THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Antonio Crowder,	)	OEA Matter No. 1601-0050-17
Employee	)	
	)	Date of Issuance: May 1, 2018
v.	)	
	)	Joseph E. Lim, Esq.
Metropolitan Police Department,	)	Senior Administrative Judge
Agency	)	

Marc Wilhite, Esq., Employee Representative
Jhumur Razzaque, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On May 19, 2017, Antonio Crowder ("Employee") filed a Petition for Appeal with the Office of the Employee Appeals ("OEA" or the "Office") contesting the District of Columbia Metropolitan Police Department's ("MPD" or the "Agency") decision to terminate him from his position of Officer. By Notice of Proposed Adverse Action dated September 13, 2016, Agency proposed to remove Employee from his position as an Officer with the Metropolitan Police Department. On January 10, 2017, an Adverse Action Panel was convened in order to hear evidence and make findings of fact and conclusions of law regarding the circumstances surrounding several incidents that involved Employee on June 23, 2016. As a result of these incidents, Employee's employment with MPD was subsequently terminated effective April 28, 2017. On March 31, 2017, Chief of Police Peter Newsham, relying on the Adverse Action Panel's findings, informed Employee, via written notice, that Employee's appeal to the Chief of Police was denied. Moreover, this letter constituted MPD's final action in this matter. On June 9, 2017, Agency filed its Answer.

This matter was assigned to the undersigned on October 3, 2017. Thereafter, the parties attended a Prehearing Conference wherein it was determined that this matter would be adjudicated based on the standard outlined in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). Accordingly, the parties were provided with a briefing schedule in which they were able to address the merits of this matter and respond to the opposing parties' arguments. Both parties have now submitted the required briefs. 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 Adverse Action Panel's decision was supported by substantial evidence;
2) Whether there was harmful procedural error; and
3) Whether Agency's action was done in accordance with applicable laws or regulations.

STATEMENT OF THE CHARGES

In the Notice of Proposed Adverse Action dated September 13, 2016, Agency proposed to terminate Employee from his position as an Officer with MPD based on the following charges and specifications:[1]

> Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-17, which reads "Fraud in securing appointment, or falsification of official records or reports."
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> Specification No. 1: In that, on Thursday, June 23, 2016, you intentionally submitted a P.D. 775 in which you reported that you were held in court from 0820 hours until 1000 hours. You submitted this report knowing that the information was false.
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> Charge No. 2: Violation of General Order 120.21, Attachment A, Part A-6, which states: "Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Office, or in the presence of, any superior officer, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing." This misconduct is further specified in General Order 201.26, Part V-A-19, which states, "Members shall respond truthfully when questioned by superior officers in matters relating to the official business of the MPD. Members, during the course of an investigation shall respond truthfully to questions asked by any agent or official of the internal Affairs Division (IAD), even if the IAD agent is not of superior rank.
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> Specification No. 1: In that, on Thursday. June 23, 2016, at approximately 1122 hours, when asked by Sergeant William Kelly if you had checked out of court, you replied in the affirmative, although you in fact, never responded to court.
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> Charge No. 3: Violation of General Order Series 120.21, Part A-16, which states: "Failure to Obey Orders and Directives Issued by the Chief of Police." This misconduct is further defined in, General Order 201.26, Part V-B-12, which states in part: "Member shall…constantly patrol their assigned area unless otherwise directed…"

[1] MPD's Answer to the Petition at Tab 2 (June 19, 2017).

Specification No. 1: In that. on June 23, 2016, while on duty and assigned to the Fourth District PSA 409, you failed to continuously patrol your assigned area when you left the Fourth District and parked your cruiser in a secluded area of Rock Creek Park, outside the confines of your assigned PSA.[2]

Charge No. 4: Violation of General Order Series 120. 21, Part A- 16, which states: "Failure to Obey Orders and Directives Issued by the Chief of Police." This misconduct is further defined in, General Order 201.26, Part V-B-14, which states in part. "...Monitor the police radio and keep the dispatcher advised of his/her location at all times..."

Specification No. 1: In that, on June 23, 2016, while on duty and assigned to the Fourth District PSA 409, you verbally placed yourself out of service with the Fourth District dispatcher by stating that you were headed to court. However, you obtained CLD[3] Log Numbers excusing yourself from the court commitment and stayed out of service for approximately three hours.

Charge No. 5: Violation of General Order Series 120. 21, Part A- 16, which states: "Failure to Obey Orders and Directives Issued by the Chief of Police." This misconduct is further defined in, General Order 20126, Part V-B-19, which states in part, "Members shall not leave their assigned District without the approval of an MPD official ..."

Specification No. 1: In that, on June 23, 2016, while on duty and assigned to the Fourth District PSA 409, you left your assigned PSA and parked your cruiser in a secluded area of Rock Creek Park, without obtaining approval from an official.

Charge No. 6: Violation of General Order Series 120.21, Part A-14, which states: "Neglect of duty to which assigned, or required by rules and regulations adopted by the Department." This misconduct is further defined in General Order 201.26, Part V-B-12, V-B-14 (a), (b), and (c), which states, "Sworn members and Reserve Corp Members, in addition to Part V-A of this order, shall: Constantly patrol their assigned area unless otherwise directed and shall not return to the station except on official business and approved by an official; Monitor the police radio and keep the dispatcher advised of his/her location at all times; advise the dispatcher of any assigned details, or when arriving on a scene or clearing a scene; and provide a disposition(s) and go out of service with the dispatcher at the end of the tour of duty."

Specification No. 1: In that, on Thursday, June 23, 2016, at 0824 hours, you verbally placed yourself out of service with the 4D[4] dispatcher by stating that you were headed to court. However, you obtained CLD Log Numbers excusing yourself from the court commitment and stayed out of service until you were challenged about your service status at 1122 hours. As a result, you failed to monitor the police radio and keep the dispatcher advised of your location at all times.

[2] PSA stands for Patrol Service Area.
[3] CLD stands for Court Liaison Division.
[4] 4D is Fourth District of Washington, D.C.

Specification No. 2: In that, on Thursday, June 23, 2016, your patrol car, Cruiser 4091, was tracked via Office of Unified Communications (OUC) GPS[5] parked in a secluded area of Rock Creek Park outside the confines of your assigned PSA, from 0813 hours until 1022 hours. As a result, you failed to continuously patrol your assigned area.

Specification No. 3: In that, on Thursday, June 23, 2016, at approximately 1137 hours, you were located at 9th and Rhode Island Avenue, Northeast, within the boundaries of the Fifth District and PSA. As a result, you failed to continuously patrol your assigned area.

Charge No. 7: Violation of General Order Series 120.21, Attachment A, Part A25, which states, "Any Conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force." This misconduct is further defined in General Order 201.26, Part V-A-1, which states, "Members shall conduct their private and professional lives in such a manner as to avoid bringing discredit upon themselves, MPD, or the District of Columbia.

Specification No. 1: In that, on Thursday, June 23, 2016, you willfully held yourself out of service for a period of time exceeding two hours, as a minimum of seventeen radio assignments were dispatched to your coworkers. Your actions were adverse to the overall morale of your co-workers and detrimental to the efficiency of the department.

Having determined that Employee engaged in misconduct, MPD weighed each of the relevant *Douglas Factors*[6] for consideration in determining the appropriateness of the

[5] GPS is Global Positioning System.

[6] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). 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.

penalty and proposed that Employee be terminated. Subsequently, Employee elected to have an Evidentiary Hearing before an Adverse Action Panel.

SUMMARY OF THE TESTIMONY

On January 10, 2017, the Agency held an Adverse Action Panel Hearing. During this hearing, testimony and evidence was presented for consideration and adjudication relative to the instant matter. The following represents what I determine to be the most relevant facts adduced from the findings of facts as well as the transcript[7] generated and reproduced as part of the instant matter before the undersigned.

Lieutenant Angela Cousins ("Cousins") (Tr. Pages 25 – 83)

Cousins worked at the MPD for thirty years and served as a Lieutenant for seventeen years. She testified that on June 23, 2016, she was assigned to the Fourth District as Watch Commander. Cousins stated that on that date, Sergeant William Kelly ("Kelly") advised her that he received an anonymous complaint that police cruiser 4092, operated by Officer Antonio Crowder ("Employee"), was parked at a location in Rock Creek Park, near an abandoned tennis court. Cousins explained that she and Kelly drove to the location where the vehicle was reportedly parked. As they drove to the location of Employee's vehicle, Kelly informed Cousins that Employee originally stated that he had to respond to court that morning. When Cousins and Kelly arrived to the location in Rock Creek Park, the vehicle was not there.

Cousins testified that it was a rainy day and that she saw fresh, deep tire track marks embedded on the grassy area at Rock Creek Park from the side of the tennis court area. She stated that the anonymous caller provided a description of where the vehicle was parked. Cousins stated that she reached out to the dispatcher to find out the last known location of Employee. The dispatcher advised her and Kelly that the area they searched in Rock Creek Park was where Agency had as the last ping location. The dispatcher advised that Employee was held out of duty due to a court case.

Cousins testified that Employee had a court appearance and he was supposed to testify on a case that day. Cousins stated that once an officer received a Computer Automated Notification System ("CANS") notice to respond to court, they were required to advise their supervisor and appear in court on the specified day. She further explained that the officer was to go out of service through the dispatcher and advise the dispatcher that they were responding to court. Once the officer was finished with their court assignment, the officer would physically check out of court and radio the dispatcher so that the officer could go back in service and respond back to their assigned District.

Cousins stated that Kelly directed the dispatcher to contact Employee. After a slight delay, Employee responded and announced that he was located on Ninth and Rhode Island Avenue. She explained that Ninth and Rhode Island Avenue was not located in the Fourth District. Subsequently, Kelly and Cousins drove from Rock Creek Park to Employee's known location. Once they arrived on scene, they approached Employee and asked him why he was

[7] The Adverse Action Hearing transcript will be denoted herein as Tr.

outside of the Fourth District. Employee informed them that he wanted to check on his grandmother and stated that he received log numbers. Cousins explained that log numbers were obtained by an officer to be placed on standby if a court case was delayed, cancelled, or postponed. Then, the officer would get a set of log numbers through the deputy court liaison division. She further explained that if an officer was given log numbers, the officer could continue to be in service and wait to be contacted by the court liaison.

Cousins attested that Kelly advised Employee to respond to the Fourth District station and submit a form PD 119. Employee submitted the PD 119, and Cousins completed the Watch Command Report. Cousins explained that a week later, she was transferred to another unit and no longer had any further involvement in the matter.

Cousins stated that she was not aware that on the date in question, the Global Positioning System ("GPS") did not track Employee's movements from 10:22 a.m. to 11:37 a.m. She stated that she was not concerned that Employee was going to check on his grandmother, but was more concerned that Employee was not in the Fourth District.

Cousins recommended that Employee remain a police officer and that she believed that he could be rehabilitated. She explained that everyone has made mistakes, and although Employee made a poor decision, he was a decent officer.

Sergeant William Kelly ("Kelly") (Tr. Pages 83 – 150)

Kelly was Employee's supervisor. He worked for Agency for twenty-five years and was assigned to the Fourth District. Kelly stated that on June 22, 2016, he provided Employee with a CANS Notice for a murder trial on June 23, 2016. He stated that after roll call, Employee went out of service at 7:30 a.m. stating that he was headed to court. Because Kelly knew that the CANS notice did not go out until 9:00 a.m., he informed Employee that it was too early to go out of service. Employee went back in service and subsequently went out of service around 8:20 a.m. to head to court.

Subsequently, Kelly received an anonymous phone call at 11:00 a.m. regarding the location of Employee's police vehicle parked by the tennis courts at Rock Creek Park. He determined that it was Employee's police vehicle because of the scout vehicle number 4092.

Kelly informed Cousins about the call and requested that she accompany him to the park to locate the scout vehicle. When they arrived near the tennis courts, the vehicle was gone. But, because it was a rainy day, Kelly and Cousins saw tire tracks. Kelly stated that the tire tracks confirmed the information delivered by the anonymous caller.

While at the park, Kelly and Cousins attempted to contact the dispatcher to determine whether Employee was in service. Kelly stated that he contacted the dispatcher and requested Employee's mileage, location, status, and whether he cleared court. The dispatcher informed Kelly that Employee was held at court. After going back and forth over the radio to determine Employee's location, Employee replied and stated that he was at Ninth and Rhode Island Avenue, which was in the Fifth District.

Kelly said that it took them twenty minutes to arrive at Employee's location. Kelly questioned why Employee was in the Fifth District, and Employee explained that he had to drop off money to his grandmother to buy her medication. Kelly directed Employee to report to the substation to prepare a statement. Subsequently, an investigation was conducted. Kelly claimed that Employee did not tell him that he received log numbers until after Agency received the PD 119 from him. Kelly explained that per Employee's documentation, he was in court between 8:20 a.m. and 10:00 a.m. However, based on Kelly's investigation, the entry was incorrect and it was subsequently determined that Employee did not appear in court. Kelly stated that Employee participated in a Question and Answer, in which Employee confirmed that he had not prepared a Form 140, a court check-in sheet.

On cross-examination, Kelly stated that on June 23, 2016, Employee said that he operated police cruiser 4092 and stopped in the 2100 block of Park Road near the tennis courts of Rock Creek Park. Kelly explained that the GPS tracked Employee's vehicle in the park at the location specified and that the dispatcher confirmed that Employee checked out of court.

Kelly opined that Employee should be retained as an officer with Agency. He stated that everyone has made mistakes, and that Employee was a good officer, but he could not overlook his misconduct.

Maurice Darryl Thompson ("Thompson") (Tr. Pages 153 – 161)

Thomson worked at Agency for thirty-one years. He stated that he was Employee's training officer. Thomson described Employee as the type of officer who wanted to excel and explore the other facets of Agency. Thomson stated that Employee never wanted to remain on patrol.

Officer Steven Reid ("Reid") (Tr. Pages 162 – 170)

Reid worked at Agency for twenty-six years. He testified that Employee always had integrity and professionalism. Reid stated that he never had an issue with Employee, and if he was reinstated, he would not have a problem being Employee's partner because they held the same values and he was easy to work with.

Officer Roy Harrell ("Harrell") (Tr. Pages 170-181)

Harrell worked for Agency for twenty-seven years. He patrolled with Employee. Harrell testified to Employee's character and stated that Employee was a good officer who was dependable, trustworthy, and was a pleasure to work with.

Officer Bernard McDowell ("McDowell") (Tr. Pages 181 - 187)

McDowell worked at Agency with Employee in the Fourth District. He had a professional and personal relationship with Employee because they rode motorcycles together. McDowell said Employee was a good officer and believed that Employee should be retained with Agency.

John Rucker, Jr. ("Rucker") (Tr. Pages 187 - 195)

Rucker retired from Agency in 2014, after working for twenty-eight years. He was in charge of the Second District Detective's Office. At the time, Employee worked as an office staff investigator. Rucker explained that Employee was one of the four officers who followed up on all office staff in the Second District. Rucker stated that any assignment that was provided to Employee was completed without difficulty. Outside of Agency, Rucker stated that he and Employee rode motorcycles together.

Officer Antonio Crowder ("Employee") Tr. 196-315.

Employee worked for Agency for seventeen years. After working in the First District, Second and Third Districts, Employee was detailed to work in the Fourth District, where he worked for six years.

Employee recalled that on June 23, 2016, he received the CANS notice from Kelly and confirmed that his call sign was 4091, and that his police cruiser was 4092. He explained that on June 23, 2016, he went to go out of service at 7:30 a.m. However, Kelly challenged him and stated that because he did not have to appear in court until 9:00 a.m., he needed to remain in service.

Prior to being held out for court, Employee explained that he was at Rock Creek Park, parked in a space in a parking lot across from the Rockefeller home. Employee stated that though it was not in his PSA, the park was a place that he went to gather his thoughts, collect himself, and write his reports. He asserted that he was there to work and prepare for his testimony.

Employee testified that he was three or four miles away from the park when he notified the dispatcher that he had a court assignment and officially asked to be held out for court at 8:24 a.m. In route to court, Employee received a call from Glenn Kirschner ("Kirschner"), Chief U.S. Attorney, informing him that court was cancelled. In lieu of appearing in court, the parties held the witness conference via telephone. Employee explained that Kirschner prepped him and they discussed the murder case. After they were finished, Employee knew that he would have to get the log numbers. Kirschner told Employee to have his officials contact him if there were any court discrepancies.

After Employee ended the call with Kirschner, he contacted the Court Liaison to obtain the log notes. He provided the log notes, and specifically referenced them in his PD 119. Employee testified that after he obtained the log notes, he received a call from his grandmother's aide. The aide was upset because his grandmother ran out of her medication. The aide put in an emergency call for the medication to be delivered, but did not have the means to pay for it. The aide said that his grandmother requested Employee to see her immediately. Employee attempted

to explain to the aide that he was at work, but told her that he would go to his grandmother's home.

Employee stated that his grandmother depended on him and that he was her sole provider. He testified that his grandmother has dementia and various diseases since 2010. Employee admitted that leaving his district was an error of judgment, and that he should have contacted his dispatcher and his sergeant to inform them of the situation. However, at the time, he had a lot on his mind. Employee stated that Agency has approved his Paid Family Leave ("PFL") for the care of his grandmother over the past two years, which affirmed how urgent his grandmother's care was.

Employee recalled hearing Kelly contacting him over the radio through the dispatcher. He responded to the call and informed Kelly that he was headed back into the District. Employee reasoned that although he did not physically appear in court, he had talked with Kirschner, which meant that he was clearing court. He explained that once he handled the issue with his grandmother, he would have gone back in service. However, Kelly contacted him prior to his returning to service. Employee explained that he knew when Kelly contacted him, it was to make sure that he was safe. Once Kelly found out that Employee was safe, Kelly questioned Employee about his location. Employee stated that he was truthful about his location because there was no need to lie. He informed the dispatcher of the closest landmark, which was at Muscatello's.

Employee stated that he received his CANS notice late in his tour but never looked at the document, which was why he thought that he received a CANS notice for a trial, not a witness conference. Prior to June 23, 2016, Employee spoke with Kirschner four to five times. He also indicated on his PD 119 that he had a conversation with Kirschner. Employee explained that he did not reach out to Kirschner because Employee was informed to have his superiors contact Kirschner if there were any issues.

Employee attested that once Kelly contacted the dispatcher, Employee immediately notified the dispatcher that he was a 10-8, which meant that he was on service and ready for calls. Employee could not recall if he contacted Kirschner on June 22, 2016. However, the alert notification stated that Employee contacted the liaison at 5:00 p.m., excusing him from court. He could not recall why he took himself out of service on June 23, 2016, since he was excused the prior day.

Employee stated that he was never served a do not appear CANS notice. Employee testified that from 9:00 a.m. until 11:00 a.m., he was at his grandmother's home. He stated that he would request and submit phone records from the call he received from Kirschner and his grandmother's aide. However, Employee explained that he had two cellular phones with two different carriers. He was no longer serviced by one of the carriers, and was unsure if he would be able to obtain the records since he was no longer with the company.

Glen Kirschner ("Kirschner") (Tr. Pages 329 - 332)

Kirschner testified that he did not recall speaking to Employee because he spoke with many people daily. However, Kirschner did pull the file on the murder case that Employee was a part of. He stated that he had a page and a half of detailed written notes dated June 20, 2016. He explained that on that day, he spoke with Employee for quite some time and Employee provided him with detailed information on his witness and the circumstances in the murder case. He could not recall if the conversation was in person or via telephone, but believed the conversation took place by telephone. Kirschner stated that he was sure of the date because he always indicated the date of a conversation in his notes. He further stated that on June 20, 2016, a motion was filed to dismiss the case. Kirschner explained that the case was still being investigated. Kirschner could not recall if he had a follow up conversation with Employee on June 23, 2016, but reiterated that he spoke with Employee at length on June 20, 2016.

Trial Board Finding

At the start of the Panel Hearing, Employee pled guilty to Charge No.3, Specification No. 1, and Charge No. 5, Specification No. 1, and not guilty to the rest of the charges and specifications.

The Adverse Action Panel issued its finding and recommendations after the January 10, 2017, Evidentiary Hearing. The Panel found Employee not guilty of Charge No. 6, Specification No. 1, but found him guilty of the rest of the charges and specifications. With regard to the guilty findings and specifications, the Panel weighed each of the offenses according to the relevant *Douglas Factors*, categorizing them either as aggravating or mitigating factors. After consideration of the *Douglas Factors*, the Panel reviewed and evaluated all witness testimony and all of the items admitted into evidence and considered reasonableness in rendering its opinion.

The Panel recommended that Employee be terminated for Charges 1, 2, 4, and 7. Additionally, the Panel recommended that Employee serve a ten-day suspension for each of the Charges 3, Specification No. 1, Charge No. 6, Specifications No. 2 through 3, and a five-day suspension for Charge No. 5, Specification No. 1.

Agency Final Decision

Subsequently, on February 24, 2017, Agency issued its Final Notice of Adverse Action in this matter. Upon consideration of the Panel's decision and a review of the record, Agency agreed with all the charges as outlined in the Panel's Findings, Conclusion and Recommendation document. Agency decided that Employee's employment would be terminated effective April 28, 2017. Employee appealed this decision to the Chief of Police on March 10, 2017, and in a letter dated March 31, 2017, his appeal was denied. The Chief of Police also noted that the March 31, 2017, letter represents Agency's final action in this matter.

ANALYSIS AND CONCLUSION

This Office's review of this matter is limited pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department*,[8] that OEA has a limited role where a departmental hearing has been held. According to *Pinkard,* the D. C. Court of Appeals found that OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings.[9] The Court of Appeals held that:

> "OEA may not substitute its judgment for that of an agency. Its review of the agency decision…is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. The OEA, as a reviewing authority, must generally defer to the agency's credibility determinations."

Additionally, the Court of Appeals found that OEA's broad power to establish its own appellate procedures is limited by Agency's Collective Bargaining Agreement. Thus, pursuant to *Pinkard*, an Administrative Judge 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;
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> 2. The employee has been subjected to an adverse action;
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> 3. The employee is a member of a bargaining unit covered by a collective bargaining agreement;
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> 4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard, i.e.*: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, 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.

In this case, Employee is a member of the Metropolitan Police Department and was the subject of an adverse action; MPD's Collective Bargaining Agreement contains language similar to that found in *Pinkard*; and Employee appeared before an Adverse Action Panel, which held an Evidentiary Hearing. Based on the documents of records and the position of the parties as stated during the Status Conferences held in this matter, the undersigned finds that all of the aforementioned criteria are met in the instant matter. Thus, pursuant to *Pinkard*, OEA may not

[8] 801 A.2d 86 (D.C. 2002).
[9] *See* D.C. Code §§ 1-606.02(a)(2), 1-606.03(a),(c); 1-606.04 (2001).

substitute its judgment for that of Agency and the undersigned's review of Agency's decision is limited to the determination of whether the trial board's finding was supported by substantial evidence; whether there was harmful error; and whether the action taken was done in accordance with applicable law or regulations. Further, according to *Pinkard*, I must generally defer to [the Adverse Action Panel's] credibility determinations when making my decision.[10]

Whether the Adverse Action Panel's decision was supported by substantial evidence.

According to *Pinkard*, the undersigned must determine whether the Adverse Action Panel's findings were supported by substantial evidence.[11] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[12] Further, "[i]f the [Adverse Action Panel's] findings are supported by substantial evidence, [the undersigned] must accept them even if there is substantial evidence in the record to support contrary findings."[13]

Employee's Argument on substantial evidence[14]

In his submissions to this Office, Employee argues that substantial evidence does not exist to support the charges and specifications that he was found guilty of.

Specifically, Employee submits that there was no substantial evidence to support Charge No.1, Specification No. 1 that indicated Employee knew he was not required to report to court on June 23, 2016, as he obtained log numbers on June 22, 2016. Employee notes that evidence showed he did have a telephone conference with Kirschner and that the location of the witness conference does not change the nature of the conference itself. Employee asserts that Agency could not establish that his representation that he was in "court" was fraudulent.

Furthermore, Employee asserts that there was no substantial evidence to support Charge No.2, Specification No. 1 charging that he lied about being in court for the witness conference. Employee asserts that Agency is required to prove that he willfully and intentionally deceived Sergeant William Kelly when asked if he had checked out of court. Employee asserts that Agency did not establish that a substantive telephonic witness conference with Kirschner is not the same as being in "court," and thus, this misunderstanding or miscommunication with his supervisor does not make Employee's assertion "willfully and intentionally deceitful."[15]

Employee also argues that there was no substantial evidence to support Charge No. 4, Specification No. 1 charging that he failed to monitor the police radio and keep the dispatcher advised of his location at all times. He alleges that Agency's Panel did not mention how Employee supposedly failed to monitor his police radio and instead made impermissible supposition and conjecture.

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[10] *Id.*
[11] *See Pinkard*, 801 A.2d at 91.
[12] *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).
[13] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).
[14] Reply Brief of Employee (February 16, 2018).
[15] *Id.* at page 3.

Employee also argues that there was no substantial evidence to support Charge No. 6, Specifications No. 2 and 3 charging that he failed to continuously patrol his assigned area. He points out that these specifications are duplicative and cumulative with the Charge 3, Specification 1, that he had already pled guilty to and received a ten-day suspension.

Lastly, Employee argues that there was no substantial evidence to support Charge No. 7, Specification No. 1 charging that he willfully placed himself out of service for more than two hours to avoid radio assignments, and thereby engaging in conduct prejudicial to the reputation and good order of the police force and bringing discredit upon themselves, MPD, or the District of Columbia. He contends that there is no evidence that his actions negatively impacted his co-workers and that his character witnesses all testified that he should be retained.

Agency's Argument on substantial evidence[16]

Agency asserts that it adopted the Panel's Finding of Facts and Conclusion of law by terminating Employee's employment. Agency also notes that its decision is supported by substantial evidence. Pursuant to Article 12, section 8, of the CBA between Agency and the Fraternal Order of Police/MPD Labor Committee, an employee may appeal the MPD's final decision to OEA when it is premised on an Adverse Action Hearing. Agency argues that the Panel's Findings and recommendations are supported by substantial evidence and that these findings, including credibility determination, were reasonable and should be upheld. Agency explains that, substantial evidence supports the finding that Employee submitted a fraudulent PD 119 to his superiors that indicated that he had been to court on June 23, 2016, for almost two hours, and that he failed to inform the police dispatcher of his whereabouts at all times as required by Agency general orders.

Agency further explains that with reference to Charge No.1, Specification No. 1, and Charge No.2, Specification No. 1, the issue is not whether Employee did or did not have a telephone conference with Kirschner, but whether he made a misrepresentation to his superiors by stating he was held up in court on June 23, 2016, from 8:20 a.m. to 10:00 a.m. Agency notes that Employee did not deny he never went to court but that his superiors had a misunderstanding or miscommunication about his report. Agency points out that Kirschner testified that, based on his written notes, his telephone conference with Employee occurred on June 20, 2016, three days before June 23, 2016. Agency contends that, after accepting all the evidence, the Panel reasonably rejected Employee's implausible explanation, especially since Employee already obtained log numbers a day before that indicated he did not have to attend court and that the case had been dismissed.

With reference to Charge No. 4, Specification No. 1, Agency contends that the charge of not monitoring the police record concerns Employee's failure to inform the dispatcher of his location at all times as required by General Order 201.26. The record contains substantial evidence that Employee misrepresented to the dispatcher that he headed to court when it is undisputed that Employee had no intention of going to court. Agency states that it is also undisputed that Employee admitted that he did not inform the dispatcher that he was at the Rock Creek Park and not at court.

[16] MPD's Reply Brief (Feb. 16, 2018).

As for Employee's complaints about Charge No. 6, Specifications No. 2 and 3, Agency notes that Police Chief Newsham had dismissed the entire charge and thus need not be discussed.

With regards to Charge No.7, Specification No. 1, Agency points out that it introduced evidence that during the two hour period Employee willfully misrepresented his whereabouts, there were seventeen (17) radio assignments dispatched to his co-workers in the Fourth District, some of which should have been assigned to Employee to spread the work, thereby unfairly and negatively impacting Agency's efficiency. Agency maintains that, the finding that Employee was guilty of this charge and specification is supported by substantial evidence and should be upheld.

Analysis on substantial evidence

After reviewing the record and the arguments presented by the parties, the undersigned concludes that the Panel met its burden of substantial evidence. The undersigned finds that the parties had a full and fair opportunity to present testimonial and documentary evidence. Employee's Representative had the opportunity to present its full case to the Panel and was also able to cross examine witnesses and challenge evidence. Further, a review of the transcript from the Evidentiary Hearing shows that the Panel was actively engaged at the hearing, asked relevant questions, and raised pertinent concerns to resolve pending issues. The Panel also made credibility determinations and the undersigned finds that there was sufficient evidence to support those determinations. Moreover, in reaching its conclusion, the Adverse Action Panel considered the *Douglas factors*.

Further, there was ample documentary and testimonial evidence in the record to support the Panel's conclusion that Employee was guilty of the Charges and Specifications that they found him guilty of. After a review, Agency adopted the Panel's findings and recommendations. Consequently, the undersigned finds that there was substantial evidence in the record to support the Panel's findings and recommended penalty.

Whether there was harmful procedural error.

Pursuant to *Pinkard* and OEA Rule 631. 3, the undersigned is required to make a finding of whether or not MPD committed harmful error. OEA Rule 631.3 provides as follows: "notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies *if the agency can demonstrate that the error was harmless* (emphasis added). Harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action."

Here, the parties are not alleging any harmful procedural error. My review of the record did not reveal any evidence of such and therefore, I conclude that there was no harmful procedural error.

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

Employee contends that termination was an improper penalty and that Agency's *Douglas* analysis failed to consider any comparative discipline or balance it against evidence of misconduct in order to craft a reasonable penalty. He contends Agency failed to consider progressive discipline and that he was a victim of disparate treatment.[17]

Agency contends that the penalty was appropriate. It explains that the Panel properly reviewed and applied each of the enumerated *Douglas* factors and relied upon the MPD's Table of Appropriate Penalty. Further, having considered each of the relevant factors, Agency's decision to terminate Employee's employment was neither arbitrary nor capricious, therefore, should not be disturbed.[18]

With regards to Employee's objections to his penalty, Agency noted that as the factfinder, the Panel found that Employee was not credible and properly included it in its analysis of the *Douglas* factors. The Panel held that dependability, truthfulness and integrity were essential characteristics for a police officer.

The Court of Appeals have held that in reviewing an administrative decision's findings of facts, great deference is given to "any credibility determinations of the administrative factfinder."[19] An administrative factfinder's credibility determinations are entitled to greater weight because the examiner has heard the live testimony and observed the demeanor of the witnesses.[20] Based on the documentary evidence, as well as Employee's own admissions, I conclude that Agency had cause to institute this cause of action against Employee. Consequently, based on documentary evidence, and Employee's own testimony, I find that Agency had cause to institute this cause of action against Employee.

In his brief, Employee objects to the way Agency analyzed the *Douglas* factors to come to a conclusion that termination was the appropriate penalty. The fact that Employee disagreed with the ultimate conclusion that Agency came to with regards the appropriate penalty does not negate or render invalid Agency's *Douglas* analysis. The important fact is that Agency did perform a detailed *Douglas* analysis.

I also note that a *Douglas* analysis by management is not required by statute. This Office does not apply a litmus test that agencies analyze a penalty in strict accordance with *Douglas*. Indeed, this Office has held that failure to discuss the *Douglas* factors, which is certainly not the situation here, does not amount to reversible error and that even without such a discussion, Agency's decision to remove Employee is valid so long as it was not an abuse of discretion or arbitrary.[21]

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[17] Reply Brief of Employee starting on page 7 (February 16, 2018).
[18] MPD's Reply Brief starting on page 7 (Feb. 16, 2018).
[19] *Metro. Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989) (*citation omitted*).

[20] *Dell v. Department of Employment Servs*., 499 A.2d 102, 106 (D.C. 1985); *Hillen v. Dep't of the Army*, 35 M.S.P.R. 453, 458 (1987) (recognizing that in trying to resolve issues of credibility, the demeanor of the witness is considered).
[21] *Christopher Lee v. D.C. Dept. of Transportation*, OEA Matter No. 1601-0076-08, *Opinion and Order on Petition for Review* (January 26, 2011). However, in February 25, 2016, and updated on May 19, 2017, the (DPM) District Personnel Manual §1606.2 lists the factors agency actions managers shall consider in deciding on the penalty for all corrective and adverse actions other than a reprimand. These factors in 1606.2 parallel the *Douglas* factors.

Lastly, Employee also asserts that he is a victim of disparate treatment but offers no evidence to support his allegation. The employee bears the burden of proof in disparate treatment claims.[22] Here, Employee has failed to make a *prima facie* showing of disparate treatment. Thus, I must dismiss this claim.

The Adverse Action Panel unanimously concluded that Employee was guilty of the charges specified above. Not only did Agency conduct a *Douglas* factor analysis in coming up with its penalty, the chosen penalty was well within the MPD Table of Penalties for the sustained charges. Accordingly, based on the preceding analysis, the undersigned finds that Agency's action of terminating Employee's employment was done in accordance with applicable laws and regulations. Based on the foregoing analysis, I find no plausible reason to disturb Agency's action.

The undersigned is sympathetic to Employee's plight given his years of service. However, the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.[23] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."[24] When an Agency's charge is upheld, this Office has held that it will leave the Agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment.[25] I conclude that given the totality of the circumstances as enunciated in the instant decision, the Agency's action of terminating Employee's employment should be upheld.

ORDER

Based on the foregoing, it is ORDERED that the Agency's action of terminating Employee's employment is hereby UPHELD.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge

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[22] Regarding this Office's well-established law on disparate treatment, *see also Huntley v. Metropolitan Police Department,* OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Link v. Department of Corrections,* OEA Matter No. 1601-0079-92, *Opinion and Order on Petition for Review* (September 29, 1995); *Adewetan v. D.C. General Hospital*, OEA Matter No. 1601-0021-93 (July 11, 1995); *Shade v. Department of Administrative Services,* OEA Matter No. 1601-0360-94 (August 3, 1999).

[23] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).

[24] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

[25] *See Stokes, supra*; *Hutchinson, supra*; *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995).