THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
WILLIAM E. HUDSON, JR. **Employee**	**OEA Matter No. 1601-0090-03**
v.	**Date of Issuance: October 3, 2005**
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT **Agency**	**Rohulamin Quander, Esq.** **Senior Administrative Judge**

Kevin Turner, Esq., Agency Representative
Tony O. Shaw, Esq., Employee Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On April 14, 2003, Employee, a fire fighter with the D.C. Fire and Emergency Medical Services Department (the "Agency") filed a Petition for Appeal with the Office of Employee Appeals (the "Office") pursuant to D.C. Official Code § 1-606.03(a) (2001), appealing his removal from his position by Adrian H. Thompson, then Acting Fire Chief of the Agency, effective March 14, 2003. The charge that generated the removal was a finding by the Fire Trial Board (the "Trial Board"), as a result of an evidentiary hearing conducted on November 20, 2002, and January 17, 2003, which was sustained by the Acting Fire Chief, that Employee was insubordinate for failing to comply with requirements of the Agency's mandatory substance abuse program.

The matter was assigned to the undersigned administrative judge (the "AJ") on April 19, 2004. I convened a Status Conference on May 24th, and another on July 1, 2004, and referred the case to the Office's mediation unit on the latter date, as the parties initially indicated that they were interested in mediating the case, if possible.

The Employee was covered by a provision of the collective bargaining agreement (the "Agreement") that restricted the Office's review in adverse actions to the record established in the Trial Board's hearing. Based on the decision of the District of Columbia Court of Appeals in *District of Columbia Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002), this AJ is limited to reviewing the record established in the Trial Board's evidentiary hearing and proceedings,

and determining whether that decision was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with applicable law or regulation. See *Pinkard*, 801 A.2d at 91.

When mediation failed, the case was returned to me on September 30, 2004. I convened a third Status Conference on November 30, 2004, and ordered the parties to submit briefs on the issue of whether Agency's decision removing Employee, which was based on the Trial Board's recommendation, should be upheld. Employee's brief was belatedly received on March 14, 2005. The parties undertook another settlement effort at about that same time, which was unsuccessful. Agency was then directed to submit a reply brief to the Office, and did so on June 10, 2005. I then closed the record on that date, after the parties had made their submissions.

Charge 1 Insubordination: Failure or refusal to comply with the Department's mandatory substance abuse program.

Specification 1 In that Firefighter William E. Hudson, Jr., an employee of the District of Columbia Fire and Emergency Medical Services Department and subject to the rules and orders governing said Department, did, nevertheless, on or about the 14th day of January 2002, provide a urine specimen that was collected while at the Police and Fire Clinic, which tested positive and at a higher level than his baseline test of January 9, 2002, for the illegal substance of phencyclidine (PCP). Both tests were confirmed positive by Gas Chromatography/Mass Spectrometry (GC/MS) testing methods at [the] American Medical Laboratory, Inc.

Firefighter Hudson first tested positive at a higher level for PCP on January 9, 2002, the day he was enrolled in the Department's mandatory rehabilitation program. Since Firefighter Hudson tested positive on his enrollment date, the baseline was established from that test. The level of PCP for Firefighter Hudson's baseline test was 460ng/mL, or 280 ng/mL higher than his first positive test on January 4, 2002.

On January 14, 2002, Firefighter Hudson provided a urine specimen that tested positive for PCP at the level of 670 ng/mL, or 210 ng/mL higher than the baseline. The increased level of PCP in Firefighter Hudson's specimen is in violation of Article III, A-6, of FD Bulletin 1-A, "Substance Abuse Testing Procedures", which stated, "[i]f an employee tests positive on the first confirmation test after entry into the mandatory program at the same or higher level than the preceding positive confirmation test, he/she will be terminated for insubordination."

Specification 2 In that Firefighter William E. Hudson, Jr., an employee of the District of Columbia Fire and Emergency Medical Services Department and subject to the rules and orders governing said Department did, nevertheless, on or about the 9th day of April 2002, provide a urine specimen which tested positive for codeine at 20,000 ng/mL, after he was enrolled in the Department's mandatory rehabilitation program for testing positive for phencyclidine (PCP).

Firefighter Hudson met with Dr. Michelle Smith-Jeffries, the Medical Review Officer, on April 9, 2002, and was afforded an opportunity to provide an explanation for the positive test. However, he failed to submit sufficient documentation to support an explanation for the positive reading as required by Article II, C.2, of FD Bulletin No. 1-A, "Substance Abuse Testing Procedures." As a result, Dr. Smith-Jeffries ruled the test as positive.

Firefighter Hudson's continued use of illicit drugs is in violation of the Department's substance abuse policy.[1]

JURISDICTION

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

ISSUE

The AJ must decide: a) whether Agency's decision removing Employee, as based on the Trial Board's recommendation, was supported by substantial evidence; b) whether Agency committed harmful procedural error; and c) whether the decision was in accordance with law or applicable regulations.

SUMMARY OF MATERIAL TESTIMONY, RECEIVED DURING THE NOVEMBER 20, 2002, AND JANUARY 17, 2003, TRIAL BOARD PROCEEDINGS

John R. Harney, Jr. – John Harney, Jr., former Battalion Fire Chief, was also Agency's Medical Services Officer (the "MSO"). One of his primary duties was to serve as a liaison between the Agency and the Police and Fire Clinic (the "PFC") staff, and to monitor staff compliance with

---

[1] Agency's Substance Abuse Policy: The District of Columbia Fire Department employees are sworn to provide the citizens of the District of Columbia with the best fire and emergency medical services available. Consistent with the Department's policy on Substance Abuse Special order No. 27, Series 1989, Special Order No. 50, Series 1987, and FD Bulletin No. 65, the use of intoxicants or any type will not be tolerated; and such use/abuse, if not corrected, will result in termination. . . .

IV. Discipline

A. Any time an employee has a confirmed positive test prior to placement in the mandatory rehabilitation program he/she shall be charged with insubordination, i.e., violation of Substance Abuse Special Order No. 27, Series 1989. . . .

C. Any employee who fails to test negative for forty-five (45) consecutive days while in the mandatory rehabilitation program or tests positive after testing negative, or tests at a higher level while in the mandatory rehabilitation program will be terminated for insubordination, i.e., violation of Substance Abuse Special Order No. 27, Series 1989.

Agency's and PFC's rules and regulations. This also includes monitoring and administering the Agency's substance abuse drug program. Tr. I, P 18.[2] Each staff member is mandated to have an annual physical examination, usually scheduled during the employee's birth month, to determine eligibility for promotion and fitness for duty. A urine sample is required and provided by each employee. The sample is evaluated, and if it screens positive, the sample is sent to an outside laboratory for confirmatory testing, to also determine which illicit substance is present. Tr. I, P 19.

On January 9, 2002, the witness was informed in an internal memo from Michelle Smith-Jeffries, M.D., the Medical Review Officer (the "MRO") that Employee's sample, taken on January 4, 2002, had come back positive for PCP. The Employee was contacted, and directed to attend a medical review conference, during which time he was informed of the test results and provided information regarding the substance abuse testing procedure and the mandatory rehabilitation procedure. Employee was enrolled in the program, and during a personal meeting that lasted for at least one hour, the witness personally gave the Employee a complete explanation of what was entailed, including weekly drug testing and weekly counseling from the Employee Assistance Program staff. Employee was provided a packet of information to read, afforded an opportunity to ask questions, and warned of the consequences of his failure to comply with the program. If the employee cooperates fully and successfully completes the program, there is no penalty imposed for having received the first positive test. Tr. I, Pp 20-22; 30.

Once a baseline of drug level is determined to be present in the enrolled employee's system, the enrollee can continue to test positive for the drug as long as each subsequent positive test is not higher than the one before. If the employee tests higher after the baseline has been established, or if the employee tests positive for a different drug, the employee is cited for a violation, and in accordance with Agency's substance abuse testing procedure, the employee is terminated from the Agency for insubordination, as the policy is that the employee cannot test positive for any drug. The witness identified Fire Department Bulletin 1-A as the Agency's substance abuse testing procedure affecting the uniformed employees of the Agency. (Agency Exhibit #1) Tr. I, P. 24-25.[3]

During a weekly test administered on April 9, 2002, the Employee's urine sample tested positive for codeine at 20,000 nanograms per milliliter ("ng/mL"). Tr. I, P. 27. The witness's role is to interpret the Agency's rules and regulations, but he had no familiarity with GHF[4] or any of the substances that someone might ingest to mask the presence of a drug in the person's system. Tr. I, P 31. When the witness advised Employee that his April 9, 2002, test had been positive for opiates (codeine), the Employee appeared to be very surprised, but recalled that the only potential source would have been some prescription medication that he had obtained from a relative, to alleviate continuing back pain due to a prior on the job injury. Tr. 1, P. 33.

---

[2] "Tr. I" refers to the first Trial Board transcript, created on November 20, 2002; "Tr. II" refers to the second transcript, created on January 17, 2003.

[3] This is a reference to Fire Department Bulletin No. 1-A, issued July 1989, titled, *Substance Abuse Testing Procedures.*

[4] The masking agent was solely referred to as GHF throughout the evidentiary proceedings. A review of the bottle label likewise refers to the product solely as GHF.

The Agency has a zero tolerance policy for violations once an employee is enrolled in the program. If an enrollee violates that policy, Agency charges him with insubordination and he is terminated. Drug abuse impairs the user, who will potentially make poor or improper decisions, rendering him less effective. Tr. 1, Pp. 37-38. The witness concurred with Agency's counsel's assertion that an increase in the level of drugs present in an employee's system on a subsequent test, after the baseline had been established, was a probable indication of subsequent drug use. Tr. I, P. 40. Only the MRO, but not this witness, who is the MSO charged to interpret policy, rules, and regulations, is qualified to evaluate whether there is a medical-related reasonable explanation, other than additional drug use, why there is some increase or greater presence of drugs in an employee's system. Tr. I, P. 41 Although Employee tested negative in February, March, and April 2002, for PCP, he did test positive for codeine during an April 2002 test. Tr. I, P. 43.

Michael B. Miller - Michael B. Miller is the manager of forensic toxicology at the American Medical Laboratories (the "AML"), and served as the Agency's first expert witness. His educational and professional experience credentials were accepted and he is qualified as an expert witness by the Department of Health and Human Services and several states. AML is certified to perform urine drug testing and to test federal and state regulated employees to the highest standards. Tr. I, P. 45.

At the outset of his testimony, the witness was presented with a packet marked as Exhibit # 2, a litigation package. He described it as, " . . . an accumulation of all chain of custody documents and raw instrument data generated while testing a particular sample." He testified that, based upon testing conducted on the package on January 14, [2002], the sample was positive for PCP. He explained in detail the chain of custody on the sample and how AML arrived at its conclusion. Tr. I, P. 54-55. Based upon AML's evaluation, the Agency concluded that the sample was positive for PCP, with a concentration of 679 ng/mL. Tr. I, P. 60.[5]

On April 9, 2002, during the weekly routine drug testing for PCP at the Agency level, Employee's urine specimen tested positive for codeine. AML, using its same chain of custody and testing procedures to protect the integrity of the specimen, subsequently conducted a verification evaluation, and reached the same conclusion.[6] Tr. I, P. 61.

Other than continued drug use by the Employee, there could be reasons, such as the lack of water or liquids in the body system, which could inaccurately give the appearance of higher drug readings. Tr. I, Pp. 79-80. Further, the amount of liquid ingested by a person could also affect the true levels of PCP in his system. Tr. I, P. 80. However, because PCP is a drug that is not stored in the body fat, the body usually gets rid of it within one to three days, without the assistance of masking agents or dilutants, unless the individual is a frequent or chronic user, which takes longer to clear. Tr. I, Pp. 77-78.

---

[5] Although the record is somewhat confusing as different witnesses refer to the ng/mL in various amounts of presence, it is clear that the amount of PCP detected in Employee's system was higher on January 14, 2002, than the baseline of 460 ng/mL, detected on January 9, 2002.

[6] The record does not reflect how soon after the April 9, 2002, test, which was apparently conducted at the PFC, that AML gained access to the specimen to conduct the conformity verification evaluation.

In order to determine whether a person continues to use a particular drug, or relapses, you have to conduct frequent tests and evaluation of the drug concentration and creatinine levels over a period of time. He was of the opinion that the level of drugs present could not accurately be determined based upon only two tests, unless the evaluations are conducted with significant interval in between, so that the level of drugs in the system would have had time to clear. Tr. I., Pp 81-82.

Following a technical discussion about how the creatinine level in an individual's urine specimen is an indicator of whether the person has recently ingested a masking agent or dilutant and based upon his knowledge and experience in dealing with this subject matter, and the consistency of the standards of testing procedures that AML did on the Employee's specimen, there was no indication that the subject specimen had been diluted with either water or some drug masking agent prior to Employee's providing the urine specimen on January 14, 2002, the third of the weekly testings. Tr. I, P. 86. The core of his testimony was that, "creatinine is a reflection of how concentrated the urine is, and the higher the urine creatinine result on a test, the more concentrated any drugs will be in the specimen." Tr. II, Pp. 11, 15-16.

Although the witness previously stated that because PCP is not stored in the body fat, and that it normally takes one to three days to vacate the system, he also testified that the higher level of PCP observed in the specimen on January 14th was probably not from a relapse or subsequent use, but rather that the specimen provided on that date was more concentrated than the baseline specimen provided on January 9th, given that the drug, PCP, takes a few days to vacate the user's system, i.e., the specimen provided on January 14th was not affected by the Employee having potentially ingested a masking agent or a diluting fluid on that date. Tr. II, P. 17.

Michelle Smith-Jeffries, M.D. - Michelle Smith-Jeffries, M.D., ("Dr. Smith-Jeffries"), Medical Director of the Police and Fire Clinic (the "PFC"), testified on behalf of the Agency. Her educational and professional experience and credentials were accepted, and she qualified as an expert, serving as the Medical Review Officer (the "MRO"). She conducted medical reviews with Employee following the urine specimens Employee submitted that were determined to be presumptively positive for PCP and opiates. Tr. II, Pp. 95-102.

The Employee's weekly testing was sparked by the discovery of PCP in his system in January 2002, a drug for which there is no legitimate medical reason for human ingesting. She served as the MRO for each of the test dates, January 4, 14, and 23, 2002, but not for the test of January 9th, and informed the Employee that each of the tests measured positive for the presence of some PCP being recorded as still present in the Employee's system. Tr. II, Pp. 106.

When a positive drug test is received for a prohibited substance, the MRO reviews the documentation accompanying the specimen to ensure that the chain of custody is intact, that the specimen numbers match, and that there were no fatal flaws in the way the specimen was collected. She interviews the individual who submitted the specimen to inform him or her of the results of the toxicology report and to provide an opportunity to offer any explanation why the specimen may be positive for a prohibited substance. If the individual is not able to offer a legitimate verifiable medical reason for the positive toxicology report, the specimen is determined to be positive and she

ıforms the Agency that the individual submitted a urine sample that tested positive for a prohibited ..ıbstance. Tr. II, Pp. 95-97.

Despite there being no valid medical use for humans to ingest PCP, she nevertheless conducted a medical review regarding the specimens Employee submitted that indicated the presence of PCP in his system before informing Agency of the confirmed positive test results. Further, after the results of the April 9, 2002, test came back positive for codeine, she also conducted a medical review to determine whether there was a legitimate verifiable medical reason for Employee to have opiates in his system. Tr. II, P. 99.

Her focus and participation in this matter as the MRO continued as a result of the subsequent discovery of codeine in his system when the April 9, 2002, routine test for PCP was administered. Her role at that time was to determine if there was a legitimate explanation and justification for the presence of codeine in his system, as the ingestion of codeine without a prescription, would be a violation of the Agency's substance abuse policy. Tr. II, Pp. 104-105.

Employee stated that he had taken two Tylenol 4 tablets for back pain, received from his sister, but that he did not have a prescription for that medication, nor a prescription for Tylenol 3, which contains less codeine. After the conclusion of the medical review she determined that Employee did not have a legitimate verifiable reason for having opiates in his system, and thus she ' ıformed Agency of Employee's positive drug test. One consideration was that, from the training she as received and from her perspective as MRO, and based upon the Employee's own statements, he ıacked a verifiable prescription for Tylenol 4, a controlled substance which can only be taken by prescription. As well, given his admission, she could not contact a doctor or pharmacist to verify that this medication had indeed been prescribed for him. She concluded that the ingestion of Tylenol 4 without a prescription was a violation of the Agency's substance abuse policy. Tr. II, Pp. 99-102. She subsequently concluded that his explanation that his sister had given him Tylenol 4 for back pain was an insufficient medical explanation, and so reflected it in her follow up medical report.[7]

Ernest M. Powell, Jr. – Ernest M. Powell, Jr., is a laboratory technician employed by Providence Hospital, Washington, D.C. In that capacity, he also serves as the urine specimen collection agent for the PFC, for the purposes of drug testing and screening. According to office logs, he was the individual who personally collected the urine specimen from the Employee during the drug screening test conducted on January 14, 2002.[8] After specific chain of custody procedures are

---

[7] Her notes concerning the codeine ingestion, which were prepared simultaneously with the in person interview of Employee on April 9, 2002, indicated that Employee took Tylenol 4, which was given to him by his sister. However, Employee's sworn testimony during the hearing was at significant variance, indicating that he took Tylenol 3, which was given to him by his cousin. Undoubtedly this inconsistency adversely affected Employee's credibility during his testimony.

[8] Although the record at Page 118 indicates that the chain of custody and drug testing procedures eing discussed occurred on January 14, 2002, with Attorney Shaw concurring with that date, at Page ı26, Mr. Shaw subsequently referred to the testing date as "April 11, 2002". No reconciliation between those two dates is noted. Further, nothing else in this record refers to an April 11, 2002, test.

ompleted, the collected specimen was forwarded to AML by a courier, where the testing was erformed. Tr. I, P. 101, 118.

Robert E. Wright, Ronald Hines, and Jake W. Baker, III – Robert E. Wright, Ronald Hines, and Jake W. Baker, III, fellow Firefighters, all testified as character witnesses on behalf of Employee, extolling Employee's personal virtue and general trustworthiness, and how much time he has devoted to working with young people, especially boys between the ages of six and 14 years, with an emphasis upon sports. In each instance, the witnesses noted that they are responsible citizens, including the Employee, and are often the only father figures that many of these young people have. Further, they have observed that Employee took pain killers as the continuing result of an on-the-job back injury sustained by Employee while he was fighting a fire in the 1990s, which injury also required a series of back operations.

Aware of the allegations of illicit drug use by the Employee, the witnesses characterized that circumstance as a lapse in judgment, which should be viewed in the greater context of Employee's overall and continuing contributions to the Agency over the past 18 years and to his local community as well. Despite Employee's admission of having used illicit drugs, each of them expressed that he was quite comfortable with the idea of having to go into a firefighting situation with Employee alongside. Tr. II, Pp. 29-61.

William E. Hudson, Jr. – William E. Hudson, Jr., the Employee, admitted to using PCP ometime during the holiday season 2001-2002, just a few days before he took the drug test, but asserted that he only engaged in the use of this illicit drug on a single occasion. Although he was well aware of the Agency's long standing existing drug policy, because of his intimate involvement with a young woman at the moment he ingested the substance, he was not focused upon the policy, and what adverse effect taking the drug might have upon his career as a firefighter. Tr. II, P. 63.

On January 4, 2002, when he was first administered the drug test as a part of his annual physical examination, he took GHF as a masking agent one hour before he took the test. However, the test result measured positive for PCP. He was retested on January 9, and 14, 2002, and, consistent with Agency policies and procedures, voluntarily enrolled in the Insight Treatment Center, an Agency-sponsored drug rehabilitation program, on January 9th. Tr. II, Pp. 66-67. Aware that his drug baseline was 460 ng/mL on January 9th, in compliance with the program's requirements, he knew that he must have drug levels that were less than the baseline.

He was shocked and incredulous to learn that the January 14, 2002, test revealed his PCP level to be 670 ng/mL, 120 points higher than the test administered five days earlier, asserting that he had not taken any illicit drug other than the admitted one time during the holidays. Tr. II, Pp. 69. He theorized that as the GHF masking agent left his system, the residue of the PCP must have been stored in his body's fat tissues and, when tested without the presence of a masking agent, caused the presence of drugs in his system to measure at a higher level than previously. Tr. II, P 70.[9] He

---

[9] This point is directly counter to the testimony of Michael B. Miller, who testified that PCP, unlike marijuana, is not stored in the body's fat tissues, and generally leaves the body system within one to three days.

characterized his actions as a case of bad judgment, and a moment of weakness, and that only he is to blame for letting himself, his family, and his fellow firefighters down. He apologized for his actions. Tr. II, P. 72.

With regard to the second charge, i.e., ingestion of codeine, he admitted to taking some Tylenol 3 for severe back paid, and forgetting to write that information on his weekly drug screening forms of April 9, 2003. The continuing back pain resulted from an on the job injury sustained while fighting a fire in 1994, followed by a series of seven surgical procedures, one of which resulted in some damage in his spinal cord area, leakage of spinal cord fluids, spinal meningitis, and a sustained infection. Tr. II, Pp. 73-74.

When he was summoned to report to Dr. Smith-Jeffries to explain why there was codeine in his system as detected during the April 9, 2002, test, he advised her that he had been moving over the prior weekend, engaging in lifting and manual labor, which resulted in the recurrence of severe back pain. Because his own belongings were packed away, including his prescriptions, he took two of his cousin's Tylenol 3 tablets, and remained in bed for the rest of the weekend prior to the Monday test. Tr. II, P. 78. Other than the results of the April 9th, test, none of the other weekly tests, generally administered on a Monday, have ever tested positive for any illicit drug. Tr. II, P.79.

On at least two subsequent occasions, he has had continuing back pain and had to visit a hospital emergency room, where he was administered a dosage of morphine and also given prescriptions for back pain. On each of those occasions, he has listed that information on the drug testing forms, so that his record would reflect that the drugs were present in his system as a result of medical treatments for pain, which is not a violation of Agency policy. Tr. II, Pp. 80-81. As well, he has previously taken prescribed Tylenol 3 for back pain, and had some of the unused portions of the medication still packed away in his belongings.

Therefore, he did not consider the prescribed occasional use of that medication as being outdated, even though it was his cousin's prescription. Further, at the time of completing the drug testing forms on April 9, 2002, he was not aware that he needed to list on the form the pain medication that he was taking, and completely forgot to list Tylenol 3 as having been recently taken. Tr. II, Pp. 86-87. On the date of his testimony, January 17, 2003, he admitted that he did not bring any documentary evidence to verify that he had a valid prescription for Tylenol 3 in effect on April 9, 2002, when he failed the drug test. Tr. II, P. 89.

Aware of the Agency's zero tolerance policy for substance abuse, the witness believed that that policy should be replaced with a case-by-case evaluation policy, to take each case's particular circumstances into consideration. Tr. II, P. 82. Admitting that the presence of PCP in the system of a working firefighter would compromise the safety of the citizens of the District of Columbia, he surmised that he ingested PCP on or about January 1, 2002. Further, after taking some holiday leave, he returned to work on January 3rd, and took the drug test on January 4th. As such, there was still some PCP in his body's system at the time that he returned to work. However, he asserted that the PCP-related high effects wore off within a couple hours of use, implying that he was fully competent to work after that time Tr. II, Pp. 83-85.

FINDING OF FACTS, LEGAL ANALYSIS, AND CONCLUSIONS OF LAW

On May 20, 2002, Employee, an 18-year veteran of the Agency, was formally charged with insubordination, and issued a proposed notice of adverse action for his failure or refusal to comply with Agency's mandatory substance abuse program. The proposed notice of adverse action charged Employee with two specifications. First, he was charged with testing positive at a higher concentration of PCP on January 14, 2002, than his baseline specimen he submitted on January 9, 2002. Second, Employee was charged with testing positive for the opiate codeine on April 9, 2002, while he was enrolled in the program for PCP abuse.

An evidentiary hearing was convened before a Trial Board on November 20, 2002, and on January 17, 2003. Employee was present at the hearing, testified on his own behalf, and was represented by counsel. Through his legal counsel, he also presented character witness testimony, documentary evidence, and cross-examined Agency's witnesses.

After considering the evidence presented, including the mandatory components of the Douglas Factors[9], the Fire Trial Board found Employee guilty of both specifications and

---

[9] In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth "a number of factors that are relevant for consideration in determining the appropriateness of a penalty." Although not an exhaustive list, the factors are as follows:

> 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
>
> 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
>
> 3) the employee's past disciplinary record;
>
> 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
>
> 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
>
> 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
>
> 7) consistency of the penalty with any applicable agency table of penalties;
>
> 8) the notoriety of the offense or its impact upon the reputation of the agency;
>
> 9) the clarity with which the employee was on notice of any rules that where violated in committing the offense, or had been warned about the conduct in question;

ecommended the penalty of removal for each specification. On February 26, 2003, the Acting Fire Chief accepted the Trial Board's recommendation, removing him from his position with Agency effective, March 14, 2003. Thereafter, Employee filed an appeal with this Office.

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

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

---

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.

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

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

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

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

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

Thus, pursuant to *Pinkard*, an AJ of this Office may not conduct a *de novo* hearing in an

appeal before the Office, but must rather base the decision solely on the record below, when all of the following conditions are met:

> 1. The appellant (Employee) is an employee of either the Metropolitan Police Department, or the D.C. Fire & Emergency Medical Services Department;
>
> 2. The employee has been subjected to an adverse action;
>
> 3. The employee is a member of a bargaining unit covered by a collective bargaining agreement;
>
> 4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard, i.e.*: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, Trial Board] has been held, any further appeal shall be based solely on the record established in the Departmental hearing"; and
>
> 5. At the agency level, Employee appeared before a Trial Board that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in, *inter alia*, Employee's removal.

All of these conditions are met in this matter. Thus, according to *Pinkard*, my review of the final Agency decision removing Employee is limited "to a determination of whether [the final Agency decision] was supported by substantial evidence,[11] whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations."[12] Further, I "must generally defer to the agency's credibility determinations."[13] My review is restricted to "the record made before the trial board."[14]

---

[11] According to OEA Rule 629.3, 46 D.C. Reg. 9317 (1999), an agency has the burden of proof in adverse action appeals. Pursuant to OEA Rule 629.1, *id.*, that burden is by "a preponderance of the evidence", which is defined as "[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." In *Pinkard*-type cases previously decided by this Office (including the initial decision in *Pinkard* itself that resulted from the remand), we have held that there must be substantial evidence to meet the agency's preponderance burden. *See, e.g.; Hibben, supra; Davidson, supra; Kelly, supra; Pinkard v. Metropolitan Police Department*, OEA Matter No. 1601-0155-87R02 (December 20, 2002), _ D.C. Reg. __( ); *Bailey v. Metropolitan Police Department*, OEA Matter No. 1601-0145-00 (March 20, 2003), _ D.C. Reg. __ ( ).

[12] 801 A.2d at 91.

[13] *Id.*

[14] 801 A.2d at 92.

Fire Trial Board Findings of Fact and Recommendations.

In the first charge, the Trial Board found that Employee tested positive for PCP on January 4, 2002. He was enrolled in the Agency's substance abuse program on January 9, 2002, with that date selected as the baseline level for measuring the presence of PCP in his system. At that time his specimen level was 460 ng/mL. Fully aware of the conditions imposed upon the entering of the program, including knowledgeable of the Agency's regulations proscribing the use of illegal substances, he provided another urine specimen on January 14, 2002, which tested as 670 ng/mL, 210 ng/mL higher than the PCP level of the prior week.

Despite the assertion of Employee, through his Attorney, Tony O. Shaw, Esq., that the lower reading of January 9th, was the result of Employee having ingested a masking agent which artificially lowered and masked the accurate, higher level presence of PCP, the Trial Board unanimously found and concluded that both imposed tests were valid, with no evidence of the urine specimen having been diluted. They found further that Employee failed to provide proof that his claimed use of GHF as a masking agent had any long-term or short-term effects on urine specimen testing. The Trial Board unanimously concluded that Employee violated Agency's Substance Abuse Program requirements and, pursuant to said regulations, was insubordinate.

In the second charge, the Trial Board found that Employee tested positive for codeine at 10,000 ng/mL on April 9, 2002, during a routine urine specimen test administered for PCP. Employee admitted that he had taken Tylenol 3 or 4, allegedly for a continuation of back pain related to an on the job injury sustained in 1994. Previously aware of the program's requirements and proscriptions, he provided no evidence to establish that the codeine in question was taken pursuant to a doctor's care or as prescribed medication, although he allegedly had been prescribed that controlled substance in the past.

The Trial Board unanimously found and concluded that Employee was guilty of violating the Agency's Substance Abuse Policy and likewise guilty of insubordination, as the medication was not prescribed for him, nor was he under a doctor's care at the time that the drug was used. Considering all of the evidence presented to them as a whole, the Trial Board panel unanimously found that Employee had violated the Agency's Substance Abuse Policy, and recommended, in accordance with the policy, that his employment with the Agency should be terminated.

Taking the relevant Douglas Factors as a whole into consideration, the Trial Board recommended that the Fire Chief could consider the following items during his deliberations about using the "Last Change Contract" (the "LCC")[15] as an alternate to electing whether to terminate the Employee at that time:

---

[5] The Last Chance Contract is an option that the fire chief can exercise that imposes stringent disciplinary requirements upon a employee, in lieu of more strict discipline, most likely immediate termination. The LCC option was not adopted in this case.

1. The defendant (Employee/Firefighter Hudson) did admit and took responsibility for the January and April positive drug tests.
2. Firefighter Hudson admitted that he met a young lady in December 2001, and that she introduced him to PCP to enhance their personal relationship.
3. Firefighter Hudson did admit that he took Tylenol 3 or 4 due to back pain before he considered the consequences of doing so.
4. Firefighter Hudson did admit to Dr. Michelle Smith-Jeffries the use of the Tylenol product during her positive test review conference, and that the medication was obtained from a relative.
5. The defendant's positive drug test took place during the first 10 days that he was in the drug program, and the only violation was the positive test that resulted from taking Tylenol 3 or 4.
6. Firefighter Hudson did not test positive for controlled substances since then, the last test being January 6, 2003.
7. Firefighter Hudson is an 18-year veteran, earning two bronze bars.
8. Firefighter Hudson's past record of three years only shows an infraction of missing a clinic appointment while on sick leave.

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

According to *Pinkard*, I must determine whether the Trial Board's findings were supported by ubstantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[16] Further, "[i]f the [Trial Board's] findings are supported by substantial evidence, [I] must accept them even if there is substantial evidence in the record to support contrary findings."[17]

Agency's Substance Abuse Testing Procedures, FD Bulletin No. 1-A, issued July 1989, provides at § 4 A. that, "Any time an employee has a confirmed positive test prior to placement in the mandatory rehabilitation program he/she shall be charged with insubordination, i.e., violation of Substance Abuse Special Order No. 27, Series 1989. At § 4 C., it states that, "Any employee who fails to test negative for forty-five (45) consecutive days while in the mandatory rehabilitation program or tests positive after testing negative, or tests at a higher level while in the mandatory rehabilitation program will be terminated for insubordination, i.e. violation of Substance Abuse Special Order No. 27, Series 1989." In light of the evidence presented and evaluated, the Trial Board found Employee guilty of two counts of insubordination, and recommended that he be terminated, consistent with the stated drug abuse policy.

As noted earlier, *Pinkard* counsels me, as the "reviewing authority", to "generally defer to the agency's credibility determinations." Based on my own review of the several witnesses' testimony, I can find no reason to disturb the Trial Board's credibility determinations. As to the Trial Board's findings regarding the charges brought against Employee, my review shows that there was certainly

---

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

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

substantial evidence to support those findings. Thus, there is no reason to overturn them.

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

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the agency, but is simply to assure that "managerial discretion has been legitimately invoked and properly exercised."[17] When the charge is upheld, the Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation or guidelines and is clearly not an error of judgment."[18]

Under the circumstances, I see no basis to conclude that Agency acted capriciously in deciding to terminate Employee. When the charge(s) against an employee 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 or an abuse of discretion.[19]

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

ORDER

It is hereby ORDERED that Agency's decision removing Employee is UPHELD.

FOR THE OFFICE:

ROHULAMIN QUANDER, ESQ.
Senior Administrative Judge

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

[18] *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 916 (1985).

[19] *Employee v. Agency*, OEA No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).