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**THE DISTRICT OF COLUMBIA**  
**BEFORE**  
**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
JAMES A. PAGE,	)	OEA Matter No. 1601-0015-01
Employee	)	
	)	
v.	)	Date of Issuance: June 25, 2008
	)	
DISTRICT OF COLUMBIA	)	
FIRE DEPARTMENT,	)	
Agency	)	
_____	)	

OPINION AND ORDER  
ON  
PETITION FOR REVIEW

James Page (“Employee”) worked as a firefighter with the D.C. Fire Department (“Agency”). On November 1, 2000, Employee received a letter of removal from Agency. He was charged with discourteous treatment of the public, a supervisor, or other employee and conviction of a misdemeanor when the crime is relevant to the employee’s job position, job duties, or activities.<sup>1</sup> The charges stemmed from the claim that Employee physically assaulted his superior, Captain Mark Bloom, a Fire and EMS Department Medical Service Officer.<sup>2</sup>

<sup>1</sup> The letter of removal was later amended on December 12, 2000.

<sup>2</sup> *Employee’s Petition for Appeal*, Attachment # 3 (December 29, 2000).

On December 29, 2000, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). He alleged that Agency’s notice was improper and that Agency failed to follow its procedures.<sup>3</sup> Employee requested that Agency’s decision be overturned and that he be reinstated to his position.<sup>4</sup>

Agency filed its Response to Employee’s Petition for Appeal on April 30, 2001. It argued that Employee failed to make any factual allegations. Therefore, it could not adequately respond to his Petition for Appeal. Agency also provided that Employee was criminally convicted for physically assaulting Captain Bloom.<sup>5</sup>

The OEA Administrative Judge (“AJ”) issued several orders requesting that Employee provide a submission clarifying his position.<sup>6</sup> On October 14, 2003, Employee filed his submission. It provided that his termination was improper because the Trial Board’s decision lacked substantial evidence and violated the Ex Post Facto Clause of the U.S. Constitution. Employee argued that he was terminated primarily because of his assault conviction and that his removal on the basis of his criminal conviction violated the Ex Post Facto Clause. Therefore, his removal should be reversed.<sup>7</sup>

Agency filed a Response to Employee’s Submission arguing that the Ex Post Facto Clause applies in criminal or penal legislation but not in civil and administrative

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<sup>3</sup> Employee raised several arguments on appeal. They were that:

- (1) the trial board was convened in violation of the D.C. laws, statutes, and case law;
- (2) the trial board refused to receive relevant evidence on the charges offered by Page;
- (3) the trial board violated its own rules and regulations when it conducted Page’s hearing;
- (4) the trial board’s decision was erroneous;
- (5) the trial board’s decision was not based on substantial evidence;
- (6) the trial board failed to offer evidence to support its findings; and
- (7) the trial board arbitrarily refused to allow Page to introduce evidence that would exonerate him.

<sup>4</sup> *Employee’s Petition for Appeal*, Attachment #1 (December 29, 2000).

<sup>5</sup> *Agency’s Response to Employee’s Petition for Appeal*, p. 3 (April 30, 2001).

<sup>6</sup> *Order for Employee to Make a Submission by October 14, 2003*, p. 2 (October 2, 2003).

<sup>7</sup> *Employee’s Submission*, p. 6-7 (October 14, 2003).

regulations. It provided that an Ex Post Facto defense generally applies to the retroactive application of a law that imposed punishment for an act that was not punishable at the time the act was committed. Agency also provided that Employee was not deprived of offering any defense during the Trial Board hearing.<sup>8</sup> It also pointed out that the *Douglas*<sup>9</sup> Factors were considered before removing Employee. Therefore, the Trial Board's decision was based on substantial evidence.<sup>10</sup>

On October 7, 2005, the AJ issued her Initial Decision. She determined that Agency's action was taken for cause. The AJ first considered the charge of discourteous treatment of a supervisor. Because the Employee and Captain Bloom were the only two present for the assault, she deferred to the Trial Board's determination of credibility. The Trial Board found Captain Bloom's account of the events to be more reasonable considering the circumstances. When addressing the charge of a conviction of a misdemeanor related to an employee's job, the AJ agreed with the Trial Board's assessment that the assault was related to Employee's job. The incident occurred at the Police and Fire Clinic; Employee was attended to by the Clinic's staff; and he was completing his annual physical which was a requirement for his position. Therefore, the AJ held that both charges were supported by substantial evidence. She also provided that termination was an appropriate penalty for Employee, and there was no harmful

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<sup>8</sup> Agency stated that Kenneth Watts, a Trial Board member, permitted Employee to testify about events that led to his conviction and offer self defense as a defense over Agency's objections. Agency cited to the Trial Board's transcript at *Agency Response to Employee's Petition for Appeal*, Tab 16, p. 123-126 (April 30, 2001).

<sup>9</sup> *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).

<sup>10</sup> *Agency's Response to Employee's October 14, 2003, Submission*, p. 5-10 (November 7, 2003).

procedural error in this matter. Therefore, the AJ upheld Employee's termination.<sup>11</sup>

Thereafter, Employee filed a Petition for Review of the AJ's Initial Decision. He claimed that Agency and the AJ incorrectly considered his conviction of a misdemeanor because it was not related to his job. Employee argued that the misdemeanor was irrelevant to his ability to perform as a firefighter. He likens his "private disagreement" with Captain Bloom as an altercation with a neighbor.<sup>12</sup> He also claimed that Agency failed to consider mitigating factors for this charge. Therefore, the matter should be remanded to Agency to examine any mitigating factors.<sup>13</sup>

In his Petition for Review, Employee only takes issue with one of the two charges against him.<sup>14</sup> It was his position that the misdemeanor was irrelevant to his ability to perform as a firefighter and that Agency failed to consider mitigating factors for this charge.<sup>15</sup> However, Employee failed to raise these issues before the AJ on appeal.

OEA Rule 634.4 provides that "any objections or legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board." Therefore, the arguments raised in Employee's Petition for Review cannot be addressed because they were not presented to the AJ on appeal.

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<sup>11</sup> *Initial Decision*, p. 6-8 (October 7, 2005).

<sup>12</sup> *Employee's Petition for Review*, p. 4 (November 14, 2005).

<sup>13</sup> Employee stated that Captain Bloom's requirement that he drink water to elicit a urine specimen was unnecessary and time consuming. He further argued that it interfered with his responsibilities to pick up his young son at school. Additionally, he claimed that Bloom insinuated that he was a drug addict. *Id.*, 4-11.

<sup>14</sup> Under the District Personnel Manual, Chapter 16, the maximum penalty for either charge is removal. Therefore, Agency's proof of either could have terminated Employee.

<sup>15</sup> It should be noted that mitigating factors were considered by Agency when applying the *Douglas* Factors (Factor # 11) to the facts in this case. *Agency's Response to Employee's Petition for Appeal*, Tab 17 (April 30, 2001).

However, this Board will assess whether the AJ correctly upheld Employee's removal given the causes of action imposed by Agency.

The Court of Appeals in *D.C. Metropolitan Police Department v. Elton Pinkard*, 801 A.2d 86 (D.C. 2002) gave OEA limited review of an agency's decision to terminate an employee pursuant to terms in a collective bargaining agreement. The Court reasoned that in those cases, OEA can only determine whether the agency's decision was supported by substantial evidence;<sup>16</sup> whether there was harmful procedural error; or whether the decision was in accordance with the law or applicable regulations.

It is clear from our review of the AJ's Initial Decision that she considered all of the requirements outlined in *Pinkard*. The AJ provided reasons to show that Agency's decision to terminate Employee was based on substantial evidence and was in accordance with the applicable regulations. She reviewed the Agency's Trial Board hearing transcript and found that Captain Bloom provided more credible testimony than Employee regarding the assault. She also considered the factors outlined by the Trial Board regarding its regulations in making her final determination.<sup>17</sup>

Additionally, there appeared to be no harmful procedural error by Agency or the AJ. Agency questionably went beyond the scope of what was required and allowed Employee to present a defense to the charges filed against him in the removal action.<sup>18</sup> Accordingly, the AJ met the *Pinkard* requirements.

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<sup>16</sup> Substantial evidence is defined as "evidence that a reasonable mind could accept as adequate to support a conclusion." *Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

<sup>17</sup> *Initial Decision*, p. 6-7 (October 7, 2005).

<sup>18</sup> *Agency's Response to Employee's Petition for Appeal*, Tab 16, p. 121-124 (April 30, 2001).

In determining the appropriateness of Agency's penalty, OEA has consistently relied on *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). *Douglas* provided the following factors to determine appropriateness:

- (1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- (3) the employee's past disciplinary record;
- (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
- (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- (7) consistency of the penalty with any applicable agency table of penalties;
- (8) the notoriety of the offense or its impact upon the reputation of the agency;
- (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.

Applying the above-mentioned factors to the facts of this case, it is clear that Agency and the AJ's decision to terminate Employee did not exceed the limits of reasonableness.<sup>19</sup>

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<sup>19</sup> *Douglas* provides, "only if the Board finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the Board to then

Agency outlined the seriousness of the offense and its relation to Employee's duties. The Trial Board members described Employee's assault on a superior as one of the most serious infractions because it was committed with malice. It also provided that the assault related to Employee's duties because the incident occurred at the Police and Fire Clinic, while he was completing his annual physical exam administered by the Clinic's staff.<sup>20</sup>

As for Employee's job level, past disciplinary record, and past work record, Agency highlighted that he was an eighteen-year veteran firefighter. Agency also considered that Employee had no previous disciplinary actions taken against him. However, it found that the nature of the offense against Captain Bloom destroyed his confidence in Employee's ability to perform his assigned duties.

Although Agency does not offer other incidents of assault that resulted in removal, it provided that any penalty less than removal would "encourage fist-fighting and possibl[y] more serious actions in the workplace."<sup>21</sup> As it pertains to the consistency of the penalty with the applicable agency table of penalties, Agency provided in its Letter of Decision and the Trial Board's Findings and Recommendations that the District Personnel Manual recommends removal as the penalty for both charges.<sup>22</sup>

Agency properly determined that the offense was one that would severely erode the trust and confidence placed in Employee. It asserted that although the assault was not a matter of public knowledge, it was well known at the Police and Fire Clinic and in the

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specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness," page 41.

<sup>20</sup> *Agency's Response to Employee's Petition for Appeal*, Tab 17, p. 2 (April 30, 2001).

<sup>21</sup> *Id.* at 3.

<sup>22</sup> *Id.* at 2.

entire Fire and EMS Department that an officer was assaulted by a subordinate. Therefore, Agency's reputation, as well as the overall morale of its supervisors, would have been seriously affected by its actions or inactions in handling this disciplinary matter. Agency reasoned that if it did nothing, then other supervisors could have been attacked by subordinates who failed to adhere to the Agency's regulations.<sup>23</sup> This was clearly a notorious matter that reasonably could have had a negative impact on Agency's reputation had Employee not been removed.

Employee was on notice of the rules that he violated, but he deliberately violated them anyway. Agency provided that every firefighter knew that they must submit urine samples annually and that refusal to do so could result in disciplinary action taken against them. More importantly, employees were aware that assaulting any member of the department would result in removal.<sup>24</sup>

Furthermore, it was reasonable for Agency to believe that Employee could not be rehabilitated because any other penalty would not have deterred Employee or any other employee from assaulting others. The Trial Board stated that "no mere hours of suspension, denial of step increase, etc. match[ed] the offense." It believed that the severity of the penalty should mirror the severity of the offense.<sup>25</sup>

As it pertains to mitigating circumstances, (as previously stated) this Board will not consider any arguments in Employee's Petition for Review that were not raised before the AJ. However, the Trial Board's record clearly shows that Agency considered

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<sup>23</sup> *Id.* at 3.

<sup>24</sup> *Agency's Response to Employee's Petition for Appeal*, p. 2 (April 30, 2001).

<sup>25</sup> *Agency's Response to Employee's Petition for Appeal*, Tab 17, p. 2 (April 30, 2001).



mitigating circumstances when applying the *Douglas* factors to this case. Agency listened to Employee's arguments that he acted in self-defense. They also examined testimony regarding his reasons for not providing the urine sample such as the need to pick up his son, his inability to use the restroom at the time, and his claim that the water provided was stale. However, they found none of these as valid reasons to mitigate an assault on Captain Bloom. Agency held that Employee was not provoked and could have engaged in a thoughtful, dignified method of conflict resolution to ensure that Agency got the urine sample and that Employee was able to pick up his son. It was Agency's belief that Employee had time to consider the repercussions of his actions and to recognize that Captain Bloom was merely doing his job in following the clinic's guidelines.<sup>26</sup>

Based on the aforementioned, it is clear that Agency and the AJ based their decisions on substantial evidence. Agency went through each of the factors outlined in *Douglas* and correctly made its decision. The reasons to terminate Employee as well as mitigating factors provided by him were considered in this case. This Board confidently supports the AJ's decision to uphold Employee's termination.

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<sup>26</sup> *Id.*

**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

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Richard F. Johns

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.