Notice: This decision may be formally revised before it is published in the *District of Columbia Register*. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SARAH GUARIN,	)	
Employee	)	OEA Matter No. 1601-0299-10
	)	
v.	)	Date of Issuance: May 24, 2013
	)	
METROPOLITAN POLICE	)	
DEPARTMENT,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Senior Administrative Judge
	)	

Robert E. Deso., Esq., Employee Representative
Eric A. Huang, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On April 23, 2010, Sarah Guarin ("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") action of removing her from service. By Notice of Proposed Adverse Action dated June 9, 2009, Agency proposed to remove Employee from her position as a Career Service Officer with the Metropolitan Police Department. On January 12, 2010, an Adverse Action Panel was convened in order to hear evidence and make findings of fact and conclusions of law regarding the circumstances surrounding an February 1 - 2, 2009, incident that occurred between Employee and fellow MPD Officer and quondam paramour Michael Mocca ("Mocca") that ultimately resulted in Employee being taken into custody by the Prince Georges County Police Department..

As a result of this incident, Employee was subsequently removed from service with the MPD. On April 19, 2010, Chief of Police Cathy Lanier, relying on the Adverse Action Panel's finding that Employee was guilty of all charges and specifications levied against her, informed Employee, via written notice, that Employee appeal to the Chief of Police was denied. Moreover, this letter constituted MPD's final action in this matter. This matter was assigned to the undersigned on or about July 10, 2012. 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). Accordingly, the parties were provided with a briefing schedule in which they would be able to address the merits of this matter and respond to the opposing parties' arguments. Both parties have complied with this briefing schedule. 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

Whether the Adverse Action Panel's decision was supported by substantial evidence, whether there was harmful procedural error, or whether Agency's action was done in accordance with applicable laws or regulations.

STATEMENT OF THE CHARGES

By Notice of Proposed Adverse Action dated June 9, 2009, Agency proposed to remove Employee from her position as a Career Service officer on the Metropolitan Police Department based on the following:

> **Charge No. 1:** Violation of general order Series 120.21, Attachment A Part A-7 which provides in part, "… 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 their involvement to their commanding officer."

Specification No. 1: In that on February 2, 2009, a criminal summons was issued, wherein you were charged with second-degree assault against Officer Michael Mocca. Adjudication for this assault charge is scheduled for June 18, 2009, in the District Court of Upper Marlboro for Prince Georges County, Maryland.

Charge No. 2: Violation of General Order Series 120.21, Part A, A-25, 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 rules, regulations, and orders relating to the discipline and the performance of the force."

Specification No. 1: In that, on February 2, 2009, the Prince Georges County police responded to a social gathering in which you attended. The subsequent response of Prince Georges County Police ultimately resulted in the police placing you in custody to be presented for a Petition of Emergency Evaluation. Specifically, your friend, Montgomery County Officer Andrew Ingles notified Prince Georges County Police that you were going to commit suicide.

Charge No. 3: Violation of general order Series 120.21, Part A, A-2, which provides, "Drinking "alcoholic beverage" or beverage as described in Section 25-101, subsection (5) of the D.C. Code, District of Columbia Alcoholic Beverage Control Act, "while in uniform off duty"; or being under the influence of "alcoholic beverage" when off duty."

Specification No. 1: In that, on February 2, 2009, you attended a social gathering at Office Michael Mocca's place of residence. The Prince Georges County Police were summoned for a domestic incident. Prior to the officers leaving the residence, you were instructed not to drive due to your level of intoxication.

SUMMARY OF THE TESTIMONY

On January 12, 2010, the Agency held an Adverse Action Panel Hearing.[1] 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

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[1] Employee has argued that the transcript of another proceeding, a Peace Order hearing that was conducted before Judge Anderson of the Prince Georges County, Maryland District Court on February 13, 2009, should be included within the record in the matter. Pursuant to Pinkard, I must deny this request primarily because this was a proceeding that occurred after the Adverse Action Panel hearing that is discussed thoroughly herein. Moreover, according to *Pinkard*, the undersigned is required to confine his analysis of the facts that undergird the instant cause of action as to whether the testimony and evidence adduced before the Adverse Action Panel is supported by substantial evidence.

from the findings of facts as well as the transcript[2] generated and reproduced as part of the instant matter before the undersigned.

Corporal Todd Dahlberg ("Dahlberg") Tr. 34 – 63.

Dahlberg testified on relevant part that he: is currently assigned to the Prince Georges County Police Department ("PGPD") in Clinton, Maryland as one of its supervisors. On February 2, 2009, Dahlberg, along with other members of the PGPD, responded to the home of Mocca in order to respond to a domestic incident involving MPD police officers. When Dahlberg arrived, he found Employee outside at the end of the street block. Dahlberg said that Employee told him that Mocca had pulled out a shotgun on her and refused to let her leave. Mocca and other eyewitnesses said that Employee's accusation were untrue. Dahlberg described Employee's condition at that time as disheveled, loud and disorderly. Dahlberg did not conduct a search for the alleged shotgun. Both Employee and Mocca complained that they had been hit by the other. Dahlberg then left. Dahlberg did not see any bruising on any of Employee's body areas that he could see (e.g. face).

Dahlberg returned later that evening due to a call from a Montgomery County officer who said that Employee, a friend of his, had contacted him and that she was possibly suicidal. When Dahlberg returned he questioned Employee and that is when he determined that Employee had taken an unknown amount of pills along with alcohol. Employee also threatened to kill herself. Employee was then placed in handcuffs and taken to Southern Maryland Hospital for an emergency psychiatric commitment.

During cross examination, Dahlberg was shown photos of alleged bruises that Employee had as a result of her encounter with Mocca. However, the photos do not clearly depict Employee they only depicted alleged parts of Employee (e.g. arm).

Officer Kyle Bodenhorn ("Bodenhorn") Tr. 63 – 72.

Bodenhorn testified in relevant part that he: works as a Police Officer – First Class for the PGPD and is currently stationed at the District 5 Police Station. On February 2, 2009, Bodenhorn responded multiple times to the home of Mocca. When he arrived at the location of the disturbance for the first visit, he encountered both Employee and Mocca. Bodenhorn testified that Employee appeared to be drunk. Moreover, through the course of questioning Bodenhorn indicated that Employee had admitted to drinking earlier that evening. Bodenhorn described Employee's demeanor as agitated and extremely irrational. Bodenhorn said that Employee had alleged that Mocca had pointed a weapon at her and had threatened her. However, when asked, Employee was unable to describe the weapon with any detail that would allow them to identify it in a search. Moreover, she could not distinguish if it was a hand gun or a long gun or what color it was.

During the second visit, Bodenhorn found Employee down the street from Mocca's residence. According to Bodenhorn, Employee was using derogatory language and appeared to

[2] Transcript will be denoted herein as Tr.

be intoxicated. Similar to Dahlberg's testimony, Bodenhorn's partner Officer Ling, conducted a further investigation where it was determined that Employee had ingested an unknown number of pills and was saying that she wanted to hurt herself. Employee was placed in handcuffs and transported to Southern Maryland Hospital for an emergency psychiatric commitment.

Kimberly Lazzo ("Lazzo") Tr. 78 – 97.

Lazzo testified in relevant part that: Mocca is her landlord and that she attended a Super Bowl party that he hosted in his home on February 2, 2009. Lazzo recalls that Employee was present for the party and that at the time Mocca and Employee were dating. Lazzo also noted that Mocca and Employee were becoming more agitated with one another as the night wore on and as they consumed more alcohol. Lazzo saw Employee consume alcohol during the evening in question. Lazzo also saw Employee strike Mocca during the course of the evening. Lazzo did not see Mocca strike Employee. At some point, Employee left the party in her vehicle but later came back. Lazzo was present when PGPD arrived in response to a disturbance at the party. Lazzo noted that Employee was taken away by PGPD while Mocca was not.

Officer Andrew Ingalls ('Ingalls") Tr. 97 – 122.

Ingalls testified in relevant part that he: is a Police Officer – Third Class with the Montgomery County Police Department ("MCPD") assigned to the Special Operations Division, Police Community Action Team. Ingalls is a personal friend of Employee. Ingalls recalled that he and Employee had made plans to watch the Super Bowl together, however, she later texted him to let him know that she was at Mocca's residence. Ingalls revealed that he had been drinking that evening as well. Later on, at approximately 1:00 a.m., Employee called Ingalls and was upset because Mocca allegedly pointed a gun at her and that the police were there and that nobody believed her rendition of the night's events. Ingalls then had a conversation, over the telephone, with one of the officers present and then told that officer that he was going to have a friend drive him to the scene and he was going to pick up Employee. Ingalls said that while he was on the phone with Employee, she started screaming at Mocca that saying that she was going to kill herself. Ingalls then called the PGPD to alert them to Employee's predicament.

After this incident, Agent Caesar with MPD Internal Affairs Division ("IAD") contacted Ingalls to ask him about the events in question. Initially, Ingalls was willing to talk to IAD. However, after discussing the matter with both Employee and her attorney Ingalls began to believe that he was not obligated to talk to IAD. So when Ingalls was finally questioned by IAD, he declined to comment about the situation. At this point, his friendship with Employee soured because Employee felt that his statements could be interpreted as her trying to exert influence over him. During cross examination, Ingalls noted that he had observed the strained relationship between Mocca and Employee on numerous occasions prior to the night in question.

Emmanuellen C. Moore ("Moore") Tr. 123 – 146.

Moore testified in relevant part that: she retired as an MPD IAD agent. Her tenure with MPD lasted for over 27 years. Moore recalls that she was assigned to monitor a case that had developed due to Employee's arrest and admission to Southern Maryland Hospital. Moore was

present, as an observer, for a protective order hearing involving Employee before a Magistrate Judge in Hyattsville, Maryland. According to Moore, Employee was granted a peace order by the Magistrate Judge. Based on what she observed at this hearing, Moore prepared a Form PD854 detailing her observations for the IAD.

Christine Marie Lazzo ("C. Lazzo") Tr. 146 – 183.

C. Lazzo testified in relevant part that: Mocca is the father of one of her children. C. Lazzo went to Mocca's residence on the night in question briefly to pick up her niece who was attending the Super Bowl Party hosted by Mocca. At some point C. Lazzo departed with her niece. C. Lazzo then testified that Employee called her and told her to come back to Mocca's residence because Employee and Mocca had been arguing and that C. Lazzo should come back and get her child. When C. Lazzo got back to the residence, Employee was not there but Mocca was. However, soon after, Employee returned and started arguing with Mocca. C. Lazzo recalled that she never saw Mocca hit Employee during the night in question. C. Lazzo also recalled that Employee kept saying that she was going to kill herself. Lazzo and C. Lazzo are sisters. At some point that evening, both Lazzo and C. Lazzo had to physically restrain Employee in order to prevent her from going after Mocca. Employee had smacked Mocca a few times which prompted this intervention. C. Lazzo recalled that PGPD officers came to the home and questioned her and her sister among others. One of the officers also searched for the weapon that Employee alleged was used against her. C. Lazzo testified that she never saw Mocca produce a weapon during the night in question. C. Lazzo recalled that PGPD officers were called out to the residence approximately four times that evening due to the squabble between Employee and Mocca. Eventually, Employee was taken by PGPD officers to Southern Maryland Hospital.

Lieutenant Deborah Pierce ("Pierce") Tr. 183 – 198.

Pierce testified in relevant part that she: is employed by MPD as a lieutenant in patrol assigned to the Third District. Pierce testified that on the night in question she was the Watch Commander and that she was informed by PGPD that an incident had occurred involving Employee and Mocca. It was related to Pierce that alcohol was a factor and that ultimately Employee was taken to Southern Maryland Hospital for an emergency psychiatric evaluation due to her attempting to commit suicide via ingestion of pills.

Pierce then went to Southern Maryland Hospital to see if the allegations were true. While there, Pierce questioned Employee who admitted to Pierce that she had swallowed some pills and that she was upset over the incident with Mocca. At that time, Pierce revoked Employee's police powers.

During cross examination, Pierce testified that while she questioned Employee at Southern Maryland Hospital she did not see any bruising on Employee and that she could smell the odor of alcohol on Employee.

Agent Monique Caesar ("Caesar") Tr. 198 – 249.

Caesar testified in relevant part that she: works for the MPD IAD and her rank is Agent/Sergeant. Her duties include investigating allegations of misconduct on behalf of members of the MPD. Caesar was assigned to investigate Employee's alleged misconduct on the dates of February 1 and 2, 2009. Caesar retrieved copies of the testimony provided during Temporary Protective Order ("TPO") proceedings in the District Court of Prince Georges County, Maryland. She incorporated this testimony into the report she prepared regarding her investigation into Employee's alleged misconduct. Caesar interviewed PGPD Corporal Chavez who related what had transpired when he responded to Mocca's residence on February 1 and 2, 2009. Chavez told Caesar that he went to Mocca's residence approximately three to four times due to reported disturbances. No weapons were ever recovered. According to Chavez, Employee did not suffer any physical injuries and that she was placed in custody because Employee had admitted to ingesting prescription pills. Caesar only knew about Employee's drinking and intoxication based on the various reports of person who were present who either smelled alcohol on Employee or observed Employee appearing to be intoxicated. Based on her overall investigation, including her interviewing multiple eyewitnesses and responding police officers, Caesar believed that all three charges and specifications levied against Employee should be sustained.

Officer Michael Mocca ("Mocca") Tr. 249 – 319.

Mocca testified in relevant part that he: is an Officer with the MPD and that he has been with the MPD for approximately eleven years. On the day in question, Mocca was hosting a Super Bowl party at his home for several friends. Employee called and he did not answer his telephone. Employee then texted him several times inquiring about the missed call. Mocca explained that when those calls came in he was busy cooking food in preparation for the party. Eventually, Mocca returned her telephone call and Employee asked him if she could come to the party. He told her she could come and that she should call him after she was finished having lunch with her mother. Later on that day, Employee called Mocca again and he did not answer. Employee then sent more texts inquiring as to why he did not answer her previous telephone calls. These texts messages were more alarming in nature.

Eventually, Employee arrives to Mocca's party. At some point during the evening's event, Mocca has a private conversation with Employee where he expresses his love for her. Mocca admitted that he had been drinking during the course of the Super Bowl party. Mocca provided his guests, including Employee, with alcoholic shots of Jagermeister and Red Bull. However, Mocca did not actually see Employee imbibe the shot. During the evening, Employee and Mocca had multiple arguments. Mocca told Employee that he did not want to argue right now while his friends were there for the party so he told Employee that he would discuss this matter with her later that evening after the party was over. According to Mocca, Employee found that arrangement unacceptable and she became increasingly agitated. As the party concluded and the guests started to leave, Employee revisited her argument from earlier. Mocca then relates that Employee became physically confrontational. This included Employee punching and shoving Mocca and threatening Mocca that if he touches her that Employee's father would kill him. Later on, Employee tried to choke Mocca and gouge his eyes out. Mocca

told Employee to just sleep it off on his couch and that they would talk in the morning. Mocca did not want Employee to drive because he knew that she had a prior arrest for DWI. According to Mocca, Employee was intoxicated even though he did not personally witness her drinking an alcoholic beverage. Despite Employee's assertion to the contrary, Mocca denied brandishing a weapon at Employee. As a result of the multiple calls to his residence due to disturbances caused by Employee, the PGPD wanted to place Employee under arrest. Mocca did not want that to happen. However, one of the PGPD officers clarified that they were not arresting her but rather they were taking her to the hospital due to fears for her personal well-being. A few days later, Mocca was arrested for felony degree assault in Prince Georges County, Maryland. Ultimately, all related criminal charges, in Maryland, against Mocca and Employee were dropped.

Phyliss Guarin ("PGuarin") Tr. 319 – 339.

PGuarin testified in relevant part that Employee is her daughter. On the day in question, prior to Employee going to Mocca's residence, PGuarin had lunch with Employee during which they both had consumed alcoholic beverages. On the night in question, PGuarin was trying to arrange a ride home for her daughter from Mocca's residence with Ingalls. Ingalls was unable to accommodate because he had been drinking that evening. PGuarin could not do it because she did not know how to get to Mocca's residence. PGuarin asked Bodenhorn if they had found the gun and he allegedly told her that they had found it in the garage.

Sarah Guarin ("Employee") Tr. 339 – 429.

Employee testified in relevant part that she is an Officer with MPD. She has been with MPD for approximately five years. Employee has known Mocca for three years. On the dates in questions, Employee admitted that she had lunch with her mother and that during this lunch she consumed one glass of wine. Before arriving to Mocca's house, she had consumed approximately two beers. She then admitted tor drinking two more beers while at Mocca's residence. Contrary to a vast majority of all of the other witnesses, Employee denied getting on top of Mocca and 'slapping' him and she denied assaulting Mocca. Moreover, Employee alleged that during the course of the evening that Mocca assaulted her and pointed a shotgun at her.

ANALYSIS AND CONCLUSIONS

This Office's review of this matter is limited pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). In that case, the D.C. Court of Appeals overturned a decision of the D.C. Superior Court that held, *inter alia*, that this Office had the authority to conduct *de novo* evidentiary hearings in all matters before it. According to the D.C. Court of Appeals:

> The OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives the OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings. *See* D.C. Code §§ 1-606.2 (a)(2), 1-606.3 (a), (c); 1-606.4 (1999), recodified as D.C. Code §§

1-606.02 (a)(2), 1-606.03 (a), (c), 1-606.04 (2001); *see also* 6 DCMR § 625 (1999).

The MPD contends, however, that this seemingly broad power of the OEA to establish its own appellate procedures is limited by the collective bargaining agreement in effect at the time of Pinkard's appeal. The relevant portion of the collective bargaining agreement reads as follows:

[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing has been held, *any further appeal shall be based solely on the record established in the Departmental hearing*. [Emphasis added.]

Pinkard maintains that this provision in the collective bargaining agreement, which appears to bar any further evidentiary hearings, is effectively nullified by the provisions in the CMPA which grant the OEA broad power to determine its own appellate procedures. A collective bargaining agreement, Pinkard asserts, cannot strip the OEA of its statutorily conferred powers. His argument is essentially a restatement of the administrative judge's conclusions with respect to this issue.

It is of course correct that a collective bargaining agreement, standing alone, cannot dictate OEA procedure. But in this instance the collective bargaining agreement does not stand alone. The CMPA itself explicitly provides that systems for review of adverse actions set forth in a collective bargaining agreement must take precedence over standard OEA procedures. D.C. Code § 1-606.2 (b) (1999) (now § 1-606.02 (b) (2001)) states that "any performance rating, grievance, adverse action, or reduction-in-force review, which has been included within a collective bargaining agreement . . . *shall not be subject to the provisions of this subchapter*" (emphasis added). The subchapter to which this language refers, subchapter VI, contains the statutory provisions governing appellate proceedings before the OEA. *See* D.C. Code § 1-606.3 (1999) (now § 1-606.03 (2001)). Since section 1-606.2 (b) specifically provides that a collective bargaining agreement must take precedence over the provisions of subchapter VI, we hold that the procedure outlined in the collective bargaining agreement -- namely, that any appeal to the OEA "shall be based solely on the record established in the [Adverse Action Panel] hearing" -- controls in Pinkard's case.

The OEA may not substitute its judgment for that of an agency. Its review of an agency decision -- in this case, the decision of the Adverse Action Panel in the MPD's favor -- is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. The OEA, as a reviewing authority, also must generally defer to the

> agency's credibility determinations. Mindful of these principles, we remand this case to the OEA to review once again the MPD's decision to terminate Pinkard, and we instruct the OEA, as the collective bargaining agreement requires, to limit its review to the record made before the Adverse Action Panel.[3]

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;
>
> 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.*, 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.

Based on the documents of records and the position of the parties as stated during the conference held in this matter, I find that all of the aforementioned criteria are met in the instant matter. Therefore my review is limited to the issues as set forth in the Issue section of this Initial Decision *supra*. Further, according to *Pinkard*, I must generally defer to [the Adverse Action Panel's] credibility determinations when making my decision. *Id.*

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

According to *Pinkard*, I must determine whether the Adverse Action Panel's findings were supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Davis-Dodson v. D.C. Department of Employment Services*, 697 A.2d 1214, 1218 (D.C. 1997) (citing *Ferreira v. D.C. Department of Employment Services*, 667 A.2d 310, 312 (D.C. 1995)). Further, "[i]f the [Adverse Action Panel's] findings are supported by substantial evidence, [I] must accept them

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

even if there is substantial evidence in the record to support contrary findings." *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989). The Adverse Action Panel unanimously concluded that the Employee was guilty of all of the charges specified above. Except for Employee and her mother PGuarin, all of the testimony overwhelmingly depicts Employee as the aggressor during the incident in question. Moreover, there seemingly was a good faith belief on the part of the responding PGPD that Employee ingested a substantial number of prescription medication in an effort to hurt herself, thereby requiring her to be taken into custody so that she could receive lifesaving treatment. After considering the testimony adduced during the Adverse Action Panel proceeding, I find that the Adverse Action Panel's findings are overwhelmingly supported by substantial evidence. Therefore, I will not disturb Agency's decision to remove Employee from service under this rubric.

Whether there was harmful procedural error.

Agency argues that it did not commit harmful procedural error when it effectuated Employee's removal from service because it did not respond within the fifteen (15) day time limit referenced in Section 7 Article 12 of the Collective Bargaining Agreement between the MPD and the Fraternal Order of Police ("FOP"). Agency's argument is stated in pertinent part as follows:

> OEA Rule 632.4 provides in pertinent part as follows, ". . . 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." Employee has noted previously that Agency failed to comply with the Agency's collective bargaining agreement ("CBA") requiring the Chief of Police to respond to Employee's appeal within fifteen (15) days. Employee's argument should be rejected because Agency's violation of the 15-day rule was harmless.
>
> Section 7 of Article 12 of the CBA between MPD and FOP, which covered FY 2004-FY 2008, and still applies currently, provides that where an appeal of an adverse action has been made to the Chief of Police, a response thereto by the Chief of Police will be made within fifteen business days. In the instant matter, the record shows that Employee's appeal to the Chief of Police, dated March 8, 2010, was received by the Chief on March 9, 2010. AR Tab 7. The response to Employee's appeal was set forth in a letter dated April 19, 2010, wherein the appeal was denied. (R. 378). Therefore, the Chief responded to Employee's appeal in 29 days.
>
> It is the Agency's position that a rescission of the Employee's termination for a failure to comply with the 15-day period is not authorized by the CBA. Moreover, because Employee was not prejudiced by the delay by the Chief of Police in responding to her appeal, rescission of her termination would be inappropriate. Additionally, a remedy of reinstatement would violate public policy.

> The issue presented was considered in a previous Rule 1 appeal in *Metropolitan Police Department v. District of Columbia Public Employee Relations Board,* 01 MPA 19 (September 11, 2002). Exhibit 1. There, MPD appealed from a PERB decision that affirmed an arbitration decision which reinstated an officer who had been terminated for misconduct because MPD violated the fifteen day period provision of the CBA. The arbitrator ruled that MPD had committed harmful error.
> In appealing to the Court, MPD raised two issues: (1) that the arbitrator exceeded his authority in reinstating the officer and (2) that the failure to comply with the fifteen day provision constituted harmless error. The Court *agreed* with the MPD on both issues and reversed the PERB decision. In doing so, the Court cited *United Steelworkers of Am. v. Enterprise Wheel & Car Corp.,* 363 U.S. 593 (1960), for the proposition that "[a]s long as the arbitrator's award 'draws its essence from the Collective Bargaining Agreement,' and is not merely 'his own brand of industrial justice,' the award is legitimate." The Court reviewed the language of the CBA and concluded that it contained "no language that expressly grants authority to the Arbitrator to issue a remedy for the Chief's violation of the 15-day rule." The Court observed that the CBA contained a provision that forbade arbitrators from adding to, subtracting from or otherwise modifying provisions of the agreement in adjudicating cases, and thus concluded that "[t]he Arbitrator's remedy in this case-vacating Officer Brown's termination-did not draw its essence from the agreement to rule within 15 days and thus was limited by the 'no modification' clause." With respect to the issue of harmless error, the Court ruled that because "MPD's failure to timely respond did not deprive Officer Brown of due process or affect the decision to terminate him," MPD committed "harmless procedural error." Thus, the Court concluded that the arbitrator erred in reinstating the officer.
>
> Here, the failure to adhere to the 15-day rule should not result in Employee being reinstated for the very reasons cited in the decision by Judge Abrecht, i.e., that the remedy of reinstatement would not draw its essence from the CBA and the violation was harmless because Employee was not denied due process and it did not affect the Department's decision to terminate her.[4]

Employee counters that any violation of the Agency's missing said deadline requires the undersigned to rescind the adverse action. Employee's argument, in pertinent part, is as follows:

> Employee was a member of the MPD collective bargaining unit represented by the Fraternal Order of Police/MPD Labor Committee. At all times relevant herein, there was in effect between MPD and the FOP a

[4] Agency's Brief at 13 – 15 (November 19, 2012).

collective bargaining agreement ("CBA"). The Labor Agreement contains an article pertaining to discipline, Article 12. Article 12, Section 7 governs appeals to the Chief of Police. Article 12, Section 7 applies equally to both employees and the Department. Article 12, Section 7 provides that upon receipt of a Final Notice of Adverse Action, the employee may, within ten business days, appeal the action to the Chief of Police and the Chief of Police, "shall respond to the employee's appeal within fifteen [15] business days." (Employee Exhibit 1). The negotiated time limits set forth in Article 12, Section 7 are mandatory ("shall") on both the employee and the Chief of Police. If the Employee fails to timely file an appeal, the right to appeal is lost forever. Correspondingly, if the Chief fails to issue a timely response to an appeal, the adverse action is null and void. The consequences of failure to comply with the reciprocal time limits are harsh and final, but that predictability and finality is what the parties voluntarily bargained for. As the Supreme Court held more than fifty years ago in the *Steelworkers Trilogy* cases, the provisions of a collective bargaining agreement are the "law of the shop" and must be honored by both parties and enforced against both parties. The Supreme Court ruled that when the parties have negotiated a collective bargaining agreement they are bound by its terms, to include accepting the construction of the CBA by an arbitrator. *United Steelworkers v. Enterprise Wheel & Car, Corp.*, 363 U.S. 593, 599 (1960). This principle of honoring negotiated collective bargaining agreement is recognized in D.C. Code §§ 1-616.52 (d) and (e) and 1-606.03 of the CMPA and MPD General Order 120.21 (Employee Exhibit 2, Article 1, ¶¶ 2,3) and was the basis of the Court of Appeals decision in *Pinkard*. Moreover, General Order 120.21, page 17, paragraph 2 sets forth a 15-day provision which is identical to Article 12, Section 7 of the CBA. Thus, both the CBA and Agency's own regulation require the Chief of Police to respond to appeals within 15 business days.

The D.C. Court of Appeals, applying the CMPA, has recognized and endorsed the "well defined and dominant policy" favoring arbitration of a dispute when the parties have chosen that course. *D.C. Public Employee Relations Board v. FOP/MPD Labor Committee*, 987 A.2d 1205, 1208-09 (D.C. 2010). Just as public and judicial policy strongly favor (*sic*) enforcing the procedural arbitration provisions of a negotiated CBA, so too must the substantive provisions of a negotiated CBA be enforced. It would make no sense and would be antithetical to the well-established principles of labor law, to rule that the procedural provisions of the CBA are enforceable but the substantive provisions are not, or that a provision of the CBA means one thing if a case goes to arbitration, but the same CBA language means something different if the case goes to OEA.

In this case, the Final Notice of Averse Action was issued on March 1, 2010. Employee filed a timely appeal on March 8, 2010; the appeal was

> received and date stamped by MPD on March 9, 2010 at 11:40, as indicated on the first page of the appeal. (AR, Tab 7). Thus, pursuant to Article 12, Section 7 of the CBA and MPD General Order 120.21, the Chief of Police had until March 30, 2010 to respond to Employee's appeal. However, the Chief did not respond to the appeal until April 19, 2010, 29 business days after the appeal was filed. (AR, Tab 8). That failure by the Chief of Police to comply with the mandatory provisions of the Labor Agreement and the Agency's General Order as not harmless error and it was not waivable (*sic*) error...[5]
>
> Much of Judge Abrecht's reasoning was repudiated by the Court of Appeals in its decision upholding an arbitrator's reversal of an MPD termination action for violation of the 55 day rule in *D.C. MPD v. D.C. Public Employee Relations Board*, 901 A.2d 784 (D.C. 2006). In that case the Court of Appeals noted that the 55 day rule was a bargained-for procedural right which created in essence a substantive right. (Id. at 786). The same is true for the 15-day rule in this case. The Court rejected MPD's argument that the violation of the 55 day rule was "harmless error" unless the employee could show prejudice or harm from the delay. (Id. at 787). The Court also rejected MPD's argument that it would be against public policy to reverse the termination of an "unfit" officer "merely because of a procedural violation". (Id.). The Court specifically rejected MPD's reliance on *Cornelius v. Nutt*, 472 U.S. 648 (1985), relied on by MPD in this case. The Court stated that, "*Cornelius*, however, merely confirms MPD's inability to point to a law violated 'on its face' by the arbitrator's interpretation of Article 12, Section 6." (Id.). The Court noted that the CMPA "contains no provision requiring harmful (or harmless) error analysis before reversal of erroneous agency action is permitted." (Id.). The Court also rejected MPD's argument that the time limit language in the CBA was "directory" rather than "mandatory." (Id. at 788).[6]

Agency in its Reply Brief contends that Employee's reliance on *D.C. MPD v. D.C. Public Employee Relations Board*, 901 A.2d 784 (D.C. 2006) ("*Fisher*") is inapplicable to the instant matter. Agency notes that *Fisher* primarily dealt with the application of the 55 day rule that required MPD to provide a charged employee with a decision on whether it is going to pursue an adverse action against a CBA covered employee. The employee in *Fisher* had to wait for approximately 600 days in order to receive her decision on whether the Agency is going to pursue an adverse action against her. Whereas, Employee herein is dealing with a separate section of the CBA, Section 7 of Article 12, which deals with receiving a decision of an adverse action appeal to the Chief of Police within 15 business days from its filing. MPD makes a further distinction from the *Fisher* case wherein the delay was almost two years whereas in the instant matter the delay was 14 days beyond the aforementioned 15 business days. Lastly, MPD

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[5] Brief of Employee at 9 – 11 (December 21, 2012).
[6] *Id*. at 12 – 13.

contends that the *Fisher* matter does not stand for the proposition that any delay will result in reversal of an Agency's action but rather the delay must be extraordinary. Of note, it is MPD's contention that the delay herein is not extraordinary as referenced in *Fisher*. MPD also contends that it committed harmless error when it failed to adhere to the 15 business day timeline described herein.

Employee, in response, cites to a case by Judge Kravitz of the District of Columbia Superior Court *D.C. MPD v. Public Employee Relations Board*, No, 01 MPA 18 (September 18, 2002). In that case, the Superior Court denied the MPD's petition for review of a PERB decision affirming the decision of an arbitrator that *inter alia* found that MPD's violation of Section 7 of Article 12 of the CBA by 16 days should result in reversal. However, the Court noted that the arbitrator was not required to make a finding of harmful error when making the determination to reverse Agency's action because no provision in the CBA requires the arbitrator to do so.

Pursuant to *Pinkard* and OEA Rule 631. 3, I find that in the instant matter, the undersigned is required to make finding of whether or not MPD committed harmful error. OEA Rule 631. 3, provides as follows "notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to take the action." Here, Employee is alleging that the undersigned should reverse Agency's action because the Chief of Police did not respond to Employee's appeal within 15 days as noted in Section 7 of Article 12 of the CBA. I find that Employee herein was adequately notified that she was being removed from service. The delay that she experienced does not appear to be extraordinary as referenced by *Fisher*. Moreover, Fisher dealt with an extraordinary delay in notifying Employee, within 55 days, whether or not the MPD was going to impose an adverse action. The 55 day rule centers on a CBA covered employee who is awaiting Agency's decision to proceed with an adverse action. It is found in Article 12, Section 6 of the CBA and it provides in pertinent part that "the employee shall be given a written decision and the reasons therefore no later than fifty-five (55) days after the date the charges are preferred or the date the employee elects to have a departmental hearing, where applicable…" The CBA's 55 day rule removes the Agency's ability to keep the proverbial cloud of possible litigation from hanging over an employee's head indefinitely. In contrast, Section 7 of Article 12 of the CBA deals with a final appeal to the Chief of Police of a CBA covered employee requesting reversal or modification of an adverse action. Pursuant to that section of the CBA, that employee has been notified of and has had an opportunity to contest before an Adverse Action Panel **before** the adverse action has been effectuated. Therefore, Employee enjoyed a delay in the imposition of the adverse action (termination) due to the Chief of Police's delay in issuing her decision outside of 15 business days. Pursuant to *Fisher*, I find that while not every violation of the deadline set forth in Section 7 of Article 12 of the CBA will be tolerated. I further find that Employee herein has not adequately demonstrated that the delay she experienced was extraordinary. Moreover, Employee has not adequately spelled out the harm, due process related or otherwise, that she suffered as a result of the Chief of Police failing to respond to Employee's appeal within 15 days as noted in Section 7 of Article 12 of the CBA. Accordingly, given the instant circumstances, I find that Agency's 14 day violation of the deadline set forth in Section 7 of Article 12 of the CBA is

harmless error.

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

Employee contends that the Adverse Action Panel's findings on all three charges and related specifications are fatally deficient and therefore the Adverse Action panel's finding of guilt is also deficient. With respect to Charge 1 Specification 1, Employee contends the following:

> Moreover, Charge 1 and the Specification is also constitutionally deficient because it did not put Employee on notice as to the specific misconduct she was required to defend against. She cannot defend against the issuance of a summons; the issuance of a summons is an action taken by others. The fact that a summons was issued is not "cause" for adverse action under the CMPA or the MPD General Order. (Employee Exhibit 2). Because MPD did not charge Employee with specific acts of assault, but instead relied on the general language that a summons for assault was issued, Employee did not receive the constitutionally required notice of any specific acts of misconduct that she had to defend against. Without the constitutionally mandated notice and right to reply, the entire adverse action is null and void. The right to notice of specific alleged misconduct, and the opportunity to reply to allegations of specific misconduct, is a constitutional due process right for D. C. Government Career Service employees such as Employee, and denial of that right renders the entire disciplinary process null and void…
>
> The crux of the due process notice requirement is that Employee may not be required to guess which alleged actions of hers during the extended sequence of events on February 2, 2009 were considered to be second degree assault by Agency. By failing to give Employee notice of what alleged actions she was required to respond to and defend, Agency forfeited its right to take action against her. Moreover, the lack of notice in the Charge and Specification resulted in the failure of the Adverse Action Panel to make requisite findings of fact. Thus, Charge No. 1, Specification 1 cannot be sustained because it does not allege "cause" and because it does not give requisite due process notice and an opportunity to reply to specific alleged misconduct.[7]

In response, Agency contends that Employee's argument lacks merit. Agency explained that Charge 1 Specification 1 provided sufficient detail to Employee to allow her to address and defend against the charge. In a nutshell, Employee's assault of Mocca on the night in question was the basis for this charge. This is in spite of the fact that Employee was not criminally convicted of same.

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[7] *See* Brief of Employee at 16 – 17 (December 21, 2012).

After considering the parties' arguments, I agree with the MPD. I find that Employee was fully aware of the incident in question that was the basis for her termination. According to the overwhelming breadth of testimony provided in this matter, Employee was removed from service due to her actions on February 1 – 2, 2009, including the finding by the Adverse Action Panel that she assaulted Mocca. Employee attempts to "cherry pick" nuggets of testimony presented during the Adverse Action Panel and the related criminal court proceeding in Prince Georges County, Maryland in order to substantiate her argument that the Charges and Specifications are fatally flawed. Now while it is true that Employee was not convicted of this crime , I note that Employee was a sworn member of the MPD, a paramilitary entity of the District of Columbia government and given as much, she was required to account for her actions to a higher standard (both on and off duty) than the average District government employee. I also find that Employee was required to adhere to the MPD General Orders and that neither the MPD nor the Adverse Action Panel, did not have to have a conviction in order to properly make a finding of guilt with respect to Charge 1 Specification 1. Moreover, as stated previously, I further find that the Adverse Action Panel's related findings and conclusion are sufficient and are supported by substantial evidence.

Employee argues that with respect to Charge 2 Specification 1, the following:

> The fact that Employee was taken into custody for emergency medical evaluation does not allege or establish misconduct by Employee. Employee was not arrested for, charged with or convicted of assault, disorderly conduct, drunk in public, driving while intoxicated or any other criminal offense. More importantly, MPD did not administratively charge Employee with any specific misconduct, and being hospitalized for emergency medical evaluation is not an allegation of proof of misconduct. Not only does Charge 2, Specification 1 fail to allege misconduct which would constitute "cause," (see previously cited OEA cases), like Charge 1, Specification 1, it violates due process by failing to put Employee on notice as to what specific alleged misconduct she was required to defend against. Employee is not responsible for the actions of the Prince George's County police and she cannot defend against those actions.[8]

Agency counters that with respect to Charge 2 Specification 1 that Employee being placed into custody due to her action of threatening to commit suicide is detrimental to the reputation and good order of the MPD.

To reiterate, the MPD is a paramilitary entity whose members are sworn to uphold and defend the laws of the District of Columbia. In order to effectively carry out its mission, the MPD must require that all of its member conduct themselves in an upright manner and have the physical, mental, and psychological ability to carry out their assigned duties. The duties and responsibilities of the MPD's sworn members are spelled out in the MPD's General Orders. A sworn member who attempts to commit suicide arguably does not have the psychological or mental ability to carry out her sworn duties. While Employee may be correct with respect to

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[8] *Id*. at 26.

being placed into custody and its application to the instant matter, I find that there is substantial evidence in the record to support the finding that Employee attempted to commit suicide on the night in question. Because of Employee's act in this regard, I further find that Charge 2 Specification 1 herein is sufficient. Moreover, I further find that the Adverse Action Panel's related findings and conclusion are sufficient and are supported by substantial evidence.

With respect to Charge 3 Specification 1, Employee again alleges that Agency's accusations are fatally deficient due to the fact that she was not deemed to be intoxicated while off duty by any recognized means of determining sobriety in the field, including a sobriety field test or blood/urine test for alcohol. Employee also notes that there was conflicting testimony as to how much alcohol she allegedly consumed noting that there were some inconsistencies as to what she allegedly drank and when she drank it. Agency counters that there was substantial evidence before the Adverse Action Panel to support the finding of guilt. Moreover, MPD notes that several officers from the PGPD, MPD, MCPD, and Mocca were attempting to stop her from driving due to her alleged intoxication. Agency also argues that just because Employee was able to find some testimony to support her rendition of events does not mean that the decision by the Adverse Action Panel was not supported by substantial evidence.

The testimony of several members of the PGPD and MPD were consistent in noting that Employee was intoxicated given her actions and body odor (of alcohol). The undersigned also notes that PGuarin, Employee's mother, and Ingalls, Employee's friend and member of the MCPD, also assisted in the effort to procure a sober ride for Employee. I find that there is substantial evidence in the record to support the finding that Employee was intoxicated while off duty on the night in question. Because of Employee's act in this regard, I further find that Charge 3 Specification 1 herein is sufficient. Moreover, I further find that the Adverse Action Panel's related findings and conclusion are sufficient and are supported by substantial evidence.

The Adverse Action Panel unanimously concluded that the Employee was guilty of the charges specified. In coming to this conclusion, the Adverse Action Panel considered the so-called *Douglas Factors* which were first enunciated in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981). Although not an exhaustive list, the factors are as follows:

> 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
>
> 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
>
> 3) the employee's past disciplinary record;
>
> 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

> 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
>
> 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
>
> 7) consistency of the penalty with any applicable agency table of penalties;
>
> 8) the notoriety of the offense or its impact upon the reputation of the agency;
>
> 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
>
> 10) potential for the employee's rehabilitation;
>
> 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.

The Adverse Action Panel found that *Douglas Factors* Nos. 1, 2, 3, 5, 7, 8, and 11 are aggravating factors in this matter. Based on the foregoing analysis, I find no plausible reason to disturb Agency's action because of the Adverse Action Panel's application of the *Douglas Factors* to the instant matter.

The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office. *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). 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. *See Stokes*, *supra*; *Hutchinson*, *supra*; *Link v. Department of Corrections*, OEA

Matter No. 1601-0079-92R95 (Feb.1, 1996); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995). I conclude that given the totality of the circumstances as enunciated in the instant decision, the Agency's action of removing Employee from service should be upheld.

ORDER

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

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Senior Administrative Judge