THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CURTIS ADAMSON	)	OEA Matter No. 1601-0041-04
Employee	)	
	)	Date of Issuance: February 14, 2006
v.	)	
	)	Daryl J. Hollis, Esq.
	)	Senior Administrative Judge
METROPOLITAN POLICE	)	
DEPARTMENT	)	
Agency	)	

Harold Vaught, Esq., Employee Representative
Kevin Turner, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

On March 3, 2004, Employee, a Sergeant in the Career Service, filed a petition for appeal from Agency's final decision removing him for "Neglect of any duty to which assigned or required by the rules and regulations adopted from time to time by the Department" and "Any conduct not specifically set forth in this order [General Order Series 1202, Number 1, Part I-B-24] which is prejudicial to the reputation and good order of the police force, or involving failure to obey or properly observe any of the regulations and orders relating to the discipline and performance of the force."

This matter was assigned to me on September 21, 2004. I conducted a Prehearing Conference on October 21, 2004. At that proceeding, I discussed with the parties the impact on this case of the D.C. Court of Appeals decision in *D.C. Metropolitan Police Department v. Elton Pinkard* (*Pinkard*), 801 A.2d 86 (D.C. 2002). In *Pinkard*, the Court held that pursuant to a section of the Collective Bargaining Agreement between Agency and Pinkard's union, this Office's review of Pinkard's appeal was limited to a review of the agency's decision, as based on the recommendation of its Trial Board, for a "determination of whether the [Trial Board's] decision was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations." *Id.* at 91. (citation omitted).

Pursuant to the discussions held at the Prehearing, Employee submitted his "*Pinkard*" brief on February 2, 2005. Agency submitted a reply brief on April 5, 2005 and Employee submitted a response brief on April 22, 2005. Because of the ramifications of *Pinkard*, no evidentiary Hearing was conducted. This decision is based on the record below and on the parties' positions as set forth in their briefs. The record is closed.

JURISDICTION

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

ISSUES

> Whether Agency's decision, as based on the Trial Board's recommendation, was supported by substantial evidence, whether Agency committed harmful procedural error, or whether the decision was in accordance with law or applicable regulations.

STATEMENT OF THE CHARGES

By advance notice received by Employee on April 28, 2003, Agency proposed to remove him. In pertinent part, this notice reads as follows:

> CHARGE NO. 1: Violation of General Order Series 1202, Number 1, Part I-B-14, which provides: "Neglect of any duty to which assigned or required by the rules and regulations adopted from time to time by the Department." As further

provided in General Order Series 101, Number 9, Part I-F-3, "Sergeants shall instruct and assist officers under their supervision in the proper performance of their duties" and Part I-F-8, "Be held responsible for the proper conduct . . . of subordinates." This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.

SPECIFICATION NO. 1: In that on Wednesday, January 15, 2003, two officers under your supervision and working as "Call Takers" had excessive periods of inactivity during their period of duty at the Public Safety Communications Center, and failed to answer 911 calls reporting a fatal fire at 1617 21st Street, without justification. You failed to ensure that the employees under your supervision were properly performing their assigned duties. Therefore, you were negligent in the performance of your duties as a supervisor, as well as your being responsible for the proper conduct of your subordinates. . . .

CHARGE NO. 2: Violation of General Order Series 1202, Number 1, Part I-B-24, which provides: "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 regulations and orders relating to the discipline and performance of the force." This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.

SPECIFICATION NO. 1: In that on January 15, 2003, you inexcusably failed to properly supervise your subordinates in that they failed to answer 911 and 311 calls during the critical period of time directly when calls were coming in for a fatal fire. As a result of your action unfavorable news media reports regarding the Metropolitan Police Department and its employees went out to the public, and could seriously tarnish the reputation of the Metropolitan Police Department as well as the District of Columbia Government. . . .

(emphasis in original).

STATEMENT OF FACTS, ANALYSIS AND CONCLUSIONS

On August 13 and October 21, 2003, Employee appeared before a three-person Trial Board that was convened to consider the above charges.[1] He was represented by counsel, presented witnesses and testified on his own behalf. Further, he had the opportunity to present documentary evidence and to cross-examine the agency's witnesses. At the conclusion of the Trial Board's proceedings, the members voted unanimously to sustain the charges but recommended that in lieu of removal, Employee be suspended from his position for 70 days (35 days for each of the two charges). In pertinent part, the Trial Board wrote as follows:

> There are many issues to consider when reviewing this incident. Several of them involve logistical problems and some involve lack of direction or lack of supervision, while others involve the lack of a clear and concise policy regarding the lines of authority and internal office policy.
>
> Clearly, there were no written policies, standard operating procedures [SOP's] or memorandums in place in reference to the duties and responsibilities of call takers.
>
> Likewise, there was no clear written policy produced regarding the specific duties required of the PSCC [Public Safety Communications Center] Supervisors. However, a roll call sheet was produced which indicated that Sergeant Adamson was specifically responsible for dispatchers in the "zone".
>
> However, the lack of SOP's does not absolve, diminish or excuse the responsibility of Sergeant Adamson. Sergeant Adamson is an official of the Metropolitan Police Department, assigned to the PSCC. His primary function is to supervise his subordinates and ensure that operations within his unit are running smoothly and above all, effectively. An effective supervisor does not require a SOP, or any other written order to ensure that a unit as vital as the PSCC, has at the very least, adequate personnel to answer emergency phone calls.

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[1] Employee's case before the Trial Board was designated Case No. 073-03.

> Although there are several mitigating factors, such as: No SOP's for supervisors, No SOP's for call takers and No SOP's for supervisor's duties and responsibilities, [that] are being considered in this decision, there can only be one conclusion after considering all of the facts of the case. Sergeant Adamson is guilty of not properly supervising his subordinates. He did not designate a specific supervisor to supervise his call takers while he was off the floor.
>
> Inspector Grossman reported that when the calls to report the fire were coming in, there were a sufficient number of calls coming in that any "Call Taker" sitting at their position in a ready status should have received at least one call.
>
> The failure of supervision was directly responsible for the breakdown of the 911 emergency call center. Officer Robertson-Carey and Ms. Bibb were both assigned to Sergeant Adamson's squad. In the opinion of the [Trial Board], the PSCC is one of the most important units within the Metropolitan Police Department. If this unit fails, the citizens of the District of Columbia will be in jeopardy. All of the assignments issued to patrol officers throughout the city rely on the accuracy and expediency of the PSCC. There can be no complacency or failure associated with this unit.
>
> The other issue to be considered involved the unfavorable news media coverage of the incident and the fact that it painted the Metropolitan Police Department in a negative light. Sergeant Adamson's failure to properly supervise call takers at the PSCC caused this incident to portray the Department as an unreliable, ineffective and incompetent agency. Sergeant Adamson's failure to see that his subordinates were properly supervised caused a breakdown and serious delay in the 911 call system. Testimony was received from Mr. Gaffigan, Inspector Grossman, and Sergeant Gentile indicating unfavorable news media reports . . . and public city council hearings.

Trial Board's Report at 14-15 (*See* Agency's response to Employee's petition for appeal at Tab E).

In reaching its conclusions and recommendation, the Trial Board also considered the so called "*Douglas* factors". In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board (MSPB), 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 where 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.[2]

The Trial Board found factors 3, 4, 6, 7 and 11 to be "neutral" factors; factors 1, 2, 8 and 9 to be "aggravating" factors; and factors 5, 10, and 12 to be "mitigating" factors. Regarding the aggravating factors, the Trial Board wrote as follows: [Factor 1:] "Sergeant Adamson's offense was serious in nature. Sergeant's Adamson's primary responsibility was to supervise two call takers answering calls coming into the [PSCC]. Sergeant Adamson's failure to monitor the call takers may have resulted in the death of a citizen"; [Factor 2:] "Sergeant Adamson, as a 'Supervisor', is held accountable to ensure that citizens in need of help receive it through his subordinates"; [Factor 8:] "The case received a substantial amount of negative publicity and caused embarrassment to the Department"; and [Factor 9:] "Sergeant Adamson, as a supervisor, should have been aware that the 'Call Takers' are to answer calls in a timely manner. During the incident in question, numerous calls were waiting to be answered and he should have been aware of how many call takers were plugged in answering calls."

Regarding the mitigating factors, the Trial Board wrote: [Factor 5:] "The [Trial Board] concludes that upon his return [from the recommended suspension], Sergeant Adamson should be able to return to his duties and perform them in a professional manner"; [Factor 10:] "There is no reason to believe that Sergeant Adamson will not return as a productive officer"; and [Factor 12:] "The penalty agreed to [by the Trial Board]

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[2] It should be noted that in *Revell v. D.C. General Hospital*, OEA Matter No. 1601-0359-96P99, *Opinion and Order on Petition for Review* (March 2, 2005), __ D.C. Reg. ____ ( ), the OEA Board wrote as follows regarding this Office's use of the *Douglas* factors:

> An Administrative Judge is not required to make an independent assessment regarding the appropriateness of a penalty using the Douglas factors. As we have stated to the District of Columbia Court of Appeals in another matter, there is no statute that requires that this Office apply the Douglas factors to an appeal.

Revell, Opinion and Order at 4.

should serve to deter this member, as well as others, from any similar misconduct in the future."

After receiving the Trial Board's report and recommendation, Assistant Chief Shannon Cockett, Director of Agency's Human Services Section, authored a memorandum to Employee entitled "Final Notice of Adverse Action"[3] that reads in pertinent part as follows:

> Upon consideration of the findings by the [Trial Board] and a review of the record, I conclude that a preponderance of the evidence proves that you are guilty of the charges and specifications as outlined [by the Trial Board]. However, I conclude that the penalty recommended by the [Trial Board] of a seventy-day suspension to be inconsistent with the facts and circumstances of you case and that your removal from the force is merited.

Cockett memorandum at 1.

In support of her determination to reject the Trial Board's recommendation of a 70-day suspension and instead impose the penalty of removal, Chief Cockett wrote in part as follows:

> Given the severity of the neglect of duty in these cases, termination is merited because the aggravating factors outweigh the mitigating factors. In this case, your failure to properly supervise your subordinates came at a very high price, not only in terms of delays in answering citizens calls for an emergency, but also in terms of a loss of public confidence in the 911 system and damage to the reputation of [Agency].

Id. Further, Chief Cockett specially disagreed with several of the Trial Board's assessments of the *Douglas* factors in this case. Where the Trial Board found factors 4, 5, 6, 10 and 12 to be either mitigating or neutral factors, Chief Cockett found them to be aggravating ones.

In her notice, Chief Cockett also advised Employee that he could appeal her decision to Chief of Police Charles Ramsey. Employee did so through his then attorney, Ted

[3] *See* Tab D of Agency's response to Employee's petition for appeal.

Williams, and on January 28, 2004, Chief Ramsey issued Agency's final decision.[4] That decision reads as follows:

> This will acknowledge receipt of your January 22, 2004 appeal of termination on behalf of [Employee]. The appeal is based The appeal is based on the following assertions:
>
> 1. There is absolutely nothing in the record supporting any of the charges and specifications lodged against him.
>
> 2. There is a conflict of interest for me to decide the appeal since I had pre-determined to terminate [Employee].
>
> After a careful review of the record, and in particular the Final Notice of Adverse Action, I find that there is more than an ample record to conclude that a preponderance of the evidence supports this termination. Also, it is my policy that negligence that may have contributed to a fatality should result in termination. As Chief of Police I am invested with the discretion to make that policy. Finally, since the collective bargaining agreement makes it my responsibility to answer appeals of this nature, there is no conflict in my deciding this appeal.

Regarding *Pinkard*, 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* Hearings in all matters before it. According to the Court of Appeals:

> On this appeal from the Superior Court, the MPD contends (1) that an evidentiary hearing before the OEA administrative judge was precluded by a collective bargaining agreement between the MPD and the Fraternal Order of Police, a labor union to which Pinkard belongs, [and] (2) that the OEA administrative judge abused her discretion in ordering a second [and *de novo*] evidentiary hearing. . . .

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[4] *See* Tab B of Agency's response to Employee's petition for appeal.

As a general rule, this court owes deference to an agency's interpretation of the statute under which it acts. There is, however, an exception to this general rule, which is that we will not defer to an agency's interpretation if it is inconsistent with the plain language of the statute itself. This case falls within the exception because the OEA's reading of the [Comprehensive Merit Personnel Act or CMPA] is contrary to its plain language and inconsistent with it. We therefore hold that, under the statute, the collective bargaining agreement controls and supersedes otherwise applicable OEA procedures, and consequently, that the OEA administrative judge erred in conducting a second hearing.

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.

The MPD contends, however, that this seemingly broad power of the OEA to establish its own 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]. . . .

It is of course correct that a collective bargaining agreement, standing alone, cannot dictate OEA procedures. 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

> (2001)) states that "[a]ny 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 the 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 procedures outlined in the collective bargaining agreement – namely, that the 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 the 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, 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.

801 A.2d at 87, 90-92. (citations omitted).

Thus, pursuant to *Pinkard*, an Administrative Judge of this Office may not conduct a *de novo* Hearing in an appeal before him, but must rather base his 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;[5]

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.

All of these conditions are met in this matter. Thus, according to *Pinkard*, my review of the final Agency decision removing Employee is limited "to a determination of whether [the Trial Board's recommendation] was supported by substantial evidence,[6]

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[5] Although *Pinkard* involved an employee of the Metropolitan Police Department covered by a collective bargaining agreement, the holding pertains to employees of the D.C. Fire & Emergency Medical Services Department, who are likewise covered by a collective bargaining agreement. *See, e.g., Culver v. D.C. Fire & Emergency Medical Services Department*, OEA Matter No. 1601-0036-01 (April 16, 2004), __ D.C. Reg. ( ); *Hibben v. D.C. Fire & Emergency Medical Services Department*, OEA Matter No. 1601-0138-99 (April 21, 2003), __ D.C. Reg. ___ ( ); *Davidson v. D.C. Fire & Emergency Medical Services Department*, OEA Matter No. 1601-0063-99 (November 20, 2002), __ D.C. Reg. ____ ( ); *Kelly v. D.C. Fire & Emergency Medical Services Department*, OEA Matter No.1601-0023-98 (November 6, 2002), _ D.C. Reg. ( ).

[6] According to OEA Rule 629.3, 46 D.C. Reg. 9317 (1999), an agency has the burden of proof in adverse action appeals. Pursuant to OEA Rule 629.1, *id.*, that burden is by "a preponderance of the evidence", which is defined as "[t]hat 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." In *Pinkard*-type cases previously decided by this Office (including the initial decision in *Pinkard* itself that resulted from the

whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations." *Id.* at 91.

a. Whether Agency's action was not "in accordance with . . . applicable regulations" when it failed to comply with the contractual "55-day rule".

According to *Pinkard*, an Administrative Judge of this Office may reverse the Agency's decision if it was not in accordance "with law or applicable regulations." In *Rousey and Jones v. Department of Consumer and Regulatory Affairs*, OEA Matter Nos. 1602-0114-90 and 1602-0115-90, *Opinion and Order on Petition for Review* (September 30, 1992), __ D.C. Reg. ____ ( ), the OEA Board found as follows:

> A collective bargaining agreement is a contract between an employer and a union for the purpose of establishing the conditions of employment. *When such an agreement establishes guiding principles and nondiscretionary policy for a government agency, it has the effect of a regulation, and . . . this Office has jurisdiction to interpret any provision of the agreement which pertains to an issue under review.*

Rousey, Opinion and Order at 4. (emphasis added).

Section 6 of Article 12 ("Discipline") of the Collective Bargaining Agreement (the Agreement) between Agency and Employee's Union, the Fraternal Order of Police, MPD Labor Committee (FOPLC), reads in pertinent part as follows:

> Section 6
> The employee shall be given a written decision and the reasons therefore no later than fifty-five (55) days after the date the employee is notified in writing of the charges or the date the employee elects to have a departmental hearing [*i.e.*, Trial Board], where applicable, except that:

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remand), we have held that there must be substantial evidence to meet the agency's preponderance burden. *See, e.g., Hibben, supra; Davidson, supra; Kelly, supra; Culver v. D.C. Fire & Emergency Medical Services Department*, OEA Matter No. 1601-0036-01 (April 16, 2004), _ D.C. Reg. ___ ( ); *Blanks v. D.C. Fire & Emergency Medical Services Department,* OEA Matter No. 1601-0098-00 (October 2, 2003), _ D.C. Reg. ( ); *Bailey v. Metropolitan Police Department*, OEA Matter No. 1601-0145-00 (March 20, 2003), _ D.C. Reg. ___ ( ); *Pinkard v. Metropolitan Police Department*, OEA Matter No. 1601-0155-87R02 (December 20, 2002), _ D.C. Reg. ___( ).

> (a) when an employee requests and is granted a postponement of a scheduled hearing, the fifty-five (55) day time limit shall be extended by the length of the delay or continuance, as well as the number of days consumed by the hearing. . .

In his February 2, 2005 brief, Employee writes as follows regarding the above provision of the Agreement:

> [Employee] was notified in writing of the charges of misconduct in April 2003. On May 5, 2003, [he] elected to have a departmental hearing. However, it was no sooner than January 18, 2004, that [Employee] was "served with a written decision and the reasons therefore."[7] Between the dates May 5, 2003, and January 18, 2004, two hundred and fifty-eight (258) calendar days elapsed. Even if we exclude from this computation the continuances that were granted either at the request or without objection by the employee (from the initially scheduled date of June 3, 2003 through the conclusion of the [Trial Board] hearing on October 21, 2003 – a 140-day exclusion), the requirements of the above-quoted "55-day rule" were exceeded by no less than 63 days. Thus, there is no legitimate dispute that the Agency failed to comply with the contractual requirement for timely disciplinary action.

February 2, 2005 brief at 9. (citations omitted). (footnote in original omitted). (footnote 7 added). As a result of Agency's violation of the 55-day rule, Employee asks that its action removing him be overturned.

In support of his above arguments, Employee proffered four arbitration decisions, all of which: 1) involved Agency and the FOPLC; and 2) pertained to the 55-day rule.[8] All

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[7] Here, Employee is referring to the probable date that he received the Trial Board's report, which in the case file is undated.

[8] Federal Mediation & Conciliation Service (FMCS) Case No. 04-53437-A (Arbitrator Hochhauser, December 27, 2004); FMCS Case No. 04-50153 (Arbitrator Shapiro, August 9, 2004); FMCS Case No. 99-05254 (Arbitrator Aronin, November 3, 1999); and American Arbitration Association (AAA) Case No. 16 30 0390 83J (Arbitrator Strongin, March 14, 1984). I note that although Arbitrator Strongin's decision was based on an earlier version of the 55-day rule, the language is essentially identical to that of the rule at issue herein.

of these decisions stand, either explicitly or implicitly, for the following: 1) the 55-day rule is mandatory rather than directory;[9] 2) to prevail on a matter involving a violation of the 55-day rule by Agency, there is no requirement that an employee show actual harm;[10] and 3) the remedy for a violation of the rule is complete rescission of Agency's action.

In its April 5, 2005 response brief, Agency argues as follows:

> Employee contends that [Agency] violated the [55-day rule] in processing the disciplinary action. However, pursuant to D.C. Official Code § 1-606.02(b) the OEA does not have jurisdiction to consider an allegation that an agency violated the terms of a collective bargaining agreement. D.C. Official Code § 1-606.02(b) states as follows:
>
> > Any performance rating, grievance, adverse action or reduction-in-force review, which has been

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[9] Specifically, Arbitrator Hochhauser wrote:

> The Agreement states that "[t]he employee *shall* be given a written decision. . ." (emphasis added). The question becomes whether the word "shall" is mandatory or directory. The word "shall" has been interpreted numerous times, and although there have been some exceptions, "shall" has most often been defined as "mandatory". [The Arbitrator then sets forth the definition of "shall" as mandatory found in Black's Law Dictionary, 5th ed.]. The Arbitrator notes that Black's includes a secondary definition for "shall" which construes it as "merely permissive or directory (as equivalent to 'may')." However, the provision of the contract cannot reasonably be read to mean that a decision "may" be issued in 55 days, leaving no real time limit for issuing the decision. This strengthen[s] the Arbitrator's view that "shall" in the context of this contract is mandatory.

FMCS Case No. 04-53437-A, *supra* at 9-10. (citation omitted). Similarly, Arbitrator Strongin wrote:

> There are . . . strong reasons for holding that the 55 day limit is binding on the [Agency] and was inserted into the agreement as a meaningful substantive protection for employees. . . . In the Arbitrator's view, the right grievant asserts was a bargained-for procedural right which created in essence a substantive right.

AAA Case No. 16 30 0390 83J, *supra* at 3, 5.

[10] "Under these circumstances, the question of whether Grievant was harmed by the delay need not be determined." FMCS Case No. 04-53437-A, *supra* at 10.

> included within a collective agreement under the provisions of subchapter XVII of this chapter, shall not be subject to the provisions of this subchapter.
>
> The subchapter to which the language refers, subchapter VI, contains the statutory provisions governing proceedings before the OEA. With this being the case, the OEA may not consider Employee's claim that [Agency] violated the [55-day rule].

April 5, 2005 response brief at 11. Further, Agency argues that: 1) assuming *arguendo* that this Office may consider Employee's "55-day rule" argument, "Employee waived his opportunity to present his claim before the OEA because he failed to raise it before [Agency], and thus, Employee's claim is not part of the record established at [Agency]." *Id.* at 12; and 2) Employee must show that he suffered actual harm as a result of Agency's failure to timely process his case.[11]

Initially, based on my own review and calculations, I find as follows regarding the above timeline set out by Employee: On May 5, 2003, he requested that his case be heard by a Trial Board. *See* Agency's August 12, 2004 Answer to the Petition for Appeal at Tab F. Pursuant to the 55-day rule of Article 12, § 6, above, in the absence of any valid continuances (Article 12, § 6(a)), the deadline for "a written decision and the reasons therefore" was June 30, 2003. Employee submits, and this is uncontested by Agency, that there were 140 days of valid continuances. Thus, the ultimate "written decision/reasons" deadline was November 16, 2003. If Chief Ramsey's January 28, 2004 Final Agency Decision is the "written decision and the reasons therefore" required by Article 12, § 6 (and this is probably so), then Agency violated the 55-day rule by 73 days. Even if I accept Employee's claim that the "written decision/reasons" requirement was met by his January 18, 2004 receipt of the Trial Board's report (which actually is the best scenario for Agency), then Agency is still in violation of the 55-day requirement by 63 days. In any event, I find that Agency was clearly in violation of the 55-day rule.

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[11] In making this argument, Agency also stated: "[Agency] does not concede that it violated the [55-day rule] in processing the adverse action." *Id.*

The 55-day rule is similar to the former "45-day rule" for an agency to commence an adverse action against an employee.[12] The 45-day rule was set forth in D.C. Code Ann. § 1-617.1(b-1)(1) (1992 repl.), and stated in relevant part as follows:

> No corrective or adverse action shall be commenced . . . more than 45 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. . . .

This Office adjudicated many cases involving violations of the 45-day rule.[13] Consequently, the following became well-settled principles: 1) the 45-day limitation was a mandatory, rather than a directory, provision; 2) because it was a mandatory provision, an employee invoking the rule was not required to show actual harm as a result of a violation of the rule; and 3) any violation of this rule by an agency resulted in a summary reversal of the adverse action.

Although the 45-day rule no longer exists, the legal principles that were clearly established from the numerous decisions generated by that rule are certainly applicable to the 55-day rule at issue herein. Further, the principles that flow from the arbitrators' decisions pertaining to the 55-day rule, discussed above, are clearly on all fours with the principles of our "45-day" decisions. Therefore, as to the instant matter I conclude as follows: 1) The 55-day rule found in Article 12, § 6 of the Agreement is a mandatory provision; 2) As a mandatory provision, it "establishes [a] guiding principle and a nondiscretionary policy" for Agency. *Rouscy, supra.* Thus, pursuant to *Rouscy*, the 55-day rule "has the effect of a regulation", which I have jurisdiction to interpret; 3) Agency was clearly in violation of the 55-day rule in its processing of the adverse action taken against Employee; and 4) Employee need not show actual harm as a result of Agency's failure to timely process the adverse action.

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[12] The 45-day rule was in effect for all appeals filed in this Office prior to October 21, 1998. It went out of existence with the passage of certain provisions of the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which modified many of sections of the CMPA, including several pertaining to this Office.

[13] *See, e.g., Wiggins v. D.C. Public* Schools, OEA Matter No. 1601-0189-98 (February 12, 2002), __ D.C. Reg. __ ( ); *Scott v. Department of Housing and Community Development*, OEA Matter No. 1601-0078-91, 41 D.C. Reg. 4227 (1994); *McHugh v. Department of Human Services*, OEA Matter No. 1601-0012-95 (November 20, 1995), __ D.C. Reg. __ ( ); *Ross v. Department of Human Services*, OEA Matter No. 1601-0338-94 (May 15, 1995), __ D.C. Reg. __ ( ). *See also Metropolitan Police Department v. Public Employee Relations Board*, No. M.P. 92-29, 122 DWLR 29 (1994)(wherein Judge Salzman of the D.C. Superior Court determined that the 45-day rule is a mandatory provision).

Agency argues that because Employee did not raise his "55-day rule" claim at its level, he may not do so now. This argument is without merit. Since the 55-day rule is mandatory, Agency *must* process an adverse action in accordance with the rule. Therefore, a violation of the rule is an *absolute bar* to the finalization of an adverse action. Viewed thusly, the rule is essentially equivalent to a lack-of-jurisdiction claim, which of course can be raised at any time. Thus, I conclude that Employee was not precluded from raising his "55-day rule" claim for the first time before me.

Finally, Agency argues that I do not have jurisdiction to consider Employee's claim that it violated the 55-day rule because of the language of D.C. Official Code § 1-606.02(b), *supra*. However, Agency is misinterpreting that section of the Code. The purpose of that section is to allow the parties to a collective bargaining agreement to remove this Office as an avenue of appeal, in favor of binding arbitration or some other mechanism of appeal agreed to by the parties. Nevertheless, if an employee is not precluded from filing an appeal here, then we are able to process the appeal in accordance with our own rules, or in the case of the instant matter, in accordance with *Pinkard*. In other words, § 1-606.02(b) is inapplicable if a collective bargaining agreement does not remove this Office as an avenue of appeal. Here, Employee properly could, and obviously did, file an appeal of Agency's action here. Since he has done so, I have the authority to consider his 55-day rule claim.

Since Agency was in violation of the mandatory 55-day rule, an "applicable regulation", I conclude that the proper remedy is a total rescission of the adverse action taken against Employee. Given this conclusion, no further *Pinkard* analysis is required.

ORDER

It is hereby ORDERED that:

1. Agency's action removing Employee from his position is REVERSED; and

2. Agency reinstate Employee to his position of record or to a comparable position, with all appropriate back pay and benefits; and

3. Agency file with this Office, within 30 days from the date on which this initial decision becomes final, documents showing compliance with the terms of this Order.

FOR THE OFFICE:

DARYL L. HOLLIS, Esq.
Senior Administrative Judge