THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
PAUL D. HOLMES,	)	
Employee	)	
	)	
v.	)	OEA Matter No. 1601-0014-07
	)	
	)	Date of Issuance: November 23, 2009
D.C. METROPOLITAN POLICE DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Paul D. Holmes ("Employee") worked as a police officer with the D.C. Metropolitan Police Department ("Agency"). He received a final notice of adverse action charging him with conduct unbecoming an officer and a conviction. The charges stemmed from Employee's alleged sexual assault of Ms. Karmease Washington and Ms. Shanica Mayo, who were under the age of consent at the time of the incident. The alleged incident occurred in Prince George's County, MD. Therefore, Detective Howard, from the Prince George's Police Department, conducted an investigation. During the investigation, Employee voluntarily answered Detective Howard's questions without

counsel.[1] However, during the Agency's Trial Board hearing, Employee elected to invoke his Fifth Amendment right against self-incrimination because of a pending criminal case. Soon after the hearing, Agency issued its Final Notice of Adverse Action removing Employee from his position.[2]

On November 13, 2006, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). He argued that Agency's action was not in accordance with the laws and regulations and that it was not supported by substantial evidence. Therefore, he sought to be reinstated and to receive all back pay and benefits.[3]

Agency responded on December 12, 2006, and argued that the Employee's charges were serious in nature because it resulted in his arrest and were an intentional violation of the law. Agency also provided that because Employee was a police officer, he was in a position of prominence and in constant contact with the public. Therefore, Agency's reputation could be seriously tarnished, and Employee could not repair its image through rehabilitation. Although Employee's lack of past disciplinary actions and his outstanding employment performance were considered, Agency found that these mitigating factors did not outweigh the serious nature of the offense. Accordingly, it requested that the OEA Administrative Judge ("AJ") uphold its decision to remove Employee.[4]

Before the AJ issued her Initial Decision in this matter, she requested briefs on the issues from both parties. Employee expanded on the arguments made in his Petition for

[1] Employee was properly informed of his right to counsel, but he waived his right and spoke with the detective.
[2] *Petition for Appeal,* Attachments #1 and #2 (November 13, 2006).
[3] *Petition for Appeal,* p. 3 (November 13, 2006).
[4] *Agency's Response to Employee's Petition for Appeal,* Tab C (December 12, 2006).

Appeal by also offering that Agency erred in holding his Trial Board hearing while he was the subject of an active criminal investigation. He felt that he had to invoke his Fifth Amendment right during his Trial Board hearing so that no statements could be used against him in his criminal case. He believed that as a result, he was removed from his position without the opportunity to be heard in his defense and was prejudiced when the Trial Board issued its decision to remove him without first allowing him to testify. Hence, Agency's decision should be reversed because it was not based on a full evidentiary hearing as required by D.C. law.[5]

Employee also argued that he could not be found guilty of conduct unbecoming an officer because Agency could not clearly prove when the sexual occurrence took place. Ms. Washington initially stated that the incident occurred in December of 1989. However, she later provided that it happened in December of 1990. The other alleged victim, Ms. Mayo, only provided that the incident happened 15 years prior. Additionally, Detective Howard provided that the date of the alleged encounter was inconclusive.

Moreover, Employee argued that he was in active duty in Operation Desert Storm in December of 1990, when Ms. Washington claimed they engaged in sexual activity. He also suggested that Agency could not prove that he was guilty of a crime solely because he was named as a suspect in a criminal investigation. For those reasons, Employee maintained that Agency's decision must be reversed.[6]

Agency disagreed and challenged that Employee was afforded a full evidentiary hearing and that its decision was based on substantial evidence. It provided that

[5] *Employee's Brief,* p. 7-9 (April 5, 2007).
[6] *Id.*, p. 10-14.

Employee requested a departmental hearing after receiving notice that the charges stemmed from criminal allegations. Employee introduced character witnesses and admitted documents into evidence to support his position during the hearing. Additionally, at no time during the hearing did his attorney object to the hearing moving forward; instead he participated in every aspect of the proceeding. Agency provided that it based its findings on the testimonies presented and drew no adverse inference from Employee invoking his Fifth Amendment right not to testify. Therefore, it is Agency's opinion that Employee was given a full evidentiary hearing consistent with the law.[7]

As to Employee's argument that Agency's decision was not based on substantial evidence, Agency provided that Employee's arguments are merely disagreements over its findings and are not valid grounds for review. It noted that all factual conflicts were reconciled as to when the event took place when it concluded that both victims were still minors. Thus, Agency's finding that Employee engaged in conduct unbecoming an officer was based on substantial evidence and removal was appropriate under the circumstances.[8]

On October 3, 2007, the AJ issued her Initial Decision. As to Employee's claim that he was not afforded a full evidentiary hearing, the AJ reasoned that Employee made a choice not to testify with the knowledge that his prior written statements and interviews were a part of the record. The AJ held that Employee could have requested a postponement of the hearing until the criminal matter was resolved. However, he failed to make the request and instead fully participated in every aspect of the departmental

[7] *Department's Brief,* p. 4-5 (May 2, 2007).
[8] *Id.,* p. 6-8.

proceedings. As a result, she ruled that the departmental hearing did not violate any laws, and Employee's decision not to testify did not deprive him of a full hearing.[9]

Additionally, the AJ found that Agency's decision was based on substantial evidence. She determined that Agency's decisions regarding witnesses' credibility were consistent with documents in the record which proved that the events took place in December 1990, as both alleged victims asserted.[10] The AJ also held that while Employee was not charged with or convicted of a crime, the evidence presented by Agency proved that he was involved in the commission of an act that would constitute a crime because both victims were under the age of consent when the incident occurred. Therefore, after weighing the negative impact that Employee's conduct would have on Agency against any mitigating factors, the AJ found that removal was appropriate in this case and upheld Agency's action.[11]

On November 7, 2007, Employee filed a Petition for Review with the OEA Board. As he provided in his brief, Employee argued that he was not afforded a full evidentiary hearing. He highlighted several cases where employees were told that if they did not answer questions concerning allegations, they would be subject to removal from their positions.[12] He, again, contended that the charge of conduct unbecoming an officer was not based on substantial evidence by outlining that Agency could not clearly prove

[9] *Initial Decision,* p. 7-8 (October 3, 2007).
[10] The AJ also referenced Employee's failure to provide adequate documentation to prove that he was in Operation Desert Storm during December 1990.
[11] *Initial Decision,* p. 8-10 (October 3, 2007).
[12] *Garrity v. New Jersey,* 385 U.S. 493, 87 S.Ct. 616 (1967); *Silver v. McCamey,* 221 F.2d 873, 95 U.S. App. D.C. 318 (D.C. Cir. 1955); and *United States v. Freidrick,* 842 F.2d 382, 268 U.S. App. D.C. 386 (D.C. Cir. 1988).

when the sexual occurrence took place.[13] He also asserted that the AJ's allegation and subsequent ruling that he was not in Operation Desert Storm at the time was *de novo* in nature and should reversed. Finally, Employee contested that the AJ's decision that he was guilty of a crime was premature and not based on substantial evidence. He proceeded to argue that the records more accurately reflect that the sexual act occurred between 1992 and 1996 when he was in possession of the Camaro automobile that one of the alleged victims said he drove during the incident. Employee then contends that if this were the case, the victims were both of the age to consent to the sexual act. Therefore, no crime was committed.[14]

This Board believes that Employee was afforded a full evidentiary hearing. As the AJ provided, he made a voluntary decision not to testify during the Trial Board hearing. We do not deny that the decision not to testify was a difficult choice to make, however, Employee could have easily requested a postponement of the hearing instead of pleading the Fifth Amendment and not testifying.[15]

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[13] Employee emphasized the discrepancy in Ms. Washington's testimony that the incident occurred in 1989 instead of 1990. He reasoned that if the incident occurred in 1989, then he could not be found guilty of conduct unbecoming an officer because the incident occurred before he was employed with the Metropolitan Police Department.

[14] *Petition for Review* (November 7, 2007).

[15] As for the cases cited by Employee in his Petition for Review, we find that the facts in those cases differ from those offered in this matter. Unlike the employees in those cases, there does not appear to be any evidence of coercion in this case. In *Garrity*, the employee was told to testify during the investigation or forfeit his job. In the current case, Employee voluntarily elected to speak with Detective Howard without counsel present after he was advised that he could seek counsel. *Agency's Response to Employee's Petition for Appeal*, Tab C, p. 14 (December 12, 2006) and *Department's Brief*, Agency's Exhibit #3 (May 2, 2007). In light of the fact that Agency did not force Employee to chose between providing a statement to Detective Howard or lose his job, the facts of this case do not rise to the level of *Garrity*. It appears that Employee wants this Board to assume that there was wrongdoing on Agency's part because it moved forward with the proceeding instead of issuing a stay. However, according to District of Columbia Municipal Regulations, Title 6A, Chapter 10, Section 1000.7, Employee had up to 24 hours before the proceedings to request a continuance of the hearing. He elected not to.

As for Employee's conduct unbecoming an officer argument, he offers three primary assertions – that he was in Operation Desert Storm in December of 1990; that the sexual act could have taken place in 1989; or that the act occurred between 1992 and 1996. Employee contends that he was in active duty from September 20, 1990 until May 14, 1991. He also provided that during this 7-month period, he was in Foreign Service for 5 months and 15 days. Examining this argument on its face, this leaves at least one and one-half months for which Employee does not provide an account for his whereabouts. He offers no evidence to prove that he was not in the DC/Maryland area during December of 1990. Therefore, we cannot assume that he was in Operation Desert Storm during this period as he contends.

Moreover, Employee's argument that the incident could have occurred in 1989, thereby relieving him of the charge of conduct unbecoming an officer, fails. Employee's own statements to Detective Howard refute this argument. During the investigation, Employee told the detective that he remembered that the incident occurred while he was an officer with the Metropolitan Police Department. He did not become a police officer with Agency until July 2, 1990. Therefore, the sexual act could not have occurred in 1989 as he suggests.[16]

OEA has consistently held that it will not question an agency's credibility

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Silver also differs from the current case because Employee was not subjected to an administrative hearing without his consent. Instead, Employee requested a departmental hearing in this matter. *Department's Brief*, Agency Exhibit #2 (May 2, 2007). Similarly, the *Freidrick* case is also distinguishable because the employee in *Freidrick* signed a form that *required* him to provide information in his case which could not be used against him in subsequent criminal prosecution. The form also provided that sanctions, including dismissal, could be used against employee if he did not submit to questioning. This clearly does not match the facts in this case.

[16] *Department's Brief*, Agency Exhibit #4, Attachment #9 (May 2, 2007).

determinations. The Court in *District of Columbia Metropolitan Police Department v. Elton L. Pinkard,* 801 A.2d 91-92 (D.C. 2002), held that OEA may not substitute its judgment for that of an agency, and it must generally defer to the agency's credibility determinations made during its trial board hearings. Similarly, the Court in *Metropolitan Police Department v. Ronald Baker,* 564 A.2d 1155 (D.C. 1989), ruled that great deference to any witness credibility determinations are given to the administrative fact finder. In this case that would be Agency.[17]

However, if we ignore both alleged witnesses' testimonies that the sexual encounter occurred in 1990, when they were both minors, and instead believe Employee's argument that the act occurred in 1992, this does not negate the charge that Employee committed an act constituting a crime. Because Ms. Mayo was born in 1977, she would have only been 15 years old in 1992.[18] According to Detective Howard, if Employee had sex with someone under the age of 16 in Maryland it was a criminal offense. Therefore, his argument that the sexual encounter could have taken place in 1992 does little to relieve him of the adverse action charges. Furthermore, Employee offers no tangible evidence that the incident occurred between 1993 and 1996, other than those were the years he owned a Camaro.

Although it is hard to determine how much weight Agency gave to witness testimonies, Ms. Washington and Ms. Mayo's account that the incident occurred in 1990 are credible and are supported by the record. The record also adequately supports

[17] The Court in *Baker* as well as the Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.

[18] Ms. Washington would have been 16 years old in 1992.

Agency's decision that Employee committed an act constituting a crime. Thus, we believe that Agency's action was based on substantial evidence. Because removal was within the range of penalties for this adverse action charge, we hereby deny Employee's Petition for Review.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED.**

FOR THE BOARD:

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Sherri Beatty-Arthur, Chair

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Barbara D. Morgan

_____
Richard F. Johns

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Hilary Cairns

_____
Clarence Labor, Jr.

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.