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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	OEA Matter No.: 1601-0111-11
ROBERT LELAND,)	
Employee)	
)	Date of Issuance: June 27, 2013
v.)	
)	
D.C. FIRE & EMERGENCY)	
MEDICAL SERVICES DEPARTMENT,)	
Agency)	Sommer J. Murphy, Esq.
)	Administrative Judge
<hr/>		
Sandy Thomas-Bellamy, Esq., Employee Representative		
Frank McDougald, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On May 24, 2011, Robert Leland (“Employee”), filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “the Office”) contesting the D.C. Fire and Emergency Medical Services Department’s (“Agency” or “Department”) actions of: 1) suspending Employee for four hundred (400) hours; 2) demoting Employee to the rank of Lieutenant. Employee was previously ranked as a Captain with Agency.

The events which formed the basis for Employee’s discipline occurred in March and April of 2010. Employee’s suspension and demotion was based on the following charge: “Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations.” Specifically, Employee was cited with violating D.C. Fire & EMS Special Order 9, Series 2010, as discussed *infra*.

On February 9, 2011, Agency’s Fire Trial Board (“Board”) held a hearing regarding the administrative charges against Employee in accordance with the Collective Bargaining Agreement (“CBA”) between Agency and Employee’s union. The Board found Employee guilty on Charge No. 1, Specification Nos. 1-10. The Board recommended that Employee be suspended for a total of four hundred (400) hours, in addition to being demoted from the rank of Captain to

Lieutenant. On April 29, 2011, Agency's Chief, Kenneth B. Ellerbe notified Employee that the Board's recommendations were accepted.

Employee subsequently filed an appeal with this Office. The undersigned Administrative Judge ("AJ") held a status conference on October 3, 2012, for the purpose of assessing the parties' arguments in the instant appeal. I subsequently ordered the parties to submit briefs addressing whether the decision of the Trial Board should be overturned. Employee and Agency complied with the Undersigned's order. Because the Undersigned is precluded from conducting a de novo examination on the merits of this appeal, as discussed *infra*, an evidentiary hearing was not held. The record is now closed.

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

STATEMENT OF THE CHARGES

Charge No. 1: Violation of the D.C. Fire & EMS Order Book, Article VII, Section 2 which states, "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations." This misconduct is further defined in the D.C. Fire & EMS Special Order 9, Series 2010, which states, "In order to ensure the strictest confidentiality in the upcoming examination, these Members (i.e., Captain Robert Leland) have been sequestered. Members of the Department are to avoid and refrain from any direct or indirect contact with these members until after the completion of the examination process. In the event of an emergency, Battalion Fire Chief Gerard Coles will serve as a point of contact for these Members throughout the process." This misconduct is defined as cause, to wit: "Neglect of Duty" in 6B D.C.M.R. § 1603.3(f)(3), 55 DCR 1775 (February 22, 2008).

Specification No. 1: During the period of sequestration as a Subject Matter Expert for the 2010 Promotional Examination, you had contact with Firefighter Michael Cosker;

- Specification No. 2:** During the period of sequestration as a Subject Matter Expert for the 2010 Promotional Examination, you had contact with Battalion Fire Chief Sean Greene.
- Specification No. 3:** During the period of sequestration as a Subject Matter Expert for the 2010 Promotional Examination, you had contact with Lieutenant Tawana Robinson;
- Specification No. 4:** During the period of sequestration as a Subject Matter Expert for the 2010 Promotional Examination, you had contact with Firefighter Christopher Maddox;
- Specification No. 5:** During the period of sequestration as a Subject Matter Expert for the 2010 Promotional Examination, you had contact with Firefighter Joshua Krauel;
- Specification No. 6:** During the period of sequestration as a Subject Matter Expert for the 2010 Promotional Examination, you communicated via text with Captain Richard Zegowitz;
- Specification No. 7:** During the period of sequestration as a Subject Matter Expert for the 2010 Promotional Examination, you communicated via Facebook with Firefighter Alford Williams;
- Specification No. 8:** During the period of sequestration as a Subject Matter Expert for the 2010 Promotional Examination, you communicated with Firefighter Ebony Robinson;
- Specification No. 9:** During the period of sequestration as a Subject Matter Expert for the 2010 Promotional Examination, you communicated with Lieutenant Robert Washington; and
- Specification No. 10:** During the period of sequestration as a Subject Matter Expert for the 2010 Promotional Examination, you communicated with Lieutenant David Hibben.”

The two documents as issue in this case are Agency's Special Order 9 and the 2010 Promotional Exam Confidentiality Agreement, which state the following:

Confidentiality Agreement

You have been selected to serve as a subject matter expert (SME) for the 2010 Promotional Examination for the D.C. Fire & Emergency Medical Services Department (FEMS). As an SME, you are prohibited from directly or indirectly discussing, disclosing or releasing any information related to the promotional exam, promotional exam questions or promotional activities with anyone, especially members of the FEMS.

Failure to comply with the express terms of this Confidentiality Agreement will result in appropriate disciplinary action being taken, including termination.¹

Special Order 9

Subject Matter Experts—2010 Promotional Examination Process,
Effective Date, March 23, 2010

The following members have been identified as the Subject Matter Experts for the Department's Promotional Examination.

Fire Officer Process:

Captain Robert Leland

(Other employee names have been omitted by the Undersigned for privacy purposes).

EMS Process:

(Employee names have been omitted by the Undersigned for privacy purposes).

In order to ensure the strictest confidentiality in the upcoming examination, these Members have been sequestered. Members of the Department are to avoid and refrain from any direct or indirect contact with these members until after the completion of the examination process. In the event of an emergency, Battalion Fire Chief Gerald Coles will serve as a point of contact for these Members throughout the process.²

¹ The confidentiality agreement was issued by Assistant Fire Chief Alfred Jeffery to Employee on March 12, 2010. The agreement was signed and dated by Employee on the same day.

² Employee Brief, Attachment 1 (February 4, 2013). The Order was signed by Fire & EMS Chief Dennis L. Rubin.

SUMMARY OF THE TESTIMONY

On February 9, 2011, Agency held a Trial Board disciplinary hearing. The following represents a summary of the testimony given during the hearing as provided in the transcript (hereafter denoted as "Tr.") which was generated following the conclusion of Employee's proceeding. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their positions.

Battalion Chief Gerald Coles testified in relevant part as follows:

Battalion Fire Chief Gerald Coles ("Coles") served as a liaison during the 2010 promotional process. As a liaison, Coles was responsible for keeping employees ("members") on task and responding to any requests that members of the process had. According to Coles, Battalion Chief John Briscoe would have been Employee's first level of supervision. Tr. at 16. Briscoe would then contact Coles to coordinate any requests that members of the promotional process had. He testified that he had no knowledge of Employee making contact with any members of Agency during the process. Tr. at 17. Coles also stated that he believed there was a standing order that provides written guidance pertaining to the scope of allowable interactions between Subject Matter Experts ("SME" or "SMEs") and members of the promotional process during the period of sequestration. Tr. at 24. He testified that members of the process could have incidental contact with SMEs during sequestration so long as there was no discussion of the exam. Coles only had contact with Employee one time during orientation at the Reeves center. Tr. at 27.

Sandra Denise Smith testified in relevant part as follows:

Sandra Denise Smith ("Smith") is assigned to Agency's Logistics Division. During the 2010 promotional process, she performed administrative work. This involved assisting with lodging, catering, and speaking with members on the phone. Tr. at 31-32. Smith testified that she was present when the members first signed their written confidentiality agreements. Smith recalled that Employee had a question after reading the agreement. Tr. at 32.

Battalion Chief John Briscoe testified in relevant part as follows:

John Briscoe ("Briscoe") served as a Battalion Fire Chief on the test-writing committee during the 2010 promotional process. In this capacity, Briscoe was responsible for serving as a facilitator or "buffer" between members of the committee and Agency. He testified that Employee approached him with some concerns about the technical exam. Tr. at 36. According to Briscoe, members of the committee were instructed to inform him of any interactions they had with restricted persons. Briscoe would then pass that information on to Chief Coles or Chief Jackson. Tr. at 40. Briscoe further opined that, by signing the confidentiality agreement during sequestration, members of the promotional process agreed not to discuss anything about the exam with employees in the Department outside of the members of the test-writing committee. Tr. at 45.

Assistant Fire Chief Kenneth Jackson testified in relevant part as follows:

Kenneth Jackson ("Jackson") is an Assistant Fire Chief with Agency. Jackson served as the agency administrator during the 2010 promotional process. Tr. at 65. His duties included overseeing the testing information, and serving as the main contact for the SMEs and Chiefs. Jackson stated that all SMEs who were selected would be required to review and sign a confidentiality statement. The SMEs were also told that they were not to have any contact with any members of the agency outside of the members who are SMEs or the chief officer who presided over the process. Jackson testified that SMEs were also informed that a violation of the rules could result in termination. Tr. at 66-67. According to Jackson, Employee disclosed to him that he had a roommate that was an employee of the D.C. Fire & EMS. Jackson testified that Employee provided a special report to Chief Jeffery on March 15, 2010 to disclose this information prior to the sequestration period. Tr. at 67-69. Jackson stated in pertinent part the following:

"The problem I have with this situation with Captain Leland, and I expressed this to him when I met with him and had the conference with him, it's not that all of these things were going on, it's not that he even wanted to get contact with those people, that he could not participate in the run or whatever the case may be. The biggest thing is that we had a mechanism in place for him to do that. And that's all he had to do was follow that, and I had explained that to him on several occasions, more than once. I had talked to every SME in that room even after meeting with him to give him the confidentiality statement, if for any reason you have to contact anybody...you can contact me directly and say that I need to get this information to somebody." Tr. at 72; 78-79; 82.

Jackson also stated that Employee was not restricted from having any contact with his roommate because Agency was made aware of his living situation via Employee's written request. Tr. at 77. According to Jackson, there were other SMEs in previous years who resided with roommates in the Department. Tr. at 79. He further testified that a person in Employee's situation would be provided with a mechanism for handling communication with restricted persons during the sequestration period. Tr. at 80. Jackson stated that Agency did not know about the other people Employee contacted during his sequestration period. SMEs are instructed to tell a person that approaches them during this time that they are forbidden from having any contact with them, unless the communication is facilitated via the proper mechanism. Tr. at 81. The order preventing communication during the sequestration period is distributed to the entire Department ("Special Order 9"). According to Jackson, Special Order 9 did not specifically apply to Employee; however, Employee had already been instructed on how to contact anyone in the agency. Tr. at 82.

To the best of his knowledge, Jackson did not believe that Employee's interactions with other Department employees during the 2010 promotional process compromised the actual exam scores or test information. Tr. at 83. Jackson further testified that he had a conference with Employee, during which he reiterated that Employee was not to have any contact with members

of the Department. When asked by Jackson why he had contact with restricted persons, Employee said that he “messed up.” Tr. at 84. When questioned, Jackson stated that, while the policy regarding the mechanism for handling communication during the sequestration period is not written, it was given by verbal order. SMEs have the contact information for the Fire Chiefs, and can call them if approached by another Department. Tr. at 86. Jackson testified that if a SME was to contact a prohibited person via text message during the sequestration process to ask if the assessment center was still on schedule, and the SME replied in the affirmative, this communication would be a violation of the confidentiality agreement. Tr. at 92-93.

Jackson stated that he didn’t know if Employee was remorseful at the time of their meeting because of the high number of people he had contact with during the process. Tr. 94. In his opinion, Employee disregarded the rules and regulations of the sequestration process. Tr. 97.

Captain Robert Leland testified in relevant part as follows:

Robert Leland (“Leland”) is a Captain of Engine Company 13. Leland was assigned to the Subject Matter Expert panel for the March, 2010 promotional exam. Tr. 103. The purpose of an SME was to edit the questions that I/O Solutions³ had developed for the examination. Leland understood that the purpose of the sequestration period was to maintain the confidentiality of the exam. Tr. at 104. Leland testified that he signed the confidentiality agreement, but did not receive any other written directive or order regarding sequestration or confidentiality. Tr. at 104. He stated that sequestered employees were told not to discuss the content of the exam with any other Department members. If a sequestered employee did have contact with a prohibited person, they were told to advise that person that they were a SME. Tr. at 105-106.

In March of 2010, Leland wrote a special report to Chief Jeffery, requesting that he be removed from the SME panel. Chief Jeffery responded in writing and acknowledged Leland’s living situation and reminding him to limit his contact with members of the Department during the sequestration period. Tr. at 106. Leland testified that he was never told to find a different living arrangement. He also stated that neither Chief Jackson, nor Chief Coles provided him with any specific guidance regarding communication with other Department members in light of his personal situation. Tr. at 107. According to Leland, in order to comply with the ‘no contact’ rule, he did not participate in any Department functions (other than a marathon race). On one occasion, Leland hid in a bathroom when he was at dinner with his roommate, so he wouldn’t be seen when a member of the Department walked in. Leland testified that, whenever someone called him, he would tell them that he was an SME. Tr. at 108.

Leland further testified that he did not disclose anything about the contents of the exam to any Department employee during the sequestration process. Tr. at 109. He stated that there were occasions when Department members contacted him during the sequestration process. He did not inform Chief Coles about the communications. Leland admitted that he exchanged text messages with Firefighter Michael Cosker and Fire Chief Sean Greene, but did not inform these employees that he was an SME. Tr. at 113. Leland also admitted that he did not abide by Chief Jackson’s

³ I/O Solutions is a public safety selection consulting firm that specializes in developing, and implementing promotional tests and assessments. (www.iosolutions.org).

orders regarding the process for correspondence. Tr. at 115. According to Leland, he was remorseful about the entire situation. Tr. at 116-117. He understood Chief Jackson's order that SME panel members should limit their contact with other Department members during the sequestration period. Tr. at 121. A March 21, 2010 email from Chief Jeffery to Leland stated that "On the surface, I am going to say that you will have to restrict your contact with the group that you are preparing to run for. Any communication should be passed to the Battalion Fire Chief chairman for distribution to those members." Tr. at 122. Leland testified that he violated Chief Jeffery's order by having contact with other Department members and not passing on communications with restricted members to the BFC chairman. Tr. at 123.

Deputy Fire Chief Kevin Byrne testified in relevant part as follows:

Deputy Fire Chief Kevin Byrne ("Byrne") is the Professional Standards Officer, and was responsible for drafting Special Order 9. Byrne was responsible, in part, for determining the appropriate charges to levy against Employee. Tr. at 127. He testified that Employee was not charged with compromising the 2010 examination or with violating the written confidentiality agreement that he signed. Tr. at 127-128. When asked if Special Order 9 applied to all employees, Byrne stated the following: "It applied to all people, but it was primarily designed, of course, for the rank and file, don't be calling members that are SMEs." Tr. at 131. Upon further questioning, Byrne affirmed that Special Order 9 applied to non SMEs, but stated that common sense should allow the sequestered employees to infer that they should not have contact with other Department members during the process. Byrne stated that Employee would violate Special Order 9 if he did not use the process for facilitating communication during the sequestration period. Tr. at 132. Byrne further stated that verbal orders should be carried out with the same credence as written orders.

Deputy Fire Chief Larry Anderson testified in relevant part as follows:

Deputy Fire Chief Larry Anderson ("Anderson") was assigned as the director of training at the Training Academy during the 2010 promotional process. Anderson stated that he has known Employee since he first began working with Agency. Anderson opined that Employee always did what was asked of him, and had an impeccable record. He never questioned Employee's honesty or integrity, and has previously worked with him at Engine 32. According to Anderson, Employee is a compassionate professional who is valuable to the Department. Tr. at 140-141.

Employee's Position

Employee argues that the Board's decision is not supported by substantial evidence because Agency was not able to produce any evidence that the Board's decision "rationally follows from the facts."⁴ Based on the record, Employee believes that Agency did not have sufficient cause to suspend and demote him. Employee further argues that the testimony given during the Trial Board hearing supports a finding that Special Order 9 did not apply to him

⁴ Employee Brief, p. 8 (February 4, 2013).

during the 2010 sequestration period.⁵ Lastly, Employee asserts that Agency committed harmful procedural error when it incorrectly interpreted Special Order 9 as being applicable to Employee and other SMEs who were sequestered.

Agency's Position

Agency argues that the Board's decision is supported by substantial evidence. Agency submits that there is substantial evidence in the record to prove that Employee communicated with Department members during the time in which he was sequestered during the 2010 promotional examination, as prohibited by Special Order 9, and the confidentiality agreement signed by all SMEs.⁶ In support of its position, Agency submits that Employee admitted to having contact with prohibited members of the Department during the sequestration period. Moreover, Agency argues that the confidentiality agreement signed by Employee prohibited him from disclosing, directly or indirectly, any information related to the promotional process or exam.⁷

In addition, Agency argues that it did not commit any harmful procedural errors in disciplining Employee. Agency states that it properly served notice of the proposed charges to Employee, and he was given the right to have counsel and an evidentiary hearing before the Trial Board. Agency contends that Employee's discipline was done in accordance with all applicable laws and regulations.⁸

ANALYSIS, AND CONCLUSIONS OF LAW

Undisputed Facts

1. Employee was assigned to the Subject Matter Expert panel for the March, 2010 promotional exam.
2. SMEs were required to sign a written confidentiality agreement, which prevented them from directly or indirectly discussing, disclosing, or releasing any information related to the promotional exam questions or promotional activities with anyone
3. On March 15, 2010 Employee drafted a memo to Assistant Fire Chief, Alfred Jeffery. Employee requested to be removed as an SME because of his pending divorce proceeding. Employee also stated in the memo that he was living with another member of the Department and was unable to change his housing arrangement in order to be in compliance with the Department's 'no contact' rule.⁹
4. On March 19, 2010, Employee emailed Chief Jeffery again to ask if he had received the March 15, 2010 communication.

⁵ *Id.*

⁶ Agency Brief, p. 5 (December 3, 2012).

⁷ *Id.*

⁸ Agency Brief, p. 10 (December 3, 2012).

⁹ Agency Brief, Attachment 3 (December 3, 2012).

5. In response to Employee's email, Chief Jeffery stated that Employee was bound by his signed confidentiality agreement. Jeffrey further informed Employee that he was required to restrict contact with the group of Department marathon runners in preparation for an upcoming race. Employee was told that any communications would be required to be passed to the Battalion Fire Chief Chairman for distribution to those employees who planned on participating in the race.
6. On March 21, 2010, Employee responded to Chief Jeffery's email and stated that he would uphold the confidentiality agreement at all times and would limit his contact with the group of marathon runners.
7. On June 15, 2010, Employee submitted a Special Report to Chief Jackson. The report identified several members of the Department with whom Employee had contact with during the promotional process.
8. Employee was subsequently issued a Proposed Notice, advising him that he was being charged with violating Agency's Special Order 9. The notice included ten (10) specifications of Employee's alleged misconduct.
9. On February 9, 2011, Employee had a hearing before Agency's Fire Trial Board, wherein he entered a plea of not guilty to the charges levied against him.
10. On April 29, 2011, Fire Chief Kenneth Ellerby notified Employee that he accepted the recommendations of the Board, who found him guilty on Charge 1, Specifications 1-10. Employee was subsequently demoted to the rank of Lieutenant and was suspended for 400 hours.
11. Employee filed a Petition for Appeal with OEA on May 24, 2011.

Employee is a member of the International Association of Firefighters Local 36 bargaining unit, and is covered by a provision of the collective bargaining 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. Therefore, based on the holding in *District of Columbia Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002), my role as the deciding Administrative Judge is limited to reviewing the record previously established, and determining whether the Trial Board's decision was supported by substantial evidence; whether there was harmful procedural error; or whether it was in accordance with applicable law or regulation.¹⁰

In *Elton Pinkard v. D.C. Metropolitan Police Department*¹¹, the D.C. Court of Appeals limited the scope of OEA's review in certain appeals. The Court of Appeals in *Pinkard* overturned a decision of the D.C. Superior Court holding that, *inter alia*, this Office had the

¹⁰ See *Pinkard*, 801 A.2d at 91.

¹¹ 801 A.2d 86 (D.C. 2002).

authority to conduct *de novo* evidentiary hearings in all matters before it. In its decision, the Court held in pertinent part that:

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. *See* D.C. Code §§ 1-606.2 (a)(2), 1-606.3 (a), (c); 1-606.4 (1999), recodified as D.C. Code §§ 1-606.02 (a)(2), 1-606.03 (a), (c), 1-606.04 (2001); *see also* 6 DCMR § 625 (1999).

It is of course correct that a collective bargaining agreement, standing alone, cannot dictate OEA procedure. 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 (b) (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 this language refers, subchapter VI, contains the statutory provisions governing appellate proceedings before 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 procedure outlined in the collective bargaining agreement -- namely, that any 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 an 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, also 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.¹²

¹² *Id.* at 90-92. (citations omitted).

Thus, pursuant to the holding in *Pinkard*, an AJ 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.*, Trial Board] 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 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.

Based on the documents of records and the position of the parties as stated during the Status Conference held in this matter, I find that all of these criteria are met in the instant appeal. Therefore my review is limited to the issues as previously mentioned. In addition, according to *Pinkard*, I must generally defer to the Trial Board’s determinations of credibility when making my decision.

Whether the Agency Trial Board’s decision was based on substantial evidence.

In reviewing Agency’s decision to terminate Employee, this Office will evaluate the Trial Board’s findings under a “substantial evidence” test.¹³ Substantial evidence defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”¹⁴ “If the administrative findings are supported by substantial evidence, we must accept them even if there is substantial evidence in the record to support contrary findings.”¹⁵ Accordingly, Agency must present substantial evidence before this Office to support its conclusions at Employee’s

¹³ *Staton v. Metropolitan Police Department*, OEA Matter No. 1601-0152-09 (December 17, 2010).

¹⁴ *Davis-Dodson v. D.C. Department of Employment Services*, 697 A.2d 1214, 1218 (D.C. 1997) (citing *Ferreira v. D.C. Department of Employment Services*, 667 A.2d 310, 312 (D.C. 1995)).

¹⁵ *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).

hearing before the Trial Board. As previously mentioned, *Pinkard* advises the Undersigned, as the “reviewing authority,” to “generally defer to the agency’s credibility determinations.”¹⁶

In this case, Employee was charged with violating Article VII, Section 2, of the D.C. Fire & EMS Order Book. The Order Book includes one of the definitions of cause as “[a]ny on-duty or employment-related act or omission that interferes with the efficiency and integrity of operations.” Agency specifically charged Employee with violating Special Order 9, Series 2010, *supra*, which states in pertinent part the following:

In order to ensure the strictest confidentiality in the upcoming examination, these Members have been sequestered. Members of the Department are to avoid and refrain from any direct or indirect contact with these members until after the completion of the examination process. In the event of an emergency, Battalion Fire Chief Gerald Coles will serve as a point of contact for these Members throughout the process.¹⁷

Moreover, the confidentiality agreement that all SMEs were required to sign states in part:

You have been selected to serve as a Subject Matter Expert for the 2010 Promotional Examination for the D.C. Fire and Emergency Medical Services Department (FEMS). As an SME, you are prohibited from directly or indirectly discussing, disclosing, or releasing any information related to the promotional exam questions or promotional activities with anyone...especially members of the FMS. Failure to comply with the express terms of this Confidentiality Agreement will result in appropriate disciplinary action being taken, including termination.¹⁸

Based on a review of the documents of record, including the testimony given during Trial Board Hearing, and the parties’ written briefs, I find that Special Order 9 did not specifically apply to Employee or the other SMEs during the 2010 promotional process.

On its face, the language of Special Order 9 does not indicate that SMEs were expressly included in the document’s purview. The Order does; however, expressly direct non SMEs to refrain from direct and indirect contact with the sequestered members during the promotional process. Moreover, there is no evidence in the record to indicate that Special Order 9 was issued to Employee or other SMEs during the examination period.¹⁹

¹⁶ See *Pinkard*, 801 A.2d 86 (D.C. 2002).

¹⁷ Employee Brief, Attachment 1 (February 4, 2013.)

¹⁸ *Id.* at Attachment 2.

¹⁹ Tr. at 104

The inapplicability of Special Order 9 to Employee is further supported by the testimony given during the Board hearing. When asked if Special Order 9 applied to Employee during the 2010 promotional process, Chief Jackson stated “No, it does not.” Tr. at 83. In addition, upon further examination of the document, Chief Byrnes testified that Special Order 9 addressed everyone else except the SMEs. Tr. at 134. He further stated that it was common sense for the sequestered SMEs to not have contact with other Department members during the sequestration period.

It should be noted that a similar order was issued by Agency during the 2006 Fire & EMS promotional process.²⁰ Special Order 60 (November 28, 2005) contains virtually identical language to that of Special Order 9.²¹ On May 7, 2007, the Trial Board issued Letter of Decision U-06-352, in which a Department employee was charged with violating Special Order 60 while being sequestered as an SME during the 2006 promotional period.²² Similar to the instant appeal, the employee in that case was not charged with violating the confidentiality agreement or compromising any of the exam information. In its holding, the Board held that Special Order 60 only applied to other members of the Department, and was not applicable to the SMEs during the sequestration period. Letter of Decision U-06-352 sustained the Trial Board’s recommendation that the employee be found not guilty on the charge against him.

With respect to Employee’s alleged breach of the confidentiality agreement, I find that there is a lack of substantial evidence in the record to support the assertion that Employee breached such agreement. Employee advised Agency that he was residing with another Department member during the sequestration period. Although Employee admitted to having contact with the then (10) Department members as provided in Specifications 1-10, he testified that he did not discuss anything about the contents of the exam with other employees. Tr. at 109. Moreover, both Chief Jackson and Chief Byrne testified that they did not believe that Employee’s interactions with other Department employees during the 2010 promotional process compromised the actual exam scores or test information. In fact, breach of the confidentiality agreement was never included in the charges or specifications levied against Employee.

It is unclear from the testimony adduced during Employee’s Trial Board hearing why Agency did not provide the 2010 sequestered employees with any additional specific written guidance, other than the confidentiality agreement, in light of the holding in Letter of Decision U-06-352. The issuance of express written rules regarding the limitations of an SME’s contact with other employees during the sequestration period would serve to clarify the Department’s expectations, in addition to codifying the verbal commands that are given to these employees. While SMEs were expected to follow both written and verbal orders during this time, this tribunal is charged with determining whether the charges against Employee are supported by

²⁰ The document was admitted during the Board hearing as Defense Exhibit No. 1. Tr. at 153.

²¹ Language was added to Special Order 9 to read “Members are to avoid and refrain from any *direct and indirect* contact with these members until after the completion of the examination process....” (emphasis added). The previous order did not include the terms “direct and indirect.”

²² Employee Brief, Attachment 4, (February 4, 2013). The employee in Case No. U-06-352 was charged with having contact with other department members during a ski trip while he was serving as an SME during the 2006 promotional period. This employee was also required to sign a confidentiality agreement identical to that of Employee in the instant appeal.

substantial evidence. It is clear from the record that Agency has not established a bright line test for determining if a communication between a sequestered SME and another Department member is acceptable.

Notwithstanding the existence of more appropriate and applicable violations Agency could have charged Employee with, an employee can only be expected to defend against the charges actually levied against them.²³ Based on the foregoing, I find that Special Order 9 was not applicable to Employee during the 2010 promotional process. I further find that Agency has failed to prove that the Board's findings were supported by substantial evidence and there is insufficient evidence to support a finding that Employee interfered with efficiency or integrity of government operations.

In *Douglas v. Veterans Administration*,²⁴ the Merit Systems Protection Board, this Office's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Although not an exhaustive list, the factors are as follows:

1. The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or 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 the 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;

²³ See *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 662 (D.C. 1994); *Johnston v. Government Printing Office*, 5 M.S.P.R. 354, 357 (1981).

²⁴ 5 M.S.P.R. 280, 305-306 (1981).

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.

The Court in *District of Columbia Metropolitan Police Department v. Elton L. Pinkard*²⁵ 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* ruled that great deference to any witness credibility determinations are given to the administrative fact finder.²⁶ In this case, Agency would be the administrative fact finder.²⁷ The Court in *Baker* as well as the Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board* 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.²⁸

In considering the *Douglas Factors*, the Trial Board determined that Employee demonstrated consistently and continuous disregards for both written and verbal orders, in violation of Special Order 9. The Board further described Employee's actions as insubordinate and egregious in nature. While the Board noted Employee's twenty (20) years of satisfactory service with the Department and lack of disciplinary actions, it went on to state that his alleged offenses may adversely affect his superior officer's confidence in his ability to fully comprehend written and/or verbal orders. In addition, the Board stated that Employee should have been thoroughly familiar with the Department's policies and procedures, and he should have "reasonably known that he may have been violating Department orders and/or regulations at the time of these violations."²⁹

I disagree, and find that the Board erred in its consideration of the *Douglas Factors*. As previously discussed, Special Order 9 did not apply to Employee during the sequestration period. The confidentiality agreement was the only written guidance available to sequestered SMEs

²⁵ 801 A.2d 91-92 (D.C. 2002).

²⁶ 564 A.2d 1155 (D.C. 1989).

²⁷ *Id.* at 1717.

²⁸ 527 A.2d 313 (D.C. 1987).

²⁹ Agency Brief, Attachment 9 (December 3, 2012).

during the promotional process. Again, Employee was not formally charged with violating the terms of the confidentiality agreement or with subordination. By incorrectly determining that Special Order 9 applied to Employee, I find that the Board's conclusions do not rationally flow from the evidence.

Whether there was harmful procedural error, or whether Agency's action was done in accordance with applicable laws or regulations.

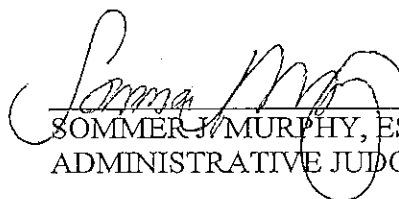
Employee argues that Agency committed harmful procedural error when it charged Employee with violating Special Order 9. As stated above, I find that this Order did not apply to sequestered employees during the 2010 promotional process, which is a harmful procedural error. I further find that Agency has failed to present substantial evidence to prove that Employee interfered with the integrity and efficiency of government operations. Based on the foregoing, Agency's decision to suspend and demote Employee must be reversed.

ORDER

It is hereby **ORDERED** that:

1. Agency's action of suspending Employee for four hundred (400) is reversed; and
2. Agency shall reinstate Employee to the position of record he occupied prior to the effective date of the adverse action; and
3. Agency shall immediately reimburse Employee all back-pay and benefits lost during his suspension period; and
4. Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:


SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE

NOTICE OF APPEAL RIGHTS

This is an Initial Decision that will become a final decision of the Office of Employee Appeals unless either party to this proceeding files a Petition for Review with the Office. A Petition for Review must be filed within thirty-five (35) calendar days, including holidays and weekends, of the issuance date of the Initial Decision in the case.

All petitions for review must set forth objections to the Initial Decision and establish that:

1. New and material evidence is available that, despite due diligence, was not available when the record was closed;
2. The decision of the presiding official is based on an erroneous interpretation of statute, regulation or policy;
3. The findings of the presiding official are not based on substantial evidence; or
4. The Initial Decision did not address all the issues of law and fact properly raised in the appeal.

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with the General Counsel's office, D.C. Office of Employee Appeals, 1100 4th St., SW (East Building), Suite 620E, Washington, DC 20024. Three (3) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review must file their response not later than thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review.

Instead of filing a Petition for Review with the Office, either party may file a Petition for Review in 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.

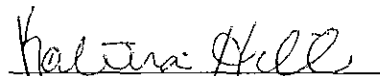
CERTIFICATE OF SERVICE

I certify that the attached INITIAL DECISION was sent by regular mail this day to:

Robert Leland
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Katrina Hill
Clerk

June 27, 2013
Date