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**THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS**

In the Matter of:)	
)	OEA Matter No. 1601-0039-17
SHEILA THOMAS BULLOCK,)	
Employee)	
)	Date of Issuance: April 30, 2018
v.)	
)	Michelle R. Harris, Esq.
D.C. METROPOLITAN POLICE)	Administrative Judge
DEPARTMENT,)	
Agency)	
John Schroth, Esq., Employee Representative)	
Nada Paisant, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On April 18, 2017, Sheila Thomas Bullock (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Metropolitan Police Department’s (“Agency” or “MPD”) decision remove her from service. On May 8, 2017, Agency filed its Answer to Employee’s Petition for Appeal. Following a failed attempt at mediation, this matter was assigned to the undersigned Administrative Judge on August 21, 2017. On August 23, 2017, I issued an Order Convening a Prehearing Conference in this matter for September 28, 2017. On September 6, 2017, Employee, by and through her counsel, filed a Consent Motion to Reschedule the Prehearing Conference. I issued an Order on September 7, 2017, granting Employee’s Motion and rescheduling the Prehearing Conference to October 2, 2017.

On October 2, 2017, both parties appeared for the Prehearing Conference. During the Prehearing Conference, I found that because there was an Adverse Action Panel hearing in this matter, that OEA’s review of this appeal was subject to the standard of review outlined in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). As a result, the parties were ordered to submit briefs addressing whether: (1) the Adverse Action Panel’s decision was supported by substantial evidence; (2) whether there was a harmful procedural error; and (3) whether Agency’s action was done in accordance with all laws and/or regulations. Parties were also directed to specifically address whether the “90-Day Rule” pursuant to D.C. Code § 5-1031 was violated in the administration of the instant adverse action.

On October 3, 2017, I issued an Order codifying the verbal order from the Prehearing Conference and setting the briefing schedule. Accordingly, Agency’s brief was due on or before November 13, 2017, Employee’s brief was due on or before December 15, 2017, and Agency had the option to submit a sur-reply brief by or before January 8, 2018. On November 7, 2017, Agency filed

a Consent Motion to Extend the Briefing Schedule. Accordingly, on November 9, 2017, I issued an Order granting Agency's Motion. As a result, Agency's brief was now due on or before November 21, 2017, Employee's Brief was due on or before December 22, 2017 and Agency had the option to submit a sur-reply Brief on or before January 12, 2018. Parties submitted all briefs in accordance with the prescribed deadlines. Additionally, on February 23, 2018, Employee, by and through her counsel, submitted a filing noting its intention to rely on a recent Superior Court Order of a case that was cited in her brief.¹ The record is now closed.

JURISDICTION

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

ISSUES

1. Whether the Adverse Action Panel's decision was supported by substantial evidence;
2. Whether there was harmful procedural error;
3. Whether Agency's action was done in accordance with all applicable laws or regulations.
4. Whether the "90-Day Rule" pursuant to D.C. Code § 5-1031 was violated in the administration of the instant adverse action.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That 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.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

¹ The case cited as *Metropolitan Police Department v District of Columbia Office of Employee Appeals* (In re: Alice Lee), Case No. 2017 CA 003525 P (MPA), which was filed on February 13, 2018. Employee indicated that this case affirms the OEA ruling in a matter it cited in her brief, *Alice Lee v MPD*, OEA Matter No. 1601-0087-15.

STATEMENT OF THE CHARGES

In a Final Notice of Adverse Action dated February 10, 2017, Agency terminated Employee from service based on the following:

Charge No 1: Violation of General Order Series 120.21, Attachment A, Part A-7, which provides, “Conviction of any member of the force in any court of competent jurisdiction of any criminal or quasi-criminal offense, or of any offense in which the member either pleads guilty, receives a verdict of guilty or a conviction following a plea of nolo contendere, or is deemed to have been involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction. Members who are accused of criminal or quasi-criminal offense shall promptly report, or have reported their involved to their commanding officers.”

Specification No 1: In that on or about August 11, 2016, you pled guilty to Domestic Violence Simple Assault (Case #2016DVM000218) and agreed to a deferred sentencing plea agreement with the United States Attorney’s Office (USAO).

Specification No 2: In that, on or about February 1, 2016, an arrest warrant charging you with Domestic Violence Simple Assault was issued by the District of Columbia, Superior Court Judge John Bayly. You were subsequently arrested on February 4, 2016.

Specification No 3: In that, on December 28, 2015, you deliberately filed a false police report at the Sixth District police station, alleging that on December 27, 2015, you were punched in the mouth by your husband.

Specification No 4: In that, on December 27, 2015, in an unprovoked attack, you physically assaulted Ms. Tije Holland while at the Barcode Club located at 1101 17th Street, Northwest, Washington, DC, causing serious injury to Ms. Holland’s face, mouth and eye.

Charge No. 2: Violation of General Order Series 120.21, Attachment A, Part A-17 which reads in part, “...falsification of official records or reports.”

Specification No. 1: In that, on December 28, 2015, you deliberately filed a false police report at the Sixth District police station, alleging that on December 27, 2015, you were punched in the mouth by your husband while at the Barcode Club located at 1101 17th Street, Northwest, Washington, DC. You filed this report knowing it was not factual.

Charge No. 3: Violation of General Order Series 120.21, Attachment A, Part A-12, which reads “Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee’s or the

agency's ability to perform effectively, or violations of any law of the United States or any law, municipal ordinance, or regulation of the District of Columbia." This misconduct is further defined in General Order Series 201.26, Part 1-B-23 which provides, "Members shall not conduct themselves in an immoral, indecent, lewd or disorderly manner...They shall be guilty of misconduct, neglect of duty, or conduct unbecoming to an officer and a professional..."

Specification No. 1: In that on December 27, 2015, while off duty and visiting the Barcode Club located at 1101 17th Street, Northwest, Washington, DC, you, while unprovoked, physically attacked Ms. Tije Holland, who was also visiting the Barcode Club, causing serious injury to Ms. Holland's face, mouth and eye.

SUMMARY OF THE TESTIMONY

On December 29, 2016, Agency held an Adverse Action Panel hearing. During the hearing, testimony and evidence was presented for consideration and adjudication relative to the instant matter. The following represents what the undersigned has determined to be the most relevant facts adduced from the findings of fact, as well as the transcript (hereinafter denoted as "Tr."), generated and reproduced as a part of the Adverse Action Panel hearing.

Sergeant Kathryn Skaluba ("Skaluba") (Tr. Pages 20-33)

Skaluba testified that she is a member of the Metropolitan Police Department. She previously worked with the Fifth District ("5D"), but is currently with the Fourth District. Skaluba testified that she was on duty the night of December 27, 2015, and that she was called out to Washington Hospital Center to interview the victim of an assault. Skaluba testified that the victim was Ms. Holland. Skaluba testified that she answered the call from a radio run, but while in route, the officer on scene indicated that the complainant was alleging misconduct from an a member of MPD.

Skalubua testified that Ms. Holland told her she was at a club with her boyfriend and saw his ex-wife. She said she was the struck in the face by the officer and possibly the officer's sister. Skaluba came to find out that the officer in question was MPD member Sheila Thomas Bullock. Following this interview, Skaluba testified that she contacted the Watch Commander and the Internal Affairs Division ("IAD"), and that ultimately she turned the case over to IAD. Skaluba testified that the only involvement she had was approving the incident offense report prepared by Officer Copeland, the responding officer and the person who had initial contact with the complainant. On cross-examination, Skaluba testified that she did not know if Ms. Holland called 9-1-1 on the night of the incident. Skaluba indicated that she was unaware of who called the police, but that she was dispatched to Washington Hospital Center.

Agent Kenneth Carter (“Carter”) (Tr. Page 33 -63)

Carter testified that he is a member of the MPD Internal Affairs Division (IAD). He stated that he was on duty the evening of December 27, 2015, going into the early morning of December 28, 2015. Carter testified that he was contacted by Agent Tracye Malcolm who indicated that they were to respond to an investigation relating to Officer Sheila Thomas Bullock; specifically it was a call to investigate an assault. Carter stated that he and Agent Malcolm met at the Washington Hospital Center, who also advised him that Ms. Holland made a police report indicating that she had been assaulted earlier in evening. Carter testified that he interviewed Ms. Holland, who explained that she was at Barcode Lounge with her boyfriend, Antonio Bullock, who told her that Officer Sheila Thomas Bullock and her sister had walked in. Carter stated that Ms. Holland told him that she was assaulted by Officer Thomas and her sister Angela Thomas. Carter testified that Ms. Holland indicated that she was punched in the facial area. Carter also indicated that he interviewed Antonio Bullock, who indicated that while he did not see the altercation begin, but attempted to break it up. Carter testified that Mr. Bullock indicated that after the melee, Officer Sheila Thomas and her sister left the club.

Carter also testified that while at Washington Hospital Center, he noted that Ms. Holland was treated for abrasions and swelling in the face. Carter also confirmed that the interviews he conducted with Ms. Holland and Mr. Bullock were recorded. Carter testified that following the interview with Ms. Holland at Washington Hospital Center, he and Agent Malcolm then proceeded to locate Officer Thomas Bullock. Carter stated that they called Officer Thomas Bullock and then went to her residence in Prince George’s County Maryland. Carter indicated that Agent Malcolm and Officer Thomas Bullock spoke and that at that time Officer Bullock was made aware that her police powers were revoked. Carter testified that he could not recall if Officer Thomas Bullock relayed that she had been assaulted during this visit.

On cross-examination Carter testified that IS numbers were assigned on December 28, 2015. He also indicated that he did conduct the interviews of Ms. Holland and Mr. Bullock at the Washington Hospital Center. Carter was also asked about what Ms. Holland indicated with regard to the relationship she had with Mr. Bullock. Carter testified that while he could not recall if Ms. Holland said that she had never met Officer Thomas Bullock, that she indicated that there had not been any previous confrontations between her and Officer Thomas.

Retired Agent Tracye Malcom (“Malcolm”) (Tr. Pages 63-99)

Malcolm testified that she was previously employed by the Metropolitan Police Department for 25 years, and that prior to retirement she served in the Internal Affairs Division. Malcolm stated that she was on duty with IAD around December 27, 2015, through December 28, 2015. Malcolm testified that she was the on-call agent that evening and received a call from either a “CIC” or a Sergeant to come out to investigate an officer involved incident. Malcolm testified that she, along with her partner, Agent Carter were made aware that Officer Thomas Bullock had been involved in a fight with a lady at the Barcode Club in DC. Malcolm stated that she interviewed the victim and her boyfriend. Malcolm also testified that she went to the home of Officer Thomas Bullock to meet with her and revoke her police powers. During that visit, Malcolm testified that she told Officer Thomas Bullock that there was a criminal allegation. Malcolm stated that she recalled Officer Thomas Bullock asking about filing a police report and that she advised her to do exactly what a citizen

would do. Malcolm testified that Officer Thomas Bullock did not indicate that she had been assaulted during this interview.

Malcolm also testified that she interviewed Ms. Tije Holland and Mr. Antonio Bullock. Malcolm indicated that Ms. Holland said that Officer Thomas Bullock and her sister hit her in the face while at the club. Malcolm indicated that she did secure video of the assault. Malcolm also testified that injuries to Ms. Holland were noted, specifically to her face and lip. Malcolm also testified that she did not complete entire investigation, and that it was reassigned because she was retiring.

On cross examination, Malcolm testified that she could not remember the exact that she went to Officer Thomas Bullock's home, but that it was daylight when she arrived. Malcolm indicated that Officer Thomas Bullock was calm upon their arrival. Malcolm also testified that she applied for an arrest warrant for Officer Thomas on February 1, 2016 and that a subsequent arrest was made February 4, 2016. She also agreed that April 11, 2016 was when Officer Thomas entered into a deferred sentencing agreement with the U.S. Attorney's Office. Malcolm indicated that she was present for one hearing, and believed that she completed her work with the matter after initial interviews, and that she retired in June of that year.

Agent Trina Johnson ("Johnson") (Tr. Pages 113-126)

Johnson testified that she's been a member of the Metropolitan Police Department for eighteen years, and currently works in the IAD division. In November of 2016, Johnson testified that she assisted Agent Tilley with the interview of Officer Thomas as it related to the incident that took place inside a club in DC. Johnson testified that the criminal matter has been "dissolved." Johnson indicated that during the interview, Officer Thomas said that in December of 2015, she was involved in a physical altercation and that she was the first to strike. Johnson testified that during the course of this investigation, she recalled that Officer Thomas had made a report of assault to the 6th District on December 28, 2015, after her police powers had been revoked.

On cross examination, Johnson indicated that she had been with IAD since September 18th. She indicated that it was Sergeant Tilley who did the investigation on this case, and that he wrote the original report and wrote the addendum. Johnson testified that her first involvement with this case was on November 17, 2016, when she interviewed Officer Thomas.

Lieutenant Han Kim ("Kim") (Tr. Pages 131-149)

Kim testified that he is a member of the Metropolitan Police Department's Internal Affairs Division. Kim testified that he has been a member of MPD for twelve years. He stated that within IAD, he is the supervisor of Squad 3 and his primary duties are to do case reviews and review investigations once they're submitted for inaccuracies, identifying all witnesses and other items related to investigative needs. Kim indicated that during the time of his review, he also communicates with the IAD Agents. Kim indicated that he reviewed the investigation of Officer Thomas that was conducted by Agency Tilley. Kim indicated that he reviewed the final investigative report and addendum report; but could not recall what if any items he identified that needed to be addressed before the report was finalized. Kim also stated that he reviewed the report with regard to

the two findings of assault and the filing of a false police report. Kim testified that the basis for sustaining the assault was based on the account of the complainant, Ms. Holland.

Kim indicated the basis for sustaining the false police report was based on circumstances related to Officer Thomas reporting, and from her interview. Kim testified that Officer Thomas was not interviewed in this matter until the addendum report. Kim stated that the addendum report was prepared on November 21, 2016. Kim indicated that he believed the timing of this addendum was to allow Officer Thomas to come in and speak with them while her criminal case was still pending and once that case was disposed of, she came in to speak with them.

With regard to the filing of a false police report, Kim indicated that while Officer Thomas had many times to report an assault to other agents, she did not. Kim testified that he still agreed with the findings with regard to the false police report. On cross-examination, Kim testified that he was Agent Tilley's supervisor. He also indicated that Agent Tilley conducted the investigation, wrote the original report, the addendum and he made findings and recommendations.

Director William Sarvis, Jr. ("Sarvis") (Tr. Pages 171-179)

Sarvis testified that he is employed with the Metropolitan Police Department and is currently assigned as the Director of Medical Services. Sarvis indicated that he knew Officer Thomas both personally and professionally. Sarvis testified that he supervised Thomas when she was detailed to the Police and Fire Clinic on several occasions. Sarvis testified that Thomas always carried herself well and that she was always professional. Sarvis stated that he had never known Thomas to be violent or have a temper, nor did he have any occasion to counsel her for any such behavior. Sarvis testified that he thought that Thomas should be retained by the department; and that in consideration of progressive discipline, that there is another penalty suitable for this situation.

Sergeant Kenya Jackson ("Jackson") (Tr. Pages 182-192)

Jackson testified that she is a member of the Metropolitan Police Department, currently assigned to the Criminal Investigations Divisions 22nd District, Detectives Unit. Jackson testified that she has been a member of MPD for approximately 19 years. Jackson indicated that she knows Office Thomas and met her in the 2nd District. Jackson stated that Thomas was very hard working, loyal and very friendly. Jackson said Thomas was a pleasure to be around and she would welcome working with her again in MPD. On cross-examination Jackson testified that Officer Thomas was a colleague and friend. She indicated that she did know Officer Thomas' husband.

Ms. Monica Hill ("Hill") (Tr. Pages 198-206)

Hill testified that she is currently employed as a financial specialist at D.C. Homeland Security. Hill indicated that she has been friends with Officer Thomas for over 20 years. Hill testified that she is very loving and caring and that her general demeanor is pleasant. Hill testified that she believe that MPD should retain Officer Thomas because she is not a violent individual and is hard working. Hill indicated that she did know Mr. Bullock, and personally believed him to be pervert and

womanizer. On cross-examination Hill testified that she was aware that Officer Thomas and Mr. Bullock were going through a divorce.

Mr. Douglas Evans Sr., Esq. (“Evans”) (Tr. Pages 210-216)

Evans testified that he is an attorney currently in private practice, and has been practicing for 27 years. Evans indicated that he has known Officer Thomas for a number of years, and had gotten to know her better within the past year. Evans testified that he found Officer Thomas to be a very genuine person and one who had a heartfelt concern for the community and always had a positive demeanor.

Officer Sheila Thomas (“Employee”) (Tr. Pages 217 -309)

Employee testified that she was employed with the Metropolitan Police Department. She indicated that she and Antonio Bullock (“Bullock”) were married in January 2011. She stated that shortly after their marriage Bullock told her that he would need to turn himself into jail in North Carolina for a DUI. She indicated that initially she believed it to be a minor issue, however Bullock was ultimately incarcerated in North Carolina for the next four years, until March 2015. Then, in April 2015, while Bullock was not yet living at home, Employee called him and another woman answered. Employee indicated that the person who answered the phone was Ms. Tije Holland. Later, Employee came to find out that Mr. Bullock and Ms. Holland were in an extramarital relationship. Employee filed for divorce from Mr. Bullock and it was finalized at the end of December 2015. On the night of December 27, 2015, Employee testified that she and her sister were at the club, Bar Code. She stated that she had been there a while when she saw Mr. Bullock and Ms. Holland enter. At some point during the evening, Employee testified that all she can remember is that she hit Ms. Holland and essentially “blacked out”. Employee testified that she was later visited at her home by IAD officers and was notified of the investigation of the assault and that her police powers were revoked.

Employee testified that she believed that Mr. Bullock hit her that evening, which is while she filed a police report, but admitted that the video evidence does not show that Mr. Bullock hit her. Employee indicated that she was later arrested in February of 2016 for the assault and entered into a deferred plea agreement in April of 2016. Employee testified that she completed her sentence in September of 2016. Employee testified that during the course of completing her sentence that she had to do community service and attend anger management courses. Employee indicated that she knew her actions were wrong, and that she now has learned better ways to channel her anger. Employee indicated that the circumstances of her marriage with Mr. Bullock and seeing him with Ms. Holland caused her anger. Employee testified that she does have better tools to help her with her anger and that before this she had never done anything like this.

Panel Findings

The Panel made the following findings of fact based on their review of the evidence presented at the hearing. The Panel found the following²:

1. Officer Sheila Thomas-Bullock was appointed to the Metropolitan Police Department on February 23, 2004. She is currently assigned to the Second District and detailed to the Court Liaison Division.
2. Officer Thomas-Bullock was married to Mr. Antonio Bullock until their divorce which was finalized on December 31, 2015.
3. Mr. Antonio Bullock was serving a prison sentence in North Carolina from February 2011 through March of 2015, during which he began a relationship with another woman, Ms. Tije Holland.
4. On the night of December 27, 2015, Officer Thomas-Bullock, accompanied by her sister Angela Thomas, initiated and unprovoked attacked on Ms. Holland inside of the Barcode nightclub.
5. Ms. Holland sustained injuries as a result of the assault by Officer Thomas-Bullock, for which she sought hospital treatment.
6. The MPD Internal Affairs Division began a criminal investigation into Officer Thomas-Bullock's actions.
7. Video surveillance footage from Barcode was recovered, showing the assault by Officer Thomas-Bullock.
8. Officer Thomas-Bullock was revoked of her police powers by Agents of IAD.
9. Subsequent to her police powers being revoked, Officer Thomas-Bullock filed a police report in the Sixth District, alleging that her ex-husband, Mr. Antonio Bullock, had assaulted her, knowing this to be false.
10. On February 1, 2016, an arrest warrant was obtained, charging Officer Thomas-Bullock with Simple Assault domestic violence.
11. On February 4, 2016, Officer Thomas-Bullock was arrested in connection with the arrest warrant.
12. On April 11, 2016, Officer Thomas-Bullock pled guilty to Simple Assault in D.C. Superior Court, and entered into a deferred sentencing agreement through the United States Attorney's Office.
13. The criminal case was disposed in September 2016, after Officer Thomas-Bullock completed all terms of her deferred sentencing agreement.
14. Officer Thomas-Bullock was interviewed by the IAD following the conclusion of the criminal case, wherein Officer Thomas-Bullock admitted to the unprovoked assault on Ms. Tije Holland.

Upon consideration and evaluation of all of the testimony and factors, the Panel found that there was preponderance of evidence to sustain all three charges. Accordingly, the Panel found that with regard Charge Number 1, Specifications 1 and 2, that Employee was guilty; Specifications 3 and 4 were dismissed. With regard to Charge Number 2, Specification 1, Employee was found guilty, and lastly, with regard to Charge Number 4, Specification 1, Employee was also found guilty.

² Agency Answer at Tab 3 Adverse Action Panel Findings of Fact and Conclusion of Law (May 8, 2017).

In addition to making the aforementioned findings of facts, the Panel weighed the offenses according to the relevant *Douglas*³ factors. The Panel concluded that the nature and seriousness of the offense, employee's job level and type of employment, the notoriety of the offense or its impact on the reputation of the Agency; the clarity with which employee was on notice of any rules that were violated; the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by employee or others; and the consistency of the penalty with any table of penalties, were all aggravating factors. Specifically, the Panel found that the incident was very serious and constituted a criminal offense in the District of Columbia.

Further, the Panel cited that the filing of the false police report raised questions about her fitness to carry out the duties and responsibilities of a law enforcement officer. The Panel considered the past disciplinary record and past work record to be mitigating factors in this matter. The Panel found that upon review of Employee's work history that there were no serious cases of misconduct, and that she had over twelve years with the department and was well liked and respected within the department. Finally, the Panel weighed the consistency of the penalty with those imposed upon other employees for similar offenses to be a neutral factor. Namely, the Panel found that the proposed penalty was consistent for similar misconduct among other employees. Based on their aforementioned findings, the Panel's final recommendation was that Employee be terminated for Charge 1, Specifications 1 and 2, and be suspended for thirty (30) days for Charge 2, Specification 1 and Charge 3, Specification 1.

ANALYSIS AND CONCLUSIONS

This Office's review of this matter is limited pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department*.⁴ According to the *Pinkard* decision, OEA has a limited role where a departmental hearing has been held. The D.C. Court of Appeals held that

³ *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

- 1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed 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 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.

⁴ 801 A.2d 86 (D.C. 2002)

while OEA generally has jurisdiction over employee appeals from a final agency decision involving adverse actions under the CMPA⁵, in a matter where a departmental hearing has been held:

“OEA may not substitute its judgement for that of an agency. Its review of the agency decision...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.”

Further, the Court of Appeals held that OEA’s power to establish its own appellate procedures is limited by the agency’s collective bargaining agreements. As a result, and in accordance with Pinkard, an Administrative Judge of OEA may not conduct a de novo hearing in an appeal before them, but rather, must base their decision on the record 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 and Emergency Medical Services Department;
2. The employee has been subject 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 has been held, any further appeal shall be based solely on the record established in the Department hearing”; and
5. At the agency level, employee appeared before a panel that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action of the deciding official that resulted in an adverse action being taken against employee.

In this case, Employee is a member of the D.C. Metropolitan Police Department (MPD) and was the subject of an adverse action; MPD collective bargaining agreement contains language similar to that found in Pinkard; and Employee appeared before an Adverse Action Panel, which held a hearing. Based on the documents of record, and the position of the parties as stated during the Prehearing Conference held in this matter and in the briefs submitted herein, the undersigned finds that all of the aforementioned criteria are met in this instant appeal. Accordingly, pursuant to *Pinkard*, OEA may not substitute its judgment for that of the Agency, and the undersigned’s review of Agency’s decision in this matter is limited to the determination of whether the Adverse Action Panel’s findings were supported by substantial evidence, whether there was harmful error, and whether the action taken was done in accordance with applicable laws or regulations.

Whether Adverse Action Panel’s Decision was supported by Substantial Evidence

Pursuant to Pinkard, the undersigned must determine whether the Adverse Action Panel’s (“Panel”) findings were supported by substantial evidence.⁶ “Substantial evidence” is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”⁷ If

⁵ See D.C. Code §§ 1-606.02 (a)(2), 1-606.03(a)(c); 1-606.04 (2001).

⁶ *Elton Pinkard v. DC Metropolitan Police Department*, 801 A.2d at page 91. (2002).

⁷ *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 at 985 (D.C. 2002).

the [Adverse Action Panel] findings are supported by substantial evidence, then the undersigned must accept them even if there is substantial evidence in the record to support findings to the contrary.⁸

After reviewing the record, and the arguments presented by the parties in their briefs submitted before this Office, the undersigned finds that the Adverse Action Panel met its burden of substantial evidence. The parties had an opportunity to present testimonial and documentary evidence and had the ability to call witnesses and to cross-examine witnesses during the Panel hearing. Employee had the opportunity to call any witnesses and was represented by counsel who cross-examined Agency's witnesses. Further, a review of the transcript indicated that the Panel was engaged in the hearing, asked relevant questions and made credibility determinations for the witnesses, supported by sufficient evidence in making those determinations. Additionally, the Panel considered and reviewed the *Douglas* factors in making its determinations and findings, and in sustaining the charges.

Whether there was harmful procedural error.

In accordance with *Pinkard* and OEA Rule 631.3, the undersigned is required to evaluate and make a finding of whether or not Agency committed harmful error. OEA Rule 631.3 provides that “notwithstanding any other provision of these rules, the Office shall not reverse an agency’s action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency’s procedures, which did not cause substantial harm or prejudice to the employee’s rights and did not significantly affect the agency’s final decision to take action.”

90-Day Rule

In the instant matter, Employee argues that the undersigned should reverse Agency’s decision because Agency committed harmful procedural error by failing to commence the adverse action in accordance with the “90 Day Rule” pursuant to D.C. Code § 5-1031. The “90-Day Rule” requires agencies to initiate adverse actions against sworn members of the police force no later than 90 days from the date that Agency “knew or should have known of the act or occurrence constituting cause.”⁹ Agency argues that it adhered to the provisions of the 90 Day rule, and that even if there was a violation of the rule that it was *de Minimis*, and that the 90 Day rule is directory, rather than mandatory. Further, Agency argues that it could not commence adverse action against employee until the conclusion of her criminal matter so as not to impinge upon Employee’s Fifth Amendment rights against self-incrimination.¹⁰ D.C. Code §5-1031 - Commencement of Corrective Adverse Action provides in pertinent part that:

(a-1)(1) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that

⁸ *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1189 (D.C. 1989).

⁹ *Alice Lee v MPD*, OEA Matter No. 1601-0087-15 (March 15, 2017).

¹⁰ Agency’s Reply Brief at Page 7-9 (January 12, 2018).

the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.

(2) For the purposes of paragraph (1) of this subsection, the Metropolitan Police Department has notice of the act or occurrence allegedly constituting cause on the date that the Metropolitan Police Department generates an internal investigation system tracking number for the act or occurrence.

(b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department or any law enforcement agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of the Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) or (a-1) of this section shall be tolled until the conclusion of the investigation.(Emphasis Added)

The legislative purpose of the 90 Day Rule enacted by the D.C. Council first in 2004, and then updated in 2015, was to ensure that adverse actions against employees were commenced and administered in a timely manner.¹¹ Specifically, the Council cited that the 90-Day rule “protects employees who are being administratively investigated from working under the threat of disciplinary action for an excessive length of time.”¹² Additionally, Council cited that as it relates to MPD, this rule incentivizes the Agency to “follow up on allegations efficiently and to resolve disciplinary cases in a timely fashion.”¹³ Additionally, the D.C. Court of Appeals has found that the D.C. Council, in enacting this legislation, “sought to expedite the process and provide certainty with some degree of balance and flexibility.”¹⁴ As a result, the 90-Day rule provides guidance and timelines for the commencement of adverse actions.

At issue here is whether Agency, in administering the instant adverse action, adhered to the provisions of this law, specifically D.C. Code 5-1031 (b). Here, Employee avers that Agency violated the 90-day rule because they did not issue the Notice of Proposed Adverse Action (“NPAA”) until August 12, 2016. Employee argues that the criminal investigation in this matter, conducted by the United States Attorney’s Office (“USAO”) ended with the arrest of Employee on February 4, 2016, and as a result, Agency’s August 12, 2016 notice was untimely. Agency argues that the end of the criminal investigation was not complete until Employee pled guilty and entered into a Deferred Sentencing Agreement (“DSA”) on April 11, 2016. Agency argues that the criminal investigation was ongoing, and was “made clear by the fact that instead of proceeding to trial, the USAO allowed Employee an opportunity to plead guilty to Simple Assault pursuant to a Deferred Sentencing Agreement (“DSA”) on April 11, 2016.”¹⁵ Agency further asserts that because a DSA is an agreement where the “USAO agrees to defer disposition of the criminal case until such time as the defendant completes requirements”; and if defendant completes the requirements, the USAO will enter a “nolle-prosequi” which is defined by the USAO that the Government would no longer seek

¹¹ Employee Brief at Page 21 and Exhibit 5. (December 22, 2017).

¹² *Id.*

¹³ *Id.*

¹⁴ *D.C. Fire and Medical Services Department v D.C. Office of Employee Appeals*, 986 A.2d 419, 425-526 (D.C. 2010).

¹⁵ Agency’s Reply Brief at Page 3 (January 12, 2018).

prosecution”¹⁶; that its issuance of the Notice of Proposed Adverse Action on August 12, 2016, was 86 business days after the plea agreement, and as a result, is not a violation of the 90-Day rule.¹⁷

Employee argues that it is not enough for Agency to suggest that an investigation is ongoing.¹⁸ Employee avers that it is insufficient that Agency “claims that Officer Thomas was the subject of criminal investigation by the USAO up until the plea agreement on April 11, 2016;” and argues that MPD has the burden of proof to *show* that there was an actual criminal investigation occurring up until April 11, 2016.¹⁹ Employee asserts that Agency has failed to show that any criminal investigation was ongoing following the February 4, 2016, arrest of Employee. As a result, Employee avers that the Notice of Proposed Action (“NPAA”) was untimely and in violation of the 90-Day Rule because it was issued 135 days after the arrest warrant was issued, and 132 after the warrant was served and Employee was arrested.

Both parties cite to the D.C. Court of Appeals *Jordan*²⁰ case, wherein the Court of Appeals discussed the 90-Day Rule and the tolling during a criminal investigation. In *Jordan*, the Court of Appeals weighed the interpretation of the phrase “conclusion of a criminal investigation”, under the then 45-Day rule cited as D.C. Code § 1-617(b-1). The Court of Appeals held that Superior Court and OEA erred in concluding that the criminal investigation in this matter ended with the submission of the report by the Inspector General. The Court held that neither entity cited to any binding cases that determined when a criminal investigation ends and that the Court of Appeals knew of none. However, the Court of appeals did hold that “the natural meaning of the statutory language, however, is that the “*conclusion of a criminal investigation*” must involve an action taken by an entity with prosecutorial authority – that is, the authority to review evidence, and to either charge an individual with commission of a criminal offense or decide that charges should not be filed (*Emphasis Added*).”²¹

In the instant matter, Employee was investigated for simple assault that occurred on December 27, 2015. Agency assigned IS numbers to the matter in the early morning hours of December, 28, 2015. In its Briefs, Agency cites that following its criminal investigation, on January 8, 2016, an Agent with MPD referred the incident to the USAO for further criminal investigation.²² Following that, an affidavit in support of an arrest warrant for Employee was prepared and a DC Warrant for Domestic Violence Simple Assault was issued by DC Superior Court Judge John Bayly on February 1, 2016.²³ Subsequently, Employee was arrested on February 4, 2016.

Based on the aforementioned, the undersigned finds that in these circumstances, Agency has not shown that a criminal investigation occurred after Employee’s arrest on February 4, 2016. The undersigned finds that the mere notion that because the USAO elected to enter into a Deferred Sentencing Agreement with Employee exhibits an ongoing investigation, is not substantive to prove that a criminal investigation was ongoing between February 4, 2016, and April 11, 2016. The matter was referred to the USAO in January 2016, and it was later determined that an arrest for the charge of Simple Assault was warranted, which was executed on February 4, 2016. Pursuant to the D.C.

¹⁶ *Id.* at Page 5.

¹⁷ *Id.*

¹⁸ Employee’s Brief at Page 11-12 (December 22, 2017).

¹⁹ *Id.*

²⁰ *District of Columbia v District of Columbia Office of Employee Appeals and Robert L. Jordan*, 883 A.2d 124 (2005).

²¹ *Id.* at 128.

²² Agency Brief at Page 3 (November 21, 2017).

²³ *Id.* at Exhibit 1.

Court of Appeals holding in *Jordan* that the end of an investigation “*must involve action taken by an entity with prosecutorial authority – that is the authority to review evidence and either charge an individual with commission of a criminal offense or decide that charges should not be file;*” the undersigned finds that the February 4, 2016, arrest date meets this standard. Here, the USAO was the prosecutorial authority that assessed and ultimately charged Employee of the offense of Domestic Violence Simple Assault, and as a result, Employee was arrested on February 4, 2016. The undersigned finds that the fact that Employee entered into a DSA on April 11, 2016, reflects a decision between the USAO and Employee with regard toward the final ***disposition of the criminal case*** and does not, without substantial evidence, indicate that a criminal investigation was ongoing between February 4, 2016 and April 11, 2016.

Further, Agency’s argument that a violation of the 90-Day rule is *de Minimis* as the rule is directory and not mandatory, does not align with rulings with regard to this matter. OEA has held and Superior Court has affirmed, that “it is well-settled that the 90-day deadline is mandatory rather than a directory provision.”²⁴ As a result, I find that Agency’s issuance of the NPAA on August 12, 2016, was in violation of the 90-Day rule pursuant to D.C. Code §5-1031, as it was 132 days following the arrest of Employee on February 4, 2016, which the undersigned has determined reflects the end of the criminal investigation in this matter.

Due Process

Employee argues that Agency violated Employee’s due process by not calling the complainant, Ms. Holland, or Mr. Bullock as witnesses during the panel hearing.²⁵ Further, Employee argues that the investigative report was improperly entered into the record since the agent who authored the report, Agent Tilley, was not presented at the hearing and made available for cross-examination. Agency argues that it did not violate Employee’s due process rights by not calling Agent Tilley or Ms. Holland or Mr. Bullock. Employee argues that Agency violated her due process in that Employee was did not have a fair opportunity to present her case in accordance with the rulings of the Supreme Court.²⁶ Agency avers that the investigative report was reviewed by the panel and that they made their decision without Agent Tilley being present. Further, Agency argues that Employee was present for the hearing and was represented by counsel, and had the right to call and present witnesses as they determined.

The undersigned agrees with Agency. Here, there is no evidence to suggest that Employee was barred from calling Ms. Holland, Mr. Bullock or Agent Tilley as their own witnesses for the Adverse Action Panel Hearing. Further, Employee had the opportunity to cross-examine all witnesses and make objections to testimony as well as documentary evidence as presented during hearing. The Panel was engaged in the hearing and weighed all testimony and objections. Therefore, I find that Employee had the opportunity to present her case in a fair manner, and that Agency did not violate Employee’s due process in this matter.

²⁴ *Metropolitan Police Department v. D.C. Office of Employee Appeals (in re Alice Lee)*, 2017 0035325 P (MPA), February 13, 2018. See also

²⁵ Employee’s Brief at Page 27-28 (December 22, 2017).

²⁶ *Id.* at Page 26. citing *Lightfoot v District of Columbia*, 448 F.3d 392, 401 (D.C. Cir. 2006).

Whether Agency's action was done in accordance with applicable laws or regulations.

As outlined previously in this analysis, the undersigned finds that Agency failed to appropriately follow the 90-Day rule as enumerated in D.C. Code §5-1031 (b), in that it commenced its adverse action against Employee in an untimely manner. As previously stated it has been held that this provision is mandatory, not directory in nature and must be adhered to.²⁷ As a result I find that Agency's action was not administered in accordance with all applicable laws, rules and regulations. Agency has the burden of proof to show that its actions were executed in accordance with all applicable laws, rules and regulations, and for the aforementioned reasons, the undersigned finds that Agency has not met that burden.

Whether the Penalty Was Appropriate

Because I find that Agency committed harmful procedural error and failed to appropriately follow all applicable laws, rules and regulations, I further find that Employee's termination must be reversed.

ORDER

Based on the foregoing, it is **ORDERED** that:

1. Agency's action of terminating Employee from service is **REVERSED**.
2. Agency shall reinstate Employee and reimburse Employee all back pay and benefits lost as a result of her termination.
3. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

MICHELLE R. HARRIS, Esq.
Administrative Judge

²⁷ *Metropolitan Police Department v. D.C. Office of Employee Appeals (in re Alice Lee)*, 2017 0035325 P (MPA), February 13, 2018.