THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
Abraham Evans	) OEA Matter No. 1601-0081-13
Employee	)
	) Date of Issuance: April 6, 2015
v.	)
	) Joseph E. Lim, Esq.
Metropolitan Police Department	) Senior Administrative Judge
Agency	)

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

INITIAL DECISION

PROCEDURAL BACKGROUND

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

Agency was served with a copy of Employee's Petition for Appeal on April 29, 2013, and filed a comprehensive reply document. Agency's response contained nine tabs as attachments, including the complete transcript of the Panel hearing and all of the underlying documents which Agency maintained were supportive of the charges and its election to take action against Employee. The matter was assigned to the undersigned administrative judge (the "AJ"), on February 25, 2014. I held a Prehearing Conference on May 12, 2014. On the parties' request, an amended briefing schedule was issued on July 16, 2014. Agency failed to submit its brief by the deadline but subsequently showed good cause for its failure on December 31, 2014. I closed the record after receiving legal briefs and final arguments from the parties.

JURISDICTION

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

ISSUES

Whether Agency's decision to terminate Employee, based on the Trial Board's recommendation, was supported by substantial evidence; b) Whether Agency committed harmful procedural error; and c) Whether the decision was in accordance with law or applicable regulations, specifically, D.C. Official Code § 5-1031 (a) (2001), otherwise known as the "90-day rule."

Agency's Position:

On June 26, 2012, MPD issued a Notice of Proposed Adverse Action to Employee numbered DRB# 338-12, IS# 09-001645.[1] MPD personally served Employee with the Notice of Proposed Action, which outlined the three charges he was facing. *Id*. Agency alleged that Employee disobeyed Police Orders and Directives by engaging in outside employment without proper authorization from their Assistant Chief/Senior Executive Director and accepting gifts or business favors such as discounts, services, or other considerations of monetary value while on duty with MPD. Agency also alleges that Employee "willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Department Officer to, or in the presence of, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing" when he denied being paid for providing security services at Calvert Woodley Liquor Store.[2]

Agency argues that an Adverse Action Hearing Panel ("Panel"), which consisted of three senior MPD officials, unanimously found Employee guilty of all charges and specifications in an Evidentiary Hearing on January 17, 2013. Agency submits that the evidence supported the charges and that the recommended penalty was appropriate. However, Agency's January 23, 2015, brief ignores the 90-day issue raised by Employee in his August 12, 2014, brief.

Employee's Position:

Employee bases his appeal on four arguments:

1. Agency violated the 90-day rule of D.C. Code §5-1031(a).

2. Agency's decision was not supported by substantial evidence on Charge 1.

3. Agency's decision was not supported by substantial evidence on Charge 2.

4. Agency's decision was not supported by substantial evidence on Charge 3.

1 Agency Tab 2.
2 *Id.*

FINDING OF FACTS

Uncontested Material Facts: [3]

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

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

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

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

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

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

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

8. On November 29, 2011, the United States District Court for the District of Columbia Judge Reggie B. Walton signed an Order dismissing the Indictment against Employee. (Employee Exhibit 2)

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

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

Suspension Without Pay ("SWOP") to Full Duty based on the recommendation of the Internal Affairs Division. (Employee Exhibit 4).

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

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

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

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

14. Agency issued Employee a Notice of Proposed Adverse Action on June 26, 2012, charging Employee with the following Charges and its respective Specifications:[4]

Charge No. 1: Violation of General Order Series 120.21, Part A-16, which states: "Failure to Obey Orders and Directives Issued by the Chief of Police." This misconduct is further defined in General Order Series 201.17, Part IV, which states: "Members shall not engage in outside employment without proper authorization from their Assistant Chief/Senior Executive Director." Further, Part V, G, 2, (b), which states: No member shall engage in outside employment if the "second job" would interfere with the member's scheduled tour of duty on the Department." Part V, G, 4, which states: "Members shall not accept any compensation for services rendered while on duty."

Specification No. 1: In that, between December 15, 2008, and May 4, 2009, you worked outside employment without authorization, providing security for Calvert Woodley Liquor Store, while on duty with the Metropolitan Police Department. Further, you were paid by a store employee on approximately 30 separate occasions for providing security for the liquor store.

Charge No. 2: Violation of General Order Series 120.21, Part A-16, which states: "Failure to Obey Orders and Directives Issued by the Chief of Police." This misconduct is further defined in General Order Series 201.26, B-24, which states in part, "A member shall not accept a gift, or gratuities from organizations, business concerns, or individuals, with whom he/she has, or reasonably could be expected to have official relationship on business of the District Government. Similarly, members are prohibited from accepting personal or business favors such as social courtesies, loans,

4 Agency Tab 2.

discounts, services, or other considerations of monetary value…"

Specification No. 1: In that, on February 12, 2012, you admitted during your interview with the Internal Affairs Division, that you received discounts from the Calvert Woodley Liquor Store and purchased wine, while on duty with MPD.

Charge No. 3: Violation of General Order 120.21, Attachment A, Part A-6, which states: "Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Department Officer to, or in the presence of, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing." As further specified in General Order Series 201, Number 26, which states in part, "…Additionally during the course of an investigation, all members shall respond truthfully to questions by an agent or official of the Internal Affairs Division (IAD)…"

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

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

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

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

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

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

Based on the above uncontested facts, I find that January 21, 2011, at the latest, is the date that Agency knew or should have known of Employee's act or occurrence allegedly constituting cause for his termination. Since January 21, 2011, was the date Employee was indicted in U.S. District Court for receipt of illegal gratuities and illegal supplementation of salary after months of investigation by Agency's Internal Affairs Division and the FBI. At that point in time, the tolling of the ninety day rule of D.C. Code §5-1031(b), would have ended as the investigation of Employee had ended.

Based on the language of D.C. Code §5-1031(a), the ninety days from January 21, 2011, not including Saturdays, Sundays, or legal holidays of Washington's birthday in February, DC Emancipation Day in April, and Memorial Day in May, would have been June 3, 2011. This would have been the deadline for Agency to initiate adverse action against Employee.

LEGAL ANALYSIS, AND CONCLUSIONS OF LAW

Employee is a member of the Fraternal Order of Police (the "Union"), and is covered by a provision of the Collective Bargaining Agreement (the "Agreement") that specifically restricts the scope of this Office's review in adverse actions to the record previously established in the Trial Board's administrative hearing.

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

> On this appeal from the Superior Court, the MPD contends (1) that an evidentiary hearing before the OEA administrative judge was precluded by a collective bargaining agreement between the MPD and the Fraternal Order of Police, a labor union to which Pinkard belongs, [and] (2) that the OEA administrative judge abused her discretion in ordering a second [and *de novo*] evidentiary hearing. . . .
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> As a general rule, this court owes deference to an agency's interpretation of the statute under which it acts. There is, however, an exception to this general rule, which is that we will not defer to an agency's interpretation if it is inconsistent with the plain language of the statute itself. This case falls within the exception because the OEA's reading of the [Comprehensive Merit Personnel Act or CMPA] is contrary to its plain language and inconsistent with it. We therefore hold that, under the statute, the collective

bargaining agreement controls and supersedes otherwise applicable OEA procedures, and consequently, that the OEA administrative judge erred in conducting a second hearing.

The OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives the OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings.

The MPD contends, however, that this seemingly broad power of the OEA to establish its own procedures is limited by the collective bargaining agreement in effect at the time of Pinkard's appeal. The relevant portion of the collective bargaining agreement reads as follows:

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

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

The OEA may not substitute its judgment for that of an agency. Its review of the agency decision in this case, the decision of the trial

> board in the MPD's favor, is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. The OEA, as a reviewing authority, must generally defer to the agency's credibility determinations. Mindful of these principles, we remand this case to the OEA to review once again the MPD's decision to terminate Pinkard, and we instruct the OEA, as the collective bargaining agreement requires, to limit its review to the record made before the trial board.

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

Thus, pursuant to *Pinkard*, an AJ of this Office may not conduct a *de novo* hearing in an appeal before the Office, but must rather base the decision solely on the record below, when all of the following conditions are met:

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

All of these conditions are met in this matter. Thus, according to *Pinkard*, my review of the final Agency decision to terminate Employee is limited "to a determination of whether [the final Agency decision] was supported by substantial evidence,[5] whether there was harmful

[5] According to OEA Rule 628.3, 59 D.C. Reg. 2129 (2012), an agency has the burden of proof in adverse action appeals. Pursuant to OEA Rule 628.1, *id*., that burden is by "a preponderance of the evidence", which is defined as "[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." In

procedural error, or whether it was in accordance with law or applicable regulations."[6] Further, I "must generally defer to the agency's credibility determinations."[7] My review is restricted to "the record made before the trial board."[8]

Whether Agency committed harmful procedural error; and Whether Agency violated D.C. Official Code § 5-1031 (a) (2001), otherwise known as the "90-day rule" in suspending Employee.

The first challenge raised by Employee is that Agency violated D.C. Code Section 5-1031(a), which requires Agency to initiate an adverse action against a sworn member of the police force no later than 90 days from the date Agency "knew or should have known of the act or occurrence allegedly constituting cause." Employee argues that the matter should be dismissed because MPD failed to propose his termination in a timely manner, in that it failed to propose the adverse action within 90 days of when it knew or should have known of the charged conduct. MPD contends that it did act within the 90 day period as its own Internal Affairs investigation ended on June 14, 2012. Less than 90 days later on June 26, 2012, MPD served Employee with a Notice of Proposed Adverse Action.

D.C. Code § 5-1031. Commencement of corrective or adverse action states as follows:

> (a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.
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> (b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of Corporation Counsel, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

In *D.C. Fire and Medical Services Department vs. D.C. Office of Employee Appeals*, 986

Pinkard-type cases previously decided by this Office (including the initial decision in *Pinkard* itself that resulted from the remand), we have held that there must be substantial evidence to meet the agency's preponderance burden. *See, e.g.; Hibben, supra; Davidson, supra; Kelly, supra; Pinkard v. Metropolitan Police Department*, OEA Matter No. 1601-0155-87R02 (December 20, 2002); *Bailey v. Metropolitan Police Department*, OEA Matter No. 1601-0145-00 (March 20, 2003).

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

[7] *Id.*

[8] *Id.* at 92.

A.2d 419 (January 7, 2010), the D.C. Court of Appeals held that 90-day period for Agency to propose removal of technician began to run on the date that a panel of Agency leaders interviewed technician in an investigation of the incident.

In this instance, it is undisputed that Employee initially aroused Agency's suspicions in December 2008 after receiving allegations of misconduct from a Ms. Colter. Agency's Internal Affairs Division initiated surveillance of Employee and two other officers around December 15, 2008. After Agency briefed the United States Attorney's Office regarding its surveillance on January 13, 2009, the FBI also began an investigation of Employee.

Two years later, this investigation culminated in Employee's indictment on January 21, 2011, by the United States Attorney's Office in the U.S. District Court for the District of Columbia on charges of receipt of illegal gratuities and illegal supplementation of salary. Thus, the investigation had ended by this point and the 90-day period began.[9]

Around nine months later on November 29, 2011, the United States District Court for the District of Columbia dismissed the Indictment against Employee. On January 4, 2012, Agency formalized Employee's change of duty status from Indefinite Suspension without Pay to Full Duty based on the recommendation of its Internal Affairs Division. Employee returned to work the same day.

A little more than a month later on February 12, 2012, Agency's Internal Affairs decided to reopen its investigation of Employee.[10] Five months later on June 14, 2012, Internal Affairs completed its investigatory report and recommended that the charges against Employee be sustained. Agency issued Employee a Notice of Proposed Adverse Action on June 26, 2012.

Based on the above facts, it is evident that Agency knew or should have known of Employee's act or occurrence allegedly constituting cause for his termination at the very latest on January 21, 2011, the date Employee was indicted in U.S. District Court for receipt of illegal gratuities and illegal supplementation of salary. After all, it was Agency who started the investigation in 2008 and briefed the U.S. Attorney's Office regarding its allegations.

Yet it was not until roughly a year and a half later on June 26, 2012, that Agency initiated its adverse action against Employee. This is way past the 90-day deadline dictated by D.C. Code § 5-1031. The D.C. Court of Appeals has held that compliance with this code is mandatory, thereby requiring reversal of Agency's adverse action when it is violated.[11]

I therefore conclude that Agency committed a harmful procedural error and violated D.C. Official Code § 5-1031 (a) (2001). Considering this conclusion, I need not address the merits of the findings made by the Panel.

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9 At that point in time, the tolling of the ninety day rule of D.C. Code §5-1031(a), would have ended as the investigation of Employee had ended.

10 Ironically, the U.S. Attorney's Office issued a Letter of Declination for Employee the same month.
11 *Supra, D.C. Fire and Medical Services Department*, 986 A.2d 419.

ORDER

It is hereby ORDERED that:

1. Agency's decision to remove Employee from his position is REVERSED.

2. Agency is directed to reinstate Employee, issue the back pay to which he is entitled and restore any benefits lost as a result of the removal, no later than 30 calendar days from the date of issuance of this Decision.

3. Agency is directed to file with this Office documents within 45 calendar days to reflect its compliance with the directives of this Decision.

FOR THE OFFICE: JOSEPH E. LIM, ESQ.
Senior Administrative Judge