pertinent part, that:

> Where an officer has engaged in misconduct that calls into question the officer's credibility, that officer has irreparably impaired his or her ability to serve the criminal justice system. Such officers are thus unable to perform an essential police function.

9. By letter dated July 17, 2008, Chief Lanier asked Mr. Nickles to review the list of the officers who had been reinstated after being terminated for disciplinary reasons[3] She asked the OAG to advise her if any of the officers on the list would be allowed to testify in civil and criminal matters prosecuted or defended by the OAG. She also asked if "the sustained misconduct in these cases disqualify these members from performing the functions of a police officer;" noting that the responses would be "extremely important in assisting [Agency] with building the disciplinary cases for these members".

10. By letter dated August 1, 2008, Mr. Nickles informed Chief Lanier that upon review of "the allegations and supporting documentation" that she had provided regarding Employee and 26 other officers who had been terminated and then reinstated, he determined that Employee was one of 18 officers that his Office would not rely upon or call as a witness based on the decision that Employee was "found to have engaged in conduct that went directly to [his] honesty and truthfulness." He concluded that Employee's conduct was "serious enough—and the supporting evidence is compelling enough – to support any decision that MPD would make about [Employee], including termination".

11. On July 30, 2008, Monty Wilkinson, Executive Assistant United States Attorney for Operations stated in a letter to Chief Lanier:

> We write to advise you of our position regarding [Employee] who was reinstated recently by [MPD]. Based on information provided to us by your agency, it is our understanding that [Employee] was terminated in 2003 for conduct unbecoming and for making untruthful statements during MPD's investigation of [his] conduct with a prostitute. Our office has determined that the untruthful statement charge goes directly to [Employee's] veracity.
>
> If [MPD] is aware of any facts which materially conflict with this information or that shed further light on this incident, we ask that you provide us with those facts as soon [as] practicable. As it currently stands, if [Employee] were called by the government as a witness, we would need to disclose the information we have concerning this incident. Because of the likelihood of significant impeachment, it would be difficult to effectively utilize [Employee] as a witness at trial or pre-trial hearings at this time.
>
> We will advise you if we believe the officer in the future no longer would be subject to significant impeachment.

12. According to Agency, these two letters, i.e., the letters of July 30, 2008 and August 1,

[3] The letter stated that a "brief synopsis of the reason for the discipline and the outcome of the member's Trial Board hearing" were attached. There is an attachment in the record. However, it does not include the first page, which the parties agree contains the information regarding Employee. Mr. McDougald confirmed that this first page was not part of the record considered by the 2009 Trial Board. The record in this matter was reopened on November 19, 2012 to allow the parties to confirm that the first page of this attachment is not part of the record before this Administrative Judge, and that the parties do not want it to be included as part of the record.

2008, "became the basis for charging Employee with a violation of the Department's rules and regulations". (Agency Brief, p. 6).

13. Agency initiated an investigation, conducted by Sergeant Arthur Gregory. The investigation consisted primarily of the letters from Mr. Wilkenson and Mr. Nickles, cited above. Sgt. Gregory interviewed Employee who referred to two incidents in which he had made or assisted in arrests. In neither case was he required to provide testimony. At least one incident predated his reinstatement.

In his Investigative Report, issued on August 28, 2008, Sgt. Gregory concluded:

> [T]his "investigation disclosed sufficient evidence to sustain the allegation of inefficiency on the part of [Employee]. Specifically…Mr. Wilkinson… wrote 'Because of the likelihood of significant impeachment, it would be difficult to effectively utilize [Employee] as a witness at trial [or] pre-trial hearings at this time. Also, [Acting Attorney General Nickles] wrote "Of the 27 names you provided, we have determined that we would not rely upon-or call as a witness- 18 of them." [Employee] was listed as one of the eighteen officers.

14. On September 25, 2008, Agency served Employee with the Notice of Proposed Adverse Action, in which it proposed Employee's removal based on:

> Charge No. 1: Violation of General Order Series 120.21, Table of Offenses and Penalties Part A, #8 which states in part AInefficiency as evidenced by repeated and well-founded complaints from superior officers, or others, concerning the performance of police duty, or the neglect of duty.@
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> Specification No. 1: In that, on May 23, 2008, the Acting Attorney General of the District of Columbia issued a written opinion stating that certain reinstated members could not function as effective members of the Metropolitan Police Department, due to past conduct, which called into question the member=s veracity. On July 30, 2008, the Metropolitan Police Department received a formal letter from the United States Attorney=s Office indicating that your court testimony would not be sponsored by that agency due to past conduct that rendered you not credible for purposes of testifying in court. Moreover, on August 1, 2008, the Metropolitan Police Department received a formal letter from the D.C. Attorney General=s office indicating similarly that your testimony would not be sponsored by that agency in any criminal or civil proceeding, due to past conduct that rendered you not credible for purposes of testifying in court. These circumstances prevent you from performing a full range of police duties, rendering you, inefficient, or ineffective, for service to the Metropolitan Police Department.

15. Employee challenged the proposed action, and an Adverse Action Panel convened on July 28, 2009.

16. Roy McCleese, Chief of the Appellate Division of the United States Attorney's Office (USAO), was called as a witness by Agency at the 2009 AAP proceeding. Mr. McCleese testified that his Office established the Lewis Committee in the mid-1990s and that he has been a member of the Committee since its inception. Mr. McCleese testified that MPD notifies USAO of members it has determined have issues involving credibility or veracity. Mr. McCleese explained that the purpose of the Committee is to ensure that the USAO complies with its "legal duties under the Constitution to disclose to criminal defendants information that the defendants have a right to [know]…to try to either establish their innocence or cast doubt on the credibility of the government's witnesses". In placing an officer on the list, Mr. McCleese explained, his Office is not determining or even believes that the officer was untruthful or engaged in charged conduct. Rather, the decision to place an office on the List is made "if there is credible information giving rise to a reasonable belief that the officer committed a bad act going to veracity." If the USAO intends to call that officer as a witness, it will disclose the fact that the officer is on the List to the defendant who can use that information.

He said at times, the USAO will not call an officer on the List as a witness because credibility issues can be "very damaging" to the government's case. He added that "depending on the seriousness of the case, the government has dismissed cases where the testimony of the challenged officer is considered essential" rather than risk having the officer impeached. Mr. McCleese noted that officers on the Lewis List have been called to testify "on rare occasions". He said that although officers can be removed from the List, officers found to have committed "bad acts that go to veracity" are not normally removed. The witness stated that dozens of officers were on the Lewis List, but he did not know how many of these officers remain employed by Agency.

Mr. McCleese testified that MPD provided his Office with Employee's name, and information regarding the 2003 incident. He added, however, that Employee had been on the List "for other matters at various times" prior to 2003. He stated that the USAO would have to assess on a case-by-case basis whether Employee would be permitted to testify. He noted that Employee's placement on the Lewis List was not an "absolute bar to his ability to testify".

At the 2009 AAP proceeding, Sgt. Gregory testified in response to a question as to whether he felt "there was anything else he could do as an investigator to further investigate this case to reach a final determination and conclusion", that "he felt that all the conclusions were already made by the U.S. Attorney's Office, by the Attorney General's Office and by his officials". Responding to the reasons the language attributed to the U.S. Attorney's Office was incorrect in his report, i.e., the USAO did not state "that [Employee's] court testimony WOULD NOT be sponsored" Sergeant Gregory stated the specification was provided to him by his official. (emphasis in original).

The Panel also accepted as evidence a letter from Robert Hildum, Deputy Chief of the Criminal Division of OAG, in which he stated that he had reviewed the matter and determined Employee had made untruthful statements, and that therefore the OAG would not use him as a witness. Mr. Hildum stated that officers placed on OAG's version of the Lewis List can be removed.

17. In its Findings of Fact and Conclusions of Law,[4] the Panel sustained the charge and recommended termination. It noted that Employee "had been previously listed on the Lewis list, due to circumstances unrelated to the Inefficiency case". It also noted that placement on the List is not an "automatic disqualifier for [Employee] to testify in a court proceeding" but that "the finding of veracity issues…would remain a requirement for the [USAO] to disclose" and that generally officers with veracity issues are not removed from the List. In reviewing the Douglas factors, the Panel stated that it considered Employee's past disciplinary record to be a "neutral" factor, but it considered his "past work record" to be an "aggregating" factor "since it was reported by the USAO that [Employee] had been flagged by their office for other matters at various times prior to 2003".

The Panel determined that Agency had acted in a timely manner, stating:

> Action was taken on the Inefficiency charge within the required time constraints and was deemed separate and apart from the charges placed, and the discipline taken, for the 2003 adverse action… Therefore the Panel found that the provision under the D.C. Code Section 5-1031, a provision referred to as the 90-day rule and "Double Jeopardy," did not apply…
>
> The time between MPD's receipt of the letters (from the USAO and the OAG) when MPD first became aware of this information to the date the Proposed Adverse Action was served on [Employee] was within the fifty (55) day limit…

The Panel also concluded that the "notoriety of the offense" or impact on Agency's reputation was an aggravating factor, noting that:

> [Employee's] case, one of the numerous cases which resulted in reinstatement, received media coverage that was adverse and embarrassing the police department. The media attention caused the public to lose confidence in the police department and caused damage to the agency's reputation.

18. MPD issued its Final Notice of Adverse Action on September 10, 2009, affirming the Panel's recommendation. Employee appealed the decision to the Chief of Police who denied the appeal on October 13, 2009. The effective date of removal was October 16, 2009.

Positions of the Parties, Analysis, Findings and Conclusions

This matter is governed by *District of Columbia Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002), in which the D.C. Court of Appeals concluded that OEA has a limited role in an appeal in which an Adverse Action Panel has issued a decision:

> The OEA may not substitute its judgment for that of an agency. Its review of the agency decision…is limited to a determination of whether it was supported by

[4] The document appears to be undated and the Final Notice of Adverse Action does not provide a date for the AAP's Findings of Fact and Conclusions of Law.

> 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.

In cases governed by *Pinkard*, Agency must meet its burden of proof by "substantial evidence"[5] which is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion". *Davis-Dodson v. District of Columbia Department of Employment Services,* 697 A.2d 1214, 1218 (D.C. 1997), *Ferreira v. District of Columbia Department of Employment Services,* 667 A.2d 310, 312 (D.C. 1995). *Pinkard* is one of a long line of cases that require that deference must be given to credibility determinations made by the administrative fact finders who heard the matter and therefore considered to be in a better position to assess credibility. *See, e.g., Metropolitan Police Department v. Baker,* 564 A.2d 1155 (D.C. 1989). There was sufficient evidence in the record of both proceedings to support the credibility assessments made by the Panels.

Two issues are presented for resolution in this matter. The first is whether Agency met its burden of proof regarding its decision to terminate Employee for "inefficiency". The second is whether Agency initiated the adverse action that resulted in Employee's 2009 removal in a timely manner. The Administrative Judge carefully reviewed both the 2003 and 2009 Adverse Action Panel proceedings in deciding this matter. She reviewed the first, in large part because it contained the information that formed the basis for the "inefficiency" charge which resulted in the 2009 removal. The record supports the conclusion that in both AAP proceedings, the parties had full opportunity to present testimonial and documentary evidence. Both Panels fully participated at the proceedings. The members of both Panels appeared to be neutral, and there was no evidence of bias." The Administrative Judge accepts the conclusions reached by the 2203 Panel regarding Employee's credibility and truthfulness.

With regard to the first issue, Agency contends that its decision to remove Employee for "inefficiency" because his placement on the Lewis List due to credibility issues renders him unable to testify in criminal proceedings, which is an essential function of a sworn officer, is based on substantial evidence and is "not clearly erroneous as a matter of law". (Agency Brief, p. 8). In analyzing this issue, the Administrative Judge relied in large part on the testimony of Roy McCleese, Chief of the USAO's Appellate Division, who was an Agency witness at the 2009 AAP proceeding.

Mr. McCleese has been a member of the Lewis Committee since the Committee's inception in the mid-1990s, and therefore has historical and substantive knowledge of the Lewis List and the placement of MPD officers on the List. There was no challenge to Mr. McCleese's evidence at the proceeding and no evidence was presented which contradicts his testimony. The Administrative Judge found his testimony to be credible and reliable.

The Administrative Judge considered the fact that the List has been in existence since the mid-1990s and that MPD is almost exclusively responsible for forwarding the names of officers for placement on the List to be very relevant to both issues, because these facts establish that the List and

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[5] This is an exception to OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) which states that the party with the burden of proof must meet that burden by "a preponderance of evidence".

placement process were well-established by 2000. Perhaps most critical to the Administrative Judge, was Mr. McCleese's testimony that Employee had been placed on the List prior to the misconduct that resulted in his 2003 removal. Based on this uncontradicted and very credible testimony, the Administrative Judge concludes that Agency knew, or should have known that Employee had been on the Lewis List for matters unrelated to and preceding his 2003 removal. Yet it took no action to remove him. Indeed, the evidence established that MPD was aware of credibility issues regarding Employee prior to his 2003 removal. The first Panel referred to two prior occasions where Employee was found to be untruthful and the Panel expressed its concern that Employee would be unable to serve as a witness, which it identified as an essential police duty.

MPD did not offer any reason for its decision that Employee's placement on the Lewis List in 2008 created an issue any different from his earlier placement on the List or indeed, from its earlier determinations that Employee was not credible, neither of which had resulted in a recommendation for removal. Agency did not present any evidence or argument at the 2009 AAP proceeding why it did not seek to remove Employee for "inefficiency" on any previous occasion. It did not present any evidence at the 2009 AAP proceeding as to why it allowed Employee to remain a sworn officer although he was placed on the Lewis List prior to his removal in 2003. The matter was not addressed by the Panel in its decision or by Agency in its final Notice. Even if MPD argued, although it did not, that it had not forwarded Employee's name to the USOA for placement on the Lewis List prior to 2003, it could not argue it was unaware that Employee had significant credibility issues. The 2003 Panel specifically referenced credibility problems and the impact on his ability to testify at trials.

In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981), the U.S. Merit Systems Protection Board enumerated factors that were relevant for a governmental agency to consider when determining the appropriateness of a penalty. The 2009 Panel utilized the *Douglas* factors in reaching its decision to remove Employee. For example, the Panel considered of the nature and seriousness of "the offense" to be an "aggravating factor," and identified the "offense" or "incident" as the making of "untruthful statements." However, Employee was not charged with or removed for making untruthful statements. There is no incident or offense related to this removal that refers to making untruthful statements. The allegation refers to incidents preceding his 2003 removal and if considered, should have been considered in the prior removal. The Panel stated it also considered the "clarity with which [Employee] was on notice of any rule which was violated in committing the offense, or had been warned about the conduct in question" to be an "aggravating factor". However, again, Employee did not engage in any behavior since his reinstatement that resulted in his removal. He was not charged in engaging in any untruthfulness since his reinstatement. Thus, it was unreasonable to consider this to be an aggravating factor. Finally, the Panel considered the "notoriety" of the offense "or its impact upon the reputation of the agency" to be an "aggravating factor" noting that Employee's reinstatement was among those that "received media coverage that was adverse and embarrassing" to Agency. But Employee is only charged with being unable to serve as a witness. Agency did not charge him with engaging in conduct that caused publicity, negative or otherwise, at the time of his reinstatement or thereafter. Based on this analysis, the Administrative Judge concludes that the Panel's determination that these factors were "aggravating" factors and the Panel's consideration of these "aggravating" factors in reaching its decision was significantly flawed.

After a careful review of the record and the arguments presented by the parties, for the

reasons stated above, the Administrative Judge concludes that Agency failed to meet its burden of proof on this issue. In *Brown v. Watts*, 993 A.2d 529 (D.C. 2010), the Court of Appeals stated that OEA must accept findings even if the record could support a contrary conclusion. In this matter, the Administrative Judge concludes the record does not support a contrary conclusion. The standard of review in the instant matter requires that Agency's decision, made pursuant to an evidentiary hearing, will not be set aside if the record on review demonstrates that the decision is supported by substantial evidence and is not clearly erroneous as a matter of law. *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). The Administrative Judge is also aware that mere disagreement with the Panel's decision is not grounds for reversing its decision. *See, e.g., Kirkwood v. District of Columbia Police and Firefighters= Retirement and Relief Board*, 468 A.2d 965 (D.C. 1983). However, evidence is not substantial if it is so highly questionable in the light of common experience and knowledge that it is unworthy of belief. *Metropolitan Police Department v. Baker,* 564 A.2d 1155 (D.C. 1989). In this matter, the evidence supported the conclusion that Employee had been on the Lewis List since before 2002, and his placement on the List had not caused MPD to propose his removal. For the reasons discussed, the Administrative Judge concludes that Agency did not present the sufficient evidence that a reasonable mind could accept as adequate to support its conclusion. *Black's Law Dictionary,* 8th Edition (2004). *See also, Mills v. District of Columbia Department of Employment Services,* 838 A.2d 325 (D.C. 2003).

The second challenge raised by Employee is that Agency violated D.C. Code Section 5-1031(a), which requires Agency to initiate an adverse action against a sworn member no later than 90 days from the date Agency "knew or should have known of the act or occurrence allegedly constituting cause". Employee argues that the matter should be dismissed because MPD failed to propose his removal in a timely manner, in that it failed to propose the adverse action within 90 days of when it knew or should have known of the charged conduct. MPD contends that it did act within the 90 day period. In its report, the AAP found Agency acted in a timely manner.

After carefully reviewing the record and the arguments of the parties, the Administrative Judge concludes that Agency did not initiate the adverse action in a timely manner. The analysis used to reach this conclusion is essentially the one contained in the discussion of the first issue, so it will only be summarized.

The evidence established that Employee was on the Lewis List prior to the initiation of the 2003 charges that led to his first removal. The evidence also established that MPD almost exclusively provided the names of officers to USAO for consideration for placement on the Lewis List since the List's inception in the mid-1990s. It is reasonable to conclude that MPD proposed Employee's name to USOA prior to 2002. Even if it did not, the evidence clearly established that by 2002, Employee had been found to be unreliable and dishonest on at least two occasions before his first removal was proposed. The 2003 AAP Panel referred to these credibility problems and to the fact that officers are called upon as witnesses and that officers with credibility issues cannot be called to testify. One of the charges against Employee in 2002 was making false statements. As the Panel noted, he had been found to be untruthful two times before the removal was proposed. Therefore, by the time Agency initiated the adverse action in 2002, it knew Employee would create problems for the government if called as a witness, even if it did not know he was on the Lewis List.

Even if Agency argues that it decided that since Employee was being terminated in 2003, it did not need to worry about the possibility that he would be called as a witness when it proposed his removal in 2002, Agency was aware of these problems when he was reinstated in 2007. One of the charges that led to his 2003 removal was giving false statements. That was the third time Employee was found by Agency to have been untruthful. He had been placed on the Lewis List before 2003. Therefore at the time of reinstatement on October 17, 2007, Agency was well aware of three instances in which it had concluded Employee had not been honest and had given false statements. Even assuming Agency forgot Employee had previously been on the Lewis List, it had to know at the time he was reinstated in 2007 that he met the criteria for placement on the Lewis List. Mr. McCleese provided credible testimony that the Lewis List was established in the mid-1990s and that those on the list are officers referred by MPD based on credibility issues that could render the officer an unreliable or at least impeachable witness. Agency had been making decisions for referral for placement on the Lewis List for more than ten years by 2007 and certainly had the experience and the expertise to make those referrals. Agency offered no reason, and the Administrative Judge can think of no reason. that Agency needed Mr. Nickles' opinion on the matter. If the criteria for placement on the List changed since 2002, Agency did not provide any evidence to that effect. Employee's reputation as a credible witness was certainly an issue for Agency since before 2002, and the 2003 AAP "strongly" challenged his credibility in its decision. As Mr. McCleese noted, placement on the List does not mean the decision that an officer was not credible was correct, only that the decision was made and could jeopardize the government's case if the officer was called as a witness. One of the charges sustained in 2003 was "willfully making an untruthful statement."

There may be instances where there is a question of the nexus between the charged misconduct and the referral of the officer to the Lewis Committee or its OAG equivalent. But in this instance, MPD knew or should have known that Employee who was discharged, in part, for "willfully making an untruthful statement" would merit referral to the Lewis Committee. In addition, Agency knew of two earlier sustained charges against Employee for providing false testimony and knew, or should have known, that Employee had been on the Lewis List prior to 2002. There was no good reason presented why Agency had to wait for the OAG to give his opinion.

By 2008, the Lewis List had been in existence for more than ten years at that time. The reasons and procedures for placing an office on the List were well-established. Agency's determination that Employee presented significant credibility problems had been made prior to 2002. It would appear that Agency would have forwarded Employee's name to the OAG and USOA immediately upon his reinstatement. He had credibility problems before he was removed in 2003, and one of the charges that led to his 2003 removal was "willfully making an untruthful statement." But even if Chief Lanier believed she needed to ask OAG and the USAO its views regarding Employee's credibility problems, Employee was reinstated on October 17, 2007. At the time of his reinstatement, these matters were well known. There was a clear nexus between his 2003 removal and Agency's determination that the issues regarding his credibility would have a negative impact on his ability to serve as a witness for the government. Yet, although there is some reference in the correspondence to an earlier discussion of the issue, Agency did not ask OAG for its views until July 17, 2008, almost nine months after his reinstatement. There was no explanation for

this nine month delay. The Administrative Judge concludes that this extensive delay was unreasonable, rendering Agency's initiation of the adverse action as untimely.

In sum, the Administrative Judge concludes that Agency failed to meet its burden of proof regarding the removal, and further, that it failed to meet its burden of proof that it acted within the time frame permitted to initiate this adverse action. Each conclusion, on its own, merits the reversal of Agency's action in this matter.

ORDER

It is hereby

ORDERED:

1. Agency's decision is to remove Employee from his position is reversed.

2. Agency is directed to reinstate Employee, issue him the back pay to which he is entitled and restore any benefits he lost as a result of the removal, no later than 45 calendar days from the date of issuance of this Decision.

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

FOR THE OFFICE:

LOIS HOCHHAUSER, ESQ.
Administrative Judge