THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
PAUL D. HOLMES	) OEA Matter No. 1601-0014-07
Employee	)
	)
v	) Date of Issuance: October 3, 2007
	) Muriel A. Aikens-Arnold
METROPOLITAN POLICE DEPARTMENT	) Administrative Judge
	)
Agency	)
	)

James W. Pressler, Jr., Esq., Employee's Representative
Thelma Brown, Esq., Assistant Attorney General for the District of Columbia

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 13, 2006, Employee, a Police Officer, filed a Petition for Appeal of Agency's action to remove him from his position effective October 6, 2006 for: 1) Conduct Unbecoming; and 2) Conviction On November 20, 2006, this Office notified Agency regarding this appeal and instructed Agency to respond within thirty (30) days. Agency filed its Answer to Employee's Petition For Appeal (PFA) as instructed.

This matter was assigned to this Judge on December 15, 2006. On January 10, 2007, an Order Convening a Status Conference on January 25, 2007 was issued.[1] Due to a postponement, said conference was held on January 31, 2007. During that meeting, the Judge discussed the review process and the fact that, in accordance with a decision made by the District of Columbia Court of Appeals, this Office is limited to a review of the agency record.[2] The parties were

[1] On 1/24/07, Agency's representative requested a postponement due to a conflict. That request was granted and the status conference was rescheduled.

[2] *See District of Columbia Metropolitan Police Department v. Elton L. Pinkard,* 801 A.2d 86 (D.C. 2002), in which the Court held, *inter alia,* that this Office erred in conducting a second evidentiary hearing when a Police Trial Board (PTB) hearing had previously been held in a disciplinary matter; and violated the Department's labor agreement which provides *solely* for a review of the PTB record on appeal. The Court remanded the appeal to this Office to determine whether Agency's action was supported by substantial evidence, whether there was harmful procedural error or whether it was in accordance with law or applicable regulations. The Court further stated that "OEA, as a reviewing

directed to file briefs regarding their respective positions.[3] On February 6, 2007, an Order Closing the Record was issued giving both parties an opportunity to submit legal briefs. After several extensions were requested and granted, the record was closed effective May 7, 2007 at which time both briefs had been filed. The record is closed.

JURISDICTION

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

ISSUE

Whether the Agency action, based on the Police Trial Board (PTB) hearing, was supported by substantial evidence, whether there was harmful procedural error, or whether it was otherwise contrary to law or applicable regulations.

FINDINGS OF FACT

Statement of the Charges

By memorandum dated April 25, 2006, Employee was notified of a proposal to terminate his employment with the Department based on the following two (2) charges:

Charge No. 1: Violation of General Order Series 1202, Number 1, Part I-B-12, which provides: "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 violations of any law of the United States or any law, municipal ordinance, or regulation of the District of Columbia." This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.

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authority, also must generally defer to the agency's credibility determinations." *Pinkard* at pp. 91-92.

[3] Employee advised that he asserted his Fifth Amendment right against self-incrimination at the trial board hearing due to a related criminal investigation (after which no charges were filed); and requested that this Judge hear his testimony in this forum. That request was denied as this Judge is legally precluded from taking oral testimony when an evidentiary hearing was previously held at the agency level. Further, Employee was afforded an opportunity to testify even though, under the circumstances, he chose not to do so.

Specification No. 1: In that on December 20, 2005, Ms. Karmease Sha-ron Washington reported to Sergeant Kevin Rice of the Sexual Assault Unit that you sexually assaulted her approximately 14 years ago when she was 14 years old. She reported that you picked her and her friend up and took them to a motel in Prince George's County, Maryland and had sexual intercourse with them. Ms. Washington also told Officer David Jackson of the Sixth District that an officer had raped her. While the scout car was pulling up to the Sixth District Station, you came out to take Ms. Washington to another scout car. She identified you as being the officer that raped her and her friend approximately 14 years ago.

Specification No. 2: In that on December 20, 2005, Ms. Shanica Gwenith Mayo provided a statement to Detective Bruce Howard of the Sexual Assault Unit of the Prince George's County Police Department. She reported that when she was approximately 13 years of age, she had vaginal sex with you.

Specification No. 3: In that on December 21, 2005, you were interviewed by Detective Bruce Howard of the Prince George's County Police Department. By your own admission, you had sex with two females approximately 14 years ago. The females in question were Ms. Karmease Sha-ron Washington and Ms. Shanica Gwenith Mayo, who were both under age. Your actions at that time were both conduct unbecoming that of an officer and a disgrace to the Metropolitan Police.

Specification No. 4: In that on December 21, 2005, during an interview with members of the Office of Internal Affairs Division, you admitted that you stopped at the liquor store and purchased liquor for two under-aged girls. Your actions were in violation of the above General Order, in that you contributed to the aid of a minor by purchasing liquor for them.

Charge No. 2: Violation of General Order Series 1202, Number 1, Part-I-B-7 which provides: "Conviction of any member of the force in any court of competent jurisdiction of any criminal or quasi-criminal offense or of any offense in which the member either pleads guilty, receives a verdict of guilty or a conviction following a plea of nolo contendere or is deemed to have been involved in the commission of any act which would constitute a crime whether or not a court record reflects a conviction. Members who are accused of criminal or quasi-criminal offenses shall promptly report or have reported to their commanding officers their

involvement.." This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.

Specification No. 1: In that on December 21, 2006, you were named as a suspect in a criminal allegation of "Second Degree Rape" by the Prince George's County Police Department in Maryland.

Employee was given an opportunity to submit a written response and to request a trial board hearing before a three-member panel. Employee requested a hearing, which was held on July 27, 2006, after which the panel found him guilty of all charges, except Charge No. 1, Specification No. 3, and recommended the penalty of removal.[4]. On August 31, 2006, Assistant Chief of Police Shannon P. Cockett issued a decision, affirming the panel recommendation to remove Employee, effective October 13, 2006. On October 2, 2006, Chief of Police, Charles H. Ramsey denied Employee's final appeal of the adverse action.[5]

POSITIONS OF THE PARTIES

Employee's Position.

Employee makes three arguments: 1) That Agency did not allow for a full evidentiary hearing when Employee was the subject of an active criminal investigation; 2) That Agency's finding that Employee engaged in conduct unbecoming an officer is not based on substantial evidence; and 3) Agency's finding that Employee is guilty of a crime was premature and was not based on substantial evidence.

First, Employee asserted his Fifth Amendment right against self-incrimination to be silent before the PTB panel, arguing that police officers should not be forced to choose between offering self-incriminating statements or job forfeiture; and that the "adverse action hearing should have been continued to afford Officer Holmes the opportunity to defend himself at a time when his Fifth Amendment rights were no longer in jeopardy."[6] Second, the record evidence is inconclusive, the complaining witnesses were not credible, and the weight of the evidence clearly

[4] See Agency Exhibit 5 attached to Agency's Brief (hereafter referred to as "AE" and "AB") filed on 5/2/07. The PTB panel recommended dismissal of said specification as redundant to Charge No. 1, Specifications numbered 1 and 2.

[5] See AE -6 and AE-7.

[6] See Employee's Brief (hereafter referred to as "EB") filed on 4/5/07 at pp. 8-9, citing *Garrity v. New Jersey*, 385 U.S. 493, 87 S.Ct. 616 (1967) where "[T]he Court reasoned that the choice between remaining silent and losing their livelihood violated the officers' Fifth Amendment right to remain silent." See also Agency's General Hearing Rules with Title 5, Subchapter XIV, § 5-127.01, and Title 6A, DCMR, Chapter 10 Disciplinary Procedures, § 1000.2 which, *inter alia*, provides the accused an opportunity to be heard in his defense, against written charges, prior to any removal action.

does not support a finding that the alleged misconduct occurred subsequent to Employee's appointment in July, 1990. Third, Employee was not indicted or charged for the alleged crime reflected in Charge No. 2, which was based on a criminal conviction. Further, the record lacks substantial evidence to satisfy the elements of "Second Degree Rape", ie., the date that the alleged sexual misconduct occurred and the ages of the alleged victims.[7] Based on the foregoing reasons, Agency's action must be set aside.

Agency's Position.

Agency contends that it met its burden of proof by a preponderance of evidence; that Employee's conduct significantly diminished his value as a Police Officer; that his continued employment undermines the integrity of the agency and does not promote the efficiency of the service. In response to Employee's first argument, Agency asserts that a full evidentiary hearing was conducted consistent with applicable law, rule, regulation and policy. Specifically, Agency contends: that Employee requested the administrative hearing (with knowledge of the pending criminal allegations); that Employee was not compelled to testify and no adverse inference was drawn from his silence; that Employee's representative did not object to the administrative hearing going forward, did not request a postponement, and fully participated in every aspect of the proceeding, to which Employee consented. Further, there is no record that Employee was told that his failure to testify could or would result in his removal.[8]

Relative to Employee's second argument, Agency asserts that Employee's efforts to raise doubt regarding the facts and the credibility of witnesses are nothing more than a disagreement over the findings. Agency reconciled factual conflicts to determine that there was substantial evidence in the record to support findings that the events took place when both complaining witnesses were minors; and, therefore, the PTB panel's conclusions were legally sufficient to support the decision and flowed rationally from the findings. Last, Agency argues that the penalty was warranted and appropriate to maintain discipline within the Department, and to maintain the efficiency of the service and the integrity of its police officers.[9] Agency requests that its decision in this matter be affirmed.

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[7] See EB at pp. 10-14.

[8] See AB at pp. 4-5, 9.

[9] See AB at pp. 6-9; Agency cited various legal precedent regarding the substantial evidence standard as well as the elements comprising the standard for appellate review of a final agency decision. Substantial evidence is defined as such relevant "evidence that a reasonable mind might accept as adequate to support a conclusion." *Black's Law Dictionary,* Eighth Edition. Agency also cited *Douglas v. Veterans Administration,* 5 MSPB 313 (1981) to support its argument that the penalty was appropriate. *Douglas* established a 12-prong test for evaluating the appropriateness of a penalty. Hence the name "Douglas factors."

ANALYSIS AND CONCLUSIONS

Whether Agency's Action Was Taken For Cause.

D.C. Official Code §1-616.51 (2001) requires the Mayor, for employees of agencies for whom he is the personnel authority to "issue rules and regulations to establish a disciplinary system that includes," *inter alia*, "1) A provision that disciplinary actions may only be taken for cause; [and] 2) A definition of the causes for which a disciplinary action may be taken." The action herein is under the Mayor's personnel authority. Said regulations were published by the D.C. Office of Personnel (DCOP) published at 47 D.C. Reg. 7094 *et seq*. (September 1, 2000). Section 1603 sets forth the Definitions Of Cause: General Discipline.[10]

In an adverse action, this Office's Rules and Regulations provide that an agency must prove its case by a preponderance of the evidence. "Preponderance" is defined as "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 629.1, 46 D.C. Reg. 9317 (1999).[11]

The Hearing Issue

Employee contends that, in the absence of his testimony before the PTB panel, he did not receive a full hearing in violation of applicable law and Agency's hearing procedures, which provide an opportunity to be heard *prior to* issuance of a final decision to remove the individual

[10] The list of causes in §1603.3, in pertinent part, is as follows: . . . "cause" means a conviction . . . of another crime (regardless of punishment) at any time following submission of an employee's job application when the crime is relevant to the employee's position, job duties, or job activities; any knowing or negligent material misrepresentation on an employment application or other document given to a government agency; any on-duty or employment related act or omission that the employee knew or should reasonably have known is a violation of law; any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment related reason for corrective or adverse action that is not arbitrary or capricious." Section 1603.4 reads, in pertinent part, as follows: "With regard to any uniformed member . . . of the Metropolitan Police Department . . . "cause" also means the following, whether occurring on or off duty: (a) Any act or omission which constitutes a criminal offense, whether or not such act or omission results in a conviction . . ."

[11] In accordance with *Pinkard*, Agency's burden of proof must meet the "substantial evidence" test, which is defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Davis-Dodson v. District of Columbia Dep't of Employment Services,* 697 A.2d 1214, 1218 (D.C. 1997).

from the police force.[12] However, this argument is flawed for several reasons. First, there is no dispute that the use of coerced statements made, in the employment setting, would likely be suppressed in a criminal proceeding. *See Garrity, supra.* Second, while administrative agencies, as a general rule, do not impose criminal penalties, this Judge recognizes the privilege against self-incrimination. Nevertheless, Employee made a choice *not to testify* before the panel when he had the opportunity to do so; and with the knowledge that his prior written statements and oral interviews with agency and other law enforcement officials were a part of Agency's record.[13]

Moreover, there is no evidence, written or otherwise, that Employee requested a postponement of the hearing until the criminal matter was resolved or for any other reason. A review of the hearing transcript reflects the following discourse, in pertinent part, between the Chairman and Employee's Counsel:

> MR. VAUGHT: . . . my client . . remains in jeopardy in the criminal sense . . . under the circumstances, a Fifth Amendment privilege attaches. And I am bringing it up right now just so that before we commence we have that understanding and if there is disagreement or questions regarding that situation, I guess I am bringing it up right now to air that issue . . .
>
> CHAIRMAN PENDERGAST: . . . to be clear, do you or do you not intend to have him testify?
>
> MR. VAUGHT: I intend, at this point -- now, of course, it remains his call, but I intend at this point in time to advise him to avoid at all cost jeopardizing the criminal case . . . and to elect not to testify.[14]

Last, as Agency correctly asserts, Employee's representative " . . did not object to the administrative hearing going forward and, in fact, fully participated in every aspect of the proceeding."[15] There is no evidence to show otherwise. Based on consideration of the record, this Judge concludes that Agency conducted a full hearing and did not violate any law or

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[12] See footnote 6.

[13] See EB at pp. 3-4; also AE-3 (Hearing Transcript) and AE-4 (Final Investigative Report with attachments).

[14] See PTB Hearing Transcript (hereafter referred to as "PTBHT") at pp. 11-13; also § 1000.7 which reads, "If a continuance is desired, the accused shall make application therefore . . . in writing at least twenty-four (24) hours prior to the time set for the hearing." .

[15] See AB at p.4.

applicable regulation in so doing.[16]

The Substantial Evidence Issue

The question is not what the court would believe on a *de novo* appraisal, but whether the administrative determination is supported by substantial evidence on the record as a whole, including evidence supporting as well as that offered in opposition to the agency's finding. *Boylan v. USPS,* 704 F.2d 573 (11th Cir. 1983). Further, this Office is not in a position to make a *de novo* decision on the weight of the evidence. *DeCicco v. United States,* 677 F.2d 66, 70 (Ct. Cl. 1982). However, the entire record is reviewed to determine whether there are factors, such as "exaggeration, inherent improbability, or errors" which detract from the weight of that particular evidence. *Spurlock v. Dept. of Justice,* 894 F.2d 1328, 1330 (Fed. Cir. 1990).

Employee contends that the weight of the evidence does not support a finding that the alleged misconduct occurred subsequent to Employee's appointment to the Department in July, 1990. Specifically, Employee argues that: 1) Ms. Washington's testimony conflicted with prior statements to investigators, and therefore, is neither reliable nor supported by substantial evidence; and 2) Employee was on active military duty in Operation Desert Storm in December 1990 which was "completely ignored" in the findings and conclusions of the PTB panel.

First, Employee's argument regarding Ms. Washington's credibility, is based, in part, on representations made by investigators that Ms. Washington gave varying periods of time when this incident occurred. However, Ms. Washington's testimony, on cross-examination, was consistent with her prior written statement taken on December 20, 2005, in which she clearly stated that the incident occurred in December, 1990.[17] As previously stated, this Office must generally defer to the agency's credibility determinations. Thus, the appeals court has held:

> That some parts of a witness' testimony may be attacked is a common

[16] See Also, see §1001.6, which reads, in pertinent part, "The fact that a member of the force has been charged with and is awaiting trial for a criminal offense involving matters *prima facie* prejudicial to the reputation and good order of the force, in this or any other jurisdiction, shall not be a bar to his or her immediate trial by a police trial board."

[17] See PTBHT at p. 119; also AE-4 (attachments 5 and 9) where Ms Washington's statement reflects, in part, at p.3 of 10, "[I]t was cold, our Christmas tree was up, and we had gifts under our tree. I know it was cold cause we had big coates (sic) on." Although Ms. Washington indicated in a second interview/statement on 12/29/05 that she was then twenty-nine years old and was thirteen years old when this incident occurred, the panel was entitled to determine the witness' credibility. Even though Employee did not know the date when this incident occurred, he indicated (among other things) in his written statement, dated 12/21/05, that he was employed by the Department and was off-duty when this incident occurred; did not know that one of the girls was thirteen years old; and that they appeared to be in their mid-twenties.

> phenomenon It supplies no basis, however, for holding that the fact-finder is not entitled to credit other parts of a witness's testimony. Where, as here, the presiding official expressly found a witness . . . credible, this court cannot substitute a contrary credibility determination on a cold paper record.[18]

Second, Employee asserts that he " . . . could not have been in a motel room in Prince George's County, as he was in (sic) active military duty in Operation Desert Storm." To support this proposition, Employee relies upon the testimony of Detective Howard that, during his interview, Employee stated he was deployed to Operation Desert Storm "sometime in the time frame from late 1990 through mid-1991." In addition, Employee presented a DD Form 214, Certificate of Release Or Discharge From Active Duty reflecting, *inter alia*, a period of active duty during the time period in question. Nevertheless, without knowing the mental processes followed by the panel in its consideration of this evidence, this Judge notes the absence of military orders to demonstrate that Employee's duty assignment was outside of the United States during that time. Rather, the DD Form 214 reflects a local duty assignment located in Washington DC during that time period. Further, Employee presented a Department training transcript and letter reflecting that he attended the Recruit Training Program (approximately 650 hours of instruction) at the Institute of Police Science from July 2, 1990 through August 23, 1991.[19]

Third, Employee contends that Agency's finding that he was guilty of a crime was premature and *not* based on substantial evidence. While Employee was not charged with or convicted of a crime, the evidence demonstrated that he was "deemed to have been involved in the commission of an act which would constitute a crime whether or not a court record reflects a conviction." Here, the panel concluded, based on the entire record, that Employee engaged in unlawful acts. Whether one of the females involved was thirteen or fourteen years old, at the time of the event, was only consequential in determining any legal charges. Of primary significance, to the panel, was the fact that both women were, by law, under the age of consent when the incident occurred.

The PTB panel relied upon the evidence of record, including the testimony of witnesses, and concluded that Employee was guilty of all charges and specifications, except Charge Number One, Specification Number 3. Specifically, the panel found that, *inter alia,* Employee's conduct was unacceptable, that Employee admitted that he engaged in conduct not suitable for a member of the Department, and that his admission throughout investigations conducted by the Department and law enforcement authorities in Maryland cannot be denied. Further, consideration was given to the so-called *Douglas* factors, as well as character witness testimony.

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[18] See footnote 2; also *DeSarno v. Dept. of Commerce,* 761 F.2d 657 (Fed. Cir. 1985), following *Griessenauer v. Dept. of Energy,* 754 F.2d 361 (Fed.Cir. 1985).

[19] See EB at p. 12; PTBHT at p. 157; also, EB, Exhibits 3 and 4.

As part of its Findings of Fact, the panel specifically cited the aforementioned testimony (ie., Operation Desert Storm) and stated "After very carefully considering all the testimony, and other relevant evidence in the case at hand, the Panel determined that, by a preponderance of evidence, the following facts were established." The charges and specifications were then listed, each followed by the outcome; and a unanimous recommendation for removal as the penalty. Therefore, this Judge concludes that the panel considered the whole record and that Agency's proof of its charges against Employee by a preponderance of the evidence was supported by substantial evidence.

Whether the Penalty Was Appropriate Under the Circumstances.

When assessing the appropriateness of the 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 the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 1915, 1916 (1985).

The PTB found such aggravating factors as follows: the nature and seriousness of the offense; Employee's admitted involvement with the two young ladies, during the course of the investigation; his position of prominence and constant contact with the public; and his reputation, in the community, as a trusted public servant, was eroded. Relative to mitigating factors, the panel considered Employee's performance on the job, as a good, hard-working officer; however, the potential for rehabilitation did not exist, under the circumstances. Neutral factors that were considered by the panel included: the absence of prior discipline; and the consistency of the penalty which was in line with those imposed upon other employees for similar offenses, as well as Agency's table of penalties.

Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office. As a trained police officer, he knew or should have known that his poor judgment was in violation of the laws he was sworn to uphold and would bring discredit to the Department. Based on the totality of circumstances, this Judge finds no reason to disturb the penalty which was within the parameters of reasonableness. Agency's action was not an error of judgment, and should be upheld.

ORDER

It is hereby ORDERED that Agency's removal is UPHELD.

FOR THE OFFICE: _____
MURIEL A. AIKENS-ARNOLD, ESQ.
Administrative Judge