THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1],	)	
	)	OEA Matter No. 1601-0002-22
	)	
v.	)	Date of Issuance: July 1, 2022
	)	
FIRE AND EMERGENCY	)	
MEDICAL SERVICES DEPARTMENT,	)	MONICA DOHNJI, Esq.
Agency	)	Senior Administrative Judge
	)	

Employee, *Pro Se*
Rahsaan Dickerson, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On October 8, 2021, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the Fire and Emergency Medical Services Department's ("Agency" or "FEMS") decision to suspend him for one-hundred and twenty (120) duty hours effective October 18, 2021 to November 5, 2021. On October 19, 2021, OEA issued a Request for Agency Answer to Petition for Appeal. On November 17, 2021, Agency submitted its Answer to Employee's Petition for Appeal. This matter was assigned to the undersigned on December 2, 2021.

A Status/Prehearing Conference was convened in this matter on January 26, 2022. During the Status Conference, the undersigned was informed that there was an Adverse Action Panel Hearing in this matter. As such, 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). Thereafter, I issued a Post Status Conference Order requiring the parties to submit briefs addressing the issues raised during the Status/Prehearing Conference. Both parties have complied. The record is now closed.

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.

JURISDICTION

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

ISSUES

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

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.

STATEMENT OF THE CHARGE(S)

According to Agency's Answer to Employee's Petition for Appeal at Tab 17, Employee's adverse action was predicated on the following charges and specifications, which are reprinted in pertinent part below:

Charge 1: Violation of D.C. Fire and Emergency Medical Department Order Book Article VI, § 6, which states: "Conduct unbecoming an employee includes conduct detrimental to good discipline, conduct that will adversely impact the employee's or agency's ability to perform effectively, or any conduct that violates public trust or law of the United States, any law, municipal ordinance, or regulation for the District of Columbia committed while on-duty or off-duty."

This misconduct is defined as cause in D.C. Fire and Emergency Medical Department Order Book Article VII, § 2 (c), which states: "Any on-duty or employment-related act or omission that the employee knew or should reasonably

have known is a violation of law." *See also* DPM § 1603.3 (e).

This misconduct is defined further as cause in D.C. Fire and Emergency Medical Department Order Book Article VII, § 2 (h) which states: "Any act which constitutes a criminal offense whether or not the act results in a conviction." *See also* DPM § 1603.3 (h).

Specification 1: FE EMT [Employee] describes his misconduct in his Special Report (dated 03 04 2019) as follows:

I, [Employee] was arrested on February 28, 2019, by the Glenarden Police Department MD and charged with a DUI…

Captain Melonie C. Barnes describes Firefighter EMT Johnson's misconduct further in her Final Investigative Report (03/17/2020) as follows:

CHRONOLOGICAL NARRATIVE SECTION

"On February 28, 2019, Firefighter [Employee] was arrested in Prince George's County, Maryland and charged Driving Under the Influence (DUI) by Glenarden Police Department.

The District Court of Maryland for Prince George's County Statement of Probable Cause reads in part: On 02/28/2019 at 2049 hours, Ofc. Furr #9345 of the Glenarden Police Department advised Prince George's Police County Communications while working secondary employment at (A-1 Restaurants and Liquors) located at 7910 Martin Luther King Jr. Hwy, Glenarden, Maryland 20706, he attempted to initiate a traffic stop in the parking lot on a black Cadillac Escalade bearing a Maryland Registration Plate (*******) which refused to stop. Ofc. Furr advised Communications that the fleeing vehicle was being driven on three tires and its rims. Ofc. Furr and Cpl. Shelby #9331 advised that they had the vehicle stopped at Martin Luther King Jr. Highway Eastbound just pass James Fletcher way.

Officers gave the driver verbal command to exit the vehicle, the driver complied. The driver was placed into handcuffs for officer safety since he became agitated once outside the vehicle. The driver who was identified by his Maryland Driver's License to be the DEFENDANT [Employee] appeared to be under the influence of alcohol. Officers asked the DEFENDANT *if* he had anything to drink today, the DEFENDANT stated "I've had a couple of drinks." Cpl. Shelby asked the DEFENDANT if he would object to a standardized field sobriety test (SFST), the DEFENDANT gave verbal consistent for officers to administer the (SFST).

> [O]nce the tests were completed the DEFENDANT was placed backed into custody and advised that he was being arrested for operating a motor vehicle under the influence of alcohol.
>
> I (Ofc. Harris # 9353) asked the DEFENDANT if he would be willing to submit to a breathalyzer. The DEFENDANT stated that he was not willing. The DEFENDANT was advised of his "Advice of Rights" in which he refused to acknowledge or sign. I issued the DEFENDANT a Maryland Uniform citation (KA97178) for Driving under the influence ….
>
> Firefighter/EMT [Employee]'s probable cause arrest confirms that he was taken into custody for a criminal offense (Driving under the influence) whether or not the act results in conviction. Accordingly, a-duty hour suspension is proposed."[2]

SUMMARY OF THE TESTIMONY

On June 23, 2021, Agency held a Trial Board Hearing. During the hearing, testimony and evidence were 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 part of the Trial Board Hearing.

Agency's Case in Chief

Captain Melonie Barnes – Tr. pgs. 17 – 64

Melonie Captain Barnes ("Captain Barnes") is a Captain at the Office of Internal Affairs at Agency. Her duties include investigating internally the members involved in criminal and egregious misconduct. Tr. pg. 19. Captain Barnes acknowledged initiating an investigation into Employee. Tr. pgs. 19-20. She testified that Employee was arrested for Driving Under the Influence("DUI"). She is unsure of who reported the arrest to her office – Employee or his Lieutenant. Tr. pg. 20. Captain Barnes asserted that once they learn about a member arrest, if the member is released, they come to the office, present them with paperwork such as arrest papers or release documents they received. She stated that they also get a brief statement by way of special report. After they receive the special report, the case is tolled until the criminal case is adjudicated in court. Tr. pgs. 20 -21. Captain Barnes affirmed that she received a special report from Employee and that was part of her investigatory compilation of documents. Tr. pg. 21.

Captain Barnes identified Government's Exhibit 5 as the final investigative report she prepared and that was forwarded to the Office of Compliance. She explained that the report contained information from the Court about Employee. Tr. pgs. 23 - 24. Captain Barnes explained that the report contained the date the report was finalized, the investigation tracking number ("IA"); personal information about Employee; and the date Agency found out about Employee's arrest. Tr. pgs. 25-26.

[2] *See* Agency's Answer to Employee's Petition for Appeal at Tabs 6 & 17 (November 17, 2021).

Captain Barnes testified that Employee was arrested on February 28, 2019. Tr. pg. 27. Captain Barnes affirmed that she made recommendations based on the information she received. She stated that the interview led to her ultimate conclusion. Captain Barnes stated that she learned from Glenarden City Police that Employee had a flat tire and was pulled over. She learned during an interview with Employee that his case was dismissed from Court. She also stated that during the interview, Employee admitted to drinking and driving. Tr. pg. 28. She averred that this information ultimately led to her sustaining the case. Tr. pg. 29.

Captain Barnes narrated what she learned transpired between Employee and the Glenarden City Police on February 28, 2019, as documented in the court record. Tr. pg. 30. She stated that Employee received a nolle prosequi disposition in the criminal case. Captain Barnes averred that she interviewed Employee on March 13, 2022, after the disposition of the criminal case. She affirmed that the incident occurred a year prior to the interview. Tr. pgs. 31-32. Captain Barnes testified that Employee was cooperative during the course of the interview. She stated that Employee explained that he had consumed some drinks at one location and was driving to another location. Someone pulled up beside him and informed him that he had a flat or low tire. Employee was attempting to go to the next gas station for help. Employee was asked if he had been drinking and he answered in the affirmative. Tr. pg. 33. He was asked to get out of the car and police conducted its testing. Tr. pg. 34. Captain Barnes stated that contrary to the court documents stating that a field sobriety test was conducted, they did not conduct breath testing. Tr. pgs. 34-35. Captain Barnes also stated that Employee informed her during the interview that he just had a surgery and he was on prescription medication. Employee also informed her that he had not consumed alcohol in some time. Tr. pg. 35.

Captain Barnes stated that after her investigation into the matter, her ultimate decision was to sustain the alleged misconduct that led to Employee's arrest for Driving Under the Influence of alcohol. Tr. pg. 37. Captain Barnes noted that Employee himself admitted to drinking and getting behind the wheel and driving. Tr. pg. 38. She acknowledged that Employee's admission, along with the information she received from Glenarden City Police was enough to sustain the misconduct. Captain Barnes testified that Employee was remorseful. Tr. pg. 38. Captain Barnes also stated that Employee's driver's license was valid once he submitted his driving record to Agency. Tr. pg. 40.

Captain Barnes noted that whatever was in the documents received from the Glenarden City Police Department was included in her investigation report. Tr. pg. 41. She stated that based on the report, Employee was asked to submit to a field sobriety test, and he refused. Tr. pg. 43.

On across, Captain Barnes affirmed that Employee reported to the interview on March 13, 2020, as requested and kept her informed about the status of the case. She also affirmed that her investigation report was based on the Police report and her interview with Employee. Tr. pg. 44. While referencing Exhibit 5, Captain Barnes testified that it appeared the Statement of Probable Cause was completed by one of the officers on the scene. Tr. pg. 45. She testified that she does not recall reading the Police report. She stated that it was customary for her office to do so, and that in Maryland, they accept the Statement of Probable Cause in-lieu of a Police report as far as narratives are concerned. Tr. pg. 46.

Captain Barnes reiterated that Employee noted during the interview that he had a couple of drinks and he drove his vehicle. Tr. pg. 47. Captain Barnes testified that she was not present at the scene and has no personal knowledge of the events that happened that evening. Captain Barnes reiterated that according to Employee's driving record, his driver's license was valid. Tr. pg. 54. Captain Barnes testified that she does not recall a conversation with Employee about expungement. Tr. pg. 56. Captain Barnes affirmed that Employee told her he had never been pulled over for drinking and driving prior to this incident. She also affirmed that Employee denied having an alcohol and substance abuse problem. Captain Barnes further acknowledged that Employee denied feeling intoxicated that night. Tr. pg. 57.

When questioned by the Trial Board Member, Captain Downs, on the timeline in the current matter, Captain Barnes testified that they cannot conduct an investigation parallel to a policing agency as that can be considered as impeding an investigation. Tr. pg. 59. Captain Barnes also testified that the COVID-19 pandemic shutdown everything and she affirmed that this delayed the Trial Board from proceeding in a timely manner. She stated that during COVID, no Trial Board was held, the Courts were closed, and a lot of things stopped during the last year. Tr. pg. 60.

Sergeant Christopher Shelby – Tr. Pgs. 64 – 97

Sergeant Christopher Shelby ("Sergeant Shelby") has been employed by City of Glenarden Police Department in Prince George's County, Maryland for about14 years. Tr.pgs.66-67. Sergeant Shelby affirmed that he was working the night of February 28, 2019 and that he encountered Employee that night. Tr. pg. 67. Sergeant Shelby's assignment on February 28, 2029, was Patrol Supervisor for night shift which was from 1800 t0 0400. Tr. pg. 68. He does not recall the exact time of the night he encountered Employee. Tr. pg. 68. Sergeant Shelby testified that a unit working secondary employment (Officer Sean Furr) at an A-1 Liquor Store and Restaurant observed Employee driving on the rims, obstruct the curve, and the unit requested backup. Sergeant Shelby was the closest unit at the time, so he responded to the scene. He stated that Furr had the vehicle that was driving on three (3) tires stopped. The fourth tire was blown out and driving on rims. Once backup arrived, they approached Employee's vehicle and asked him to step out of the vehicle. Sergeant Shelby stated that Employee was pulled over a very short distance from the parking lot of the A-1 Liquor Store and Restaurant. He explained that other units responded, and that is typically what they do – if one unit calls out, they all go. Tr. pgs. 68-71. Sergeant Shelby testified that after Employee was asked to step out of the vehicle, they had a rookie officer take over. He noted that he did not have too much contact and interaction with Employee because at this time, his direction was towards the rookie officer, Ronnie Harris("Harris") having Furr give a field sobriety test. He stated that he went from backing the units up to giving directions to the other units to ensure that they were doing what they were supposed to be doing. Tr. pgs. 71-72.

Sergeant Shelby stated that Harris arrived the scene with his field training officer, Corporal Covington. Tr. pg. 72. Sergeant Shelby does not recall having a conversation with Employee at the scene. Sergeant Shelby believed Employee submitted to a sobriety test. Tr. pg. 73 -74. He does not recall how Employee performed during the cause of the sobriety test because his direction shifted to directing the other units. He stated he did not pay much attention to the

test itself. Sergeant Shelby asserted that once the field sobriety test was concluded, Employee was placed under arrest. He did not have any interactions with Employee post arrest. Tr. pgs. 74-75. Sergeant Shelby stated that Employee was not transported in his cruiser after the arrest. He testified that he does not recall who completed the Statement of Probable Cause. Tr. pg. 76.

Sergeant Shelby affirmed that Employee was criminally charged. He did not have to attend court because he was just a backup unit and supervisor. Tr. pg. 77. Sergeant Shelby identified the Statement of Probable Cause as a document that is typically prepared by Glenarden City Police Department officers ("GCPD") for Statement of Probable Cause. Tr. pgs. 78-79. Sergeant Shelby affirmed that he did not observe any interaction between Employee and any officer that actually spoke to Employee. He acknowledged that he observed Employee engage in a standard field sobriety test. Tr. pg. 80. Sergeant Shelby testified that he might have had general conversations with other involved GCDP officers after the arrest, but he does not recall the specifics of the conversation. Tr. pg. 82. Sergeant Shelby testified that, after an incident like the one involving Employee, his only responsibility is to ensure that a Statement of Probable Cause is submitted to the State or the Commissioner. After that point, he has nothing to do with changing the report or anything else. Tr. pgs. 84-85. He asserted that if he was the report writer, he would ensure that the document or information is correct. Sergeant Shelby affirmed that in general, a Statement of Probable Cause has to be accurate. Tr. pg. 86. Sergeant Shelby averred that, the criminal case against Employee was dismissed. Tr. pg. 86.

Sergeant Shelby restated on cross that he was the first backup unit on the scene. Tr. pg. 87. When asked if he was present in the parking lot mentioned in the report, Sergeant Shelby stated that he was not present at that time. Tr. pg. 88. He acknowledged that he did not witness any interaction between Employee and Officer Furr prior to his arrival. Tr. pg. 88. Sergeant Shelby asserted that he believed Furr administered the test. He explained that Harris was the rookie officer and Harris observed the test and took whatever information Furr had and used it for his probable cause. Tr. pg. 89. Sergeant Shelby affirmed that the Probable Cause statement stated that Employee denied the field sobriety test. Tr. pg. 89. Sergeant Shelby affirmed that a police report is supposed to be accurate and contain certain details. Tr. pgs. 91-92. Sergeant Shelby stated that from his reading of the Probable Cause report, it did not specifically quote if Employee denied or agreed to a field sobriety test. Tr. pg. 92.

Sergeant Shelby testified on redirect that he really did not have a lot to do with Employee's case. When questioned by a Panel member if he saw Employee's vehicle, Sergeant Shelby testified that he saw the vehicle. Tr. pg. 94. Sergeant Shelby, however, could not recall which tire was flat. Tr. pg. 95. Referencing the Statement of Probable Cause, when asked by other Panel Member if Sergeant Shelby recalled his interaction with Employee in the evening of the incident, Sergeant Shelby noted that he did not recall since the incident happened so long ago. Tr. pgs. 96-97. Sergeant Shelby explained that field sobriety and breathalyzer are different, so he differentiates them in his reports. Tr. pg. 97.

Corporal Patrick Covington – Tr. Pgs. 100 – 139

Corporal Patrick Covington ("Corporal Covington") has been employed with the City of Glenarden Police Department for over three (3) years. He affirmed that he was employed by the

City of Glenarden in February 2019. Tr. pg. 101. Corporal Covington affirmed that he responded to a scene involving Employee in February 2019. Tr. pg. 101-102. He acknowledged that he was on duty on the night of the incident involving Employee and he responded to the scene with his then trainee, Officer Harris. Tr. pg. 102.

Corporal Covington stated that Officer Furr was working a second employment at the A-1 liquors located at 7910 Martin Luther King Jr. Highway, when he advised communication of a vehicle driving on three (3) tires and a rim. According to Corporal Covington, Furr stated that he activated his emergency equipment and attempted to stop the vehicle, but the vehicle immediately failed to stop. Officers stopped the vehicle at Martin Luther King Jr. Highway and James Fletcher. Corporal Covington asserted that he and his partner headed to the scene to assist. Tr. pgs. 102-104. He asserted that upon their arrival at the scene, he observed officers placing Employee in handcuffs and walking him back to another marked cruiser. Tr. pg. 105.

Corporal Covington testified that once he arrived at the scene, he conducted a standardized field sobriety test ("SFST") and Employee was clearly agitated. Tr. pg. 105. He explained that Employee did not want to corporate at first. Corporal Covington stated that he had consistently repeat himself when giving instructions. Corporal Covington maintained that you could tell Employee was clearly angry, his voice was raised, and he was yelling at officers at the beginning. Corporal Covington asserted that prior to administering the test, he spoke to Sergeant Shelby who advised that he believed Employee was driving under the influence and he directed Corporal Covington to conduct the SFST. Tr. pg. 106. Corporal Covington asserted that Employee was asked, and he consented to taking the SFST. Upon completion of the SFST, Employee was asked if he wanted to go the Prince George's County District 3 for a breathalyzer, which he refused. Tr. pg. 107. Corporal Covington explained that while he conducted the SFST, he did it after a conversation Employee had with Sergeant Shelby and Sergeant Shelby relayed to Corporal Covington that Employee was intoxicated. Tr. pgs. 107-108.

Corporal Covington stated that they are trained and certified to conduct SFST in their Police Academy. Tr. pg. 108. He explained that they conduct a series of components such as involuntary and jerking movements of the eyes. He testified that Employee failed the SFST as he consistently could not follow basic instruction of following Corporal Covington's pen with only his eyes. He stated that Employee turned his head several times, he could not work in straight line, count his steps, walk heel to toe or complete the one leg test. Tr. pgs. 109 - 113. Corporal Covington testified that, if an individual fails an SFST, they are asked if they are willing to take a breathalyzer test. If they refuse, then they go full custody, with their blood and alcohol levels taken. Tr. pg. 114. Corporal Covington testified that, after Employee refused to submit to a breathalyzer, he was informed that he would be placed under arrest for driving under the influence ("DUI"). Tr. pg. 115.

Corporal Covington stated that Harris completed the Statement of Probable Cause with assistance from Corporal Covington on how to write the document because Harris was in training. Tr. pgs. 115 - 116. Corporal Covington affirmed that he conducted the SFST. Tr. pg. 116. Corporal Covington explained that Harris wrote the Statement of Probable Cause because he was in training and had never done one, and this was aa great opportunity for him to learn how to be proficient in DUI arrests. Tr. pg. 116.

Corporal Covington testified that he and Harris transported Employee to the Department of Corrections in Upper Marlboro for processing. Corporal Covington stated that during the transport, Employee was pleasant and apologized for his behavior earlier on. Tr. pg. 117. Corporal Covington affirmed that a criminal proceeding occurred after the arrest. Tr. pg. 119. He stated that since Harris was no longer a trainee, he was the charging official in this matter, and the criminal case against Employee was nolle prosequi/dismissed due to a paperwork mix-up. Tr. pgs. 119-120. Corporal Covington stated that he was a part of the decision to dismiss the case. Tr. pg. 120. He acknowledged that it was his department's position that the case should be dismissed due to lack of evidence. Tr. pg. 120. Corporal Covington stated that based on his observation, Employee's vehicle had three tires, just rims on the fourth one. Tr. pg. 121. He affirmed that he had to appear before the District Court of Maryland for Prince George's County at least once. He explained that Employee's case was continued because Employee retained private counsel. Tr. pg. 122.

Corporal Covington asserted that Employee was charged with DUI. He affirmed that if an individual is charged and convicted with DUI, there is an impact on their driver's license. According to Corporal Covington the individual can be issued a 45-days temporary driver's license if they submit to it. Tr. 123. He affirmed that Employee's vehicle was impounded. Tr. pgs. 123-124.

On cross, Corporal Covington affirmed that he was not the first officer at the scene of the incident. He noted that he was not present at the parking lot noted in the police report. Tr. pg. 124. Corporal Covington affirmed that Employee had already been pulled over when he arrived. He affirmed that he did not witness any interaction between Employee and Furr or between Employee and Sergeant Shelby prior to his arrival at the scene. Corporal Covington acknowledged that it is important for police reports to be accurate and complete. Tr. pgs. 125 - 126. While it is not explicitly stated in the police report, Corporal Covington affirmed that Employee consented to a field sobriety test. Tr. pgs. 126 -128. He stated that it was noted in the report that Employee was agitated. Tr. pg. 128. Corporal Covington responded in the negative when asked if he knew of any academic reports stating the efficacy of Standardized field sobriety tests. Tr. pgs. 128-129. Corporal Covington noted that the case was dismissed due to paperwork issues and they did not see the feel to recharge Employee. He affirmed that he recommended that the case should be dismissed due to lack of evidence. Tr. pg. 129.

Corporal Covington noted that he was not aware that the State only charged Employee with a single count. Tr. pgs. 129 – 130. He was not aware that Employee's driver's license was not confiscated, suspended or revoked. Tr. pg. 130.

On redirect, Corporal Covington affirmed that the case was *nolle prosequi* due to a GCDP error. Tr. pgs. 130-131. Corporal Covington clarified that the lack of evidence that let to GCDP's dismissal of Employee's case was because they were unable to provide required paperwork and not because of what happened at the scene of the incident. Tr. pg. 131. Corporal Covington stated that the charging officer and the State Attorney decide whether or not to proceed with a criminal case. Tr. pg. 132.

On recross, Corporal Covington stated that it was his professional opinion that the case was dismissed because of paperwork errors. Tr. pgs. 132-133. On re-redirect, Corporal Covington affirmed that he speculated that the case was dismissed due to lack of evidence. Tr. pg. 133.

When questioned by Trial Board Member Robinson, Corporal Covington affirmed that he conducted the test. He also noted that Employee complied with all the directives to the best of his abilities, with certain commands. Tr. pg. 134. Corporal Covington averred that Employee was cuffed by Furr. But when he consented to the test, he was uncuffed. Tr. pg. 135.

In response to Trial Board Member Troy's question, Corporal Covington stated that it wasn't until after he had started administering the test that he could see signed that Employee was under the influence. In his professional opinion, Employee was staggering again and did not follow basic instructions. Tr. pg. 136.

Corporal Covington responded in the negative when asked by Trial Board Member if an explicit response is required by an individual before a field sobriety test can be administered. Tr. pg. 137. Corporal Covington testified that GCPD requires reasonable articulable suspicion that an individual is under the influence a controlled substance or alcohol. He explained that the officer knows this based on training, knowledge and experience. Tr. pg. 138. Corporal Covington did not recall seeing the fourth tire anywhere at the scene when he arrived. Tr. pgs. 138-139.

Employee's Case in Chief

Employee – Tr. pgs. 143 – 180

Employee has been employed with Agency since September of 2002. He's currently assigned at the Fire Prevention Division. Tr. pgs. 143-144. He was assigned on Engine 29 on February 28, 2019. During that time his work schedule was 24 hours on, 72 hours off. He stated that he was not working on February 28, 2019. Employee explained that he left his house between 4:00 p.m. and 4:30 p.m., drove around, and ended up at a bar around 5:30 p.m. He was at the bar for two (2) to three (3) hours. He asserted that he had two (2) to three (3) drinks. He stated that he recently had surgery on the back of his head, and he affirmed that he was on medication at the time. Tr. pgs. 144 - 145. Employee stated that he took the medication several hours before heading to the bar. Tr. pg. 146.

Employee explained that after he left the bar, he was heading home when his vehicle started driving strangely, so he pulled over. He affirmed that it was already dark outside. Tr. pg. 146. Employee stated that he pulled into the parking lot because he was familiar with it and he felt it was a safe place to check out what was going on with his vehicle. Tr. pgs. 146-147. Employee stated that a friend approached him while at the parking lot to inform him that his tire was flat. He explained that he immediately pulled out of the parking lot in an attempt to go to the gas station. He responded that he did not see any officers while he was at the parking lot. He noted that he saw people mingling and others going in and out of the restaurant. Tr. pg. 147. Employee responded that the first time he saw the officer was when he saw their lights in his rearview mirror. Tr. pgs. 147-148. He noted that he did not know why he was being stopped. He

was asked by the officer to get out of the vehicle. Employee asserted that he remembered the officer putting cuffs on him, asked him several questions and placed him behind the police car. He responded that he did not know why he was handcuffed. Tr. pg. 148.

Employee affirmed that he was asked to consent to a field sobriety test. Tr. pg. 149. He noted that he refused the test. He affirmed that officers continued asking him to take the test, although he had refused to do so. When asked if he was driving while intoxicated on February 28, 2019, Employee stated that he did not think so. Tr. pg. 150.

Employee acknowledged that he immediately notified his supervisor, Lieutenant Robert Delahanty, via email of text of the incident. Tr. pg. 150. He also stated that he was made to do a special report. Tr. pg. 151. Employee identified Exhibit 1, as the special report her wrote to the department. Tr. pg. 151.

Employee affirmed that he kept Agency informed of the State Court proceedings throughout 2019, up till when the case was dropped in 2020. He testified that he was in constant contact with Captain Barnes. Tr. pg. 153. Employee identified Exhibit 2, as how he communicated and kept Agency informed. Tr. pg. 153. He noted that he communicated with Agency approximately three (3) to four (4) times. He acknowledged that he appeared each time his case was scheduled for a hearing. Employee stated that his case was thrown out of court in February of 2020. He immediately informed Agency of the decision. Tr. pg. 154.

Employee identified Exhibit 3 as the email he sent informing Agency that his case had been thrown out. Tr. pgs. 154-155. Employee identified Exhibit 4 as an email of paperwork he got from Court and sent to Captain Barnes. Tr. pg. 155. Employee noted that prior to the arrest and charge, he had never been involved in a similar incident. He affirmed that the State case was eligible for expungement and he filed for it. Tr. pg. 156.

Employee affirmed that on August 27, 2020, Agency requested a response from him about whether he would accept the recommended discipline. He stated that he responded informing Agency that he would not accept the recommended discipline and would go to trial. Tr. pg. 156. Employee identified Exhibit 5 as the document informing Washington that he was not accepting the recommended discipline and that he would go to trial. Tr. pgs. 156-157. Employee responded that he requested the Trial Board because he did not think he was intoxicated at the time. Tr. pg. 157.

On cross, Employee affirmed keeping Agency informed of his criminal case. He also affirmed sitting for an interview with Captain Barnes around March of 2020. Tr. pg. 158. He acknowledged the interview took place about a year after the February 2019, incident. Tr. pg. 159. He agreed that his memory in 2020 was fresher than it was in June 2021. Tr. pg. 159. Employee affirmed that he testified on direct that he had two (2) or three (3) drinks over a span of two (2)- three (3) hours. Tr. pgs. 160 -161. Employee acknowledged telling Captain Barnes during the interview that he had three (3) mixed Vodka drinks. Tr. pg. 160. He also acknowledged that it was possible that he told Captain Barnes during the interview that the time between having the drinks and leaving the bar was one and a hour (1.5) hours. Tr. pg. 161.

Employee affirmed that prior to being pulled over by the GCPD, an acquaintance of his pointed out to him that something was wrong with his tire. Tr. pg. 162. He explained that he did notice that his vehicle was driving different, that why he pulled over. Tr. pg. 163. He noted that he saw the acquaintance at the parking lot of the A-1 Restaurant and Liquor. Tr. pg. 164. He affirmed that he had noticed that his vehicle was driving funny, he pulled over to the parking lot, where his friend told him his tire was messed up. He then left the parking lot to go to the gas station. Tr. pg. 164. Employee testified that he was inside the vehicle when he was informed by his friend that his tire was flat, and he didn't have a chance to check the tire once he was pulled over. Tr. pg. 165. He affirmed that he did not know what happened to his tire. Tr. pg. 167.

Employee affirmed telling Captain Barnes that he refused the field sobriety test along with other instructions because he did not feel impaired. He testified that he did not remember doing the field gaze test that Corporal Covington testified that he did. Tr. pgs. 167 -169. He testified that he told the GCPD that he had a few drinks. Tr. pg. 170. Employee did not recall Captain Barnes asking him about a Breathalyzer. Tr. pg. 171. He stated that it has been two (2) years since the incident and he does not recall every question that were asked. Tr. pg. 171. He stated that he believed he was asked if he was willing to submit to a Breathalyzer, but he did not remember saying yes to Breathalyzer. Employee testified that he really did not drink at all. Tr. pg. 172. He did not recall the last time he had a drink prior to February 28, 2019. He affirmed that it was a long time since he had a drink prior to February 28, 2019. Tr. pgs. 173 -174.

Employee acknowledged telling Captain Barnes during the interview that he had a surgery and was on prescription pain pills. Tr. pgs. 174-175. He affirmed telling Captain Barnes during the interview that he generally did not take the pills when he gets them. He also affirmed takin the pills earlier in the day and later had three (3) drinks on February 28, 2019. Tr. pg. 175. When asked if he checked the interaction of alcohol he consumed and the pills he took on February 28, 2019, Employee stated that he did not. He agreed it was his responsibility to check the interaction before consuming alcohol. Tr. pgs. 175-176.

Employee affirmed telling Captain Barnes during the interview that he had learned from the incident and never want to be in that situation again. He explained that he had spent 18 years at Agency staying out of trouble and he planned on continuing to stay out of trouble. Tr. pgs. 176 - 177.

Employee also affirmed on redirect that he left home around 4:00 p.m. or 4:30 p.m., and he communicated the same to Captain Barnes. Tr. pg. 177. He also affirmed that per the police report, he was arrested at 20:49 hour of 8:49 p.m. He testified that it was about 30 to 45minutes from the venue to his home, and 20 minutes from the venue to the parking lot. Tr. pg. 178.

When asked if he observed any damage to his vehicle that evening, Employee stated that he did not observe any and aside from his friend, no one talked to him about damages to his vehicle that evening. He became aware of the damages after he picked up his vehicle from impound. Tr. pg. 179.

When questioned if he took more than one (1) pill on February 28, 2019, Employee said he did not. Tr. pg. 179. He affirmed that he felt fine at the time of the stop. He also affirmed that

he testified on cross that he was stopped around 8:49 p.m. He acknowledged that it was approximately nine (9) hours between when he took the medication and when he was stopped. Tr. pg. 180.

When asked what he saw when he picked up his vehicle from impound, Employee testified that the tire was off of the rim. Tr. pg. 183.

When asked by Trial Board Member Spencer were the missing tire was located, Employee stated that it was in the front of the vehicle. Tr. pg. 183. Employee affirmed that he did not recall performing any of the sobriety tests. Tr. pgs. 183-184. Employee clarified that the missing tire was on the right passenger side of the vehicle. Tr. pg. 184.

Lieutenant Robert Delahanty – Tr. Pgs. 186 – 193

Lieutenant Robert Delahanty ("Lieutenant Delahanty") is currently assigned to Truck 5, Number 1. He has been employed with Agency for thirty-two and a half years (32.5). Tr. pg. 186. He testified that Employee was assigned to Truck 5 for a couple of years and he affirmed that he was Employee's supervisor at that time. He testified that Employee was a polite, a nice guy and a hard worker. He also stated that Employee would do anything that was asked of him. Tr. pg. 187. When asked if he had any work-related disciplinary issues with Employee, Lieutenant Delahanty said no. Tr. pg. 187. He averred that Employee was a hard worker who was eager to learn and always asked questions. He stated that he had good working relationship with Employee and that Employee worked well with others. Tr. pgs. 187-189.

Lieutenant Delahanty expressed that he was disappointed when Employee left to go to Fire Prevention Division because they liked him, and Employee was a good mix with everybody. Tr. pg. 188. He stated that Employee was cautious, he watched what he did, made sure he did not get hurt, and he was safety conscious. Tr. pg. 189. He testified that he had never seen or heard anything about Employee drinking. Tr. pg. 190. He noted that he agreed to serve as a character witness for Employee because he was a good guy and a hard worker. Tr. pgs. 190 -191. Lieutenant Delahanty affirmed that Employee was an asset to the Department because of his knowledge and background. He noted that he would still work with Employee despite the charges against him. Tr. pg. 191.

When questioned by Trial Board Member Troy, Lieutenant Delahanty stated that he had never seen Employee agitated or get mad. He noted that Employee was a happy guy. Tr. pg. 193.

Chief Mitchell Kannry – Tr. Pgs. 195-200

Chief Mitchell Kannry ("Chief Kannry") is the Deputy Fire Chief in charge of Fire Prevention. He has been with Agency for seventeen (17) years. He stated that Employee is one of the Inspectors assigned to his Division. Tr. pg. 195. He testified that he is in Employee's chain of command. Tr. pg. 196. He testified that Employee has always been very respectful, they have never had any issues with Employee in the Division, he is someone who can handle the tasks and he is a very effective employee. Tr. pg. 196. When asked if he has ever had any disciplinary issues with Employee, he said no. Tr. pg. 196. Chief Kannry averred that Employee does

exceptional work. He is eager and quick to learn, as well as known for being very reliable and dependable. Tr. pg. 196. He added that Employee is a team member, trustworthy, responsible, and completes assigned tasks in a timely manner. Tr. pg. 197. Chief Kannry stated that Employee has always been known to take proper precautions around the office or in the field. He testified that he has never observed Employee's use of alcohol. He asserted that Employee is an asset to the Division. When asked if the charges against Employee change his opinion of Employee, he stated that they don't. Tr. pg. 198.

On cross, Chief Kannry stated that he has worked with Employee at the Fire Prevention Division for a less than a year. Tr. pg. 199. He testified that he has never socialized outside of work with Employee. Tr. pg. 200.

Panel Findings

The Trial Board Panel made the following findings of fact based on their review of the evidence presented at the hearing:[3]

1) The facts of the case proved that [Employee] was driving on a completely flat tire, on the rim and was subsequently pulled over and arrested by the Glenarden Police Department (PD).

2) [Employee] did fail a field sobriety test as issued by Glenarden PD.

3) [Employee] admitted during his Fire Trial Board Testimony to having drinks and then driving his vehicle on the night in question.

Upon consideration and evaluation of all the testimony and factors, The Trial Board Panel found that there was a preponderance of evidence to sustain the charge against Employee. The Panel found Employee guilty of Charge No.1, Specification No.1. In addition to making the findings of fact, the Panel also weighed the offense against the relevant *Douglas* factors[4] and concluded that a 120-duty hour suspension was an appropriate penalty for this offense.[5]

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[3] Agency Answer at Tab 17(November 17, 2021).

[4] *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;

ANALYSIS AND CONCLUSIONS OF LAW[6]

Pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department*,[7] OEA has a limited role where a departmental hearing has been held. According to *Pinkard*, the D. C. Court of Appeals found that OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings.[8] The Court of Appeals held that:

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

Additionally, the Court of Appeals found that OEA's broad power to establish its own appellate procedures is limited by Agency's Collective Bargaining Agreement. Thus, pursuant to *Pinkard*, an Administrative Judge of this Office may not conduct a *de novo* hearing in an appeal before him/her, but must rather base his/her decision solely on the record below, when all of the following conditions are met:

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
>
> 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.*, Adverse Action Panel] has been held,

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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

the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[5] Agency Answer, *supra*, at Tab 17.

[6] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

[7] 801 A.2d 86 (D.C. 2002).

[8] *See* D.C. Code §§ 1-606.02(a)(2), 1-606.03(a),(c); 1-606.04 (2001).

> any further appeal shall be based solely on the record established in the Departmental hearing"; *and*
>
> 5. *At the agency level, Employee appeared before an Adverse Action Panel that conducted an evidentiary hearing*, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee (emphasis added).

There is no dispute that the current matter falls under the purview of *Pinkard*. Employee is a member of the D.C. Fire and Emergency Medical Services Department and was the subject of an adverse action (120 duty hours suspension); Employee is a member of the International Fire Fighters. Local 36, AFL-CIO MWC Union ("Union") which has a Collective Bargaining Agreement ("CBA") with Agency. The CBA contains language similar to that found in *Pinkard* and Employee appeared before an Adverse Action Panel on June 23, 2021, for an evidentiary hearing. This Panel made findings of fact, conclusions of law and recommended that Employee be suspended for 120-duty hours for the current charge. Consequently, I find that *Pinkard* applies in this matter. Accordingly, pursuant to *Pinkard*, OEA may not substitute its judgement for that of the Agency, and the undersigned's review of Agency's decision in this matter is limited to the determination of (1) whether the Adverse Action Panel's decision was supported by substantial evidence; (2) whether there was harmful procedural error; and (3) whether Agency's action was done in accordance with applicable laws or regulations.

1) Whether the Adverse Action Panel's decision was supported by substantial evidence

Pursuant to *Pinkard*, I must determine whether the Adverse Action Panel's ("Panel") decision was supported by substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[9] If the Panel's 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.[10]

After reviewing the record, as well as the arguments presented by the parties in their respective briefs to this Office, I find that the Panel met its burden of substantial evidence. Employee does not dispute that he drank and drove his vehicle on February 28, 2019. He testified to this fact during the Trial Board hearing. Specifically, Employee asserted that he had two (2) to three (3) drinks. He also stated that he recently had surgery, and he affirmed that he was on medication at the time. Tr. pgs. 144 - 145. Employee stated that he took the medication several hours before heading to the bar. Tr. pg. 146. Employee acknowledged telling Barnes during the interview that he had three (3) mixed Vodka drinks. Tr. pg. 160. Employee explained that after he left the bar, he was driving home when his vehicle started driving strangely. Tr. pg. 146. When asked if he checked the interaction of alcohol he consumed and the pills he took on February 28, 2019, Employee stated that he did not. Tr. pgs. 175-176.

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[9] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).
[10] *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987).

Captain Barnes testified that Employee admitted during their interview that he had consumed alcohol and was driving home when he was pulled over by the police. Tr. pgs. 28, 33, 38, and 47. Additionally, Employee testified that he told the GCPD that he had a few drinks. Tr. pg. 170. Employee also affirmed taking medication earlier in the day and later had three (3) drinks on February 28, 2019. Tr. pg. 175.

Additionally, Employee stated that a friend approached him while at the parking lot to inform him that his tire was flat. He explained that he did notice that his vehicle was driving different, that why he pulled into the parking lot. Tr. pgs. 162-164. Corporal Covington stated that based on his observation, Employee's vehicle had three tires, just rims on the fourth one. Tr. pg. 121. Corporal Covington also testified that Employee failed the SFST as he consistently could not follow basic instruction. Tr. pgs. 109 - 113. Furthermore, Employee affirmed that per the police report, he was arrested at 20:49 hour of 8:49 p.m. Tr. pg. 178. He was asked by the officer to get out of the vehicle. Employee asserted that he remembered the officer putting cuffs on him, asked him several questions and placed him behind the police car. He responded that he did not know why he was handcuffed. Tr. pg. 148.

The Panel found that Employee was driving on a completely flat tire, on the rim and was subsequently pulled over and arrested by the Glenarden Police Department (PD); he failed a field sobriety test as issued by Glenarden PD; and he admitted during his Fire Trial Board Testimony to having drinks and then driving his vehicle on the night in question. In addition, the Panel considered and reviewed the *Douglas* factors in making its determinations and findings to sustain the charge. Based on the aforementioned testimonies, I find that there was substantial evidence in the record to support the Panel's findings. Employee's decision to drive after consuming alcohol and prescription medication conflicts with Agency's mission to preserve life and promote safety. Therefore, Agency proved that Employee engaged in any on duty or employment related act or omission that Employee knew or should reasonably have known was a violation of the law. I find that there was substantial evidence in the record to support Agency's findings.

2) Whether there was harmful procedural error

Employee argued that Agency violated Article 31 section B (5) of the CBA which required Agency to begin a Trial Board Hearing within 180 days of the employee's receipt of the Initial Written Notification. Employee explained that even considering the period of tolling under the COVID-19 MOU between Agency and the Union; the Trial Board Hearing was untimely, therefore the charge against him should be dismissed. Employee further explained that the criminal procedure against him ended on February 19, 2020, with a *nolle prosequi* disposition. He notified Agency on the same day that the charges had been dropped. Accordingly, the 180-days clock for holding a hearing commenced on February 19, 2020. The clock ran against Agency until April 15, 2020, when the MOU between Agency and the Union tolling the 180-days clock went into effect. Employee contended that the elapsed time as of April 15, 2020, was 56 days, thus, Agency had 124 days left to commence the Trial Board Hearing. Employee further explained that the clock on the 180 days timeline restarted on November 20, 2020, with the execution of the addendum to the April 15, 2020, MOU. Since 56 days had already elapsed, Agency was required to begin to hearing within 124 days of November 20, 2020, and this deadline expired on March 24, 2021. Additionally, Employee argued that none of the three (3) dates (April 22, 2021; May 10, 2021; and May 17, 2021) that Agency offered to

begin the hearing fell before the March 24, 2021 deadline. Employee argued that assuming the 180 days started on February 27 or 28, 2020, when Agency received the certified copies of the criminal case disposition, the Trial Board Hearing would still be well outside the 180-days period. Employee asserted that Agency's violation of CBA Article 31 section B (5) is not harmless error. He averred that Agency was negligent in its handling of the case, and that Agency violated the same rules and procedures that it expected Employee to comply with.[11]

Agency on the other hand argued that there was no harmful procedural error during Employee's disciplinary proceedings since Employee's Trial Board Hearing was scheduled within 180 days of service of the Initial Written Notification. Agency explained that Employee's criminal case was disposed of around the time when the entire world was dealing with the COVID-19 pandemic, which caused agencies to make workforce adjustments, to include switching from in-person hearings to virtual hearings, and temporarily tolling disciplinary deadlines through an MOU. Agency agreed that 56 days elapsed between February 19, 2020, to April 15, 2020, when the MOU went into effect tolling the 180 days scheduling deadline. Agency also affirmed that the clock restarted on November 20, 2020 but noted that the clock stopped on March 22, 2021 (174 days from February 19, 2020). Agency argued that pursuant to the April 15, 2020, MOU, it could not unilaterally schedule a Trial Board Hearing, instead, it worked collaboratively with the charged employee's counsel to schedule the Trial Board Hearing. Agency maintained that it could have scheduled Employee's Trial Board Hearing for the 180th day, however, doing so would have simply been a symbolic gesture that would not serve the parties' interest as the parties would have undoubtedly requested a continuance. Agency additionally noted that unilaterally scheduling the Trial Board Hearing for the 180th day would have led to an unfair labor practice complaint. Agency however asserted that, assuming that it did not comply with the 180 days scheduling requirement, that contractual agreement is directory, and Agency's interests in imposing discipline outweighs any prejudice to Employee. Agency cited to *Kyle Quamina v. Department of Youth Rehabilitation Services,*[12] in support of its assertion. Employee explained that the logic in Quamina applies to the current case as the CBA in this case did not set forth a penalty for failure to schedule a Trial Board Hearing within 180 days. Agency averred that the directory nature of CBA Article 31 section B (5) renders the purported failure to bring the case within 180 days harmless error. Accordingly, its discipline should stand.[13]

In *Brown v. Watts*, 933 A.2d 529 (April 15, 2010), the Court of Appeals held that OEA is not jurisdictionally barred from considering claims that a termination violated the express terms of an applicable collective bargaining agreement. The court explained that the Comprehensive Merit Personnel Act ("CMPA") gives this Office broad authority to decide and hear cases involving adverse actions that result in removal, including "matters covered under subchapter [D.C. Code §1-616] that also fall within the coverage of a negotiated grievance procedure."[14] In this case, Employee was a member of a Union when he was suspended and governed by Agency's CBA with the Union. Based on the holding in *Watts*, I find that this Office may interpret the relevant provisions of the

[11] Employee's Brief (March 14, 2022).
[12] OEA Matter No. 1601-0055-17, Opinion and Order on Petition for Review (April 19, 2019).
[13] Agency Brief (February 24, 2022).
[14] Pursuant to D.C. Code § 1-616.52(d), "[a]ny system of grievance resolution or review of adverse actions negotiated between the District and a labor organization *shall take precedence* over the procedures of this subchapter for employees in a bargaining unit represented by the labor organization" (emphasis added).

CBA between Employee's Union and MPD, as it relates to the adverse action in question in this matter.

Article 31 Section B (5) of the CBA between Agency and Employee's Union provides in pertinent part as follows:

> (5) ***if the case is to be heard by the Trial Board, the hearing shall begin within 180 days of the employee's receipt of the Initial Written Notification.*** When the employee requests a postponement or continuance of a scheduled hearing, the 180-day time limit shall automatically be extended by the length of the postponement or continuance granted by the Department.[15] .(Emphasis added)

Here, there is no dispute that the 180 days clock started on February 19, 2020. There's also no dispute that the clock was tolled on April 15, 2020, when the MOU between Agency and Union went into effect. The parties also agreed that the clock restarted on November 20, 2020, pursuant to the terms of the amended MOU. Furthermore, the parties agreed that 56 days had lapsed from February 19, 2020, to April 15, 2020, when the clock was tolled. The Trial Board Hearing began on June 23, 2021. From November 20, 2020, when the clock restarted, to June 23, 2021, when the Trial Board Hearing began is a total of 215 day, plus the 56 days that had elapsed prior to the April 15, 2020, MOU. This brings the total number of days to 271 days from February 19, 2020, when the 180 days clock began to June 23, 2021, when the Trial Board Hearing began. Therefore, I agree with Employee's assertion that Agency violated the terms of Article 31, section B (5) of the CBA as stated above.

While Article 31 section B (5) of the CBA was a bargained-for provision that Agency and the Union negotiated, the OEA Board and the Courts have held that, where there is no specific consequence to an agency's violation of a time limit, the time limit is construed to be directory in nature.[16] The OEA Board in *Quamina*, *supra*, cited to *Teamsters Local Union 1714 v. Pub. Employee Relations Bd*., 579 A.2d 706, 710 (D.C. 1990), wherein, the D.C. Court of Appeals held that "[t]he general rule is that [a] statutory time period is not mandatory unless it both expressly requires an agency or public official to act within a particular time period and specifies a consequence for failure to comply with the provision. In *Watkins v. Department of Youth Rehabilitation Services*, OEA Matter No. 1601-0093-10, Opinion and Order on Petition for Review (January 25, 2010), this Board adopted the reasoning provided in Teamsters when examining a forty-five-day regulation which also addressed the time limit in which an agency was required to issue a final decision in cases of summary removal. The Board in *Watkins* noted that the personnel regulation regarding the forty-five-day rule did not specify a consequence for

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[15] Agency's Answer, *supra*, at Tab 21, Exhibit B.

[16] *See Rodriguez v. District of Columbia Office of Employee Appeals*, 145 A.3d 1005 (D.C. 2016). Although the CBA provision at issue in *Rodriguez*, as well as the outcome of *Rodriguez* are different from that of the current matter, the D.C. Court of Appeals in *Rodriguez* echoed the premise that a violation of a time limit CBA provision that does not provide a specific consequence to an agency's violation of a time limit is considered harmless error. The Court in *Rodriguez* noted that *"[w]e also can agree that application of harmless error review might warrant a ruling in favor of the Agency if Article 24, Section 2.2 of the CBA provided only that the Union was to be notified in writing within forty-five days "after the date that the Employer knew or should have known of the act or occurrence[,]" without specifying any consequence of the failure to give the requisite notice*." (Emphasis added).

the agency's failure to comply; therefore, the regulation was construed to be directory in nature.[17] Unlike a mandatory provision, a directory provision requires a balancing test to determine whether any prejudice to a party caused by agency delay is outweighed by the interest of another party or the public in allowing the agency to act after the statutory time period has elapsed."[18]

Here, although Article 31 section B (5) provides a clear time limit for when to begin a Trial Board Hearing, it however does not provide a consequence for failing to strictly adhere to this provision. Consequently, I find that based on the aforementioned, Agency correctly asserted that the CBA language of Article 31 section B (5) should be considered directory, rather than mandatory in nature.

Employee admitted to taking prescription medication on February 29, 2019. He also admitted to consuming two (2) to three (3) alcoholic beverages a few hours after taking the prescription medication. Employee further admitted to driving his vehicle after consuming the alcoholic beverages. Employee also admitted to driving on a flat tire, was pulled over and eventually arrest. Employee is alleged to have been arrested for DUI, several serious infractions. Moreover, Employee's criminal case was dismissed on February 19, 2020, less than a month before the whole world was shut down as a result of the COVID-19 pandemic. When weighed against the prejudice to Employee, it is clear that the public interest in adjudicating this matter on its merits outweighs Agency's procedural delays.[19] Accordingly, the undersigned agrees with Agency's assertion that Agency's failure to comply with the above referenced CBA section is considered harmless error.

OEA Rule 631.3 provides that, "[n]otwithstanding 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: 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 the action."

Moreover, the OEA Board in *Quamina*, addressed this issue of harmless error. It noted that "… an agency's violation of a statutory procedural requirement does not necessarily invalidate the agency's adverse action. Thus, the facts in this matter warrant the invocation of a harmless error review. In determining whether Agency has committed a procedural offense as to warrant the reversal of its adverse action, this Board will apply a two-prong analysis: whether Agency's error caused substantial harm or prejudice to Employee's rights *and* whether such error significantly affected Agency's final decision to suspend Employee."[20] In applying this two-prong analysis to the current matter, the undersigned finds that Agency's failure to schedule the Trial Board Hearing within the 180 days required time period did not cause substantial harm or

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[17] In distinguishing mandatory statutory language from directory language, the Board in *Watkins* highlighted the *holding in Metropolitan Police Department v. Public Employee Relations Board,* 1993 WL 761156 (D.C. Super. Ct. August 9, 1993), wherein the Court found statutory language mandatory, not directory, where it provided that no adverse action shall be commenced 45 days after an agency knew or should have known of the act constituting the charge.

[18] *See JGB Property v. D.C. Office of Human Rights,* 364 A.2d 1183 (D.C. 1976); and *Brown v. D.C. Public Relations Board,* 19 A.3d 351 (D.C. 2011). See also *Quamina*, *supra*.

[19] *Watkins at 5.*

[20] *Quamina*, *supra*.

prejudice to Employee. Barely weeks after Employee's criminal case was dismissed, there was a world-wide pandemic that shut down operations and forced agencies to adjust how they operated. Thereafter, the Union and Agency signed an MOU addressing the interaction between the Union and Agency during the pandemic. Upon the expiration of the part of the April 15, 2020, MOU that specifically applied to Trial Board Hearings (This provision expired on November 20, 2020), Agency contacted Employee and his representative and both parties agreed to schedule the pending Trial Board Hearing on June 23, 2021. Both parties were present for the virtual hearing, along with their witnesses. Agency's failure to comply with the 180 days requirement did not significantly affect Agency's decision to suspend Employee for 120 duty hours. Accordingly, I conclude that Agency's failure to comply with the 180 days requirement as provided in the CBA is harmless error.

3) Whether Agency's action was in accordance with law or applicable regulation

Charge No. 1: Conduct unbecoming an employee; Any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law; Any act which constitutes a criminal offense whether or not the act results in a conviction.

Employee acknowledged in the special report he completed on March 4, 2019; in the interview he had with Shelby; and during the Trial Board Hearing that he was arrested on February 28, 2019 by the GCDP and charged with DUI. Employee also testified that he had a few drinks and drove his vehicle thereafter. Employee knew or should reasonably have known that consuming alcohol and driving was a violation of law. Although Employee was not convicted, he admitted to drinking and driving, and he was charged with a DUI, which constitutes a criminal offense whether or not the act resulted in a conviction. Based on the record, I find that there is substantial evidence in the record to support this charge and specification. I further find that Agency's decision to levy the current charge against Employee was done in accordance with applicable laws and regulations.

Whether the Penalty was Appropriate

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of* Columbia, 502 A.2d 1006 (D.C. 1985).[21] According to the Court in *Stokes,* OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties ("TAP"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency.

[21] *See also Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[22]

In this case, I find that Agency's was taken for cause with regard to the sole charge in this matter. When an Agency's charge is upheld, this Office has held that it will leave the Agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment.[23]

In the instant matter, I find that Agency has met its burden of proof for the charge of Conduct unbecoming an employee; Any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of law; Any act which constitutes a criminal offense whether or not the act results in a conviction.

According to General Order 2016.36, the penalty for a first offense for Conduct unbecoming is 120 duty hours suspension for a first offense.[24] The record shows that this is the first time Employee is being charged with this cause of action. Additionally, Agency did a thorough *Douglas* factors analysis in this matter. Because suspension is the penalty for violation of this cause of action, I conclude that Agency had sufficient cause to suspend Employee for 120 duty hours. As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[25] When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors, and is clearly not an error of judgment. I find that Agency has properly exercised its managerial discretion and its chosen penalty of suspension is reasonable and is clearly not an error of judgment. Accordingly, I conclude that Agency was within its authority to suspend Employee.

Penalty Based on Consideration of Relevant Factors

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[26] The relevant factors are generally outlined in *Douglas v. Veterans Administration*.[27] The evidence does not establish that the

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[22] *Butler v. Department of Motor Vehicles,* OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).
[23] *Id.*; *See also Hutchinson*, *supra*; *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (Sept. 21, 1995).
[24] Agency Answer, *supra*, at Exhibit A.
[25] *Love* also provided that "[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." *Citing Douglas v. Veterans Administration.*
[26] *Butler v. Department of Motor Vehicles,* OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C. Reg. 352 (1985).
[27] 5 M.S.P.R. 313 (1981).

penalty of 120 duty hours suspension constituted an abuse of discretion. In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." Here, Agency has presented evidence that it considered relevant factors as outlined in *Douglas,* in reaching its decision to suspend Employee.[28] The penalty of 120 duty hours suspension was within the range allowed for a first offense. Therefore, I further conclude that Agency's action should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of suspending Employee for 120 duty hours is **UPHELD.**

FOR THE OFFICE:

/s/ *Monica N. Dohnji*
MONICA DOHNJI, Esq.
Senior Administrative Judge

[28] Agency's Brief, *supra*, at Tab 17.