THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
Abraham Evans	) OEA Matter No. 1601-0081-13R18
Employee	)
	) Date of Issuance: June 29, 2018
v.	)
	) Joseph E. Lim, Esq.
Metropolitan Police Department	) Senior Administrative Judge
Agency	)

Donna Rucker, Esq., Employee Representative
Sonia Weil, Esq., Agency Representative

2nd INITIAL DECISION ON REMAND

PROCEDURAL BACKGROUND

On April 24, 2013, Abraham Evans ("Employee"), a Police Officer with the Metropolitan Police Department (the "Agency" or "MPD") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") pursuant to *D.C. Official Code* § 1-606.03(a) (2001), appealing Agency's action terminating his employment for "Failure to Obey Orders and Directives and Untruthful Statements." The charges that generated Employee's adverse action was a finding as a result of an evidentiary hearing conducted on January 17, 2013, by the Adverse Action Hearing Panel ("Panel").

On April 6, 2015, I issued an Initial Decision ("ID") overturning Agency's removal of Employee on the ground that it violated the mandatory 90-day rule embodied in D.C. Code §5-1031(a). Agency appealed, and on September 13, 2016, the OEA Board reversed the ID on the ground that the 90-day rule was not violated, and remanded the matter back to the undersigned with instructions to review the issue of whether there was substantial evidence to support Agency's action.[1] After Employee indicated that she had appealed the matter to the District of Columbia Superior Court ("D.C. Superior Court") on October 19, 2016, I issued the first ID on Remand dismissing the appeal as moot on December 20, 2016.[2]

On October 13, 2017, the D.C. Superior Court remanded this matter back to the undersigned after the parties filed a consent motion to remand the matter back to OEA.[3] I held a

1 *Evans v. MPD*, OEA Matter No. 1601-0081-13, *Opinion and Order on Petition for Review* (September 13, 2016).
2 *Evans v. MPD*, OEA Matter No. 1601-0081-13R16 (December 20, 2016).

3 *Abraham Evans v. D.C. Office of Employee Appeals, et. al. & D.C. Metropolitan Police Department*, 2016 CA

status conference on December 19, 2017, and ordered the submission of legal briefs. When Employee failed to comply, I issued an Order for Good Cause, and on May 15, 2018, Employee responded. I again ordered the submission of legal briefs and closed the record after receiving legal briefs and final arguments from the parties.

JURISDICTION

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

ISSUE

Whether Agency's decision to terminate Employee, based on the Adverse Action Hearing Panel's recommendation, was supported by substantial evidence.

Agency's Position:

On June 26, 2012, MPD issued a Notice of Proposed Adverse Action to Employee numbered DRB# 338-12, IS# 09-001645. MPD personally served Employee with the Notice of Proposed Action, which outlined the three charges he was facing. *Id*. Agency alleged that Employee disobeyed Police Orders and Directives by engaging in outside employment without proper authorization from his Assistant Chief/Senior Executive Director and accepting gifts or business favors such as discounts, services, or other considerations of monetary value while on duty with MPD. Agency also alleges that Employee "willfully and knowingly made an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Department Officer to, or in the presence of, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing" when he denied being paid for providing security services at Calvert Woodley Liquor Store.[4]

Agency argues that an Adverse Action Hearing Panel ("Panel"), which consisted of three senior MPD officials, unanimously found Employee guilty of all charges and specifications in an Evidentiary Hearing on January 17, 2013. Agency submits that the evidence supported the charges and that the recommended penalty was appropriate.

Employee's Position:

Employee asserts that Agency's decision was not supported by substantial evidence on Charges 1, 2, and 3.

FINDING OF FACTS

Uncontested Material Facts: [5]

007680 (D.C. Super. Ct. Oct. 13, 2017).

4 *Id.*

5 Agency and Employee Briefs and their respective attachments. Where one party makes factual assertions and the opposing party does not dispute them, the asserted statements are taken as fact. Thus, they are taken as conceded.

1. Employee, a member of the Fraternal Order of Police (the "Union"), was employed as a Police Officer by Agency for 6 years.

2. Employee's discipline arose out of misconduct initially reported to MPD's Office of Internal Affairs ("IAD") in December 2008 by Lillian Colter while she was being interviewed on an unrelated matter.

3. Based on this information, between December 15, 2008 and January 6, 2009, IAD agents conducted a preliminary surveillance of the Calvert Woodley Liquors Store ("CWL"). The investigation revealed that three officers, one of whom was identified as Employee, were providing security for the store during closing time.

4. On January 13, 2009, Agent Robert Merrick met with Assistant United States Attorney ("AUSA") Steven Durham and briefed him regarding the criminal allegations against Employee and the other two officers, Nathaniel Anderson and Malcolm Rhinehart. AUSA Durham assigned the criminal investigation to AUSA Michael Atkinson. Meanwhile, surveillance of the store continued until May 9, 2009.

5. In March 18, 2010, the Federal Bureau of Investigation ("FBI") and Agency's internal affairs interviewed Employee.

6. On November 21, 2010, Officer Anderson pled guilty to a charge of illegal supplementation of salary and agreed to debrief as part of his plea agreement.

7. On January 21, 2011, the United States Attorney's Office indicted Employee and Officer Rhinehart in the U.S. District Court for the District of Columbia on charges of receipt of illegal gratuities and illegal supplementation of salary. Officer Rhinehart was subsequently terminated on an unrelated matter.

8. On November 29, 2011, the United States District Court for the District of Columbia Judge Reggie B. Walton signed an Order dismissing the Indictment against Employee.

9. An undated MPD Internal Affairs Memorandum changed Employee's duty status from Suspension Without Pay ("SWOP") to Full Duty after an investigation was issued. (Employee Exhibit 3). On January 4, 2012, a signed MPD Human Resource Management Memorandum formalized Employee's change of duty status from Indefinite Suspension Without Pay ("SWOP") to Full Duty based on the recommendation of the Internal Affairs Division. (Employee Exhibit 4).

10. On January 4, 2012, Employee returned to work.

11. On February 12, 2012, Employee was again interviewed by Internal Affairs.

12. On February 17, 2012, AUSA Durham issued a Letter of Declination for Employee, stating that Employee appeared to be on his lunch break during the times he was providing security for the store.

13. On June 14, 2012, IAD completed its investigatory report and recommended that the charges against Employee be sustained.

14. Agency issued Employee a Notice of Proposed Adverse Action on June 26, 2012, charging Employee with the following Charges and its respective Specifications:[6]

Charge No. 1:	Violation of General Order Series 120.21, Part A-16, which states: "Failure to Obey Orders and Directives Issued by the Chief of Police." This misconduct is further defined in General Order Series 201.17, Part IV, which states: "Members shall not engage in outside employment without proper authorization from their Assistant Chief/Senior Executive Director." Further, Part V, G, 2, (b), which states: No member shall engage in outside employment if the "second job" would interfere with the member's scheduled tour of duty on the Department." Part V, G, 4, which states: "Members shall not accept any compensation for services rendered while on duty."
Specification No. 1:	In that, between December 15, 2008, and May 4, 2009, you worked outside employment without authorization, providing security for Calvert Woodley Liquor Store, while on duty with the Metropolitan Police Department. Further, you were paid by a store employee on approximately 30 separate occasions for providing security for the liquor store.
Charge No. 2:	Violation of General Order Series 120.21, Part A-16, which states: "Failure to Obey Orders and Directives Issued by the Chief of Police." This misconduct is further defined in General Order Series 201.26, B-24, which states in part, "A member shall not accept a gift, or gratuities from organizations, business concerns, or individuals, with whom he/she has, or reasonably could be expected to have official relationship on business of the District Government. Similarly, members are prohibited from accepting personal or business favors such as social courtesies, loans, discounts, services, or other considerations of monetary value…"
Specification No. 1:	In that, on February 12, 2012, you admitted during your interview with the Internal Affairs Division, that you received discounts from the Calvert Woodley Liquor Store and purchased wine, while on duty with MPD.
Charge No. 3:	Violation of General Order 120.21, Attachment A, Part A-6, which states: "Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her

6 Agency Tab 2.

official duties as a Metropolitan Police Department Officer to, or in the presence of, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing." As further specified in General Order Series 201, Number 26, which states in part, "…Additionally during the course of an investigation, all members shall respond truthfully to questions by an agent or official of the Internal Affairs Division (IAD)…"

Specification No. 1: In that, on February 22, 2012, during an interview with the Internal Affairs Division (IAD), you denied being paid for providing security services at Calvert Woodley Liquor Store. You made this statement knowing it to be untrue. However, during an IAD interview with Kevin Ehrman, store manager, of Calvert Woodley Liquor Store, he stated that he has paid you in cash, approximately 20 to 30 times.

15. On charges that Employee disobeyed several longstanding orders, Employee appeared before the Adverse Action Hearing Panel on January 17, 2013, for an administrative hearing. Agency submitted a complete transcript of the hearing. (Agency Tab 3) Employee was represented by Attorney Donna Rucker.

16. The Hearing Panel sustained all of the specifications of the three charges and recommended termination. Specifically, the Hearing Panel recommended that Employee be found guilty of Charge 1, Specification 1, Charge 2, Specification 1, and Charge 3, Specification 1. The Hearing Panel recommended that Employee be removed for being found guilty of all Charges. (Agency Tab 5.) The Hearing Panel's Findings and Recommendations recited that the selection of the proposed penalties was made after considering the "Douglas Factors" and Employee's past record.

17. Employee was notified of the Panel Recommendations by a Final Agency Decision document dated March 1, 2013. (Agency Tab 6).

18. Employee appealed to the police chief in a letter dated March 11, 2013. (Agency Tab 7).

19. The Findings and Recommendations were accepted as Agency's Final Decision on March 22, 2013, by Cathy Lanier, Police Chief for Agency. (Agency Tab 8).

SUMMARY OF TESTIMONY

On January 17, 2013, Agency held a hearing before the Adverse Action Panel pursuant to the amended Notice of Adverse Action served upon Employee. He entered a plea of "Not Guilty" to all of the charges. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was submitted by the parties. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their position.

Testimony of Mark Rudden ("Rudden")

Rudden was a manager at Calvert Woodley Liquors Store ("CWL") from 2009 to 2012. Rudden testified that, during his tenure at CWL, he knew Employee as one of several officers that provided security during the 8:30 p.m. store closing. The store kept a lot of cash on the premises, and had been robbed previously.

Rudden testified that, about three nights a week, a police officer would arrive at the store about five to ten minutes before closing, walk around the store, and assist the employees in getting out of the store safely. He saw Officers Anderson and Rhinehart regularly, but that he only occasionally saw Employee. Rudden was aware of Anderson and Rhinehart being paid for security services, but that he never saw Employee being paid by CWL. Rudden said that, when he paid the officers, he would meet them behind the store and hand them $25 in cash. He did not know who made the arrangements for the officers to provide security for the store.

Rudden testified that, when Employee was present at the liquor store, he did not know whether he was there as an employee of the store or if he was there to perform his duties as a police officer, nor was Employee ever at the store without other officers. He also testified that he never saw Employee at CWL out of uniform. Rudden would not give discounts to civilians, but he would give them to all police officers, firefighters, and veterans because they put their lives on the line.

Testimony of Agent Jeffery Williams ("Williams")

Williams testified that he was employed by the Agency as an Internal Affairs ("IAD") employee but was on detail to the Federal Bureau of Investigation ("FBI") Public Corruption Unit. Agent Williams testified he took over the investigation from Sergeant Bonner of the FBI Public Corruption Task Force after Bonner retired. He was not present for the majority of the investigative interviews, but he conducted the interview with Employee.

Williams testified that Employee was investigated because IAD received an allegation that MPD officers were engaging in unauthorized outside employment by providing security services to CWL. Agency had received reports that police officers were arriving at the store just before closing to provide security and being paid for providing this service.

Williams stated that IAD agents surveilled CWL and observed Employee enter CWL during closing time, receive a white envelope from the manager named Kevin Ehrman, and leave after the store was closed. He further stated that the store manager later stated that the envelope given to Employee contained $20-$25. The money was concealed in an envelope so the other employees would not know that the payments were being made. Williams said that, during his investigative interview, Employee admitted that he received discounts on bottles of wine that he purchased from CWL while he was on duty.

Williams testified that the FBI was involved in the case because it was a criminal investigation of MPD officers which falls under the purview of the FBI. Williams also stated that though the case was charged federally by the U.S. Attorney's Office, prosecution was declined

because they determined that Employee was only in CWL during his lunch break, a period of time for which he was not paid, and therefore could not be charged with supplemental income. Except for a guilty plea from one officer, the charges against all officers were dismissed because the officers may have provided the security services during their lunch breaks, when they are not paid.

Testimony of Kevin Ehrman ("Ehrman")

Ehrman was a manager of CWL from 2006 to 2009 who came to know Employee as one of the officers providing security at the store. Ehrman testified that he was robbed at gun point one night while closing the store. While the store had an alarm system in case someone broke in, there was no security or a panic button. This lack of security concerned all of the managers, and nobody wanted to work closing hours.

Ehrman testified that after the store managers expressed their concerns at a meeting with the store's owners, they determined that a private security service was too expensive. Someone indicated that he might be able to make an arrangement with a few police officers with whom he was acquainted to provide security while off-duty. Thus the store's ownership agreed to pay police officers $25 in cash to show up 15 minutes prior to closing to make sure the managers could get to their cars safely. Ehrman believed that the officers were providing the security services during their break time.

The officers that appeared varied from night to night and there were approximately four or five total; however, only one officer would be compensated each night. Ehrman testified that he would pay the officers out of petty cash by putting the money in an envelope and handing it to them. He testified that the police officer providing security would wait while the manager locked the doors, finished his paperwork, and closed up the safe. Then the officer would escort the manager to his car.

Ehrman testified that Employee provided the security service about once or twice a week for at least a year and a half. Ehrman paid Employee $25 in cash each time he provided the service. Ehrman testified that he would document the payments by placing a receipt in the cash register drawer; however, there was no name indicating who received the payment. Ehrman testified that he believed that the arrangement was legal.

Ehrman indicated that there was no written record of any agreement by Employee or any other officer to provide security to CWL and that the only record of payments was handwritten receipts for $25 he made which did not indicate who was paid out of petty cash or what they were for. Ehrman testified that the payments to the officers were not "advertised," and as far as he knew, the other employees were not aware of the payments.

Ehrman testified that his employment ended with CWL when he was replaced by the son of the owner's best friend and denied any allegations of improprieties on his part regarding the use of CWL's petty cash. Ehrman testified that Rudden was the person who replaced him as store manager.

Testimony of Captain Melvin Gresham ("Gresham")

Gresham testified that he met Employee when they worked together on the 2nd District's 3rd watch in 2008. Based on his observations, he believed that Employee is a trustworthy and dependable officer of the District of Columbia. Gresham said that the charges against Employee did not change his opinion and that Employee deserved a chance at redemption. Gresham claimed that he knew of other officers with similar charges against them who were not removed.

Gresham admitted that unauthorized work outside of employment is a serious offense, but he believed that Employee should have a chance to redeem himself. He admitted that the first step to redemption is for the person to admit the wrongful act; however, he also believes that even if the person denies their wrongful act they can still redeem themselves.

Gresham testified that CWL was in his patrol service area and that he was aware of robberies in the area but not specifically at CWL. He said that he did not recall receiving citizen complaints about officers lingering in the area around CWL.

Testimony of Lieutenant Eric L. Hayes ("Hayes")

Hayes testified that he met Employee in 2008 at the 2nd District. He described Employee as a very conscientious, hard worker. In his 33 years at the Metropolitan Police Department, Hayes saw other officers who were involved in similar misconduct but kept their jobs. He testified that, if he found out that an officer worked and received unauthorized outside payment while on duty, he would have that officer investigated because those are serious allegations. However, he believed that the allegations do not warrant termination because mitigating circumstances may push an officer to violate MPD's General Orders.

Hayes testified that he was not familiar with the liquor store, and that the store did not come to his attention for any crimes or any citizen complaints.

Testimony of Captain Juanita Mitchell ("Mitchell")

Mitchell testified that she knew Employee from her time at the 2nd District as a Captain of the midnight tour of duty, where she served from June 2008 to January 2010. She described Employee as a very pleasant officer, helpful with citizens. Hayes testified that even knowing the charges against Employee, she would recommend that the Chief of Police retain him as an officer after disciplining him so that he might learn from the experience and do better in the future. Mitchell admitted that accepting gratuities reflects poorly on the officer's ethics and integrity.

Testimony of Lt. Antonio Charland ("Charland")

Charland testified that he knew Employee through working with him at night in the 2nd District. He recalled an incident in which Employee comforted and assisted his brother during a

medical emergency. Charland said that Employee displayed compassion and empathy for a citizen's tragic circumstance even though Employee did not know at the time that the citizen was related to a senior police officer. Charland felt proud to have an officer like Employee in his division.

Charland said he was aware of the general order prohibiting the acceptance of gratuities by officers and explained that it exists because officers are supposed to be public servants who get paychecks for their service. He also testified that if proven, the acceptance of a gratuity would call into question the integrity of an officer. Charland stated that even if found guilty of the charges, he believed that Employee should be retained if at all possible because he is an asset to the Agency.

Testimony of Officer Abraham Evans (Employee)

Employee testified that after his indictment due to this incident, MPD placed him on suspension for approximately one year. He returned to regular duty for approximately five months when criminal charges were dropped. Employee denied providing security to CWL and denied being paid any money for providing such services. He admitted that he was often present during the closing hours, but he asserted that he was present to perform his duties as a police officer.

Employee testified that his Patrol Service lieutenant, Lieutenant Houser, instructed officers to go to the store to establish a presence because of the robbery. He insisted that he was not paid by any manager. He did not notify Lieutenant Houser of the charges and allegations despite the fact that the charges relate to conduct he claimed she ordered him to carry out.

Employee testified that he would check in on CWL throughout his shifts from time to time, sometimes entering the store, and sometimes just viewing it from the outside to make sure things were ok. He denied all allegations, but admitted that he received wine discounts from the store while on duty. Employee testified that he witnessed other frequent customers receiving discounts too. He testified that he never went on break to provide security for the store. He testified that there were no other officers present while he was inside the liquor store.

Employee said that he went to CWL once a week, and that he went to the store throughout his tour and not just during closing hours. Sometimes he would sit in front of the store; and other times, he would go into the store. Employee testified that sometimes he did not document these visits as business checks despite the fact that he was required to do so.

Employee admitted that he accepted gratuities in the form of discounts from CWL despite knowing that accepting gratuities was a violation of the Agency's general orders, but that he did so because he did not think that the discount was being given to him because of his status as a law enforcement officer since he had seen other regular customers receive discounts as well. Employee testified that he was not aware that other officers were receiving money to provide security to CWL. He conceded that violating General Orders compromises an employee's

integrity and ethics.

Employee testified that he knew other offices were being paid. He said that if he could change anything, he would not take discounts. Employee testified that he was aware that other officers throughout the Metropolitan Police Department were disciplined in the past for unauthorized outside employment.

Employee testified that he knew Ehrman from going to CWL but knew of no reason why Ehrman would lie about paying him for providing security services. Employee testified that he felt insulted by Ehrman's allegations. Employee testified that he believed that Ehrman had money issues, and that he may have taken money from the petty cash.

Employee testified that he loves his job more than anything else. Employee testified that at no time did he make any statements to Internal Affairs that he believed to be untruthful.

Testimony of Robert Starr ("Starr")

Starr, a manager of CWL, testified that after CWL was robbed, they sought to enhance security by asking officers to come into the store during their shift so that there would be a police presence around the building. Several officers agreed to arrive ten to fifteen minutes prior to closing to provide the requested security services for a payment of $25 in cash.

Starr identified Employee as one of the officers who provided the security service for the store and he remembered Employee accepting the $25 payment. Starr testified that he personally paid Employee, but could not remember how many times he did so. Starr testified that any officer that arrived at closing time would be offered the payment and some officers declined to accept it. Starr testified that he did not recall any instances when Employee refused the payment.

Starr testified that Employee was not present for the meeting between management and ownership about security for the store and he never had any conversation with Employee in which it was indicated that Employee was security for the store.

He testified that the arrangement was done with the owner's knowledge and approval. Starr testified that they kept a receipt for each $25 payment and that the payments were recorded on handwritten receipts kept in the petty cash drawer but that no officer names were on those receipts. Starr further testified that at no time did CWL draw up any paperwork to indicate that the officers were employees of CWL. He testified that he was not aware of any records being provided to the Internal Revenue Service regarding the payments to the officers.

Starr testified that he could not remember any officers being involved in any of the discussions regarding the arrangement for security. Starr said that, when Employee provided the security, he would generally stay in his car. Starr would close the store and offer Employee the payment while Employee remained in his vehicle.

Starr testified that he was not aware of Ehrman having any financial issues or stealing from the store. Starr testified that he would be very surprised if that were true. Starr admitted that when he was first interviewed much closer in time to the events in question and was asked to identify Employee, he was unable to do so. He is not sure if other managers were giving money to officers for security as they did not discuss it.

LEGAL 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 (the "Agreement") that specifically restricts the scope of this Office's review in adverse actions to the record previously established in the Adverse Action Hearing Panel's administrative hearing.

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. 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

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 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 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 an adverse action (employee's removal, suspension, demotion, or personal performance rating) or a reduction-in-force.

All of these conditions are met in this matter. Thus, according to *Pinkard*, my review of the final Agency decision to terminate Employee is limited "to a determination of whether [the final Agency decision] was supported by substantial evidence,[7] whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations."[8] Further, I "must generally defer to the agency's credibility determinations."[9] My review is restricted to "the record made before the trial board."[10]

---

[7] According to OEA Rule 628.3, 59 D.C. Reg. 2129 (2012), an agency has the burden of proof in adverse action appeals. Pursuant to OEA Rule 628.1, *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); *Bailey v. Metropolitan Police Department*, OEA Matter No. 1601-0145-00 (March 20, 2003).

[8] See *D.C. Metropolitan Police v. Pinkard*, 801 A.2d 86, at 91.

[9] *Id.*

[10] *Id.* at 92.

In my April 6, 2015, ID, I had addressed the issues of whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations.[11] The remand specifically instructed me to address only the issue of whether Agency's action was supported by substantial evidence.12

Whether the Adverse Action Hearing Panel's findings were supported by substantial evidence.

The Panel's decision consists of about 36 pages and listed its findings of fact and conclusions of law in exhaustive detail. The Panel found Employee guilty of all charges and specifications by a preponderance of the evidence.

In Employee's brief, he asserts that Agency's decision was not supported by substantial evidence on Charges 1, 2, and 3. Charge 1 alleges that Employee engaged in unauthorized outside employment by providing security services for CWL for pay. Charge 2 alleges that Employee knowingly accepted discounts from CWL. Charge 3 alleges that Employee lied to management when he denied providing security services to CWL for pay.

The Panel based their guilty finding on the testimony of the managers and former managers of CWL as well as a surveillance video which showed Employee receiving a white envelope from a CWL manager after providing security services. The testimonies from CWL managers indicated that the envelope contained payment for Employee's services. They also accepted Employee's admission that he knowingly received gratuities/discounts from CWL.

Employee's assertion that the Panel's findings were not supported by substantial evidence rests on his disagreement with their credibility determinations regarding the witnesses and the video evidence.

According to *Pinkard*, I must determine whether the Adverse Action Hearing Panel's findings were supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[13] 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."[14]

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 Adverse Action Hearing Panel's credibility determinations. As to the Adverse Action Hearing Panel's findings regarding the charge brought

---

[11] *Evans v. MPD*, OEA Matter No. 1601-0081-13R16 (December 20, 2016).

12 *Evans v. MPD*, OEA Matter No. 1601-0081-13, *Opinion and Order on Petition for Review* (September 13, 2016).

[13] *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)).

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

against Employee, my review shows that there was certainly substantial evidence to support those findings. I note that the Adverse Action Hearing Panel also relied on Employee's own admission of not following Agency's general orders to convict him. Thus, there is no reason to overturn them.

ORDER

It is hereby ORDERED that Agency's decision to remove Employee for cause is UPHELD.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge