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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0251-09
RONALD WILKINS,)	
Employee)	
)	Date of Issuance: May 21, 2012
v.)	
)	
METROPOLITAN POLICE)	
DEPARTMENT,)	
Agency)	Sommer J. Murphy, Esq.
_____)	Administrative Judge
James W. Pressler, Esq., Employee Representative		
Charles Tucker, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 28, 2009, Ronald Wilkins (“Employee”), filed a petition for appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the D.C. Metropolitan Police Department’s (“Agency”) action of terminating his employment. Employee worked as a Lieutenant with Agency in Career Service status.

The events which formed the basis for Employee’s termination occurred between approximately August 31, 2008 and September 29, 2008. Specifically, Employee’s termination was based on the following charges: 1) Absence Without Leave (“AWOL”); 2) 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 presences of, any superior officer, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing; 3) Any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force; and 4) Neglect of duty to which assigned, or required by rules and regulations adopted by the Department.

On May 5, 2009, Agency’s Adverse Action Panel (“the Panel” or the “Board”) held a hearing regarding the administrative charges against Employee in accordance with the Collective

Bargaining Agreement (“CBA”) between Agency and Employee’s union. On June 17, 2009, the Panel issued its Final Notice of Adverse Action, finding Employee guilty on all four (4) charges and recommended that he be terminated. Employee subsequently filed an appeal with the Chief of Police on July 6, 2009; however, his appeal was denied on July 22, 2009. Employee’s termination became effective on July 31, 2009.

On August 28, 2009, Employee filed a petition for appeal with this Office. The matter was assigned to the undersigned Administrative Judge on or around November of 2010. A Status Conference was held on May 4, 2011, for the purpose of assessing the parties’ arguments with respect to Employee’s appeal. I subsequently ordered the parties to submit briefs on the issue of whether or not the decision of the Trial Board should be overturned. Employee and Agency submitted written briefs on July 6, 2011, and August 22, 2011, respectively. Because the Undersigned is precluded from conducting a de novo examination on the merits of this appeal, as discussed *infra*, an evidentiary hearing was not held. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether the Trial Board’s decision was supported by substantial evidence.
2. Whether there was harmful procedural error, or whether Agency’s action was done in accordance with applicable laws or regulations.

STATEMENT OF THE CHARGES

Charge No. 1: Violation of General Order 120.21, AWOL (Absent Without Leave) i.e., reporting late for duty more than six (6) times within a one year period, an absence from duty without official leave in excess of the first four (4) hours of a scheduled tour of duty, or an unexcused absence from a scheduled duty assignment that is not in the category of lateness.

Specification No. 1: From August 31, 2008 through September 13, 2008, you were “Absent Without Leave” for your tour of duty on September 2, 3, 5, 8, 10 and 12, 2008. During your interview with the Internal Affairs Division (IAD), you admitted remaining at your assigned place of duty for your scheduled tour of duty. You did not request nor were you granted leave for the aforementioned dates.

Charge No. 2: Violation of General Order 120.21, “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 presences of, any superior officer, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing.”¹

Specification No. 1: During your interview with IAD, you initially claimed from August 31, 2008 through September 13, 2008, you worked your scheduled tours as reported in time and attendance. After being confronted with evidence to the contrary, you recanted your statement proclaiming that during the majority of your tour of duty you remained at your residence instead of reporting to the Office of Unified Communications (OUC) for your scheduled tour of duty. You also stated that the reason you remained home was due to illness. You also admitted having not made any notifications, requesting any leave, nor reporting the use of any leave to time and attendance during the pay period.

Charge No. 3: Violation of General Order 120.21, “Any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force.”

Specification No. 1: On or about September 16, 2008, you fictitiously reported your time and attendance for the pay period from August 31, 2008, through September 13, 2008. Specifically, on September 2, 3, 5, 8, 10, and 12, you reported that you worked your scheduled tour of duty from 0600-1430 hours. During your interview with IAD, you admitted having not worked most of your scheduled tour of duty on those dates, but instead, remained at your residence suffering from hypertension. You also admitted having provided this information verbally to time and attendance for entry into TACIS.

Charge No. 4: Violation of General Order 120.21, “Neglect of duty to which assigned, or required by rules and regulations adopted by the Department.”²

¹ Misconduct under this section is further expounded upon in MPD’s General Order 201.26, Part I-B-30.

² See also General order 101.9, Part 1, E-7.

Specification No. 1: You consistently failed to report to your assigned duty location at OUC located at 2720 Martin Luther King Avenue, S.E., Washington, D.C., from August 31, 2008, through September 13, 2008.

Specification No. 2: Your conduct as a sworn official was contrary to that which is expected of all members of the Metropolitan Police Department concerning their performance of duty as ordered by the Chief of Police. Specifically, you failed to carry out your assigned duties as the MPDC Liaison Officer for OUC.

SUMMARY OF THE TESTIMONY

On May 5, 2009, Agency held a Trial Board Disciplinary hearing. The following represents a summary of the testimony given during the hearing as provided in the transcript (hereafter denoted as "Tr.") which was generated following the conclusion of Employee's proceeding. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their positions.

Sergeant Charles Weeks testified in relevant part as follows:

Charles Weeks ("Weeks") works with Agency's Internal Affairs Division. His primary job responsibility is to investigate allegations and administrative matters that deal with members of the Metropolitan Police Department. His rank is Sergeant. Weeks was called to investigate Employee after being given his Complaint Sheet ("Complaint"). Tr. at 13. Weeks testified that he conducted surveillance of the Office of Unified Communications ("OUC"), which was Employee's place of employment. Weeks stated that wanted to observe Employee entering and leaving work and attempt to locate/follow him when he left work. Tr. at 23.

Weeks testified that he observed Employee's car on the side of the road one morning, two blocks away from his residence. Tr. at 26-27. Employee was in the car and talking on his cell phone. He was the only person in the vehicle. Weeks followed Employee to the OUC. Weeks stated that Employee parked in the visitor area and was in the building for approximately forty (40) minutes. When Employee left the building, Weeks followed him, but eventually lost him in traffic. According to Weeks, Employee did not return to the OUC that day. Tr. at 27. Weeks stated that he observed Employee sometime during the pay period of August 31, 2008, through September 13, 2008, which was the last day he conducted surveillance on Employee. Tr. at 28.

Weeks stated that he also had Employee's badge report and enter/exit reports pulled, which revealed that Employee did not lose his badge or leave the badge at home during the two week time frame at issue. He also confirmed that Employee was not listed in the visitor's logbook. Tr. at 34.

Weeks further testified that Employee did not accurately report his hours worked during the August 31, 2008 through September 13, 2008 pay period "the 8/31/08-9/13/08 pay period."

According to his investigation, Employee worked less than four (4) hours during this pay period. Weeks stated that Employee should have worked seventy-two (72) hours, thus approximately sixty-nine (69) hours were unaccounted for. Tr. at 37.

According to Weeks, Employee originally stated that the hours he reported to Time and Attendance were correct; however, after being confronted with the evidence concerning his absences, Employee admitted that he had only worked about three and a half (3½) hours during the pay period at issue, and that most of the time he was at home, sick. Employee also admitted that he did not notify anyone at Agency that he was ill or that he was having marital problems during this time period. Tr. at 43. During the interview, Employee told Weeks that he had a dentist appointment coming up and spoke of having high blood pressure and marital issues. Tr. at 44. Weeks testified that Employee's version of events changed every time he was presented with new evidence obtained during the investigation.

Weeks also testified that the findings of his investigation were based on the badge reports; the fact that Employee's badge was not reported lost or stolen; and Employee's failure to sign in the visitors log in lieu of using his personal badge to sign in. Week's investigation was also based on an inquiry into Employee's annual or sick leave status, as well as the surveillance cameras, which revealed that Employee wasn't entering and exiting the building at the time he claimed to be at work. Tr. at 80-86.

Sergeant Jennette Miller testified in relevant part as follows:

Sergeant Jennette Miller ("Miller") worked as an Administrative Sergeant with Agency's Telecommunications Division and was responsible for keeping time for all members of the office in the Time, Attendance and Court System ("TACIS"), Agency's computerized system used to enter and record hours worked. She also issued cell phones to Agency employees and kept records of the offices' land line telephones. Tr. at 94.

Miller testified that sometime after September 13, 2008, Employee came to the office and reported his time to her. The transcript pertinent to Miller's testimony provided the following with respect to Employee's timesheet (Tr. at 97-98):

Bruckheim: Can you explain to the Board how to read this printout?

Miller: Yes. Start at the top with August 31st and read down. August 31st has – showing day off, that's a Sunday, his day off is Sunday.

Next day is Monday, which was a holiday, being a Labor Day holiday, so that showed that he was off for the holiday.

Next day is Tuesday, and that showed that he worked Tuesday from 0600 to 1430.

Then Wednesday shows the same thing, he worked 0600, 1430.

Thursday shows 0600, 1430, all the way down to Friday, September the 12th.

Bruckheim: Okay. If Lieutenant Wilkins had taken any sick leave, would that have been reflected on this printout?

Miller: Yes.

Bruckheim: How would it have been reflected?

Miller: It would have showed sick leave for him.

Miller further testified that she was aware of Employee's health issues and marital problems from previous conversations with him. However, when he reported his time for the 8/31/08-9/13/08 pay period, he did not communicate that he had any health or marital issues. Tr. at 100.

Lieutenant Ronald Powell testified in relevant part as follows:

Lieutenant Ronald Powell ("Powell") is a police officer property manager with Protective Services. At the time his testimony was given during Employee's Panel hearing, he worked in the Wilson Building. However, during the time period of 8/31/08-9/13/08, Powell worked in the OUC. His duties included managing all security operations for the building. Tr. at 105-106.

According to Powell, employees who work at the OUC can gain entry by either the visitor's entrance or the employee's entrance. If they enter through the visitor's entrance, they present their credentials when driving up to a gate where an officer is required to verify their credentials. Powell testified that the visitor's entry process takes longer than the employee's entry process. Tr. at 107.

In describing the visitor's logbook at the OUC, Powell confirmed that the logbook entered into evidence was from the time period of September 1, 2008, through September 13, 2008. The officer handling visitor entry was required to enter all visitors in the logbook. During the time period at issue, Powell did not receive any reports that Employee was having trouble entering the building or that he was not entering through the proper procedures. Tr. at 111. Powell also stated that the only time when visitors or employees are not entered into the logbook is when an MPD member comes to pick up a telephone incident report. These MPD members come in on the midnight shift and are announced from the Telephone Reporting Unit ("TRU"). Powell further testified that when someone leaves the building, the security guard is supposed to log that information. However, it may not happen if the guards are in between shifts. Tr. at 112-114.

Ronald Wilkins testified in relevant part as follows:

Ronald Wilkins (“Employee”) was transferred to the position of Liaison Officer in June of 2008. Employee testified that his tour of duty was from 6:00 a.m. until 2:30 p.m. and stated that his hours were somewhat flexible and that he could choose to work the 3:00 p.m to 11:00 p.m. position if he had to attend early meetings. Tr. at 126-128.

Employee testified that he did not report to work on September 2, 3, 5, 8, 10 and 12 of 2008, and he could not recall where he was during this time. He stated that during his interview with Investigator Weeks, he had trouble remembering the events which transpired during the time. Employee also stated that he was having a lot of health, marital, and personal problems. Employee testified that he felt “de-motivated.... [and] worthless...” He further stated that his personal and professional life “ran into one another.” Tr. at 131-134.

Employee stated that after he was administratively charged with being AWOL, he sought legal counsel and his attorney said that “something is not right with [him][and that he] probably need[s] to seek some type of psychological evaluation.” Employee subsequently received psychological assistance from Dr. Mitchell Hugonnet, a Clinical Psychologist. Employee testified that he was diagnosed with deep depression. Tr. at 135.

Employee believed that some of his absences at work were a product of him trying to hide what was going on in his life. He stated he felt ashamed that he didn’t have mental control, which made him not want to attend work on a regular basis. Further, Employee testified that he was being mentally abused and stated that his marital issues caused him to be unmotivated and also caused his memory loss and hypertension, which he was diagnosed with in 2006. Employee was treated with Norvasc, a medicine used to treat high blood pressure. Tr. at 137-139.

In 2005, 2006, and 2007, Employee sought advice for his marital issues with Agency’s Employee Assistance Program. He stated that he received counseling from a total of three counselors; two counselors for the marital issues, and one counselor for personal issues. He also sought counseling from a spiritual counselor. Tr. at 140. Employee further testified that he was proscribed the antidepressant, Paxil, and attended therapy twice a week in an effort to return to his “normal state.” Tr. at 141.

When asked, Employee testified that he did not intentionally violate any of Agency’s General Orders with respect to time and attendance, but contended that his unhealthy physical state and mental problems contributed to bad decision making. Tr. at 144-145. Employee conceded that he did not report for duty on the six dates as alleged in Agency’s charges against him. Tr. at 145. Employee further testified as follows (Tr. at 145-146):

Bruckheim: Lieutenant Wilkins, just so we’re clear, you admit that you did not report for duty on the six dates that are alleged in Count 1 – rather Charge 1, Specification 1, of the charges against you; is that right?

Wilkins: Yes, I admit that.

Bruckheim: Essentially regarding Count – Charge 2, Specification 1, it alleges that you made a willful and knowing false statement pertaining you MPD duties.

It is your position, Lieutenant, that you made those statements but you made them not knowing that they were false, or is it your position that you made the statements but have a reason for why you did what you did, and that reason became clear to you when you sought psychiatric treatment?

Wilkins: Yes.

Bruckheim: Yes to which one?

Wilkins: That I mean I – my actions and what I did was made clear to me after I had [sought] psychiatric help on – basically from the things that I did.

Employee testified that he did not meet with a therapist until after he was served with the charges and specifications which led to his removal. Employee visited the Police and Fire Clinic a few times in 2008 because of blood pressure issues and was required to wear an EKG to monitor his heart. Tr. at 156-60. Employee stated that he didn't know why he did not properly report the sixty-nine (69) hours in which he was absent from work and testified that he was not aware of his psychological condition at that time. Tr. at 162-165. Employee admitted that he made a bad decision; however, he also stated that his physical and mental conditions were mitigating factors in this matter. Tr. at 166-167.

Commander James Crane testified in relevant part as follows:

James Crane (“Crane”) is a Commander in the Special Operations Division of MPD. From 2002 through 2007, Crane was the Director for the Communications Division and Employee worked as a Lieutenant under his direction. Crane testified that he had no reason to believe that Employee could not handle the requirements of the Liaison position during this time. He stated that Employee knew the procedures for taking calls and what the performance measures were. Crane further stated that because the job required a lot of responsibility and time devoted to taking calls, there was a lot of independence in the work performed by Employee. Tr. at 180-194.

Dr. Mitchell Hugonnet testified in relevant part as follows:

Doctor Mitchell Hugonnet (“Hugonnet”) is a Clinical and Forensic Psychologist. He examined Employee on April 25 and 26 of 2009, for a total of five (5) hours, after Employee was referred to him through Agency for a psychological evaluation.

Hugonnet testified that he diagnosed Employee with major depression, without psychotic features. According to Hugonnet, Employee’s depression drove his misconduct, and stated that without the depression, the misconduct would not have occurred. Hugonnet further testified that Employee’s depression made it impossible for him to perform his job. Tr. at 210-211. He noted that Employee was ‘people avoidant’ and avoidant in his marriage.

Hugonnet also stated that Employee’s progressive depression began in 2006; however, the symptoms did not become apparent or contaminate his behavior until 2008. He contended that Employee could no longer maintain the steady motivation required to simply get out of bed in the morning and maintain a consistent work schedule without being overcome with anxiety and despair. According to Hugonnet, this was the reason why Employee varied his work schedule in effort to buffer himself from being engulfed by his depression. Tr. at 212-213

In addition, Hugonnet testified that Employee had cognitive impairments and found it difficult to reason in a logical, goal-oriented fashion and maintaining his orientation in time and space. According to Hugonnet, the accumulation of painful disappointments, arguments between Employee and his wife, and the buildup of hopelessness caused him to withdraw and impaired his cognitive thinking. Tr. at 230. He believed that despite his disorientation, Employee could tell right from wrong if he was able to discern the choices. He also stated that there is some ambiguity in the gap between right and wrong, and Employee may not know the polar extremes. Tr. at 232-233.

Hugonnet confirmed that he reviewed investigator Week’s interview with Employee. When asked whether Employee’s blatant untruthful statements and evasiveness was indicative of someone who was not mentally cognitive of what they’re doing and who was also depressed and not rational, Hugonnet stated that the missing six days were an emotional avoidance of people and that Employee could not have gone to work if he had tried. Tr. at 246-247.

Hugonnet further testified that Employee was not currently fit to be on full duty status at the time of the Board hearing; however, he opined that Employee should be retained as a member of the MPD because the incident at issue was a result of a reversible sickness. Tr. at 249-249.

Employee’s Position

Employee argues that Agency’s decision to terminate him was not supported by substantial evidence because it ignored material evidence adduced during his hearing before the Panel. It is Employee’s position that Agency failed to “address and analyze all material facts...[and must] give full and reasoned consideration to all material facts and issues.”³

³ Employee Brief at p. 16 (July 6, 2011).

Moreover, Employee asserts that the Panel's written findings of fact fail to include the testimonial evidence of Dr. Hugonnet or offer a reason as to why the Panel chose not to give any credit to such testimony. In addition, Employee contends that the Panel's analysis of the *Douglas Factors, supra*, was flawed because, inter alia, it failed to provide Employee with a document which outlined the relevant factors it considered, the weight attributed to them, as well as the reasoning and philosophy for the conclusion.⁴ According to Employee, his depression constituted a "mental impairment" and thus served as a mitigating factor that was ignored by the Panel. In addition, Employee submits that the penalty of termination was improper under Agency's General Orders, as well as the Rehabilitation Act of 1973, and the holding in *Whitlock v. Donovan*,⁵ as discussed below.

Agency's Position

Agency contends that its decision to terminate Employee is supported by substantial evidence and that it complied with all applicable District laws, regulations and MPD General Orders. Agency further argues that the Board appropriately weighed the seriousness of Employee's offenses against the mitigating factors that were presented by Dr. Hugonnet during the course of his testimony. Accordingly, Agency states that the decision to terminate Employee was within management's discretion and should therefore be affirmed.

ANALYSIS, AND CONCLUSIONS OF LAW

Employee is a member of the Fraternal Order of Police (the "Union"), and is covered by a provision of the collective bargaining agreement that specifically restricts the scope of this Office's review in adverse actions to the record previously established in the Trial Board's administrative hearing. Therefore, based on the holding in *District of Columbia Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002), my role as the deciding Administrative Judge is limited to reviewing the record previously established, and determining whether the Trial Board's decision was supported by substantial evidence; whether there was harmful procedural error; or whether it was in accordance with applicable law or regulation.⁶

In *Elton Pinkard v. D.C. Metropolitan Police Department*⁷, the D.C. Court of Appeals limited the scope of OEA's review in certain appeals. The Court of Appeals in *Pinkard* overturned a decision of the D.C. Superior Court holding that, *inter alia*, this Office had the authority to conduct *de novo* evidentiary hearings in all matters before it. In its decision, the Court held in pertinent part that:

The OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives the OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings. *See* D.C. Code §§ 1-606.2 (a)(2), 1-606.3 (a),

⁴ *Id.*

⁵ 598 F. Supp. 126 (D.D.C. 1986).

⁶ *See Pinkard*, 801 A.2d at 91.

⁷ 801 A.2d 86 (D.C. 2002).

(c); 1-606.4 (1999), recodified as D.C. Code §§ 1-606.02 (a)(2), 1-606.03 (a), (c), 1-606.04 (2001); *see also* 6 DCMR § 625 (1999).

It is of course correct that a collective bargaining agreement, standing alone, cannot dictate OEA procedure. But in this instance the collective bargaining agreement does not stand alone. The CMPA itself explicitly provides that systems for review of adverse actions set forth in a collective bargaining agreement must take precedence over standard OEA procedures. D.C. Code § 1-606.2 (b) (1999) (now § 1-606.02 (b) (2001)) states that "any performance rating, grievance, adverse action, or reduction-in-force review, which has been included within a collective bargaining agreement . . . *shall not be subject to the provisions of this subchapter*" (emphasis added). The subchapter to which this language refers, subchapter VI, contains the statutory provisions governing appellate proceedings before OEA. *See* D.C. Code § 1-606.3 (1999) (now § 1-606.03 (2001)). Since section 1-606.2 (b) specifically provides that a collective bargaining agreement must take precedence over the provisions of subchapter VI, we hold that the procedure outlined in the collective bargaining agreement -- namely, that any appeal to the OEA "shall be based solely on the record established in the [trial board] hearing" -- controls in Pinkard's case.

The OEA may not substitute its judgment for that of an agency. Its review of an agency decision -- in this case, the decision of the trial board in the MPD's favor -- is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. The OEA, as a reviewing authority, also must generally defer to the agency's credibility determinations. Mindful of these principles, we remand this case to the OEA to review once again the MPD's decision to terminate Pinkard, and we instruct the OEA, as the collective bargaining agreement requires, to limit its review to the record made before the trial board.⁸

Thus, pursuant to the holding in *Pinkard*, an AJ of this Office may not conduct a *de novo* hearing in an appeal before him/her, but must rather base his/her decision solely on the record below, 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 & Emergency Medical Services Department;

⁸ *Id.* at 90-92. (citations omitted).

2. The employee has been subjected to an adverse action;
3. The employee is a member of a bargaining unit covered by a collective bargaining agreement;
4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard*, *i.e.*: “[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, Trial Board] has been held, any further appeal shall be based solely on the record established in the Departmental hearing”; and
5. At the agency level, Employee appeared before a Trial Board that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.

Based on the documents of records and the position of the parties as stated during the Status Conference held in this matter, I find that all of these criteria are met in the instant appeal. Therefore my review is limited to the issues as previously mentioned. In addition, according to *Pinkard*, I must generally defer to the Trial Board’s determinations of credibility when making my decision.

Whether the Agency Trial Board’s decision was based on substantial evidence.

In reviewing Agency’s decision to terminate Employee, this Office will evaluate the Trial Board’s findings under a “substantial evidence” test.⁹ Substantial evidence defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁰ “If the administrative findings are supported by substantial evidence, we must accept them even if there is substantial evidence in the record to support contrary findings.”¹¹ Accordingly, Agency must present substantial evidence before this Office to support its conclusions at Employee’s hearing before the Trial Board.

In this case, Employee does not deny that he was AWOL during the August 31, 2008 through September 13, 2008 pay period. Employee was required to work seventy-two (72) hours during this time; however, he admitted to actually working less than four (4) hours. Employee was AWOL for approximately sixty-nine (69) hours and did not request leave, and was not granted leave for the time period. Tr. at 37. I find no credible reason to disturb the Board’s findings, as they are supported by substantial evidence in the record.

⁹ *Staton v. Metropolitan Police Department*, OEA Matter No. 1601-0152-09 (December 17, 2010).

¹⁰ *Davis-Dodson v. D.C. Department of Employment Services*, 697 A.2d 1214, 1218 (D.C. 1997) (citing *Ferreira v. D.C. Department of Employment Services*, 667 A.2d 310, 312 (D.C. 1995)).

¹¹ *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).

There is also substantial evidence in the record to support Agency's argument that Employee violated MPD's General Order 120.21, which prohibits "[w]illfully 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 presences of, any superior officer."¹²

Sergeant Weeks from Agency's Internal Affairs division was assigned to investigate the allegations against Employee. Weeks testified that during his investigation, Employee originally stated that the hours he reported to the Time and Attendance clerk were correct; however, after being confronted with the evidence that Weeks had gathered concerning his absences, Employee admitted that he did not work the number of hours he reported, and that most of the time he was at home, sick. Employee's initial statements to Sergeant Weeks regarding his time and attendance during the pay period at issue was therefore a willful misrepresentation of the truth. Furthermore, Employee was familiar with the rules pertaining to time and attendance and knew right from wrong, as supported by the testimony of Dr. Huggonet. Accordingly, I find that the testimony adduced during the Trial Board's hearing is sufficient to support a finding of guilty on the aforementioned charge. Based on the foregoing, there is also substantial evidence in the record to support a finding of guilty on the charges of "[a]ny conduct...which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force and "[n]eglect of duty to which assigned, or required by rules and regulations adopted by the Department."

As previously mentioned, *Pinkard* advises the Undersigned, as the "reviewing authority," to "generally defer to the agency's credibility determinations."¹³ Based on my own review of the witnesses' testimony, I can find no reason to disturb the Board's credibility determinations. It should be noted that the Board relied on Employee's own admissions of not reporting to work when assigned to convict him of the AWOL and related charges. Accordingly, there is no reason to overturn them.

In *Douglas v. Veterans Administration*¹⁴, the Merit Systems Protection Board, this Office's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Although not an exhaustive list, the factors are as follows:

1. The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

¹² General Order 201.26, Part I-B-30.

¹³ See *Pinkard*, 801 A.2d 86 (D.C. 2002).

¹⁴ 5 M.S.P.R. 280, 305-306 (1981).

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

The Court in *District of Columbia Metropolitan Police Department v. Elton L. Pinkard*¹⁵ held that OEA may not substitute its judgment for that of an agency, and it must generally defer to the agency's credibility determinations made during its trial board hearings. Similarly, the Court in *Metropolitan Police Department v. Ronald Baker* ruled that great deference to any witness credibility determinations are given to the administrative fact finder.¹⁶ In this case, Agency would be the administrative fact finder.¹⁷ The Court in *Baker* as well as the Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board* found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.¹⁸

¹⁵ 801 A.2d 91-92 (D.C. 2002).

¹⁶ 564 A.2d 1155 (D.C. 1989).

¹⁷ *Id.* at 1717.

¹⁸ 527 A.2d 313 (D.C. 1987).

In considering the *Douglas Factors*, the Trial Board determined that only one factor, “Mitigating Circumstances Surrounding the Offense,” was inapplicable to the instant matter. The Board held that Employee’s past work record constituted a mitigating factor because of his twenty-four (24) years of service with Agency. Conversely, factor number ten (10), entitled “Potential for Employee’s Rehabilitation” was found to be an aggravating factor. The Board reasoned that the seriousness of the offense, coupled with the testimony given during the course of the hearing, warranted a finding that Employee had little chance of rehabilitation.

Employee submits that the Board’s decision should be overturned because: 1) it ignored material evidence that was elicited via Dr. Hugonnet’s testimony during the hearing; 2) the failure of the Board to make findings of fact based on Dr. Hugonnet’s testimony was improper under the holdings in *Hammond v. Department of Human Services*¹⁹ and *Whitlock v. Donovan*,²⁰ and 3) the penalty of termination was arbitrary, capricious and improper under *Douglas*, *Whitlock* as well as Agency’s General Orders. I find that the Board properly considered both mitigating and aggravating factors in making its final determination of the charges levied against Employee. As previously noted, the Board considered each of the *Douglas Factors*, except for factor eleven (11). I further find that there is no credible reason to disturb the Board’s analysis, as there exists substantial evidence to support their findings, although there is evidence in the record to support a contrary finding.²¹ Therefore, I must defer to the Board’s findings of witness credibility, as they were in the best position to observe and evaluate, and draw reasonable conclusions from each witness’s testimony. Contrary to Employee’s assertions, the Board was not required to adopt Dr. Hugonnet’s testimony as a finding of fact when it issued its final decision. This is not to say that Employee’s arguments regarding the holdings in *Hammond*, *Whitlock* and Agency’s General Orders are inapplicable or without merit; however, a review of the documents of record reveals that there is substantial evidence in the record to support Agency’s findings.

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

The record does not reflect that harmful procedural occurred at the Trial Board level of the instant appeal. Thus, if any procedural error occurred, it was harmless and *de minimus* in nature. Based on the foregoing analysis, I find no credible reason to disturb Agency’s action of terminating Employee. The Board properly considered the *Douglas Factors* in choosing the appropriate penalty to level against Employee and I find no credible reason to support a finding that Agency failed to act in accordance with all applicable laws or regulations.

¹⁹ OEA Matter No. 1601-0080-88, Opinion and Order on Petition for Review (May 22, 1998).

²⁰ 598 F. Supp. 126 126 (D.D.C. 1984).

²¹ See *Baumgartner*, discussed *infra*.

ORDER

It is hereby ORDERED that Agency's action of terminating Employee is UPHELD

FOR THE OFFICE:

SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE