THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BYRON PURNELL,	)	
Employee	)	OEA Matter No. 1601-0060-13
	)	
v.	)	Date of Issuance: November 26, 2014
	)	
DISTRICT OF COLUMBIA	)	
METROPOLITAN POLICE DEPARTMENT,	)	
Agency	)	MONICA DOHNJI, Esq.
	)	Administrative Judge

Byron Purnell, Employee *Pro Se*
Corey P. Argust, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On February 26, 2013, Byron Purnell ("Employee") filed a Petition for Appeal with the Office of the Employee Appeals ("OEA" or the "Office") contesting the District of Columbia Metropolitan Police Department's ("MPD" or the "Agency") decision to demote him from his position of Sergeant to Officer. By Notice of Proposed Adverse Action dated September 4, 2012, Agency proposed to remove Employee from his position as an Officer with the Metropolitan Police Department. On October 4, 2012, an Adverse Action Panel was convened in order to hear evidence and make findings of fact and conclusions of law regarding the circumstances surrounding several incidents that involved Employee from April 21- May 7, 2012. As a result of these incidents, Employee was subsequently demoted from Sergeant to Officer. On January 17, 2013, Chief of Police Cathy Lanier, relying on the Adverse Action Panel's findings, informed Employee, via written notice, that Employee's appeal to the Chief of Police was denied. Moreover, this letter constituted MPD's final action in this matter. On March 18, 2013, Agency filed its Answer.

This matter was assigned to the undersigned on February 24, 2014. Thereafter, the parties attended a Status Conference wherein it was determined that this matter would be adjudicated based on the standard outlined in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002).[1] Accordingly, the parties were provided with a briefing schedule in which they were

[1]Agency raised the issue of jurisdiction. The undersigned requested that the parties submit brief addressing the jurisdiction issue raised. Both parties complied. Upon further review of the record, the undersigned determined that this Office has jurisdiction over this matter because Agency failed to notify Employee of his appeal rights.

able to address the merits of this matter and respond to the opposing parties' arguments. Following several extension requests from the parties, both parties have now submitted the required briefs. The record is now closed.

JURISDICTION

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

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.

ISSUES

1) Whether the Adverse Action Panel's decision was supported by substantial evidence;
2) Whether there was harmful procedural error; and
3) Whether Agency's action was done in accordance with applicable laws or regulations.

STATEMENT OF THE CHARGES

In the Notice of Proposed Adverse Action dated September 4, 2012, Agency proposed to terminate Employee from his position as a Sergeant with MPD based on the following charges and specifications:[2]

> **Charge No. 1:** Violation of General Order Series 120.21, Attachment A, Part A-12, which reads "Conduct unbecoming 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 violation of any law of the District of Columbia." This misconduct is further defined in General Order Series 201.26, Part V-A5 which provides, "Members shall not conduct themselves in an immoral, indecent, lewd or disorderly manner or in a manner which might be construed by an observer as immoral, indecent, lewd of disorderly."

[2] Agency's Answer at Tabs 2 (March 18, 2013).

Specification No. 1: In that, on or around April 21, 2012, you committed a fraudulent act by submitting a time sheet to JETU Apartments for compensation, affirming that you had worked six hours on April 21, 2012. You submitted this time sheet, knowing you had not worked the full six hours.

Specification No. **2:** In that, on May 5, 2012, you ordered officer Samaria Robinson to say you were working at the JETU Apartments at the time she was there on April 21, 2012, and that you simply made a mistake when you signed in, when she is questioned by officials about your alleged misconduct. You ordered her to say this, knowing it to be untrue.

Specification No. **3**: In that on May 7, 2012, you ordered Officer Robinson not to submit her JETU Apartments Daily Activity Logs, because her hours and your hours would not match up after 2200 hours.

Charge No. **2**: Violation of General Order 120.21, Attachment A, Part A-6, which states: "Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Office, or in the presence of, any superior officer, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing."

Specification No. **1**: In that, on May 5, 2012, during an interview with Lieutenant Timothy Haselden regarding a complaint that you were allegedly paid by your off-duty employment, JETU Apartments, while working for the Metropolitan Police Department (MPD), you made a false statement when you told Lieutenant Haselden that you did not tell Officer Samaria Robinson to say that you were working at the JETU Apartments at the time she was there on April 21, 2012, and that you simply made a mistake when you signed in, when she is questioned about your alleged misconducts.

Specification No. **2**: In that, on May 7, 2012, during an interview with Lieutenant Timothy Haselden regarding a complaint that you were allegedly paid by your off-duty employment, JETU Apartment, while working for the Metropolitan Police Department (MPD), you made a false statement to Lieutenant Haselden, when you stated that you did not tell Officer Robinson not to fax her Daily Activity Logs, because her hours and your hours would not match up after 2200 hours.

Charge No. 3: Violation of General Order Series 120.21, Part A-16, which states: "Failure to Obey Orders and Directives Issued by the Chief of Police." Further, General Order 201.17, Part V, G, 2, (b), which states: "No member shall engage in outside employment if the "second job" would interfere with the member's scheduled tour of duty on the Department." Part V, G, 4, which states: "Members shall not accept any compensation for services rendered while on duty."

Specification No. 1: In that, on April 21, 2012, you were scheduled to work your outside employment from 1800 to 2400 hours. According to the JETU Security Log, YOUR "Time in" is listed as 6:00 p.m., and your "Time Out" is listed as 12:00 a.m.,

certified by your signature on the log. Additionally, a Daily Activity Report you prepared for the JETU Apartments reflects the same in and out times as the aforementioned security log, with a report of activities conducted for each hour you were reportedly working at JETU Apartments, also certified by your signature. Consequently, the MPD Time, Attendance, and Court Information System (TACIS), reflects that you reported for duty at the Fifth District on April 21, 2012, at 2230 hours and was relieved from duty at 0700 hours on April 22, 2012. Reportedly, you conducted the roll call at the Fifth District at 2230 hours. You reported to work at your outside employment on April 21, 2012, knowing that your outside employment tour of duty would interfere with your tour with MPD.

Specification No. **2**: In that, on April 21, 2012, you worked outside employment at the JETU Apartments while on duty with MPD. Thus, you received compensation from both jobs simultaneously.

Having determined that Employee engaged in misconduct, MPD weighed each of the relevant *Douglas Factors*[3] for consideration in determining the appropriateness of the penalty and proposed that Employee be terminated. Subsequently, Employee elected to have an Evidentiary Hearing before an Adverse Action Panel.

SUMMARY OF THE TESTIMONY

On October 4, 2012, the Agency held an Adverse Action Panel Hearing. During this hearing, testimony and evidence was presented for consideration and adjudication relative to the instant matter. The following represents what I determine to be the most relevant facts adduced from the findings of facts as well as the transcript[4] generated and reproduced as part of the instant matter before the undersigned.

[3] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3) the employee's past disciplinary record;
4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[4] Transcript will be denoted herein as Tr.

Officer Samaria Robinson **(**Tr. Pages 15 – 100)

Officer Samaria Robinson ("Ofc. Robinson") is currently employed by Agency at the Fifth District. She has worked with Agency for about three (3) years. She has a part-time outside employment with JETU Apartments. She has worked for JETU Apartments since October of 2011.

Ofc. Robinson worked the night of April 21, 2012, at JETU Apartments from 5:00 p.m. – 10:00 p.m. Ofc. Robinson testified that the Log book at JETU Apartments is used to record the hours worked for a given day, along with the date and time that an employee will be working. Ofc. Robinson stated that she worked with Employee on April 21, 2012. She also noted that on the day in question, she first saw Employee after 6:00 p.m. Ofc. Robinson further testified that she interacted with Employee towards the end of the shift when Employee stated to her that she should not fax any more daily activity sheets after 10:00 p.m. since their hours would not match after that time. She explained that this conversation took place around 9:30 p.m. as Employee was getting ready to leave JETU Apartments. Employee left JETU Apartments around 9:30 p.m. because he had to do roll call. Ofc. Robinson stated that, it is to her knowledge that when Sergeants conduct roll call, they are normally there prior to roll call starting, and she beliefs it is normally at least an hour because they have to prepare for the two roll calls.

Ofc. Robinson testified that she was surprised that Employee asked her not to fax her activity sheet. She noted that she did not listen to Employee, and she went ahead and faxed her daily activity sheet. However, she did not fax Employee's activity sheet. Ofc. Robinson testified that Employee's activity sheet for April 21, 2012, had Employee's signature insinuating that Employee worked six (6) hours. Ofc. Robinson testified that, when Employee left his activity sheet on the desk in the office and asked her not to fax them in, the fifth (5^{th}) and sixth (6^{th}) hours notes had already been completed. Thus, their activity sheets would not match up after 10:00 p.m. because Employee's activity sheet would have showed notations for things that were done in the future.

Ofc. Robinson stated that she was surprised because Employee was an official, although not her direct official; and she had a lot of respect for him. And for Employee to ask her not to fax the activity sheet after 10:00 pm; seeing his time at JETU Apartment was until midnight when he conducted roll call at 10:30 p.m. at MPD; and then see Employee at roll call telling officers to make sure they did the right thing, put her in a bad place.

According to Ofc. Robinson, the daily activity sheet is used to record your activities for the day. It is faxed to the office from the Security Office on the hour, but at no specific time. The activity sheet is normally not faxed the first hour, but is faxed the second hour and each hour thereafter. The office staff gets the daily activity sheet when they open the office the next day. She testified that she filled out and faxed the activity sheet every hour. Ofc. Robinson also stated that the check-in and check-out is billed each night that you work at JETU Apartments. She testified that Employee was not at JETU at midnight on April 21, 2012, although his check-in shows that he was there from 6:00 p.m. – 12:00 a.m. Ofc. Robinson noted that Employee conducted roll call at MPD at 10:30 p.m. She also maintained that Employee was not at JETU Apartments at 10:00 p.m. that night. Ofc. Robinson relayed that her tour of duty at MPD on April 21, 2012, was from 10:30 p.m. – 7:00 a.m, on April 22, 2012, and she left JETU Apartments at 10:00 p.m. on April 21, 2012.

Ofc. Robinson testified that on May 5, 2012, she had another interaction with Employee at the McDonalds on 1^{st} and New York Avenue. She explained that when Employee met up with her at

the McDonalds, Employee's partner was in the car which was parked on the other side of the street. According to Ofc. Robinson, during the encounter, Employee asked her if anyone had approached her about the part-time job at JETU Apartment, to which she said no. Ofc. Robinson noted that Employee explained to her that he was accused of taking time from the department on the night of April 21, 2012. Employee also stated that he screwed up and put the wrong time. Employee explained to Ofc. Robinson that if he had signed in after her, he would have put the same time as Ofc. Robinson because she did things the right way, but Employee did it the wrong way. Ofc. Robinson also stated that Employee informed her that Lieutenant Haselden will be questioning Employee the next day, and that if Lieutenant Haselden was a prudent investigator, he would speak with Ofc. Robinson because she was there.

According to Ofc. Robinson, Employee told her that if Lieutenant Haselden spoke to her, she should say that Employee was there with Ofc. Robinson and that Employee screwed up and put the wrong time. She explained that Employee specifically asked her to say that he was there when she was there, and that he simply made a mistake and put the wrong time, and that he would have never put until midnight because he had roll call. She stated that Employee never ordered her to state any information during their meeting on May 5, 2012, at the McDonalds. Ofc. Robinson stated that they did not discuss the activity reports. Ofc. Robinson testified that, she believed Employee met her at the McDonalds because he wanted to tell her what to say and that was not the truth, and this put her in a bad place because she had a lot of respect for Employee. Ofc. Robinson further stated that Employee didn't specifically ask her to state that he worked the 5:00 p.m. – 10:00 p.m. shift with her on April 21, 2012. However, she understood the conversation to mean that Employee was asking her to lie for him. She explained that, she was with Employee at JETU Apartments at some point on April 21, 2012, but after Employee left JETU Apartments at 9:30 p.m., they were not there together.

According to Ofc. Robinson, she spoke with Sergeant Fox the next day about the May 5, 2012, incident, and Sergeant Fox advised her to tell the truth. She also met with Sergeant Haselden who asked her questions about the incident on May 5, 2012, at the McDonalds, and also about what happened at JETU Apartments on April 21, 2012. Ofc. Robinson stated that she explained both incidents to Lieutenant Haselden. She also informed him that Employee never faxed his activity sheets that day at all. According to Ofc. Robinson, there is one fax machine in the office, and she has worked with Employee on several occasions and Employee never faxed his activity sheet.

When asked about how MPD got hold of the JETU Apartments sign-in log for April 21, 2012, Ofc. Robinson testified that the sign-in log came from her. She stated that the sign-in book has Employee listed as 6:00 p.m. – 12:00 a.m. She explained that her duties at JETU Apartments required making rounds through the property; assist with calls that may come out; assist with PSA units and/or handle the calls, reports. She also stated that making rounds are reflected on the activity sheets.

Ofc. Robinson testified that she never reported the April 21, 2012 incident at JETU Apartments to Internal Affairs. However, she notified her commander, Commander Solberg of the incident, on April 27, 2012, six (6) days after the April 21, 2012, incident. Ofc. Robinson explained that she waited six (6) days because she could not see the commander at work due to the variation in their shifts, and she actually did not know who to go to because of the situation and possible outcome. The matter was reported to Internal Affairs on April 30, 2012. Ofc. Robinson stated that she gathered the sign-in sheet and the activity sheet from JETU Apartments and gave it to Commander Solberg.

***Sergeant Sheri Fox* (**Tr. Pages 100 – 112)

Sergeant Sheri Fox ("Sergeant Fox") works for MPD, Fifth (5th) District. She has worked for MPD for almost fifteen (15) years. She was approached by Ofc. Robinson after roll call. Ofc. Robinson requested to talk to her stating that she was unsure of what to do in reference to a situation involving a part-time job. Ofc. Robinson presented her with a hypothetical regarding what to do if someone approached her about saying that they were at a part-time job, what should she do? Sergeant Fox advised her to be truthful in her statement. Ofc. Robinson then explained that Employee approached her to basically lie for him. After her conversation with Ofc. Robinson, Sergeant Fox went to Lieutenant Haselden and informed him about the conversation she just had with Ofc. Robinson. Lieutenant Haselden conducted a Q&A session with Sergeant Fox.

Sergeant Fox testified that Ofc. Robinson's story surprised her because it was not something she expected to hear about Employee. Sergeant Fox stated that she has worked with Ofc. Robinson for almost two and a half (2.5) years and she does not have any reason to doubt her credibility nor her story. Sergeant Fox noted that she found Ofc. Robinson's story to be credible based on the seriousness of the matter. She also stated that Ofc. Robinson was calm when she talked to her. Ofc. Robinson did not provide her with dates and specific hours that were worked by Employee, Ofc. Robinson was just trying to get guidance from her as to what to do. The Q&A session with Lieutenant Haselden occurred the day after her conversation with Ofc. Robinson.

***Captain Marvin Lyons* (**Tr. Pages 113 – 119)

Captain Marvin Lyons ("Captain Lyons") has worked with MPD for twenty-seven (27) years. He is currently assigned to the third (3rd) District. He knows Employee from the sixth (6th) District when he was in the homicide division and also in the fifth (5th) district where he was for the past five (5) years, up until he got transferred in June. Captain Lyons was Admin Captain for the Fifth (5th) District. He testified that while at the Fifth (5th) District, any time he needed something done or any particular vice or police squad, Employee always took the lead. Captain Lyons stated that Employee uses real good judgment, and Employee always came to his office to talk if he had doubts or questions about anything. Captain Lyons noted that he has never had a problem with Employee's truthfulness. According to Captain Lyons, if given the opportunity to work with Employee in the future, he would like to do so because he can trust Employee, and Employee is dependable. Captain Lyons also stated that Employee is like the go-to person that handles things on short notice.

Captain Lyons testified that he understands that Employee is being charged with double dipping; asking an officer to lie for him, as well as asking an officer to not submit sheets at his outside employment. However, he is surprised by these charges. He stated that from his dealing and interactions with Employee, he has not seen Employee's character that would make him belief that Employee will engage in unethical behavior. He noted that Employee is dependable, takes initiative and trustworthy. Additionally, Captain Lyons noted that if an officer engaged in a conduct and found guilty of that conduct, the officer should not be retained.

***Sergeant Raymond Chambers* (**Tr. Pages 119 – 128)

Sergeant Raymond Chamber ("Sergeant Chambers") has worked with Agency for twenty-six and a half (26.5) years. He is currently assigned to the Emergency Response Team ("ERT"). He testified that he has known Employee for about sixteen (16) years both officially and personally. He

stated that Employee worked underneath him when he was promoted to sergeant and assigned to the sixth (6th) district. Employee was one of the officers assigned to his area. Sergeant Chambers worked with Employee for about two (2) years before leaving the sixth (6th) district and transferring to ERT. Sergeant Chambers noted that of the twenty-five (25) officers that he had in his Patrol Service Area ("PSA"), Employee was probably the best officer.

Sergeant Chambers stated that there was nothing he could ask of Employee that he would not do. He talks with Employee several times in the course of the week. Sergeant Chambers noted that he has had the opportunity to interact with Employee since he became an official. Sergeant Chambers thinks Employee has a big heart, and he has not heard any negative thing about Employee in his official capacity. Sergeant Chambers stated that Employee calls him for advice when confronted with an issue. Employee is a very good official; conscientious; has very good judgment; and sometimes Employee's eagerness to care for people may sometimes cloud his judgment. He has never questioned Employee's truthfulness. He trusts Employee with his life. Sergeant Chambers explained that he does not worry about Employee's judgment and never questioned it. He noted that he would take Employee at his word if Employee stated that he made a mistake. Sergeant Chambers also stated that if he had the opportunity to work with Employee again, he would.

Sergeant Chambers testified that he is aware of the charges and specifications that Employee is facing, but the charges surprise him. He also stated that if someone was found guilty of these charges and the charges were accurate and proven, then the person should not be retained by Agency.

Lieutenant Edward Bernat **(Tr. Pages 128-141)**

Lieutenant Edward Bernat ("Lt. Bernat") has worked with the MPD since 1993 and he is currently assigned to the fifth (5th) district. He knows Employee and has worked with Employee. Lt. Bernat testified that Employee is assigned to Patrol Service Area 504, and previously PSA 502, and Employee is one of his supervisors on alternate shifts. Lt. Bernat testified that he was at the fifth (5th) district on April 21, 2012, and there was the spring IMF World Bank Meetings. His platoon was working the midnight tour of duty for the World Bank Meetings, and Employee was assigned to that platoon. After roll call was conducted at the fifth (5th) district, they responded to their assignments at the World Bank. Lt. Chambers noted that Employee usually did the roll call when Employee was assigned to a platoon.

Lt. Chambers stated that he has worked with Employee on and off during the four (4) years that he has been at the fifth (5th) district. He and Employee are always together when Employee is assigned to his Platoon, and sometimes, their path will cross during the different shifts. According to Lt. Chambers, Employee has always conducted his duties as he asked Employee to conduct them. Lt. Chambers stated that he did not feel that he should check up behind Employee to ensure that he carried out his duties.

Further, Lt. Chambers testified that Employee is a professional official in the MPD. In his experience with Employee, he hasn't had an issue with, or concerns with Employee's judgment. Lt. Chambers also stated that Employee was approved for outside employment based on a review of his work performance and him receiving 'exceeds expectation' within the last twelve (12) months. Employee did not have a history of sick leave abuse. Lt. Chambers stated that Employee is a good official, and if given the opportunity to work with Employee in the future, he would like to do so.

Lt. Chambers also testified that he is aware of the charges that Employee is currently facing, but not the total specifics. He noted that he understands that Employee was charged with double dipping and misconduct in reference to part of orders and regulations, and the charges against Employee surprise him. In his opinion, if an officer was found guilty on all these charges, the officer should probably not be retained. When questioned if he would feel comfortable working with someone found guilty of these charges, Lt Chambers stated that he would have to know all the facts behind everything before making any decision.

Byron Purnell **(Tr. Pages 142 - 212)**

Byron Purnell ("Employee") has worked with Agency for seventeen (17) years. He is a sergeant assigned to the fifth (5th) district. Employee has been at the fifth (5th) district for about nine (9) years. Employee testified that he sought approval for outside employment at JETU Apartments and was approved. Employee started working at JETU Apartments about a year ago. On average, he worked about ten (10) hours a week at JETU Apartments. on his days off, Friday and Saturday.

Employee testified that Ms. Walker, a JETU Apartments employee produced a calendar a month prior to the upcoming month, and they put down the days they can work. She then schedules them based on what they could work. Employee explained that his normal tour of duty at JETU Apartments on Saturday is from 6:00 p.m. – 12:00 a.m. According to Employee, he was scheduled to work at JETU Apartments on April 21, 2012, from 6:00 p.m. – 12:00 a.m. He was also scheduled to work at JETU Apartments from 6:00 p.m. – 12:00 p.m. on April 28, 2012, which was the following Saturday.

With reference to the April 21, 2012, incident, Employee identified the JETU Apartments security log where he entered his time. He explained that you enter time when you come into the door – generally, putting time in the book is the first thing most people do when they come in the door. According to the security log book, on April 21, 2012, Employee's name is the second from the bottom on the security log book. As reflected in the security log book, Employee's time-in on that day is 6:00 p.m. and his time-out is 12:00 a.m. Employee also signed the security log book. Employee further explained that the time that he signed on the security log book was not accurate. He stated that he actually arrived at JETU Apartments on April 21, 2012, at 5:00 p.m.; although he was scheduled to work from 6:00 p.m. – 12:00 a.m. Employee noted that he arrived earlier than the scheduled 6:00 p.m. because they had a CU Detail and their days off and tour of duty were changed to 2230 hours.

Employee further testified that there was no policy in place at JETU Apartments as it related to officers and modified schedules. All the officer had to do was notify JETU Apartments and document the time they actually came to work into the sheet. Employee noted that because it was a long day and he was really tired, he inadvertently put down 6:00 p.m. – 12:00 a.m.; his normal shift for that day and he arbitrarily only worked for five (5) hours from 5:00 p.m. – 10:00 p.m. at JETU Apartments, a complete error on his part.

After identifying the JETU Apartments daily activity sheet for April 21, 2012, Employee acknowledged that it was the same time as the security log book, 6:00 p.m. – 12:00 a.m. Employee also testified that he has no plausible explanation as to why he had information for the fifth (5th) and sixth (6th) hours on the activity sheet, although he was not at JETU Apartments. He explained that he was tired and he inadvertently did it, but he has no excuse for doing it. He admitted that it was his

fault. Employee stated that at no time was he trying to defraud JETU Apartments or attempt to get paid for time that he was not working. Employee testified that he was at roll call at MPD at 2230 and he did not intend to get paid for not working. He stated that he got paid for the five (5) hours that he worked and he did not intend to get paid an extra hour, nor was he trying to intentionally get paid for more.

Employee does not recall having a conversation with Ofc. Robinson about not faxing her daily activity sheet because it would not match up. He explained that not faxing the daily activity sheet for the last hour does not prevent Ofc. Robinson from getting paid. Employee noted that he left JETU Apartments on April 21, 2012, close to 10:00 p.m. He left his daily activity sheet on the desk inside the office at JETU Apartments. He was not attempting to conceal the activity sheet. He also did not fax the activity sheet each hour because he was basically on the street, he has a take home car and he is in the car and not in the office every hour, walking the property. He also noted that not faxing the activity sheet each hour has not been a problem with regards to getting paid. Employee left his activity sheet on the desk in the office at JETU Apartments because Ms. Tara from JETU Apartments collects the sheets and takes them back, in order to get an idea of who was working that day.

According to Employee, he arrived at JETU Apartments on April 21, 2012 at 5:00 p.m., and Ofc. Turner was there, but Ofc. Robinson was not there. He was informed by Ofc. Turner that Ofc. Robinson just left for the station to get her vest and duty belt. Employee mentioned that Ofc. Robinson did not go back to the station to get her jacket as she stated in her testimony. He explained that it was a warm April day, and when Ofc. Robinson returned to JETU Apartments from the station, she had her vest and duty belt in her hand. Ofc. Robinson returned to JETU Apartments about ten (10) minutes after Employee arrived at JETU Apartments. Employee stated that he worked at JETU Apartments from 5:00 p.m. -10:00 p.m. on April 21, 2012 and he left to go respond to the district, change out his uniform, and prepare to do CDU roll call. He knew roll call was at 2230 hour, and he got there on time. He conducted the roll call at 2230. His tour at MPD started at 2230 on April 21, 2012, and ended at 0700 on April 22, 2012.

Employee testified that he was contacted by Lieutenant Haselden on May 5, 2012 with allegations of double dipping. Lieutenant Haselden informed him that he needed to do a Q&A on Employee in reference to Employee's part time. Lieutenant Haselden showed Employee the documents he was going to question him on. The documentation included the login sheet and Employee's activity sheet from JETU Apartments. The Q&A was not done on that day, it took place on May 7, 2012.

Employee stated that later that day, he radioed Ofc. Robinson for her location so they could meet. He met with Ofc. Robinson at the McDonald's and informed her that she did the right thing and he, Employee did the wrong thing. Employee asked Ofc. Robinson not to change what she did because he did not want to see anything happen to her. According to Employee, he never ordered Ofc. Robinson to state to Lieutenant Haselden that he worked the same hours as her. He explained the there was no reason to give Ofc. Robinson an hour because naturally, they worked the same hours from 5:00 p.m. – 10:00 p.m. at JETU Apartments, then they worked from 10:30 p.m. – 7:00 a.m. at MPD. He simply told her to make sure she said the right thing, and that she did the right thing by putting it in the book from 5:00 p.m. 0 10:00 p.m. He stated that nothing else was disclosed during the meeting with Ofc. Robinson at the McDonald's. Employee explained that he met with Ofc. Robinson because he was looking out for one of his officers and just making sure that she did the

right thing and he did the wrong thing. He was not attempting to encourage or influence Ofc. Robinson to lie on his behalf.

Employee testified that he first realized that there was a discrepancy in his time when Lieutenant Haselden informed him of the sheets. After the discrepancy with the time came up, he contacted JETU Apartment around the first week of May, 2012, to alert them of the error. He informed Ms. Walker that he made an error and to make sure that she deducted one (1) hour from Employee's pay, to ensure that the six (6) hours was converted to five (5) hours of pay. Employee stated that he was only paid for five (5) hours. Employee further testified that he has a heart for his officers, and he had no intention of having Ofc. Robinson do anything for him, but just to make sure that she knew she did the right thing. He further explained that his actions, as far as his sheets and time, were a lack of judgment from being tired, which is no excuse to the Panel. Employee also noted that he had no intention of defrauding the government or JETU Apartments for one hour and a half (1.5). He maintained that he has not shown this in the past and nothing he has done in his seventeen (17) years of working and also working part time. He apologized for his action in this situation and he regrets that sheet, as well as having the misconception of speaking with Ofc. Robinson at that particular moment.

Employee stated that by filling in the fifth (5^{th}) and sixth (6^{th}) hour on his activity report for JETU Apartments on April 21, 2012; his intention was not to double dip. Employee does not recall when he filled out the fifth (5^{th}) and sixth (6^{th}) hour, but he filled out the sheets periodically when he goes back to his car after walking the property - about every three (3) hours or at the end of the tour. When asked if he would fill out notes of activities he had not done, Employee stated that yes, it is pretty much just making sure that the general area is secure and then filling out the sheet as he comes across the time. The notes that he made did not necessary reflect the time or the actions that he was doing. He acknowledged that he made the entries on the activity sheet for the sixth (6^{th}) hour, and he stated that it was his fault. He filled it out as if he was working a 6:00 p.m. -12:00 a.m. tour. The times in the activity sheet were random times. He has no explanation for why he put hours in the fifth (5^{th}) and sixth (6^{th}) hours when he was not there. Employee signed the activity sheet after he finalized it, and left it for the management company. He testified that he was wrong by putting in the wrong time on the log book and entering his sheet.

Employee does not know why Ofc. Robinson stated that Employee told her not to fax her activity sheet after 2130 because their time would not match. Employee also stated that he jumbled up the time because he had no sleep, and he was not focused. He explained that there is really no excuse for that and that it was just 'muscle memory" of putting in his regular time without focusing in really what it is that he should have been doing. He is used to 6:00 p.m. – 12:00 a.m.; it is his normal shift, what he normally works on Saturdays. He also stated that at JETU Apartments, you generally sign-in and sign-out all in one moment. So he signed in his time-in and time-out at the same time. The time on the login book is not indicative of the time that Employee actually left JETU Apartments.

Trial Board Finding

The Adverse Action Panel issued its finding and recommendations after the October 4, 2012, Evidentiary Hearing. The Panel found Employee guilty of Charge No.1, Specification No. 1, Charge No. 3, Specification No. 1, and Charge No. 4, Specification No. 1.

> **Charge No. 4**:[5] Violation of General Order 120.21, Table of Offenses & Penalties, Part A, # 25, which reads, "Any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force."
>
> **Specification No. 1**: In that on April 21, 2012, you submitted a daily activity report to your outside part time employer identified as the JETU apartments of 869 21st Street N.E. Washington, D.C., indicating that on April 21, 2012, you conducted visual checks/inspections of the property from 2230 hours with the last entry on the activity report indicated as 2359 hours, knowing that this was false and the report was fraudulent because during this period you were located at 1805 Bladensburg Ave N.E. Washington D.C. attending roll call within the Metropolitan Police Department's 5th District roll call room.

The Panel found that there were either insufficient facts for the other proposed charges and specifications or that Employee was not guilty of the proposed charges and/or specifications.

With regard to the guilty findings and specifications, the Panel weighed each of the offenses according to the relevant *Douglas Factors*, categorizing them either as aggravating or mitigating factors. After consideration of the *Douglas Factors*, the Panel reviewed and evaluated all witness testimony and all of the items admitted into evidence and considered reasonableness in rendering its opinion. The Panel noted that it believed Employee could be rehabilitated and will prove to be an asset to the agency. The Panel recommended that Employee be demoted to the rank of Officer for the sustained violations of Department regulations. Additionally, the Panel recommended that Employee be revoked from working any outside employment for a twelve (12) month period commencing on the effective date of his demotion.[6]

Agency Final Decision

Subsequently, on December 12, 2012, Agency issued its Final Notice of Adverse Action in this matter. Upon consideration of the Panel's decision and a review of the record, Agency agreed with all the charges as outlined in the Panel's Findings, Conclusion and Recommendation document. Agency further noted that for the violations that Employee was found guilty of by the Panel, he would be demoted to the rank of Officer and his outside employment privileges were revoked for one year, commencing on the effective date of Employee's demotion. Employee appealed this decision to the Chief of Police and in a letter dated January 17, 2012, his appeal was denied. The Chief of Police also noted that the January 17, 2012, letter represents Agency's final action in this matter.

Employee's Argument

In his submissions to this Office, Employee notes that, he never intended to defraud JETU Apartments or the government for any financial gain. He explains that although he is guilty of recording and submitting incorrect information to JETU Apartments, it was unknown to him at the

[5]After a review of the evidence and testimony rendered during the Adverse action hearing, in a letter dated November 6, 2012, the Adverse Action Panel informed Employee that it was adding a fourth charge and specification. The Panel also informed Employee that it will re-open the record until November 15, 2012, in order for Employee to file a formal written response to the amended charges, for the Panel's consideration. *See* Agency's Answer at Tab 3.
[6] Agency's Answer at Tab 4.

time that he had in fact provided JETU Apartments with incorrect information that would be detrimental to his employment at MPD.

Additionally, Employee submits that while it is clear that there was substantial evidence to support the charges and specifications which focused on the submission of the Daily Activity Log, there was however, no substantial evidence to support Charge No.1, Specifications No. 2 and 3; and Charge No. 2, Specification No. 1 and 2. Employee also maintains that it is Ofc. Robinson's words against his, and that it seems as though Agency favored Ofc. Robinson's credibility over Employee's based on the wrongful submission of the JETU Apartments Daily Activity Logs. Employee further states that although Ofc. Turner was also working at JETU Apartments on April 21, 2012; he was never interviewed by Agency. Employee further notes that although his attorney attempted to interview Ofc. Turner, due to the lapse in time, Ofc. Turner could not recall the series of events that took place that evening.

Furthermore, Employee asserts that Agency's conduct constitutes harmful procedural error in that, Lieutenant Haselden ordered the Time and Attendance person to go into the Time and Attendance system and change the time Employee was scheduled to work at MPD on April 21, 2012, from 2230 hours, to 2200 hours. Employee further maintains that the Time and Attendance system shows who made the change and when it was made. Employee also states that because Agency knew it had a weak case, it made this change so it would have substantial evidence that Employee had in fact left JETU Apartments before 10:00 p.m. in order to make it to the Fifth (5^{th}) district by 10:00 p.m.

Employee also contends that if the case had remained in-house for just the issue with his Daily Activity Log, he would have received a twenty (20) days suspension and/or a suspension from his part-time job. Employee argues that due to the lack of substantial evidence in regards to Ofc. Robinson's statement, he feels that the penalty imposed on him was a little severe as he has lost time served and suffered financial loss because of being demoted. Employee states that he takes full responsibility for his record keeping error and he did not intentionally set out to defraud JETU Apartments or the government. He believes he was punished severely because of the accusations brought against him by Ofc. Robinson. He also asserts that Charge No. 4, Specification No.1 should be thrown out because it is a duplicate of Charge No.1 and 3. Employee further contends that although the Panel does have the ability to add additional charges, his attorney filed a response on November 15, 2012, stating that the department had instituted Charge No. 4, Specification No. 1, well after the ninety (90) days provided by law.[7]

Agency's Argument

In its submissions to this Office, Agency asserts that it adopted the Panel's Finding of Facts and Conclusion of law by demoting Employee and revoking his outside employment privilege for twelve (12) months. Agency also notes that its decision is supported by substantial evidence. Agency explains that pursuant to Article 12, section 8, of the CBA between Agency and the Fraternal Order of Police/MPD Labor Committee, an employee may appeal the MPD's final decision to OEA when it is premised on an Adverse Action Hearing. Agency argues that the Panel's Findings and recommendations are supported by substantial evidence and that these findings, including credibility determination, were reasonable and should be upheld. Agency explains that, substantial evidence supports the finding that Employee submitted fraudulent timesheets to JETU Apartments that

[7] Petition for Appeal (February 26, 2012); *See also* Brief (August 15, 2014).

indicated that he had worked six (6) hours on April 21, 2012. Agency further explains that with reference to Charge No.1, Specification No. 1, it is undisputable that Employee made a misrepresentation to his outside employer by submitting time sheet that indicated that he had worked from 6:00 p.m. – 12:00 a.m. Agency notes that, the only dispute raised by Employee is that he did not intend to submit the time sheet to the outside employer for the incorrect hours.

Agency further contends that, after accepting all the evidence, the Panel reasonably rejected Employee's "muscle memory" explanation and determined that Employee's entries in the JETU Log book and Daily Activity Report were deliberate, carefully articulated and documented. Agency states that the Panel's determination is supported by both testimony and written statement from Employee and Ofc. Robinson. Agency highlights that Employee admitted in his testimony, as well as his Q&A, that he submitted the documents to his outside employer indicating that he had worked at JETU Apartments from 6:00 p.m. – 12:00 a.m. Agency submits that Employee also admitted that the specific details of the work performed in the document submitted to the outside employer were untrue, and he intentionally made up and documented those untrue details. Agency argues that Ofc. Robinson confirmed that Employee's submission of time to the outside employer was consistent with an attempt to be compensated for time that Employee knew he would actually be working for MPD at the fifth (5^{th}) district.

With reference to Charge No. 3, Specification No. 1, Agency contends that, the record contains substantial evidence that Employee engaged in outside employment that would interfere with his scheduled tour of duty. Agency states that, Employee admitted that he was scheduled to work on April 21, 2012 from 6:00 p.m. – 12:00 a.m. at JETU Apartments, and he completed documentation indicating that he worked those hours. Employee was also scheduled to work at MPD fifth (5^{th}) district from 10:30 p.m. on April 21, 2012, to 7:00 a.m. on April 22, 2012. Employee admitted that he knew his shift at the fifth (5^{th}) district began at 10:30 p.m. on April 21, 2012, and that he arrived on time to begin the shift. Agency also notes that, Employee admitted that his conflicting schedule necessitated that he leave before the end of his shift at JETU Apartments at some point prior to 10:00 p.m. to travel to the fifth (5^{th}) district and prepare for roll call at 10:30 p.m. Therefore, the record contains substantial and undisputed evidence that Employee engaged in outside employment on April 21, 2012, that he knew would interfere with his MPD tour of duty.

For Charge No. 4, Specification No. 1; Agency avers that Employee acknowledged that he wrote the detailed entries in the Daily Activity Report indicating the performance of multiple visual checks and inspections at several locations between 10:00 pm – 12:00 a.m. Also, Employee admitted during the hearing that he did not actually perform any of those visual checks and inspections between 10:00 p.m. – 12:00 a.m. Employee testified that he simply filled in random times and actions on the log submitted to JETU Apartments. Employee further testified that he left JETU Apartments prior to 10:00 p.m. because he knew he had roll call at MPD, which he conducted at 10:30 p.m. Agency maintains that, the finding that Employee was guilty of this charge and specification is supported by substantial evidence and should be upheld.

Further, Agency submits that there was no harmful error. It explains that Employee was charged with misconduct in accordance with the CBA between Agency and Employee's union. Agency also notes that Employee appeared before the Adverse Action Hearing Panel; he was represented by counsel, and presented evidence in his defense. Additionally, Agency notes that Employee's only arguments regarding procedural error are that: 1) Charge No. 4, Specification No.1 was duplicative with Charge No.1, Specification 1, and Charge No. 3, Specification 1; and 2) the issuance of Charge No. 4, Specification No. 1 violated the ninety (90) days rule. Agency explains

that, even if Employee's argument of the 90 day rule has merits, Agency's action must still be upheld because there has been no harmful error. Agency further explains that its issuance of Charge No. 4, Specification No. 1 did not harm or prejudice Employee's right and did not affect Agency's decision to demote Employee and revoke his outside employment for twelve (12) months. Agency maintains that it provided Employee with notice of the additional charge and the opportunity to respond either in writing or by convening the Panel to present additional evidence. Agency maintains that by providing Employee's procedural rights, Agency did not harm or prejudice Employee. Moreover, the Charge did not affect Agency's decision to discipline Employee. Agency sustained the Panel's guilty findings and adopted the Panel's recommended discipline for all charges and for each guilty charge and specification, the Panel instituted the same penalty as in Charge No. 4, Specification No. 1.

In addition, Agency contends that the penalty was appropriate. It explains that the Panel reviewed and applied each of the enumerated Douglas factors and relied upon the MPD's Table of Appropriate Penalty. Further, having considered each of the relevant factors, Agency's decision to demote Employee and revoke his outside employment privileges for twelve (12) months was neither arbitrary nor capricious, therefore, should not be disturbed.[8]

ANALYSIS AND CONCLUSION

This Office's review of this matter is limited pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department*,[9] that OEA has a limited role where a departmental hearing has been held. According to *Pinkard*, the D. C. Court of Appeals found that OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings.[10] The Court of Appeals held that:

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

Additionally, the Court of Appeals found that OEA's broad power to establish its own appellate procedures is limited by Agency's Collective Bargaining Agreement. Thus, pursuant to *Pinkard*, an Administrative Judge of this Office may not conduct a *de novo* hearing in an appeal before him/her, but must rather base his/her decision solely on the record below, when all of the following conditions are met:

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
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> 2. The employee has been subjected to an adverse action;

[8] Agency Brief (July 25, 2014); *See also*, Agency's Answer (March 18, 2013).
[9] 801 A.2d 86 (D.C. 2002).
[10] *See* D.C. Code §§ 1-606.02(a)(2), 1-606.03(a),(c); 1-606.04 (2001).

> 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.

In this case, Employee is a member of the Metropolitan Police Department and was the subject of an adverse action; MPD's Collective Bargaining Agreement contains language similar to that found in *Pinkard*; and Employee appeared before an Adverse Action Panel, which held an Evidentiary Hearing. Based on the documents of records and the position of the parties as stated during the Status Conferences held in this matter, the undersigned finds that all of the aforementioned criteria are met in the instant matter. Thus, pursuant to *Pinkard*, OEA may not substitute its judgment for that of Agency and the undersigned's review of Agency's decision is limited to the determination of whether the trial board's finding was supported by substantial evidence; whether there was harmful error; and whether the action taken was done in accordance with applicable law or regulations. Further, according to *Pinkard*, I must generally defer to [the Adverse Action Panel's] credibility determinations when making my decision.[11]

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

According to *Pinkard*, the undersigned must determine whether the Adverse Action Panel's findings were supported by substantial evidence.[12] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[13] Further, "[i]f the [Adverse Action Panel's] findings are supported by substantial evidence, [the undersigned] must accept them even if there is substantial evidence in the record to support contrary findings."[14]

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

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[11] *Id.*
[12] *See Pinkard*, 801 A.2d at 91.
[13] *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)).
[14] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).

and the undersigned finds that there was sufficient evidence to support those determinations. Moreover, in reaching its conclusion, the Adverse Action Panel considered the *Douglas factors*.[15]

Further, there was ample documentary and testimonial evidence in the record to support the Panel's conclusion that Employee was guilty of Charge No. 1, Specification No. 1; Charge No. 3, Specification No. 1, and Charge No. 4, Specification No. 1. And Agency adopted the Panel's findings and recommendations. Consequently, the undersigned finds that there was substantial evidence in the record to support the Panel's findings and recommended penalty.

Whether there was harmful procedural error.

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

Here, Employee is alleging that the issuance of Charge No. 4, Specification No. 1 violated the ninety (90) day rule. Employee explains that while the Panel has the ability to add additional charges after a hearing based on new evidence that comes to light during the proceeding, the Panel cannot add new charges that MPD knew about from the beginning. Employee further explains that, Charge No.4, Specification No.1, comes from the questioning of time listed on the JETU Apartment Daily Activity Log, which was submitted into evidence and used during the Q&A session for Ofc. Robinson. Therefore, Charge No.4, Specification No. 1, should have been thrown out immediately because MPD had this evidence during the initial investigation. Agency on the other hand notes that, even if Employee's claim has merits, it does not constitute harmful error because its issuance did not harm or prejudice Employee's rights, and it did not affect Agency's decision to discipline Employee. Moreover, for each guilty charge and specification, the Panel instituted the same penalty as Charge No. 4, Specification No. 1.

D.C. Official Code § 5-1031 (a) provides in pertinent part that "no corrective or adverse action against any sworn member or civilian employee of the [Agency] ... shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the [Agency] knew or should have known of the act or occurrence allegedly constituting cause". There is no dispute that Employee is a sworn member of MPD. Therefore, I find that this provision applies to Employee. Charge No. 4, Specification No. 1, stems from the April 21, 2012 incident. Agency was notified of this incident, as well as the specific facts that led to the issuance of Charge No. 4, Specification No. 1 on April 27, 2012, when Ofc. Robinson turned in Employee's Daily Activity Sheet from JETU Apartments to MPD. Accordingly, Agency had ninety 90 days from April 27, 2012 to commence any adverse action against Employee. Ninety (90) days from April 27, 2012, would be approximately September 5, 2012. The Panel informed Employee of Charge No. 4, Specification No. 1, on November 6, 2012; way pass the required ninety (90) days. Consequently, I find that Employee's argument has merit. However, I further find that, Agency's violation of the ninety (90) day rule in this instant does not constitute harmful error. I agree with Agency's assertion that Employee was not harm or prejudiced by Agency's violation. Agency's issuance of Charge No. 1,

[15] *See Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981).

Specification No. 1, and Charge No. 3, Specification No. 1, is in compliance with the ninety (90) day rule, and the penalty recommended by the Panel for these two charges are the same as the penalty recommended for Charge No. 4, Specification No. 1. Accordingly, I conclude that this error did not impact Agency's decision to demote Employee and revoke his outside employment privileges for twelve (12) months.

Employee also asserted that Agency's conduct constitutes harmful procedural error in that, Lieutenant Haselden ordered the Time and Attendance person to go into the Time and Attendance system and change the time Employee was scheduled to work at MPD on April 21, 2012, from 2230 hours, to 2200 hours. However, this argument was never brought before the Panel, and it was not considered by the Panel or Agency in making its decision to discipline Employee. Therefore, I conclude that this argument is without merit and does not constitute harmful procedural error.

Whether Agency's action was done in accordance with applicable laws or regulations.[16]

In his submissions to this Office, Employee does not contest the Adverse Action Panel's findings on Charge No. 1, Specification No.1, and Charge No. 3, Specification No. 3. Employee specifically noted in his brief that it is clear that there was substantial evidence presented to support the charges and specifications which focused on the submission of the Daily Activity Log. Further, in his Petition for Appeal, Employee admitted to recording and submitting false work hours to his part-time employer as stated in Charge No.1 (Conduct unbecoming), Specification No. 1, knowing he had not worked six (6) hours on April 21, 2012, at JETU Apartments. However, Employee blamed this on clerical error based on sleep deprivation and the normalcy of his routing. He explained that it was unknown to him that he had submitted incorrect hours to his part time employer. Employee further testified that the Log book was used by JETU Apartments to pay its employees. Employee was aware that JETU Apartments relied on the sign-in and sign-out information for payroll purposes. Nonetheless, Employee logged in 6:00 p.m. – 12:00 a.m. on April 21, 2012, although he was aware that he had to be at MPD at 10:30 p.m. to conduct roll call, and he actually left JETU Apartments at 10:00 p.m. Based on the documentary evidence, as well as Employee's own admission, I conclude that Agency had cause to institute this cause of action against Employee.

With referenced to Charge No. 3, Specification No. 1 (Failure to Obey Orders and Directives), Employee stated that he adjusted his part time schedule once he was notified that he would be on the CDU detail on April 21, 2012, between the hours of 2230-0700 hours. He explained that he adjusted his schedule because it would have interfered with his hours at JETU Apartment. However, this was done after he was notified by Lieutenant Haselden that he was being investigated. The record shows that Employee engaged in outside employment from 6:00 p.m. -12:00 a.m. He was also aware that this would interfere with his scheduled tour of duty at MPD on April 21-22, 2012. Employee was scheduled to begin his tour of duty at MPD on April 21, 2012 at 10:30 p.m., and end at 7:00 a.m. on April 22, 2012. The time stamp in the JETU Apartments Log book and Daily Activity Report highlights that Employee worked at JETU Apartments from 6:00 p.m. -12:00 a.m. This schedule interfered with his MPD tour of duty on April 21-22, 2012. Consequently, based on documentary evidence, and Employee's own testimony, I find that Agency had cause to institute this cause of action against Employee.

The Adverse Action Panel unanimously concluded that Employee was guilty of the charges specified above. Accordingly, based on the preceding analysis, the undersigned finds that Agency's

[16] Because Charge No. 4, Specification No. 1, violated the 90 day rule, it will not be addressed.

action of demoting Employee was done in accordance with applicable laws and regulations. In coming to this conclusion, the Adverse Action Panel considered the *Douglas Factors.* Based on the foregoing analysis, I find no plausible reason to disturb Agency's action.

The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.[17] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). 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.[18] I conclude that given the totality of the circumstances as enunciated in the instant decision, the Agency's action of demoting Employee and revoking his outside employment privileges for twelve (12) months should be upheld.

ORDER

Based on the foregoing, it is **ORDERED** that the Agency's action of demoting Employee from Sergeant to Officer is hereby **UPHELD**.

FOR THE OFFICE:

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MONICA DOHNJI, Esq.
Administrative Judge

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