THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,	)	
Employee	)	OEA Matter No. 1601-0082-22
	)	
v.	)	Date of Issuance: April 15, 2024
	)	
DISTRICT OF COLUMBIA FIRE & EMERGENCY MEDICAL SERVICES DEPARTMENT,	)	
Agency	)	ERIC T. ROBINSON, ESQ.
	)	SENIOR ADMINISTRATIVE JUDGE

Employee *Pro-Se*
Daniel Thaler, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On September 26, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the District of Columbia Fire and Emergency Medical Services Department ("FEMS" or the "Agency") action of demoting him from Firefighter/Technician to Firefighter/Emergency Medical Technician. On December 28, 2021, Agency issued to Employee the Proposed Action recommending that he be demoted from his appointment as a Firefighter/Technician. The Proposed Action specified that Employee was charged with violations of: (1) FEMS Order Book, Article VI, § 6, Conduct Unbecoming an Employee; (2) FEMS Bulletin No. 33, Social Media Policy, § II; and (3) FEMS Bulletin No. 24, Anti-Hazing Policy. AR at Tab 6. The Proposed Action further explained that these violations amounted to neglect of duty as defined in Agency's Order Book Article VII, Section 2(f)(3) and an on-duty/employment-related reason for corrective or adverse action as defined in Agency's Order Book Article VII, § 2(g). *Id*. On May 25, 2022, a Fire Trial Board was convened in order to assess the proposed demotion. On July 28, 2022, the Fire Trial Board issued its Finding and Recommendations and unanimously found Employee guilty as charged. On August 25, 2022, Agency issued its Final Decision affirming the Fire Trial Board's recommendation. The effective date of Employee's demotion was August 28, 2022.

On September 30, 2022, the OEA, through its Executive Director, sent notice to FEMS requiring it to submit an Answer to Employee's Petition for Appeal by October 30, 2022. FEMS timely filed its Answer to Employee's Petition for Appeal on October 27, 2022. This matter was assigned to the Undersigned Senior Administrative Judge on December 2, 2022. Pursuant to Order, the parties were initially scheduled to appear for a Prehearing/Status Conference on February 8, 2023. However, pursuant to the parties' request for a Continuance, the conference was rescheduled for February 15, 2023. On February 16, 2023, the Undersigned issued an Order, whereby the parties were instructed that this matter would be decided using the framework required by *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). The implications of this framework will be discussed more thoroughly below. Both parties followed the briefing schedule outlined in that Order. After reviewing the documents of record, the Undersigned has determined that no further proceedings are warranted. The record is now closed.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

> The burden of proof for 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 631.2 id. States:

> For appeals filed under §604.1, 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.

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.

STATEMENT OF THE CHARGES

> **Charge 1**: Violation of [FEMS] Order Book Article VI, § 6, Conduct Unbecoming an Employee, which states:
>
> Conduct unbecoming an employee includes conduct detrimental to good discipline, conduct that would adversely affect the employee's or agency's

ability to perform effectively, or any law. Municipal ordinance or regulation of the District of Columbia committed while on-duty or off-duty.

Further violation of [FEMS] Bulletin No. 33, Social Media Policy, § 11, which states:

A. Know and Follow the Rules
Inappropriate electronic communication that may include discriminatory remarks, harassment, retaliation, sexual innuendo, threats of violence, or similarly inappropriate or unlawful content will not be tolerated and may result in disciplinary action up to including termination.

B. Be Respectful
Always be fair and courteous to fellow employees, residents, visitors of the District, vendors or people who work on behalf of the District. Also keep in mind that you are more likely to resolve work-related complaints by speaking directly with your co-workers or your immediate supervisor, rather than by posting complaints to a social media outlet, Nevertheless, if you decide to post complaints or criticisms, avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating or as disparaging to customers, members, employees or suppliers, or that might constitute harassment or bullying, even if it is done after work hours, on a personal electronic device, or from home.

Further violation of [FEMS] Bulletin No.24 (anti-Hazing Policy), which states:

Hazing Defined

Hazing is any intentional, knowing, or reckless act committed by an individual, whether individually or in concert with other persons, against another employee, in which both of the following apply:

- The act was committed in connection with initiation into a work group, station, shift, or division in or affiliated with the Department.
- The act contributes to a substantial risk of potential physical injury, mental harm, or degradation, or causes physical injury, mental harm, or personal degradation.

Hazing Prohibited

Hazing is prohibited. All personnel must take reasonable measures with the scope [of] their individual authority to prevent violations of this policy.

Hazing Violations

Violators of this policy, or interference in an investigation under this policy, are subject to discipline.

This misconduct is defined as cause in [FEMS] Order Book Article VII, Section 2(f)(3), which states: "any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations, to include: Neglect of Duty." See also DPM § 1603.3(f)(3) (August 27, 2012).

This misconduct is further defined as cause in [FEMS] Order Book Article VII § 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 DPM § 1603.3(g).

Specification 1:

During the Department's September 7, 2021, Virtual Town Hall forum to discuss Special order No. 196, Series 2021 (Implementation of Mandatory Covid-19 Vaccination), you posted the following comments in the chat:

11:50:31 From [Employee][1]: HOW COME THE DOH & THE DEPARTMENT WON'T TAKE AWAY A MEMBERS EMT CARD AFTER THEY'RE CAUGHT IN A STING TRYING TO MEET AN UNDERAGE CHILD FOR SEX BUT WILL TAKE IT AWAY FOR NOT GETTING VACCINATED?

11:53:26 From [Employee]: IT'S OK PEOPLE..DOH WON'T TAKE TOUR CARD IF YOU'RE A CHILD PREDATOR AND THE DEPARTMENT WILL NOT DISCIPLINE YOU SO LET THAT MARINATE FOR A MIN..

11:55:07 From [Employee]: DR HOLMAN… DO YOU THINK A MEMBER WHO WHO'S CURRENTLY EMPLOYED AND WAS CAUGHT TRYING TO MEET AN UNDERAGE CHILD FOR SEX SHOULD HOLD A DOG EMT CARD???

11:57:47 From [Employee]: DR HOLMAN ARE YOU GOING TO ANSWER MY QUESTION..SHOULD CHILD PREDATORS ON THE JOB HOLD A DOH EMT CARD?

11:59:30 From [Employee]: CHIEF DONNELLY ..DR HOLMAN DOESN'T THINK A MEMBER WHO WAS CAUGHT TRYING TO

[1] Employee's name is being omitted due to privacy concerns.

MEET AN UNDERAGE CHILD FOR SEX SHOULD HAVE A DOH EMT CARD.[2]

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,

[2] Agency Pinkard Brief pp. 10 -11 (March 31, 2023).

> 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;
>
> 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.

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

Based on the documents of record 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.*

Substantial Evidence

According to *Pinkard*, I must determine whether the Fire 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 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]

On May 25, 2022, a Fire Trial Board ("FTB") consisting of BFC Christopher Y. Holmes, BFC Douglas Pagel, Captain Christopher Moore, and Captain Michael Poles was convened. During this proceeding, they collected and assessed witness testimony and other evidence regarding Employee's alleged misconduct. The FTB's findings of fact underlying its decision include:

a. [Employee] admitted to posting multiple negative and harassing comments about FF/EMT WM[6] during the Virtual Town Hall Meeting.
b. [Employee] admitted to not following the Department's rules and regulations for reporting crimes or possible legal infractions to the Department.
c. [Employee] admitted that his comments that he posted to the Virtual Town Hall Meeting were not relevant to the purpose of the Virtual Town Hall Meeting.
d. In his written statement, Lieutenant Michael Carman stated that [Employee] "has a history of hazing FF/EMT WM prior to this incident about the allegations of sexual relations with a minor."[7]

It is unquestioned that FEMS held a Zoom meeting which was entitled, "Special Order No. 196, Series 2021, Implementation of Mandatory COVID-19 Vaccination." According to FEMS, the purpose of this virtual meeting was to provide important information about Agency's COVID-19 vaccination policy. Agency further noted that this meeting had a chat box that was visible and accessible to all attendees. The FTB considered the Covid-19 virtual town hall excerpt that was included in the Statement of Charges above. During the Trial Board, Employee unequivocally admitted to making these statements regarding his estranged work colleague.[8] He further admitted that through these statements, he was referencing his estranged colleague (who was unnamed during the town hall) that had been implicated in a "child sex sting." While Employee's allegation

[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] This person's name is being omitted due to privacy concerns.
[7] Agency Pinkard Brief pp. 9-10 (March 31, 2023).
[8] Tr. pp. 186.

is concerning, the town hall was not the time or the place to voice these concerns and that the way Employee described his colleagues conduct was also inappropriate given the forum in which he made these comments. During the Fire Trial Board hearing, I find that Employee admitted to the salient facts that are the subject of the instant adverse action.

Employee counters that his estranged colleague was in fact caught in an alleged child sex sting some time prior to the town hall meeting. Employee noted that his grave concern over his colleague, who was allowed to return to work, should supersede the subject of the town hall meeting. He further noted that some of Agency's witnesses provided untruthful testimony during the FTB. Of note, in a *Pinkard* matter, the Undersigned can only assess whether there is substantial evidence to support Agency's finding. The Undersigned is unable to assess whether I would come to the same or different conclusion. The Board of the OEA has previously held that an employee's admission is sufficient to meet Agency's burden of proof.[9] With that, I further find that it is clear that Agency has substantial evidence buttressing its decision to demote Employee.

Harmful Procedural Error

Pursuant to *Pinkard* and OEA Rule 631. 3, I find that in the instant matter, the Undersigned is required to make a finding of whether or not FEMS 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. 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."

I have examined the record and I do not find Employee's complaints to be valid. Agency followed the proper procedure in its adverse action against Employee by providing due process. Employee was given proper notice and was able to represent himself and cross-examine witnesses in the hearing afforded him. Agency conducted a thorough analysis of the relevant factors in determining his penalty. There was no inconsistency or unreasonableness in Agency's adverse action against Employee. I therefore find that there was no harmful procedural error in this matter.

Adverse Action Done in Accordance with Applicable Rules and Regulations

I find that Employee did not credibly allege that Agency's action was not done in accordance with applicable laws or regulations. I do note that Employee took personal issue with FEMS not seeking to remove or sanction his estranged colleague. Employee also alluded that his First Amendment right to free speech was somehow violated in this matter. This was allegedly due to his voicing his concern over his estranged colleague being caught in an alleged "child sex sting,' and FEMS sanctioning him through a detail to another firehouse and ultimately the instant adverse action. I find that Employee's contention is nothing more than a mere personal complaint concerning FEMS' inaction regarding his colleague rather than citing to a fact or instance that would implicate legal or regulatory error requiring review. I find that Employee also failed to present a coherent argument that his First Amendment rights were violated, particularly since he

[9] *See*, *Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987).

was speaking to the virtual assemblage about a separate matter than the one that was the basis for bringing them together. I also note that if Employee had genuine safety concerns about his estranged colleague, he could have presented the same through more appropriate and decisive venues. Employee did not do that but rather sought to bring notoriety to his concerns in a devious effort to shame his estranged colleague. My examination of the record reveals that the Agency's action was proper. Given the gravity of the conduct and the proper procedural safeguards of due process that Agency undertook, I find that Agency proved by a preponderance of the evidence that it had cause to demote Employee.

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.[10] I conclude that given the totality of the circumstances as enunciated in the instant decision, the Agency's action of demoting Employee should be upheld.

ORDER

Based on the foregoing, it is ORDERED that the Agency's action of DEMOTING Employee from his appointment as a Firefighter/Technician to a Firefighter/Emergency Medical Technician is hereby UPHELD. [11]

FOR THE OFFICE: /s/ Eric T. Robinson

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

[10] *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).

[11] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin,* 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater,* 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").