Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	
v.	)	OEA Matter No.: 1601-0040-21R24
	)	
	)	Date of Issuance: May 30, 2024
D.C. FIRE & EMERGENCY	)	
MEDICAL SERVICES DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER ON
MOTION FOR INTERLOCUTORY APPEAL

Employee worked as a Firefighter/Emergency Medical Technician ("FF/EMT") with the Department of Fire and Emergency Services ("Agency"). On August 7, 2020, Agency issued a Proposed Notice of Adverse Action, charging Employee with neglect of duty; unreasonable failure to give assistance to the public; and violation of Agency consent/refusal of care policy.[2] The first charge alleged that Employee neglected her duties as a FF/EMT and unreasonably failed to aid a member of the public during an emergency call.[3] The second charge asserted that she violated the

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Charge No. 1 contained two causes of action as a basis for misconduct: neglect of duty and unreasonable failure to give assistance to the public.

Pre-Hospital Treatment Protocols by failing to properly document the Electronic Patient Care Report ("ePCR") for the incident. Her termination became effective on July 31, 2021.[4]

The OEA Administrative Judge ("AJ") issued an Initial Decision on September 7, 2022. The AJ held that the Trial Board met its burden of proof in establishing that Charge No 1., Specification No. 1 was supported by substantial evidence. As it related to Charge No. 2, Specification No. 1, the AJ acknowledged that Employee pleaded guilty to this charge and specification during the Trial Board Hearing. As a result, she held that Charge No. 2 was supported by substantial evidence.[5] However, the AJ concluded that Agency utilized the incorrect version of the District Personnel Manual ("DPM") in administering its adverse action. She ruled that Agency erred in relying on the 2012 iteration of DPM, instead of the 2017 version of the regulations, which were in effect at the time of the adverse action. As a result, the AJ held that Agency's failure to utilize the correct regulations constituted a harmful procedural error. Therefore, Agency's termination action was reversed.[6]

Agency sought judicial review of the Board's decision in the Superior Court of the District of Columbia. It argued that the Initial Decision should be reversed or remanded because the AJ:

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[4] *Agency Answer to Petition for Appeal* (October 27, 2021). 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 it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; 3) the employee's past disciplinary record; 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties; 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; 7) consistency of the penalty with any applicable agency table of penalties; 8) the notoriety of the offense or its impact upon the reputation of the agency; 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; 10) potential for the employee's rehabilitation; 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[5] *Id*.

[6] *Id*.

(1) incorrectly based her decision on an issue raised sua sponte without briefing from the parties; (2) based her conclusions of law on an argument that was waived by Employee before the Trial Board; (3) erred in determining that the Trial Board committed a harmful procedural error by applying the wrong version of the DPM; (4) erroneously held that Employee's actions at issue were reasonable; and (5) erred by failing to address Agency's argument that OEA was estopped from ordering Employee's reinstatement. After ordering briefs and holding oral arguments, Superior Court issued a February 16, 2023, Order Vacating the Initial Decision of the Office of Employee Appeals and Remanding the Case.[7]

Relying on the holding in *Smith v. United States*, 2023 D.C. App. LEXIS 345, *20-22 (D.C. December 21, 2023), the Court noted that neither party cited to a statute, rule, or judicial decision which required the OEA AJ to provide Agency an opportunity to be heard prior to reversing an adverse action. However, it reasoned that a better practice in the spirit of judicial fairness is to "provide a party against which an adverse ruling is contemplated reasonable notice and an opportunity to be heard on the issue."[8] As a result, the matter was remanded to OEA for reconsideration on at "least two issues following full briefing and argument – and, if necessary, the presentation of evidence – by the parties: (1) the propriety of [Agency's] application of the 2012 DPM – rather than the 2017 DPM – to its determination whether [Employee's] conduct was subject to discipline, and (2) whether Employee waived her right to challenge her discipline…by failing to raise the issue before the Trial Board."[9]

The AJ subsequently issued a February 26, 2024, order directing the parties to address the following: 1) the propriety of Agency's application of the 2012 DPM – rather than the 2017 DPM

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[7] *Order Vacating the Initial Decision of the Office of Employee Appeals and Remanding the Case*, Case No. 2023-CAB-001068 (D.C. Super. Ct. February 16, 2024).
[8] *See Smith* at 20.
[9] *Id.*

– to its determination of whether Employee's conduct was subject to discipline, and (2) whether Employee waived her right to challenge her discipline on the ground that her conduct was not subject to discipline by failing to raise the issue before the Trial Board.[10] On March 5, 2024, Employee filed a Motion for Leave to Conduct Limited Discovery and to Stay the Briefing Schedule. Her motion requested the opportunity to propound discovery requests upon Agency and the International Fire Fighters, Local 36, AFL-CIO MCW Union ("Local 36").[11] Agency filed an opposition to Employee's motion, arguing that discovery is not permitted in matters covered by *Pinkard v. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2006).[12] According to Agency, the February 16, 2024, remand order from Superior Court only directed the AJ to elicit additional briefing, and if necessary, the presentation of additional evidence on the issue of waiver and the application of the 2012 DPM. Thus, it submitted that the AJ's remand order exceeded the scope of the Court's directives.[13]

On March 20, 2024, the AJ issued an order granting Employee's Motion for Leave to Conduct Limited Discovery and subsequently held a status conference on March 26, 2024. On the same day, the AJ directed Agency to submit the Collective Bargaining Agreement ("CBA") with

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[10] *Order for Briefs* (February 26, 2024).
[11] *Employee's Motion for Discovery and to Stay Briefing* (March 5, 2024).
[12] Under the holding in *Pinkard*, 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: the appellant is an employee of the Metropolitan Police Department or the D.C. Fire and Emergency Medical Services Department; the employee has been subjected to an adverse action; the employee is a member of a bargaining unit covered by a collective bargaining agreement; the collective bargaining agreement contains language essentially the same as that found in *Pinkard*; and at the agency level, the 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 being taken against Employee.
[13] *Agency's Opposition to Request for Discovery and to Stay Briefing* (March 11, 2024). Employee filed a reply to Agency's opposition, contending that Superior Court remanded the matter for further findings on the question of whether Agency bargained with Local 36 regarding the abrogation of the relevant DPM sections. She further posited that the OEA AJ cannot make such findings without ordering the submission of records from Agency, Local 36, and those persons who purportedly bargained. Thus, it is Employee's position that bargaining never occurred, and she opines that Agency's continued use of the 2012 DPM was a result of default passivity or clerical error. *See Employee's Reply in Support of Her Motion for Leave to Conduct Discovery and to Stay the Scheduling Order* (March 14, 2024).

Local 36 that was in effect at the time Employee's termination action was initiated.[14] On April 12, 2024, Agency filed a Notice Responsive to March 26, 2024, Order. It reiterated its previous position that OEA may not compel discovery or reopen the record in a matter governed by *Pinkard*; however, Agency conceded that this Office is permitted to take judicial notice of facts not subject to reasonable dispute.[15]

On April 18, 2024, the AJ issued an order granting Employee's request for limited discovery and directed the parties to address several issues outlined in the Superior Court's remand order. The order acknowledged receipt of the CBA between Agency and Local 36 which was executed in September of 2018. The order also granted limited discovery to Employee to ascertain whether Agency and Local 36 were engaged in impacts and effects bargaining of the 2017 DPM at the time of the current adverse action.[16]

On April 30, 2024, Agency filed a Motion for Certification of Interlocutory Appeal to the OEA Board and Request for Stay of Proceedings. According to Agency, the AJ's remand order granting Employee's request for leave to conduct discovery unlawfully opens this matter up for discovery, as well as a broad ranging evidentiary proceeding into bargaining between Agency and Local 36. It asserts that the AJ's directives to engage in discovery or to present new documentary evidence on remand are precluded by the holding in *Pinkard* as well as the CBA. Agency opines that nothing within the Court's remand order directed OEA to allow discovery. Instead, it posits that the AJ is limited to ordering direct briefing on the questions presented by Superior Court and any other question consistent with the remand order. Additionally, Agency reasons that the AJ's

[14] *Order* (March 26, 2024).
[15] *Agency's Notice Responsive to March 26, 2024, Order* (April 12, 2024).
[16] *Order for Briefs* (April 18, 2024). As discussed herein, the AJ's order also directed the parties to address five other issues related to Superior Court's remand order.

broad ranging inquiry into bargaining between the parties exceeds this Office's limited role under *Pinkard* and OEA's subject matter authority.[17]

It further believes that the Board should direct that briefing proceed on the issue of waiver first because a tribunal should not address complex issues of first impression when a matter can be decided on well-established law. Consequently, Agency requests that the AJ's briefing order be vacated with instructions to: (1) bar the consideration of any evidence not presented to the Trial Board and (2) limit the consideration of issues to those presented in the Court's remand order or by the parties.[18] On May 2, 2024, the AJ issued an order granting Agency's motion and certified the matter to the OEA Board for Consideration.

<u>Discussion</u>

An interlocutory appeal is an appeal that is taken before there has been a final ruling on a case. OEA Rule 619 *et seq*. sets forth the following rules with respect to interlocutory appeals:

> 619.1 The Administrative Judge may permit an interlocutory appeal if they determine that the issue presented is of such importance to the proceeding that it requires the Board's immediate consideration.
>
> 619.2 A party seeking review by interlocutory appeal must file a motion for certification within five (5) business days of service of the Administrative Judge's determination. The motion shall include arguments in support of both the certification and the determination to be made by the Board.
>
> 619.3 The Administrative Judge shall grant or deny a motion for certification.
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> 619.4 If certification is granted, the record shall be referred to the Board and the Board shall make a decision on the issue. The Administrative Judge shall proceed in accordance with the Board's decision.

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[17] *Motion for Certification of Interlocutory Appeal to the OEA Board and Request for Stay of Proceedings* (April 30, 2024).
[18] *Id*.

The certificate of service on the AJ's Order for Briefs reflects that it was issued on April 18, 2024. Agency's Motion for Certification of Interlocutory Appeal to the OEA Board and Request for Stay of Proceedings was filed with this Office on April 30, 2024. Under OEA Rule 619.2, Agency's motion is untimely.[19] Notwithstanding, because of the complex nature of Employee's appeal, this Board will consider Agency's motion.

Agency argues that the AJ's April 18, 2024, order for briefs and granting Employee's motion for leave to conduct limited discovery exceeds the bounds of the Court's remand instructions. Therefore, it requests that this Board vacate the AJ's order with instructions to bar the admission of any new evidence not submitted to the Trial Board and limit the consideration of issues to those presented by the remand order. We agree and find that the AJ's briefing order exceeds the scope of the Court's instructions to OEA on remand.

At issue in this interlocutory appeal is whether the AJ's April 18, 2024, briefing order goes beyond the bounds of Superior Court's February 16, 2023, instructions on remand. In its Order Vacating the Initial Decision of the Office of Employee Appeals and Remanding Case, the Court noted that while neither party has cited any statute, rule, or decision that required the AJ to give Agency an opportunity to be heard before reversing its termination action on a ground raised sua sponte, "a better practice – certainly one more consistent with fundamental procedural fairness – is to give a party against which an adverse ruling is contemplated reasonable notice and an opportunity to be heard on the issue."[20] The Court went on to rule as follows:

> "In the circumstances, the court concludes that the case should be remanded to OEA for reconsideration by the Administrative Judge of *at least* two issues following *full briefing and argument*—and, if necessary, *the presentation of evidence*—by the parties: (1) the propriety of [Agency's] application of the 2012 DPM—rather than the 2017 DPM—to its determination of whether [Employee's]

[19] *See* OEA Rule 603.1.
[20] *Order Vacating the Initial Decision of the Office of Employee Appeals and Remanding the Case* at p. 2.

> conduct was subject to discipline; and (2) whether [Employee] waived her right to challenge her discipline on the ground that her conduct was not subject to discipline by failing to raise the issue before the [Agency] Trial Board."[21]

The AJ's April 18, 2024, Order for Briefs granted Employee's motion for leave to conduct discovery and directed the parties to address the following issues:

1. Whether Article 31, Section A of the September 5, 2018, CBA specifically referenced Chapter 16 of the 2012 DPM and/or Chapter 16 of the 2017 DPM;

2. Whether there is a conflict between the 2018 CBA and the 2017 DPM version which was in effect at the time of the current adverse action;

3. Whether the parties were engaged in impacts and effects bargaining regarding Chapter 16 of the 2017 DPM at the time the current adverse action occurred. The parties must provide documentary evidence in support of their position;

4. The propriety of Agency's application of the 2012 DPM – rather than the 2017 DPM – to its determination whether [Employee's] conduct was subject to discipline even though the governing and applicable CBA was executed in 2018, one year after the 2017 DPM [was executed] and approximately six years after the 2012 DPM version was enacted; and

5. Whether Employee waived her right to challenge her discipline on the ground that her conduct was not subject to discipline by failing to raise the issue before the Trial Board.

In *District of Columbia Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2000), the D.C. Court of Appeals set forth the principle that under certain conditions, an Administrative Judge is bound by the record established at the agency level and may not conduct a *de novo* hearing in the event an employee files an appeal with this Office. The agency in *Pinkard* argued before the Court that: (1) a *de novo* evidentiary hearing before the OEA AJ was precluded by a CBA between the Metropolitan Police Department and the Fraternal Order of Police, a labor

[21] *Id.* at p. 2-3.

union to which Pinkard belonged, (2) OEA abused its discretion in ordering a second evidentiary hearing, and (3) there was not substantial evidence to support OEA's findings. The *Pinkard* court agreed and held that the CBA between the employee's union and the Metropolitan Police Department barred an evidentiary hearing before OEA as to whether officer's conduct warranted termination, given that hearing was previously conducted before MPD trial board. Accordingly, the following conditions must be present to invoke the *Pinkard* standard:

> 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, 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.

Where all of these conditions are present, OEA's review of an agency decision is then limited to a determination of whether: (1) the adverse action was supported by substantial evidence; (2) whether there was harmful procedural error; (3) or whether the agency's action was in accordance with law or applicable regulations."[22]

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[22] *Pinkard*, 801 A.2d 86, 92.

Moreover, in *Edwards v. D.C. Fire & Emergency Services*, OEA Matter No. 1601-0004-08, *Opinion and Order on Motion for Interlocutory Appeal* (May 23, 2008), the OEA Board reiterated the Court of Appeal's holding in *Pinkard*. In *Edwards*, the employee filed a motion for interlocutory appeal with the OEA Board following the AJ's denial of their post-Trial Board hearing discovery request in a matter governed by *Pinkard*. The OEA Board ruled that all of the conditions required under *Pinkard* were satisfied. Therefore, it held that the AJ's decision must be based solely on the record established at the trial board level. It further concluded that based on the restraints established in *Pinkard*, there can be no additional discovery ordered by the AJ.

Finally, the CBA in this case contains a provision that employee appeals of adverse personnel actions to OEA are decided on the administrative record. Article 31, Section 31(f)(7) of the CBA provides the following in pertinent part:

> "…[t]he affected employee may appeal the Fire and EMS Chief's decision to the District of Columbia Office of Employee Appeals, as permissible and in accordance with the Office's Rules and Regulations. Appeals of decisions premised upon Trial Board recommendations shall be based solely on the record established in the Trial Hearing.[23]

This Board agrees with Agency's argument that Superior Court's remand instructions do not contemplate Employee's request for leave to conduct additional discovery. The parties have not disputed that each of the conditions presented in *Pinkard* have been met. In *Pinkard* matters, this Office reviews appeals from the lens of an appellate tribunal, rather than a trial court. Thus, new fact finding is explicitly prohibited. Additionally, the presentation of new evidence on remand would run afoul of the CBA and the Court's ruling in *Pinkard*. Further, this Office has consistently

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[23] *Agency's Notice Responsive to March 26, 2024, Order* (April 12, 2024).

restricted its review of matters governed by *Pinkard* to a review of the record established at the Trial Board level.[24]

While the AJ's remand order does not seek to conduct a *de novo* evidentiary hearing or relitigate the facts underlying Agency's termination action or the Trial Board's hearing panel, it does request the parties to address three issues not specifically outlined in the Court's February 16, 2023, order. It further grants Employee request for limited discovery. Thus, we believe that the AJ's order exceeds the scope of the directives on remand since OEA is limited to reviewing the record established at the Trial Board level.

Lastly, concerning waiver, Agency asks this Board to order briefing on the issue first because a tribunal should not adjudicate complex issues of first impression when a matter can be decided on well-established law. We disagree and find that for the purposes of judicial efficiency, the AJ's decision to have the parties address the issues presented in the Court's remand order contemporaneously is not only reasonable, but consistent with the Court's remand instructions.

Based on the foregoing, this Board finds that the presentation of new evidence to on remand is precluded in a matter governed by *Pinkard*. The CBA further provides that the AJ's review of Agency's termination action is limited solely to the record established at the Trial Board. Additionally, Superior Court's February 16, 2023, remand order does not permit Employee's request to engage in discovery with Agency. The Court's remand order only directs full briefing, argument, and if necessary, the presentation of evidence on two issues: (1) the propriety of Agency's application of the 2012 DPM – rather than the 2017 DPM – to its determination of

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[24] *Employee v. DC Fire & EMS Services*, OEA Matter No. 1601-0082-22 (April 15, 2024); *Employee v. DC Fire & EMS Services*, OEA Matter No. 1601-0002-22 (July 1, 2022); *Employee v. DC Fire & EMS Services*, OEA Matter No. 1601-0078-18 (August 26, 2019); *Employee v. DC Fire & EMS Services*, OEA Matter No. J-0049-16 (January 2, 2018); *Employee v. DC Fire & EMS Services*, OEA Matter No. 1601-0039-17 (April 30, 2018); and *Employee v. DC Fire & EMS Services*, OEA Matter No. 1601-0173-12 (February 2, 2015).

whether Employee's conduct was subject to discipline, and (2) whether Employee waived her right to challenge her discipline by failing to raise the issue before the Trial Board. Accordingly, we find that the last two issues outlined in the AJ's briefing order are consistent with the Court's instructions on remand. Accordingly, we must remand this matter to the AJ for proceedings consistent with this order.

ORDER

Accordingly, it is hereby **ORDERED** that this matter is **REMANDED** to the Administrative Judge for further proceedings consistent with this opinion.

FOR THE BOARD:

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Clarence Labor, Jr., Chair

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Peter Rosenstein

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Dionna Maria Lewis

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Arrington L. Dixon

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.