THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,	)	
	)	OEA Matter No. J-0036-20
V.	)	
	)	
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT,	)	Date of Issuance: February 3, 2022
Agency	)	ERIC T. ROBINSON, ESQ.
	)	SENIOR ADMINISTRATIVE JUDGE
	)	

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

INITIAL DECISION

PROCEDURAL HISTORY

On March 10, 2020, Employee filed his Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the D.C. Fire and Emergency Medical Services Department action of summarily removing him from service. By letter date June 16, 2020, the OEA sent a letter to FEMS requiring it to provide an Answer to Employee's Petition for Appeal by July 16, 2020. On July 15, 2020, Agency timely submitted its Answer. Employee's last position of record was Firefighter/Emergency Medical Technician ("FF/EMT"). The effective date of Employee's removal from service was April 2, 2019. Employee was charged with violating D.C. Fire and Emergency Medical Services Department Order Book Article VI, § 6, which states: "Conduct unbecoming an employee includes conduct detrimental to good discipline…", and Any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations, to include: Neglect of Duty." DPM § 1603.3(f)(3). The incident that led to Employee's removal occurred on April 2, 2019, during which he transported a female patient to the George Washington University Hospital ("GWUH"). While awaiting transfer at that facility, GWUH security cameras captured Employee violently striking the patient he transported several times. Metropolitan Police Department officers responded to a GWUH call for possible assault. After initial review of the security tapes, Employee was arrested for simple assault. Upon subsequent review, as was previously mentioned, FEMS decided to summarily remove Employee

from service. Thereafter, Employee was provided the opportunity to have his removal reviewed by the Fire Trial Board Panel. The Departmental Fire Trial Board Panel occurred on October 30, 2019. During it, FEMS presented live eyewitness testimony that corroborated its contention that Employee violently struck his patient. What is more relevant is that Employee admitted to this egregious conduct but alleged that he was acting in self-defense. The Board's findings, issued on January 25, 2020, recommended that Employee be terminated for his acts of misconduct that occurred on April 2, 2019. *See* Agency Record (AR) at tab 24. In correspondence dated February 5, 2020, Agency Chief Gregory Dean notified Employee of his acceptance of the Board's recommended penalty.

The Undersigned was assigned this matter on September 30, 2020. Thereafter, on October 8, 2020, the Undersigned issued an Order Convening a Prehearing Conference. The conference was scheduled for November 5, 2020. Afterwards, that same day, the Undersigned issued an Order noting that 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). The parties were provided with a briefing schedule through which they could present their respective version of the salient law, facts and circumstances of this matter. The parties complied with the schedule. After reviewing the documents of record, I have determined that no further proceedings are warranted. The record is now closed.

ISSUE

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

According to the decision issued by the Fire Trial Board in the instant matter, the following Charges and Specifications were levied against the Employee:

Charge No 1:

Violation of D.C. Fire and Emergency Medical Services Department Order Book Article VI, § 6, which states: "Conduct unbecoming an employee includes conduct detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or any conduct that violates public trust or law of the United States, any law, municipal ordinance, or regulation of the District of Columbia committed while on-duty or off-duty."

This misconduct is defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(e), to include: "Any on-duty act or

employment-related act or omission that the employee knew or should reasonably have known is a violation of law." *See also* DPM § 1603.3(e).

The misconduct is defined as further cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 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).

This misconduct is further defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(h) which states: "Any act which constitutes a criminal offense whether or not the act results in a conviction." *See also* DPM § 1603.3(h).

Specification No. 1. [Employee] describes his misconduct in his Special Report (Dated 4/2/2019) as follows:

I, [Employee] was arrested and charged on April 2, 2019, in Washington DC by MPD. I was charged with simple assault…

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

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 [trial board] 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 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 Pinkard, and we instruct the OEA, as the collective bargaining agreement requires, to limit its review to the record made before the trial board.[1]

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:

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

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.*, Trial Board] 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 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 record and the position of the parties as stated during the Prehearing 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 Decision *supra*. Further, according to Pinkard, I must generally defer to the Panel's credibility determinations when making my decision. *Id.*

Substantial Evidence

According to *Pinkard*, I must determine whether the Panel'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." *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)). Further, "[i]f the [Panel's] findings are supported by substantial evidence, [I] must accept them even if there is substantial evidence in the record to support contrary findings." *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).

The following is excerpted, in relevant part, from Agency's Brief:

> Employee testified on his behalf at the FTB ("Fire Trial Board Hearing"). AR Tab 23, HT p. 155. Employee admitted to engaging in an altercation with the patient after arguing with her. *Id.* at p. 169. Employee testified that after the patient hit him, he hit her, and although in the video it may appear that Employee continued to repeatedly punch the patient, they were actually "jacking each other up." *Id.* at p. 169.

> On cross-examination, Employee admitted that he and the patient were speaking with raised voices in the GWUH lobby, which caused the SPOs to come over and attempt to de-escalate matters. *Id.* at p. 183. Employee testified that immediately prior to being struck by the patient, he intended to leave, and believed that he could have left the scene, but the patient hit him, which caused him to respond. *Id.* at p. 189. Employee stated that although he and the patient were jacking each other up, he responded by punching the patient multiple times, and that the multiple blows he inflicted on the patient were "natural," i.e. a natural reaction. *Id.* at 191.
>
> During the Board's questioning of Employee, Employee admitted that he got the patient off him after the first time he punched her. *Id.* at p. 198. Board member Downs asked Employee why he kept swinging if Employee got the patient off him with the first swing. Employee replied that he didn't know. *Id.*[2]

During the Fire Trial Board hearing, I find that Employee admitted to the salient facts that are the subject of the instant adverse action. Of most relevant importance, Employee admitted that he struck the patient several times. The Board of the OEA has previously held that an employee's admission is sufficient to meet Agency's burden of proof. *See*, *Employee v. Agency*, OEA Matter No 1601-0047-84, 34 D.C. Reg. 804, 806 (1987). With that, I further find that it is axiomatic that Agency has substantial evidence buttressing its decision to remove Employee from service.

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 MPD committed harmful error. OEA Rule 631. 3, provides as follows "notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. 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."

The entirety of Employee's argument that procedural error occurred is as follows:

> Yes, I feel there was harmful procedural errors made in this case. On April 2, 2019, while still dealing with the shock of this situation and just being released from the holding cell at MPD District 2, I was told that I had to report to Internal Affairs. I was escorted into the room by Lieutenant Wright. I had never been in this type of situation before so I did not know what to expect. Lieutenant Wright asked me what was going on and while I was explaining it to him, he indicated that the process would be to put me on administrative leave. Lieutenant Wright then asked me to complete the Special Report. However, shortly after I was completing the document,

[2] Agency's Brief pp 7 – 8 (December 4, 2020).

> Lieutenant Wright left the room. He came back into the room with Chief Douglas and Chief Donnelly and he gathered the document that I had been completing and things had drastically changed, I was told that I was being removed and I had to clean out my locker and not talk to anyone. I was totally shocked and in a complete state of unbelief, upset, and frustrated I could hardly comprehend what had just happened. There was no further explanation as to what had just happened to change from what I believed to be me getting placed on administrative leave to me being removed. I felt such a sense of betrayal by the Department.

Agency counters by noting that Employee was afforded a pre-termination hearing in adherence to its CBA and during the same was able to present his self-defense argument, call and cross-examine witnesses and otherwise explain his actions during the incident in question. Agency further notes that the Trial Board made determinations based on substantial evidence. Taking all of this into account, Agency asserts that no harmful procedural error occurred.

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.

Removal 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 the fact that he was removed from service summarily. However, I find that his argument lacked an indicium of legal relevance. Employee's contention was nothing more than a mere personal complaint that the action was taken as opposed to citing to a fact or instance that would implicate legal or regulatory error requiring review. My examination of the record reveals that 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 remove Employee from service.

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. *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). I conclude that given the totality of the circumstances as enunciated in the instant decision, the Agency's action of removing Employee from service should be upheld.

ORDER

Based on the foregoing, it is ORDERED that the Agency's action of removing Employee from service is hereby UPHELD.

FOR THE OFFICE:

/s/
ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE