THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0386-10
HENRY SMALLWOOD,	
Employee	
	Date of Issuance: February 10, 2014
v.	
DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPARTMENT,	
Agency	Sommer J. Murphy, Esq.
	Administrative Judge

Donna Williams Rucker, Esq., Agency Representative
Frank McDougald, Esq., Employee Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On August 26, 2010, Henry Smallwood ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the D.C. Metropolitan Police Department's ("Agency" or "MPD") action of terminating his employment. The events which formed the basis for Employee's termination occurred on September 2, 2008, when Employee was arrested and subsequently charged with Possession of a Controlled Substance and Fleeing a Law Enforcement Officer. Prior to being terminated, Employee worked as a Police Officer with MPD. The effective date of Employee's termination was July 30, 2010.

I was assigned this matter in July of 2012. On July 27, 2012, I issued an Order scheduling a Status Conference ("SC") to be held at this Office on August 23, 2012. However, Employee submitted a motion requesting additional time to obtain legal representation. Employee's motion was granted, and a second SC was held on February 28, 2013. I subsequently ordered the parties to submit briefs on the issue of whether the decision of the Trial Board ("Board" or "Panel") should be overturned. Because the Undersigned is precluded from conducting a de novo examination on the merits of this appeal, as discussed *infra*, an Evidentiary Hearing was not held. On May 1, 2013, and June 7, 2013, the parties submitted Joint Motions to Enlarge the Parties' Briefing Schedule. Both motions were granted, and the final brief was filed with this Office on August 23, 2013. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether the Trial Board's decision was supported by substantial evidence.

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

STATEMENT OF THE CHARGES

Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-3, which states, "The taking of any drug or substance, on or off duty, as described in the D.C. Uniform Controlled Substances Act of 1981, unless taken upon the prescription of a licensed physician, or registered practitioner authorized to dispense a controlled substance during the course of professional practice."

Specification No. 1: In that, on September 2, 2008, you were observed by U.S. Park Police ("USPP") Officers Sean D'Augostine and Timothy Gunan smoking a marijuana cigarette at Rock Creek Park.

Charge No. 2: Violation of General Order Series 120.21, Attachment A, Part A-7, which provides in part, "…or is deemed to have been involved in any act which would constitute a crime, whether or not a court record reflects a conviction."

Specification No. 1: In that, on September 2, 2008, you were arrested by the USPP and charged with Fleeing to Elude Law Enforcement, Reckless Driving, Speeding in Excess of 30 mph, and violating the Uniformed Controlled Substance Act, ("UCSA") Possession of Marijuana.

Specification No. 2: On January 28, 2009, you were indicted by a Grand Jury on charges of Fleeing a Law Enforcement Officer and Possession of a Controlled Substance.

Charge No. 3: Violation of General Order Series 120.21, Attachment A, Part A-12, which reads "Conduct unbecoming of an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively, or violations of any law of the United States or any law, municipal ordinance, or regulation of the District of Columbia."

Specification No. 1: In that, on September 2, 2008, you were observed by the U.S. Park Police smoking a marijuana cigarette at Rock Creek Park. When confronted and questioned by U.S. Park Police, you ran to your vehicle, entered it and sped off at a high rate of speed while being pursued by the USPP. You then alighted from you vehicle and were subsequently apprehended.

Employee's Position

Employee argues the following as reasons for overturning Agency's action of terminating his employment.

1. The Trial Board's decision to terminate Employee was not based on substantial evidence.

2. There was no direct testimony adduced during Agency's Trial Board hearing to support a finding that Employee was ingesting or using drugs at the time of his arrest.

3. Employee's termination was in direct violation of D.C. Official Code § 5-1031 (2001) because he was not served with notice of the adverse action against him within ninety (90) days after the act or occurrence allegedly constituting cause occurred.

4. Employee was not properly served with notice of his termination because Agency left the notice at an old address where he did not reside, although Employee had updated his address with Agency in an appropriate fashion.

5. The Trial Board unreasonably relied on hearsay evidence during Employee's hearing.

6. Employee was maliciously prosecuted.[1]

7. Agency engaged in racial discrimination against African American police officers.[2]

Agency's Position

Agency argues that its decision to terminate Employee was based on substantial evidence. According to Agency, the evidence adduced during the Trial Board hearing supports a finding that Employee was observed smoking a marijuana cigarette by two USPP officers, and that Employee subsequently fled the scene and drove at a high speed while being pursued by officers. In addition, Agency argues that Employee was subsequently arrested and indicted on charges of Fleeing a Law Enforcement Officer and Possession of a Controlled Substance. Agency further argues that it properly considered the *Douglas Factors*, and that Employee's conduct warranted the penalty of termination. Lastly, Agency contends that Employee was afforded all of his rights in accordance with the applicable law and regulations, thus its action of terminating Employee should be upheld.

[1] Petition for Appeal (August 26, 2010).
[2] *Id*.

Uncontested Facts

Employee was hired by MPD in February of 1990. Prior to being terminated, he worked as a Patrol Officer in the Sixth District. On September 2, 2008, Employee was arrested and charged with Fleeing a Law Enforcement Officer, Reckless Driving, Speeding in Excess of 30 miles per hour, and Possession of a Controlled Substance. On September 3, 2008, Employee appeared before a judge in D.C. Superior Court. Employee was subsequently released, and was taken to the Police and Fire Clinic for a Reasonable Suspicion Drug Test. Employee was indicted on the aforementioned charges, but the charges against him were eventually dismissed. Agency issued Employee a Notice of Proposed Action, informing him that his proposed termination was based on three (3) charges, *supra*. On April 22, 2010, Agency's Trial Board held a hearing regarding the charges against Employee in accordance with the Collective Bargaining Agreement ("CBA") between Agency and Employee's union. On June 22, 2010, Agency issued its Findings of Fact and Conclusions of law, finding Employee guilty of each charge and specification. The effective date of Employee's termination was July 30, 2010. Employee filed a Petition for Appeal with OEA on August 26, 2010.

SUMMARY OF THE TESTIMONY

The following represents what I have determined to be the most relevant facts adduced from the Board's findings of facts as well as pertinent excerpts from the transcript generated as part of the instant matter. Both Agency and Employee had the opportunity to present documentary and testimonial evidence during the course of the Board hearing to support their positions.

***Sergeant Allan Griffith testified in relevant part as follows*:**

Sergeant Allan Griffith ("Griffith") worked as a Patrol Supervisor with the United States Park Police at Rock Creek Park Station. Griffith testified that he took part in Employee's arrest on September 2, 2008. According to Griffith, a radio call was placed at approximately 9:30 p.m. because there was suspicious activity in the Carter Barron Complex, Grove 24. Once Griffith received the information about the suspicious activity, he had two officers, Sean D'Augostine and Timothy Ganun, respond to the area because there had been problems with gang activity in the area. Griffith recalled that once he arrived at Grove 24, he walked into the wood line and saw officers Augustine and Ganun addressing Employee and one other person. Griffith further testified that Employee was wearing green or tan khakis or fatigues and a tank top at the time he arrived, and that Employee was not in uniform.

According to Griffith, Employee was facing Officers D'Augostine and Ganun, made some type of gesture, then proceeded to run between them up the hill towards the woods, and then to the parking lot. Griffith stated that he did not pursue Employee; however, Officers D'Augostine and Ganun proceeded to run after him. Griffith testified that he approached the second subject, who did not attempt to run, and saw a backpack on the ground with a leather-like credential case sitting next to it. The credential case contained an MPD shield and a photo ID, which belonged to Employee. Griffith testified that he received radio transmissions from Officers D'Augostine and Ganun, who were in vehicle pursuit of Employee. Griffith noted that

he could hear the officers' sirens over his radio, and presumed that the police vehicle lights were on. After Employee was apprehended by the officers, he was subsequently taken back to the substation. Griffith did not see him there, but was informed of his presence. Griffith stated that he had a brief discussion with Officers D'Augostine and Ganun at the substation, who indicated that they saw marijuana and Employee's MPD credential case in the backpack back at Grove 24.

On cross examination, Griffith testified that when he actually saw Officers D'Augostine and Ganun, their backs were towards the wood line, and they were facing the boulder. The officers were facing Employee, who was positioned in between them. He stated that the second individual was leaning on the boulder behind Employee. Griffith admitted that he did not observe Employee smoking a cigarette or any other substance, and did not smell marijuana in the air. When asked by the Panel if he ever lost radio contact with Officers D'Augostine and Ganun while they were pursuing Employee, Griffith stated that he was in constant contact with the officers and that he was surprised that Employee was able to get to his car.

***Officer James McNess Rowlett testified in relevant part as follows*:**

Officer James McNess Rowlett ("Rowlett") worked as a Patrol Officer for the USPP, and participated in Employee's arrest on September 2, 2008. Rowlett testified that Griffith had apprised him of the situation occurring at Grove 24, and that he was originally responsible for monitoring the wood line until further direction was relayed to him. Rowlett stated that Griffith then contacted him via radio and instructed him to head towards Morrow Drive to help Officer D'Augostine with a suspect who was fleeing on foot. As Rowlett was en route, he was advised that Employee was in a silver Buick and was attempting to flee. During the pursuit, Rowlett testified that he could see Officer D'Augostine's patrol car; and that the chase continued east on Kennedy Street, north on 14th Street, then west on Rock Creek Fort Road.

According to Rowlett, Employee's car stopped in front of a residence located at 1444 Rock Creek Fort Road. Employee then exited the car and began to run behind the residence. When Rowlett arrived, he parked his car and began to chase Employee on foot, along with Officer D'Augostine. Rowlett and D'Augostine chased Employee over a wall, a fence, and then into the woods behind the 1444 Rock Creek Fort Road address. When asked how Employee was eventually apprehended, Rowlett stated that "the best way I can describe it is that he looked like there wasn't anywhere else to go. He zigzag[ed] through the wood line for a little bit and I eventually caught up with him."

Under Panel examination, Rowlett testified that the chase involving Employee exceeded speeds of seventy miles per hour. However, the posted speed limit on 14th street was twenty-five miles per hour. Rowlett stated that this was his first high speed chase, and that he was approximately fifteen to twenty car lengths behind Officer D'Augostine's car during this time.

***Lieutenant Paul Charity testified in relevant part as follows*:**

Lieutenant Paul Charity ("Charity") works for the MPD Department of Internal Affairs. Charity testified that he and Sergeant Robert Merritt responded to the district station where Employee was in custody. Charity also stated that he spoke with Employee and revoked him off

his police powers. Employee told Charity that his work-issued weapon was at his brother's residence in Upper Marlboro, Maryland. According to Charity, Employee did not smell like marijuana at the time of the discussion.

***Officer Craig Lane testified in relevant part as follows*:**

Officer Craig Lane ("Lane") was responsible for transporting Employee to the substation after his arrest on September 2, 2008. He also was tasked with looking for a marijuana cigarette that was allegedly thrown downhill on the side of the rocks in the area where Employee was originally stopped. Lane testified that he helped process the backpack and a marijuana cigarette found in tinfoil as evidence at the substation.

***Officer Jeffrey George Bloch testified in relevant part as follows*:**

Office Jeffrey George Bloch ("Bloch") testified that he was on motorcycle patrol on September 2, 2008 when he heard a radio call for a fleeing suspect in the wooded area of the Rock Creek Park. Bloch responded to the area where Employee had been apprehended after fleeing the park. Bloch was subsequently instructed to go back to Grove 24, where the second subject was being detained. He saw a tinfoil packet and an outer compartment back pack on the ground. Block also saw a partially burned marijuana cigarette lying on the large boulder.

***Sergeant Steven Chew testified in relevant part as follows*:**

Sergeant Steven Chew ("Chew") worked as an Agent for the Internal Affair Bureau, and was assigned with the investigation of Employee's case. Chew and Agent Dukes were responsible for taking Employee to the Police and Fire Clinic for drug testing after he was released from jail on September 3, 2008. Chew testified that he monitored the legal proceedings against Employee, and attended his court dates.

Chew further recalled interviewing Officer D'Augostine, who stated that on September 8, 2008, he saw Employee exhale smoke from a cigarette and pass it to a second person, who threw it on the ground when D'Augostine approached them. According to Chew, Officer D'Augostine also stated that he could smell marijuana coming from the Employee's breath and clothing. When asked about the backpack on the ground, which contained Employee's MPD badge and marijuana wrapped in tin foil, D'Augostine said Employee jumped off the boulder and attempted to grab his police credentials, but missed. Employee fled the scene at that time.

During Panel questioning, Chew explained that his understanding of water loading with respect to drug testing meant that a person can drink too much water, which may render the test inaccurate or distort the test results. Chew stated that he understood that Employee's drug testing produced inconclusive results and that a subsequent test, taken by Employee on May 22, 2009, came back negative for controlled substances.

***Sergeant Maurice King testified in relevant part as follows*:**

Sergeant Maurice King ("King") worked as Employee's supervisor prior to his termination. King testified that Employee was an above-average officer, who was cordial and professional. He believed that Employee is a dependable officer, and opined that he should be retained by Agency.

Statement from Officer Timothy Ganun

Officer Timothy Ganun ("Ganun") provided a statement regarding the events which transpired on September 2, 2008. The Trial Board received Ganun's statement into evidence during Employee's hearing. Ganun's statement provided in pertinent part the following:

> On 9/2/08, at approx[imately] 1005 hours, Ofc, D'Augostine responded to Grove 24 in Rock Creek Park for a report of two suspicious males in the wood line behind Grove 24. Upon arrival we entered [the] woods and observed two males on a large rock smoking and passing a cigarette between each other. Ofc. D'Augostine and [I] watched these actions for a couple of minutes from a concealed position behind the trees. We then approached the two subject[s] and smelled a strong odor of burning marijuana in the air. We made contact and searched the two subjects, but did not find any contraband on their persons. A small burnt, hand rolled cigarette was found on the rock where we observed them standing. Ofc. D'Augostine began to search a red backpack that was at the feet of one of the subjects, later identified as Henry Smallwood. During the search of the bag, a hand rolled marijuana cigarette wrapped in aluminum foil was found. Also found were the MPD badge and credentials of Henry Smallwood.
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> After the badge and credentials were found, Smallwood jumped up from a seated position, attempted to grab the cred[entails], and ran from the scene on foot. Ofc. D'Augostine and [I] proceeded to pursue Smallwood on foot out of the wooded area, east towards the parking area. We observed Smallwood getting into a Silver Buick. We then got into a police cruiser and began to pursue the Buick…Smallwood parked his vehicle and fled on foot again. Ofc. D'Augostine, myself and Ofc. Rowlett, who was on duty…pursued Smallwood behind the [apartment] building on the south side of Rock Creek Ford Rd. In the wooded area behind the building is where Smallwood was eventually apprehended by Ofc. Rowlett. The other subject, identified as Carl Creightney, and the red backpack remained on the scene at Grove 24 with Sgt. Griffith,

who arrived at Grove 24 just prior to when Smallwood fled that area on foot.[3]

Statement from Officer Sean D'Augostine

Officer Sean D'Augostine ("D'Augostine") provided a Complainant Statement to the Office of Internal Affairs ("OIA") regarding the events which transpired on September 2, 2008. The Trial Board received his statement into evidence during Employee's hearing. In his statement to OIA, D'Augostine stated that he received a call from a reliable confidential source that two subjects were smoking marijuana in the woods at Rock Creek Park behind the area known as Grove 24. D'Augostine and Ganun responded to the area and conducted surveillance in the woods behind a large tree about 15 to 20 yards away from the two subjects. D'Augostine observed the subject, later identified as MPD Officer Henry Smallwood, exhale smoke from a cigarette and then passed it to Mr. Creightney, who then began to smoke on the cigarette. D'Augostine indicated that he could smell the odor of marijuana coming from Officer Smallwood's breath and clothing. He noticed that there was a small piece of marijuana cigarette on the rock where the two subjects were standing. D'Augostine asked the two subjects who owned the grey and red backpack. Both subjects denied ownership of the backpack; however, when D'Augostine began to search the satchel, he found a marijuana cigarette that was wrapped in foil. From the same pocket, D'Augostine pulled out officer Smallwood's police badge and identification folder.

At that moment, Officer Smallwood jumped up from the rock and attempted to grab his police credentials out of his hands, but missed. Smallwood then fled the scene on foot, and D'Augostine gave chase after him. D'Augostine stated that Officer Smallwood subsequently entered a silver Buick with Maryland tags, and fled out of the park at a high rate of speed east on Kennedy Street, through a red light at 14th Street, with a speed varying between 75 and 90 miles per hour. Officer Smallwood finally stopped his vehicle in front of 1444 Rock Creek Ford Road, and bailed on foot. After a foot chase, D'Augostine stated that Officer Smallwood was eventually apprehended by Park Police Officer Robert Roulette.[4]

ANALYSIS, AND CONCLUSIONS OF LAW

Employee is a member of the Fraternal Order of Police (the "Union"), and is covered by a provision of the Collective Bargaining Agreement that specifically restricts the scope of this Office's review in adverse actions to the record previously established in the Trial Board's administrative hearing. Therefore, based on the holding in *District of Columbia Metropolitan Police Department v. Pinkard*, my role as the deciding Administrative Judge is limited to reviewing the record previously established, and determining whether the Trial Board's decision was supported by substantial evidence; whether there was harmful procedural error; or whether it was in accordance with applicable law or regulation.[5]

[3] Agency Brief, Attachment 2 (June 27, 2013).
[4] *Id*. at Attachment 4.
[5] 801 A.2d 86 (D.C. 2002).

In *Elton Pinkard v. D.C. Metropolitan Police Department*[6], the D.C. Court of Appeals limited the scope of OEA's review in certain appeals. The Court of Appeals in *Pinkard* overturned a decision of the D.C. Superior Court holding that, *inter alia*, this Office had the authority to conduct *de novo* evidentiary hearings in all matters before it. In its decision, the Court held in pertinent part that:

> The OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives the OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings. *See* D.C. Code §§ 1-606.2 (a)(2), 1-606.3 (a), (c); 1-606.4 (1999), recodified as D.C. Code §§ 1-606.02 (a)(2), 1-606.03 (a), (c), 1-606.04 (2001); *see also* 6 DCMR § 625 (1999).
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> It is of course correct that a collective bargaining agreement, standing alone, cannot dictate OEA procedure. But in this instance the collective bargaining agreement does not stand alone. The CMPA itself explicitly provides that systems for review of adverse actions set forth in a collective bargaining agreement must take precedence over standard OEA procedures. D.C. Code § 1-606.2 (b) (1999) (now § 1-606.02 (b) (2001)) states that "any performance rating, grievance, adverse action, or reduction-in-force review, which has been included within a collective bargaining agreement . . . *shall not be subject to the provisions of this subchapter*" (emphasis added). The subchapter to which this language refers, subchapter VI, contains the statutory provisions governing appellate proceedings before OEA. *See* D.C. Code § 1-606.3 (1999) (now § 1-606.03 (2001)). Since section 1-606.2 (b) specifically provides that a collective bargaining agreement must take precedence over the provisions of subchapter VI, we hold that the procedure outlined in the collective bargaining agreement -- namely, that any appeal to the OEA "shall be based solely on the record established in the [trial board] hearing" -- controls in Pinkard's case.
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> The OEA may not substitute its judgment for that of an agency. Its review of an agency decision -- in this case, the decision of the trial board in the MPD's favor -- is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. The OEA, as a reviewing authority, also must generally defer to the agency's credibility determinations. Mindful of these principles, we remand this case to the OEA to review once again the MPD's decision to terminate

[6] *Id.*

> Pinkard, and we instruct the OEA, as the collective bargaining agreement requires, to limit its review to the record made before the trial board.[7]

Thus, pursuant to the holding in *Pinkard*, an AJ of this Office may not conduct a *de novo* hearing, but must rather base his or 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.*, Trial Board] has been held, any further appeal shall be based solely on the record established in the Departmental hearing"; and
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> 5. At the agency level, Employee appeared before a Trial Board that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.

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

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

In reviewing Agency's decision to terminate Employee, this Office will evaluate the Trial Board's findings under a "substantial evidence" test.[8] Substantial evidence is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[9] "If the administrative findings are supported by substantial evidence, we must accept them even if

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[7] *Id.* at 90-92. (citations omitted).
[8] *Staton v. Metropolitan Police Department*, OEA Matter No. 1601-0152-09 (December 17, 2010).
[9] *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)).

there is substantial evidence in the record to support contrary findings."[10] Accordingly, Agency must present substantial evidence before this Office to support its conclusions at Employee's hearing before the Trial Board.

I find that the Trial Board's decision to uphold Charge No. 1 was based on substantial evidence. Employee argues that there was no proof submitted during the course of the hearing to support a finding that he was actually smoking marijuana on September 2, 2008. I disagree. Employee violated Agency's General Order Series 120.21, which prohibits "[t]he taking of any drug or substance, on or off duty, as described in the D.C. Uniform Controlled Substances Act of 1981, unless taken upon the prescription of a licensed physician, or registered practitioner authorized to dispense a controlled substance during the course of professional practice." According to the record, Officers Ganun and D'Augostine observed Employee and his friend, Carl Creightney, smoking and passing a cigarette with each other on September 2, 2008 in the Grove 24 area of Rock Creek Park.[11] Both officers also stated that they could smell a strong odor of marijuana in the air, and coming from Employee's breath and clothes after they approached him in the park. After searching the backpack that Employee initially denied having ownership of, D'Augostine located a marijuana cigarette wrapped in tin foil, along with Employee's MPD badge. While Officer Ganun and D'Augostine were unavailable to testify at the Trial Board hearing, their statements, taken shortly after the September 2, 2008 incident, were admitted into evidence.

"It is settled that hearsay evidence may be admitted in administrative hearings. Administrative tribunals are not required to disregard evidence merely because it is hearsay. In fact, hearsay evidence can serve under some circumstances as 'substantial evidence' on which to base a finding of fact."[12] "The decision to permit administrative agencies to admit hearsay evidence reflects a recognition that the reliability and probative value of evidence does not always turn simply on whether or not it falls within the legal definition of hearsay evidence, and that, unlike juries, the weight to be accorded hearsay evidence is determined by the item's 'truthfulness, reasonability, and credibility."[13]

In this case, I find no reason to question the truth or veracity of officer Ganun's or D'Augostine's statements regarding their observations of Employee on September 2, 2008. Both of their statements were probative of the events which transpired at the park, and there is no evidence in the record to support a finding that their statements were biased, untrue or subsequently modified. The officers: 1) observed Employee smoking a cigarette prior to approaching him in the park; 2) smelled the odor of marijuana emanating from Employee's breath and clothes after approaching him; 3) discovered a marijuana cigarette wrapped in tin foil next to Employee's police badge. Under the circumstances, it can be reasonably inferred that Employee was smoking marijuana, which is a criminal offense under the Uniform Controlled Substances Act. As such, I find that there is substantial evidence in the record to uphold Charge 1, Specification 1.

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[10] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).0\
[11] Agency Brief, Attachment 2; 4 (June 27, 2013).
[12] *Hutchinson v. D.C. Office of Employee Appeals*, 710 A.2d 227, 232-233 (D.C.1998). (citations omitted).
[13] *Wisconsin Avenue Nursing Home v. D.C. Commission on Human Rights*, 527 A.2d 282, 288 (D.C. 1987), citing *Johnson v. United States*, 628 F.2d 187, 190-191 (D.C.Cir. 1980).

With respect to Charge No. 2, General Order Series 120.21 prohibits employees from being involved in any act which constitutes a crime, whether or not a court record reflects a conviction. After being arrested, Employee was charged with several criminal offenses related to the September 2, 2008, incident. Employee was subsequently indicted by a Grand Jury for Fleeing a Law Enforcement Officer and Possession of a Controlled Substance. On May 18, 2009; however, Assistant United States Attorney, Sean Lewis, filed a motion to dismiss the case against Employee without prejudice. Although the charges against Employee were dismissed in criminal court, his actions of smoking marijuana, and subsequently fleeing the scene, still constituted a crime.[14] I find that the Trial Board adequately considered the relevant evidence, and there is no *credible* reason to disturb its findings pertinent to this charge. Accordingly, I find that the Board's decision to uphold Charge No. 1, Specifications No. 1 and No. 2 is supported by substantial evidence.

General Order Series 120.21 further states that "[c]onduct unbecoming of an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively, or violations of any law of the United States or any law, municipal ordinance, or regulation of the District of Columbia." In this case, I find that Employee violated this order when he was caught with an illegal substance by Rock Creek Park officers and subsequently fled the scene, leading the officers on a high-speed chase. An MPD employee's use and/or possession of illegal drugs is repugnant to Agency's mission of enforcing laws and protecting the residents and visitors of the District of Columbia. Employee placed himself, along with the pursing officers and other drivers, in danger by fleeing Grove 24 in a vehicle to escape arrest. Employee knowingly possessed and used an illegal substance in a public place. The nature and severity of Employee's actions were antithetical to his position as a sworn officer, and constituted conduct unbecoming of an officer. Accordingly, I find that there is substantial evidence in the record to uphold Charge No. 3, Specification No. 1 against Employee.

The Court in *District of Columbia Metropolitan Police Department v. Elton L. Pinkard* held that OEA may not substitute its judgment for that of an agency, and it must generally defer to the agency's credibility determinations made during its trial board hearings. Similarly, the Court in *Metropolitan Police Department v. Ronald Baker* ruled that great deference to any witness credibility determinations are given to the administrative fact finder.[15] In this case, the Board is the administrative fact finder.[16] The Court in *Baker* as well as the Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board* found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.[17]

The holding in *Pinkard* advises the Undersigned, as the "reviewing authority," to "generally defer to the agency's credibility determinations."[18] Based on my own review of the witnesses' testimony, I can find no reason to disturb the Board's credibility determinations and

[14] 21 U.S.C.A. § 812 (West); D.C. Official Code § 50-2201.05 (b)(1) (2001).
[15] 564 A.2d 1155 (D.C. 1989).
[16] *Id*. at 1717.
[17] 527 A.2d 313 (D.C. 1987).
[18] *See Pinkard*, 801 A.2d 86 (D.C. 2002).

there is no reason to overturn them. In addition, I find that each charge against Employee was supported by substantial evidence.

In *Douglas v. Veterans Administration*[19], the Merit Systems Protection Board, this Office's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Although not an exhaustive list, the factors are as follows:

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

2. The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;

3. The employee's past disciplinary record;

4. The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

6. Consistency of the penalty with those imposed upon other employees for the same or similar offenses;

7. Consistency of the penalty with any applicable agency table of penalties;

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;

[19] 5 M.S.P.R. 280, 305-306 (1981).

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.

In considering the *Douglas Factors*, the Trial Board in this case found that several factors were aggravating in nature. The Board noted that Employee's actions constituted criminal offenses and were an egregious display of misconduct, especially in light of his position as an experienced officer. The Board also cited to Employee's previous disciplinary record, which contained five (5) disciplinary actions within the past three (3) years. In addition, the Board held that the penalty imposed against Employee was consistent with the penalty imposed against other employees for similar offenses. Regarding the notoriety of Employee's offense, the Board stated that Employee's arrest was documented by several independent news media outlets, which could bring discredit to Agency and allow the general public to lose trust in Agency's ability to perform its essential functions. Moreover, the Board took serious issue with Employee's actions to vehemently avoid being arrested. The Board failed to find any mitigating circumstances surrounding Employee's actions and noted that no testimony was given during the hearing concerning job tension or other stressors that may have contributed to Employee's actions.

Based on the foregoing, I find that the Board properly considered the *Douglas Factors* in choosing the appropriate penalty to levy against Employee. In addition, there is no credible reason to support a finding that Agency failed to act in accordance with all applicable laws or regulations.

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

Pursuant to *Pinkard* and OEA Rule 631.3, I find that in the instant matter, the Undersigned is required to make finding of whether or not MPD committed harmful error. OEA Rule 631.3, states that "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." Employee argues that Agency committed a harmful procedural error because he was entitled to be presented with notification of the charges against him in a timely fashion. Employee states in part the following:

> In this case, Mr. Smallwood had submitted on September 2, 2009, a proper notification of a change of address on MPD form PD 73. He had regularly submitted a PD 73 each time his address changed…However, the Employer did not serve the notification [to] Mr. Smallwood at his correct home address. MPD simply left

> the…notice at the address and Mr. Smallwood did not sign for the same on September 4, 2009. The Notice of Proposal to Terminate was not left at Mr. Smallwood's current address, which the Employer had been made aware of. As such, it failed to properly and timely serve Mr. Smallwood as required under the "90 Day Rule."[20]

D.C. Official Code § 5-1031 (2001), commonly referred to as the "90 day rule" states the following:

> (a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.
>
> (b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of Corporation Counsel, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

Based on the foregoing provisions, Agency argues that it complied with the 90 day rule because the time period was tolled until the criminal investigation against Employee was resolved. I agree. In this case, Employee was arrested on September 2, 2008; the date on which Agency knew or should have been apprised of the act or occurrence allegedly constituting cause. On September 3, 2008, Agency's Internal Affairs Division initiated an investigation into Employee's actions and required him to appear at the Police and Fire Clinic for a Reasonable Suspicion Drug Screening.[21] A criminal action was also initiated by United States Attorney, Jeffrey Taylor. Under D.C. Code § 5-1031 (2001)(b), the 90 day period was tolled until the conclusion of the criminal matter/investigation. Employee was subsequently indicted by a Grand Jury for Fleeing a Law Enforcement Officer and Possession of a Controlled Substance. On May 18, 2009, Assistant United States Attorney, Sean Lewis, filed a motion to dismiss the case against Employee without prejudice. As such, the criminal case against Employee was tolled until May 18, 2009, and the 90 day period began to run at that time.

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[20] Employee Brief at 10. (August 1, 2013).

[21] *Id*. at Exhibit 3. Employee's drug test was negative; however, during Employee's February 10, 2009 arraignment, the presiding judge noted that Employee's Reasonable Suspicion Drug Screening test was inconclusive due to "water loading."

According to the record, On September 4, 2009, a copy of the Notice of Proposed Adverse Action and a copy of the related investigative report were delivered by Agent J. Bonner to 10803 Garnet Dr., Upper Marlboro, Maryland, 20772. Agency believed this to be Employee's address of record at the time of service because Agent Bonner indicated that there was no answer at the door when he arrived, but that he left the documents with a female who said Employee resided at the 10803 Garnet Dr. address.[22] Although Employee argues that he changed his address of record with Agency on September 2, 2009 (Personnel Action Form PD 73), the document he provided simply states that Employee prepared the document on this date.[23] There is no evidence in the record to show that Agency received and processed the form prior to September 4, 2009.

Therefore, I find that Agency properly notified Employee of the proposed adverse action against him on September 4, 2009; approximately seventy-seven (77) days after the criminal charges were dismissed.[24] I further find that Agency acted in accordance with D.C. Code § 5-1031 (b) by commencing the adverse action within 90 days after the disposition of Employee's criminal case.

Employee next contends that Agency erred when the Trial Board "considered and gave weight to the fact that Mr. Smallwood did not testify at the hearing."[25] According to Employee, Agency violated his constitutional right not to be compelled to testify. In its Findings of Facts, the Board stated that "[i]t shall be noted that he [Employee] did not testify or accept responsibility for his actions before the Panel…"[26] In this case, there is no evidence in the record to indicate that Employee's refusal to testify was anything other than noted by the Board in its Findings of Fact. Employee has also failed to prove that the Board's notation would have affected the outcome of its decision. Accordingly, I find that this argument is without merit.

In addition, Employee submits that Agency committed harmful procedural error because he was not given the ability to cross-examine Officer Ganun and Officer D'Augostine during the Trial Board hearing. As previously discussed, hearsay evidence which may not be admissible in criminal cases against defendants may be admissible in administrative proceedings. The Trial Board admitted both Officer Ganun's and D'Augostine's statements because they contained relevant evidentiary value. I find no *credible* reason to disturb the Board's decision. I further find that the Board did not abuse their discretion in admitting these statements.

Lastly, Employee argues that Agency committed harmful error when, during the Trial Board hearing, a request was made by Employee's counsel to dismiss Charge No. 1, but the request was denied.[27] Employee has not cited to any statute, case law or regulation which required the Trial Board to grant Employee's request to dismiss a charge against him. Moreover, even if I were to overturn Charge No. 1, there remains substantial evidence in the record to

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[22] *Id*. at Exhibit 4. Employee had submitted a Form PD 73 on January 7, 2004 wherein he provided the address on Garnet Rd.
[23] Employee provided a new address of 7801 Carroll Ave., Takoma Park, Maryland, 20912.
[24] Notice of Proposed Adverse Action; *See also* Agency Reply Brief at 5.
[25] Employee Brief at 10.
[26] Findings of Fact and Conclusions of Law at 29.
[27] *Id*.

uphold Charges No. 2 and No. 3. Thus, Employee's termination could still be upheld. I therefore find no compelling reason to disturb the Trial Board's decision to deny Employee's request to dismiss Charge No. 1 during the hearing.

Discrimination

With respect to Employee's claim in his Petition for Appeal that Agency discriminated against him based on race, D.C. Code § 2-1411.02 and DPM § 1631.1(q) specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). However, it should be noted that the Court in *El-Amin v. District of Columbia Dept. of Public Works* stated that OEA may have jurisdiction over an unlawful discrimination complaint if the employee is contending that he or she was targeted for whistle blowing activities outside the scope of the equal opportunity laws, or that his complaint of a retaliatory RIF is different for jurisdictional purposes from an independent complaint of unlawful discrimination or retaliation…"[28] Here, Employee's claims as described in his submissions to this Office do not allege any whistle blowing activities as defined under the Whistleblower Protection Act, nor does it appear that his termination was retaliatory in nature. Consequently, I find that Employee's claims regarding discrimination fall outside the scope of this Office's purview. In addition, I find that OEA does not have jurisdiction to address Employee's arguments pertaining to malicious prosecution.

Based on the foregoing, I find that Agency's decision to terminate Employee was based on substantial evidence. I further find that Agency did not commit any harmful procedural errors, and that Employee's termination was done in accordance with applicable laws and regulations. Accordingly, Agency's action of terminating Employee should be upheld.

ORDER

It is hereby ORDERED that Agency's action of terminating Employee is UPHELD.

FOR THE OFFICE:

_____
SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE

[28] 730 A.2d 164 (May 27, 1999).