THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
RICHARD POLISH,	)	
Employee	)	OEA Matter No. 1601-0076-13
	)	
v.	)	Date of Issuance: January 7, 2016
	)	
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT,	)	
Agency	)	Eric T. Robinson, Esq.
	)	Senior Administrative Judge

Richard Polish, Employee *Pro-Se*
Rahsaan Dickerson, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On April 17, 2013, Sergeant Richard Polish ("Employee") filed his petition for appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting The District of Columbia Fire and Emergency Medical Services Department action of suspending him without pay for one-hundred sixty-eight hours and demoting him from Lieutenant to Sergeant. This matter was assigned to the undersigned on or about February 2014.

FEMS succinctly described Employee's transgressions that led to his filing the instant petition for appeal as follows:

> In a Notice of Proposed Adverse Action (Notice) served on Employee on November 14, 2012, Agency proposed termination for Employee's commission of misconduct occurring between September 22, 2013, and September 26, 2013. See *Notice of Proposed Action*, Agency Record (AR) Tab 10. As a result of his misconduct, Employee was charged with (1) "Violation of D.C. Fire and EMS Rules and Regulations, Article VI, Section 5 (Rules of Conduct), which states: "Members shall conduct themselves in a respectful manner, be just, firm, and dignified in their

relations with others; be respectful and obedient to their superior officers; accord proper respect to members and others; refrain from the use of harsh, violent, abusive, coarse or insolent language…" ("Any other on duty or employment related reason for corrective or adverse action that is not arbitrary or capricious.") *Id.* Specifically, on September 22, 2012, Employee, posting under the twitter handle/name "Sid Polish (2nd BFCAide)," posted "I hear the racist regime of @dcfems claimed another great resource." On September 23, 2012, Employee made disparaging remarks aimed directly at then Fire Chief Kenneth Ellerbe by posting a tweet which referred to Chief Ellerbe as a "coward leader," stating "fuck you Loserbee" in another tweet, and posting a hyperlink to a website entitled www.fuckkennethellerbe.com in another tweet. *Id.*

In addition to the foregoing charge and specific acts of misconduct, Employee was also charged with violation of D.C. Fire and EMS Order Book, Article VI, Section 8 of the Rules and Regulations, which states in pertinent part: "[M]embers shall refrain from immoral conduct, deception; violation or evasion of law or official rule, regulation, or order; and from false statements." (i.e. "Any on duty or employment related act or omission that interferes with the efficiency and integrity of government operations, to wit: Misfeasance"). *Id.* Specifically, during Agency's investigation of alleged misconduct stemming from Employee's use of his twitter account, Employee submitted a special report, in which he offered untruthful statements concerning the origins and intent of the negative tweets of September 22 and 23, indicating that the www.fuckkennethellerbe.com link was posted as a result of someone hacking his account, and that all other negative references to Chief Ellerbe were a result of typos or auto corrections by his IPhone, which is the means by which Employee posted to twitter. *Id.* As mentioned above, as a result of providing false statements in his special report, and his twitter posts wherein he personally attacked the Chief of the Agency that he worked for, Employee was charged with violating Agency's rules of conduct, and a trial board was proposed. On January 16, 2013, a full evidentiary hearing was held before a Fire Trial Board (Board). AR Tab 15. Based on the testimony and evidence presented at hearing, the Board unanimously found Employee guilty of all charges and specifications. AR Tab 16. Based on the aforementioned guilty findings, the Board recommended a penalty of demotion and a total of one-hundred sixty-eight hours suspension without pay.[1] *Id.* On March 25, 2013, Employee was served with notice informing him that Chief Ellerbe accepted the Board's'

[1] Employee faced two separate cases for his misconduct. The two cases were both heard on January 16, 2013. In case number U-12-251, the Trial Board recommended a penalty of demotion and one hundred twenty hours suspension. In case number U-12-247, the Board recommended a penalty of forty-eight hours suspension. As the two cases contain separate charges with separate penalties, I find that OEA does not have jurisdiction to review case number U-12-247 as the penalty imposed is less than ten days in length.

> findings and recommendations, and that the Board's recommendation of both suspension and demotion would be imposed. *Id.* [2]

Thereafter, the matter was under consideration regarding jurisdiction. When the undersigned was satisfied that the OEA had authority to adjudicate this matter, a Prehearing Conference was convened. The parties appeared for said conference during which the undersigned determined, *inter alia*, that an evidentiary hearing was unnecessary. I also 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 complied with this briefing schedule. The record is now closed.
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JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

STATEMENT OF THE CHARGES

The charges and specifications, in pertinent part, are reprinted as follows:

Case No. U-12-251

Charge 1 Violation of D.C. Fire and EMS Rules and Regulations, Article VI,

[2] Agency's Brief at 1 -3 (February 2, 2015).

Section 5 (Rules of Conduct), which states: "Members shall conduct themselves in a respectful manner, be just, impartial, firm, and dignified in their relations with others; be respectful and obedient to their superior officers; accord proper respect to members and others; refrain from the use of harsh, violent, abusive, coarse or insolent language . . ." This misconduct is defined as cause in the D. C. Fire and EMS Order Book, Article VII, Section 2(g), which states: "Any other on duty or employment related reason for corrective or adverse action that is not arbitrary or capricious." *See also* 16 D.P M. § 1603.3(g) (March 4, 2008).

Specification 1

On your Twitter page, posted on September 22, 2012, you posted: "I hear the racist regime of @dcfireems claimed another great resource". By identifying yourself as an employee of the D.C. Fire and EMS Department, any reasonable person could lose confidence with the Department and believe that Chief Ellerbe's policies and orders are harmful to other races. Your comments may cause a deleterious effect on the order of the service.

Specification 2

On your Twitter page, posted on September 23, 2012, you referred to Fire and EMS Chief Ellerbe as a "coward leader." You identified yourself as an officer of the D. C. Fire and EMS Department, by writing: "Sid Polish (2ndBFCAide) on Twitter; and "http://twitter.com/2ndBFCAide." By identifying yourself as an employee of the D.C. Fire and EMS Department, any reasonable person could lose confidence with the Department by believing that the leadership of the Fire and EMS Chief is described as cowardly. A Fire Chief must appear strong, confident, and decisive to maintain order within the ranks. Your comments may cause a deleterious effect on the order of the service.

Specification 3

On your Twitter page, posted on September 23, 2012, you posted: "September 23, 1871 the department became fully paid and the name changed to the District of Columbia Fire Department. FuckyouLoserbee." Your post is disruptive to the efficient operation of the workplace since your comments involve personal attacks and are not a matter of public interest. An officer who displays disrespect toward the Fire and EMS Chief incites misunderstanding and distrust of the Department's regulations, policies; and orders that are in place to maintain order and discipline. These inflammatory characterizations of the Fire and EMS Chief do not promote the best interest of the Department.

Specification 4

Lieutenant Polish posted a website on his Twitter account entitled: www.fuckkennethellerbe.com. You also identified yourself as an

officer of the D.C. Fire and EMS Department, by Writing: "Sid Polish (2ndBFCAide)" on Twitter; and "http://twitter.com/2ndBFCAide." By identifying yourself as an employee of the D.C. Fire and EMS Department, any reasonable person could lose confidence with the Department. Your comments may cause a deleterious effect on the order of the service. Your posts are disruptive to the efficient operation of the workplace since your comments involve personal attacks and are not a matter of public interest. An officer who displays disrespect toward the Fire and EMS Chief incites misunderstanding and distrust of the Department's regulations, policies, and orders that are in place to maintain order and discipline. This derogatory statement referencing the Fire and EMS Chief does not promote the best interest of the Department.

Charge 2

Violation of the D.C. Fire and EMS Order Book, Article VI, Section 8 of the Rules and Regulations, which states in relevant part: "Members shall refrain from immoral conduct, deception; members violation or evasion of law or official rule, regulation, or order; and from false statements." This misconduct is defined as cause in the D.C. Fire and EMS Department Order Book, Article VII, Section 2(f)(6), which states in part: "Any on duty or employment related act or omission that interferes with the efficiency and integrity of government operations, to ·wit: Misfeasance." *See also* 16 D.P.M. § 160.3.(f)(6) (March 4, 2008).

Specification 1

During an official investigation, Lieutenant Richard Polish submitted a Special Report dated September 26, 2012, in which he explained how disparaging remarks about Fire and EMS Department Chief Kenneth Ellerbe were posted on his Twitter page. For the posting of www.fuckkennethellerbe.com, Lieutenant Polish stated that someone hacked into his account. Lt. Polish admitted to all the other postings, but stated the statements were typos or autocorrected on his pages by his iPhone. Both statements were written to mislead or deceive the Department to believe that he was not responsible for the personal attacks against the Fire and EMS Chief.

On January 16, 2013, Employee appeared before a Fire Trial Board. He was represented by counsel, and pleaded not guilty to each charged offense. After receiving both documentary and testimonial evidence, the Fire Trial Board unanimously made the following findings and penalty recommendations:

Charge 1, Specification 1	Guilty	48 duty-hour suspension
Charge 1, Specification 2	Guilty	24 duty-hour suspension
Charge 1, Specification 3	Guilty	24 duty-hour suspension

Charge 1, Specification 4	Guilty	24 duty-hour suspension
Charge 2, Specification 1	Guilty	Demotion to Sergeant

By letter dated March 22, 2013, D.C. Fire and Emergency Medical Services Department Chief Kenneth B. Ellerbe notified Employee that he accepted the findings and recommendations of the Fire Trial Board, and the 120 hour suspension as well as the demotion would be imposed.

ISSUES

Whether the Trial Board's decision was supported by substantial evidence, whether there was harmful procedural error, or whether Agency's action was done in accordance with applicable laws or regulations.

ANALYSIS AND CONCLUSIONS

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*, 801 A.2d 86 (D.C. 2002). In that case, the D.C. Court of Appeals overturned a decision of the D.C. Superior Court that held, *inter alia*, that this Office had the authority to conduct *de novo* evidentiary hearings in all matters before it. According to the D.C. Court of Appeals:

> 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).
>
> The MPD contends, however, that this seemingly broad power of the OEA to establish its own appellate procedures is limited by the collective bargaining agreement in effect at the time of Pinkard's appeal. The relevant portion of the collective bargaining agreement reads as follows:
>
> [An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing has been held, *any further appeal shall be based solely on the record established in the Departmental hearing.* [Emphasis added.]
>
> Pinkard maintains that this provision in the collective bargaining agreement, which appears to bar any further evidentiary hearings, is effectively nullified by the provisions in the CMPA which grant the OEA broad power to determine its own appellate procedures. A collective bargaining agreement, Pinkard asserts, cannot strip the OEA of its statutorily conferred powers. His argument is essentially a restatement of the administrative judge's conclusions with respect to this issue.

> 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 the 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 [Adverse Action Panel] 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 Adverse Action Panel 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 Adverse Action Panel.[3]

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;
>
> 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;

[3] *Id.* at 90-92. (citations omitted).

> 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.

Based on the documents of records and the position of the parties as stated during the conference held in this matter, I find that all of the aforementioned criteria are met in the instant matter. Therefore my review is limited to the issues as set forth in the Issue section of this Initial Decision *supra*. Further, according to *Pinkard*, I must generally defer to [the Fire Trial Board's] credibility determinations when making my decision. *Id.*

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

According to *Pinkard*, I must determine whether the Trial Board's findings were supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[4] Further, "[i]f the [Fire Trial Board's] findings are supported by substantial evidence, [I] must accept them even if there is substantial evidence in the record to support contrary findings." [5] Agency asserts the following in support if establishing substantial evidence for the Trial Board's findings:

> As pointed out in the summary of evidence, Employee admitted to having a twitter page wherein he identified himself as Sid Polish, 2ndBFCAide. AR Tab 16. Employee admitted that he knew members of the Agency, media, council members, and potentially members of the public frequented his twitter page. *Id.* As a result of knowing his potential audience, there can be no question that Employee (or anyone with a modicum of common sense) was fully aware of the potential negative impact that the offensive tweets could have on fellow members of the Agency and the potential impact the offensive tweets would have on the public's perception of the Agency.[6]

Employee counters this argument with the allegation that the negative comment was the result of an errant auto-correct feature of his IPhone. FEMS presented an expert witness to directly refute Employee's claim that the IPhone's auto-correct feature would operate in the manner indicated in Employee's testimony. The following excerpt from Agency's brief

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[4] *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)).
[5] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).
[6] Agency Brief at 5 (February 2, 2015).

illustrates this point:

> In rebuttal to Employee's claims, Agency called Chief Information Officer Elmore Leonard, who the Board accepted as an expert witness in the field of information technology. During Agency's direct examination of Mr. Leonard, the following exchange occurred:
>
> > Q: In your opinion, is it likely that the IPhone would, in fact, autocorrect an attempted spelling of [the word] recent into the word racist?
> >
> > A: It is both my opinion and also I found testing myself that I can see no way that that autocorrect would happen.[7] (Citations omitted).

Employee's response was not found to be credible by the Trial Board. Employee also contends that some FEMS witnesses lied under oath. I find that mere conjecture or disagreement with the outcome is not enough to overturn Agency's findings against Employee in this matter. After reviewing the record, it is clear that Employee admitted that he owned and curated the Twitter account in question. The statements contained within said account were disparaging to Agency's leadership and was in stark violation of Agency regulations regarding his conduct. Regardless of his protestations to the contrary, I find that there was substantial evidence present within the record in support of Agency's adverse action.

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

Employee contends that BFC Bashore should have been removed from the Trial Board due to bias. To corroborate this point, Employee noted that his wife was a part of a team that, prior to the Trial Board hearing, served a search warrant at BFC Bashore's personal residence. Employee further argues that Agency's failure to remove Bashore from the Trial Board constitutes harmful procedural error. Employee in his brief argued the following:

> The most egregious issue in this matter is the Agency's harmful procedural error. On January 14, 2013, Employee's counsel, Matthew Rubin, submitted a letter to then Assistant Fire Chief of Services, Kenneth Jackson, requesting the removal of Trial Board Chairman, Chief James Michael Bashore. The request was within the guidelines set forth by the Agency set forth in the DC Fire and Emergency Medical Services Order Book, under Article 7 known as Maintenance of Discipline, section 12, and in accordance with Article 32 Section F Part 2 of the Collective Bargaining Agreement (herein referred to as "C.B.A.").

[7] *Id*. at 6.

> Article 32 of the C.B.A. Disciplinary Procedures Section F-Trial Board Part 2 states, "except as otherwise provided in this section, the Fire Chief shall have complete discretion in selecting the members of the Trial Board and in determining the length of time that appointees serve on Trial Boards, subject to the right of an affected employee to challenge any member of the Trial Board pursuant to Article VII, Section 12 of the Department Rules and Regulations. A member must show cause to disqualify a Trial Board member from serving; no challenge shall automatically result in disqualification of the Trial Board member."
>
> Article 7, Maintenance of Discipline states "along with charges and specifications, the accused shall be notified by the Fire Chief of the personnel comprising the Trial Board which will hear his case. A challenge to any member of the Board shall be made to the Fire Chief at least 72 hours prior to the time set for trial. Said challenge shall be in writing and set forth the specific reasons for the challenge. The Fire Chief shall decide whether the challenge is justified and, if so, he shall designate the next eligible to serve in the challenge members (*sic*) stead. Any member of the Board challenged shall, if the Fire Chief deems it necessary, answer in writing the charges contained in such challenge."[8]

I note that the preceding regulation granted the Fire Chief "complete discretion in appointing members to serve on a Trial Board. The language within the excerpted portion of the CBA is clear in that the Fire Chief has complete discretion. Employee also contends that the Fire Chief did not select the Trial Board members but rather that Assistant Fire Chief Kenneth Jackson made the selection. This argument is without merit. I note that it is within an Agency Director's discretion to delegate certain responsibilities. Despite Employee's arguments to the contrary, I find that no harmful procedural error occurred in this matter.

Employee argues that "[a]t no time was Employee's conduct done during work hours, using a work computer or internet provided by the DC Fire and Emergency Medical Services, or using an official title representative of the Agency… At the time of the alleged infractions and during the Trial Board, DC Fire and Emergency Medical Services had no social media policy in place, therefore no (*sic*) rules or regulations regarding social media could have been violated as alleged in the charges brought against the Employee."[9] Employee's argument does not pass muster. While it may or may not be true that the Twitter posts were not done using District government resources, it is plainly evident that the Twitter posts were "employment related" as

[8] Employee's Brief at 1 (April 3, 2015).
[9] *Id*. at 3.

contemplated by 16 DPM § 1603.3(g), for which he was duly put on notice that this was the subject violation for which he being charged for. This section of the DPM has been in effect since 2008. I find that Agency action was done in accordance with all relevant laws, rules and regulations.

I conclude that Employee has failed to proffer any credible evidence that would indicate that his suspension and demotion was improperly conducted and implemented. Employee's other ancillary arguments are best characterized as a grievances and outside of the OEA's jurisdiction to adjudicate.[10]

ORDER

Based on the foregoing, it is **ORDERED** that Agency's action of demoting and suspending Employee is hereby **UPHELD**.

FOR THE OFFICE:

_____
ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

[10] Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.