THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
CHRIS WHITEHOUSE,	)	
Employee	)	OEA Matter No. 1601-0105-12R16
	)	
v.	)	Date of Issuance: May 10, 2016
	)	
METROPOLITAN POLICE DEPARTMENT,	)	Monica Dohnji, Esq.
Agency	)	Senior Administrative Judge
	)	

Julia Z. Haller, Esq., Employee's Representative
Janea Raines, Esq., Agency's Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

On May 24, 2012, Chris Whitehouse ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the Metropolitan Police Department's ("Agency" or "MPD") decision to terminate him, effective May 4, 2012. On June 25, 2012, Agency submitted its Answer to Employee's Petition for Appeal.

Following a failed mediation attempt, I was assigned this matter in October of 2013. On October 7, 2013, I issued an Order directing the parties to attend a Status Conference on November 19, 2013. On November 18, 2013, Employee requested that the November 19, 2013 Status Conference be postponed until after March 15, 2014. In an Order dated November 22, 2014, Employee's request was granted in part, and denied in part. The Status conference was rescheduled for January 13, 2014, at 11:00 am. While Agency was present for the Status Conference at the scheduled time, Employee was an hour and a half late. Because Agency's representative had already been dismissed following Employee's failure to appear at the scheduled time, in an Order dated January 14, 2014, the undersigned rescheduled the Status Conference for January 29, 2014. Agency complied, but Employee was a no-show. Thereafter, on January 30, 2014, the undersigned issued an Order for Statement of Good Cause. Employee was ordered to submit a statement of good cause based on his failure to attend the January 29, 2014, Status Conference. Following Employee's failure to comply with the January 30, 2014, Order, on February 18, 2014, I issued an Initial Decision ("ID") dismissing Employee's Petition for Appeal for failure to prosecute.

On March 20, 2014, Employee filed a Petition for Review with the OEA Board. On October 20, 2015, the OEA Board issued an Opinion and Order on Petition for Review, remanding this matter to the undersigned for further proceeding. The OEA Board explained that because OEA failed to send correspondence to Employee's correct address despite having knowledge of the new address, Employee's Petition for Review must be granted.

Subsequently, a Status/Prehearing conference was held in this matter on December 2, 2015, with both parties present. Thereafter, I issued a Post Status Conference Order requiring the parties to address the issues raised during the Status/Prehearing Conference. Both parties have complied. After considering the parties' arguments as presented in their submissions to this Office, I have decided that an Evidentiary Hearing is not required. The record is now closed.

JURISDICTION

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

ISSUES

1) Whether Agency's action of terminating Employee was done for cause; and

2) Whether the penalty of removal is within the range allowed by law, rules, or regulations.

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.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSION

According to the record, Employee started working with Agency on September 25, 1980. On March 27, 2011, Employee was involved in an off-duty incident in Prince Georges County, Maryland, which led to the issuance of an arrest warrant for Employee, charging him with First

and Second Degree Assault. Employee was arrested later that same day and was incarcerated from March 27, 2011, through April 26, 2011.[1]

On July 28, 2011, Agency conducted an investigation into the matter.[2] On June 21, 2011, Agency issued a Notice of Proposed Indefinite Suspension Without Pay, notifying Employee that he would be suspended indefinitely without pay from his position with Agency pending resolution of the administrative charges against him.[3] Employee filed a response to the June 21, 2011 notice on July 13, 2011.[4] On July 18, 2011, Agency issued its Final Notice of Indefinite Suspension Without Pay.[5] Employee appealed this decision to the Chief of Police, Cathy Lanier, on August 1, 2011.[6] The Chief of Police denied Employee's appeal in a letter dated August 18, 2011.[7] On July 28, 2011, Agency issued a Notice of Proposed Adverse Action.[8] Thereafter, on January 24, 2012, Agency issued an Amended Notice of Proposed Adverse Action against Employee, charging him with the following:[9]

Charge No. 1: Violation of General Order Series 120.01, Attachment A, Part A-7, which states, "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 their involvement to their commanding officers."

Specification No. 1: In that, on August 22, 2011, in a plea hearing held in the Circuit Court for Prince George's County, Maryland, you pled guilty to one count of Assault in the Second Degree. Subsequently, on October 19, 2011, you were sentenced to a period of 10 years; all but four years suspended. You were also placed on supervised probation for a period of three years upon release.

Specification No. 2: In that, on or about March 27, 2011, while at the residence of Ms. Donata Bryan, you grabbed Ms. Bryan around her

[1]Employee pled guilty in court on August 22, 2011, to the charge of Second degree Assault, a misdemeanor in Maryland. On October 19, 2011, Employee was sentenced to be incarcerated for ten (10) years, with six (6) of the ten (10) years suspended.
[2] Agency's Answer to the Petition at Tabs 1 & 2 (June 25, 2012).
[3] *Id*. at Tab 3.
[4] *Id*. at Tab 4.
[5] *Id*. at Tab 5.
[6] *Id*. at Tab 6.
[7] *Id*. at Tab 7.
[8] *Id*. at Tab 8.
[9] *Id*. at Tab 9-1.

neck, and placed a handgun under her chin, and then to her head, while repeatedly stating, " how do you like this bitch" before releasing her and fleeing the residence.

Specification No. 3: In that, on April 5, 2011, Ms. Donata Bryan petitioned the court for a Protective Order in Prince George's County, Maryland against you. Subsequently, on April 13, 2011, Judge G. Richard Collins in the District Court of Prince George's County, Maryland issued a Final Protective Order against you. As a result of the Final Protective Order, you were not allowed to possess a firearm. The Protective Order was in effect until October 13, 2011.

Charge No. 2: Violation of General Order series 120.21, Attachment A, Part A-12, which reads "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively, or violations of any law of the United States or any law, municipal ordinance, or regulation of the District of Columbia." This misconduct is further defined in General Order Series 201.26, Part I-B-23 which provides, "Members shall not conduct themselves in an immoral, indecent, lewd or disorderly manner… They shall be guilty of misconduct, neglect of duty, or conduct unbecoming to an officer and a profession…"

Specification No. 1: In that, on March 27, 2011, an arrest warrant charging you with Assault in the First and Second Degree, Using a Handgun in the Commission of a Violent Crime, Reckless Endangerment, and Possession of a Handgun, was issued by the District Court of Maryland for Prince George's County, Maryland, Cheverly Police Department, where you were placed under arrest. Consequently, you remained incarcerated in the Prince George's County Jail from March 27, 2011 until April 26, 2011.

Specification No. 2: In that, on or about March 27, 2012, you became involved in a verbal dispute with Ms. Bryan while at her place of residence. The aforementioned verbal dispute escalated into a physical assault, where you used a handgun in the commission of a felony crime.

Having determined that Employee engaged in misconduct, MPD weighed each of the relevant *Douglas Factors* for consideration in determining the appropriateness of the penalty and proposed that Employee be terminated. Employee initially requested to have a trial board hearing. However, he later withdrew this request, and asked to submit written responses to the

above-referenced charges. On February 23, 2012, Employee provided a written response to Agency's original/amended Notice of Proposed Adverse Action.[10] Upon review of Employee's response, on March 6, 2012, Agency issued its Final Agency Action, wherein, it found that Employee was found guilty of all charges and specifications, and terminated Employee effective May 4, 2012.[11] The Notice also provided Employee with the opportunity to appeal the decision to the Chief of Police within ten (10) days. Employee filed an appeal with the Chief of Police on March 21, 2012. In a notice dated April 10, 2012, the Chief of Police responded to Employee's appeal, upholding the termination and further stated that, this represents the final Agency action in the matter.[12]

Employee's Position

Employee argues that MPD violated his due process.[13] Employee also asserts that the record evidence does not support a finding of guilty for any of the contested charges. He states that termination is not an appropriate penalty.

In addition, Employee notes that the Final Agency Action should be reversed because it is not supported by evidence or the law, and Agency did not have cause to indefinitely suspend and terminate him. Employee maintains that the issuance of indefinite suspension and termination is arbitrary and capricious.

Employee maintains that as a matter of law, under the doctrine of *res judicata*, a final judgment on the merits of a claim bars re-litigation in a subsequent proceeding of the same claim between the same parties or their privies. He is not guilty of Charge No. 1, Specifications Nos. 2, and 3; and Charge No. 2, Specifications Nos.1 and 2. He further explains that the civil action resulted in a defense verdict which was fully and finally litigated among same parties, and Ms. Bryan did not win her claim of assault, battery, Intentional Infliction of Emotional Distress ("IIED") against Employee for the March 27, 2011, incident. The court order from the jury verdict of March 27, 2011, is a final judgment on the merits.

Further, Employee asserts that the ruling in *Elton Pinkard v. D.C. Metropolitan Police Department*[14] does not apply in this case because it is undisputed that there has been no departmental hearing held in this matter.

Employee states that Charge No. 2, Specification No. 1, should be dismissed. Employee explains that an arrest by itself is insufficient to sustain a conduct unbecoming allegation. Employee notes that Charge No. 2, Specification No. 2, should be dismissed. He explains that he was falsely charged with a felony crime. He also notes that being convicted with a misdemeanor does not preclude a person from continuing to be a police officer with Agency. Additionally, he

[10] Agency's Answer, *supra*, at Tab 10.
[11] *Id*. at Tab 11.
[12] *Id*. at Tab 14.
[13] Employee makes a blanket allegation that his due process was violated. However, he has not provided any evidence or elaborated on this due process violation. Moreover, Employee waived his right to a trial board hearing when he requested to submit a written response. As such, this issue will not be addressed.
[14] 801 A.2d 86 (D.C. 2002).

states that the physical assault allegations are inconsistent, not supported by the record, and unproven by a court of law.

Employee states that if he is found guilty of any of the charges and specifications, recent comparative discipline requires that Agency retains him. He notes that Agency failed to consider the *Douglas factors*.[15]

Agency's Position

Agency submits that *Pinkard* applies to the current matter and as such, OEA's review of this matter is limited to the standard in *Pinkard* – constrained to the administrative record. Agency explains that initially, Employee elected to have an Evidentiary Hearing before the three (3) member panel. However, he withdrew that request and stated his intention to submit a written response to the charge.[16] Agency notes that the failure to hold a hearing as required in *Pinkard* is of Employee's own request, so he cannot now contest the effects of his waiver of a hearing two (2) years after the administrative proceeding has concluded. By waiving his right to a hearing, he waived the opportunity to contest the charges against him in a formal proceeding. He cannot claim any surprises by the effect of such waiver which was done knowingly, voluntarily and under the advice of competent counsel. Agency asserts that Employee made a strategic decision to submit a written response rather than have a hearing. Agency additionally notes that despite the absence of the hearing, Employee received due process and cannot advance the need for a formal hearing at this stage.[17]

Additionally, Agency asserts that the evidence of record supports Employee's termination for cause. The director's findings are supported by substantial evidence and should be upheld. Employee pleaded guilty to, and was convicted of, conduct that constitutes a crime, Assault in the Second Degree. Therefore, Agency had evidence to find Employee guilty of a criminal offense. Further, the specifics provided by the complainant and an eyewitness supported the conclusion that Employee's assault was felonious in nature and that the offense actually happened. Also, the issuance of the two Peace/Protective Orders (temporary and final) against Employee were based upon clear and convincing evidence that Employee had in fact engaged in the alleged misconduct.[18]

Agency notes that Employee was also guilty of conduct unbecoming when he was arrested in Prince George's County, Maryland for Assault in the 1st and 2nd degree, using a handgun in the commission of a violent crime, reckless endangerment and possession of a handgun. An arrest warrant was issued on March 27, 2011. Employee surrendered, was arrested as a result of the warrant, and remained incarcerated for approximately one (1) month. In addition, Employee was guilty of conduct unbecoming when he engaged in a verbal dispute with Ms. Bryan at her residence, which escalated into a physical assault by Employee and the use of his handgun in the commission of a felony. Evidence from both the complainant and the eyewitness support the fact that Employee committed a felony crime when he used a handgun

[15] Petition for Appeal (May 24, 2012); *See also* Employee's Brief (March 7, 2016).
[16] Agency's Brief (February 3, 2016); *See also* Agency's Reply Brief (March 24, 2016).
[17] *Id.*
[18] *Id.*

during the assault and his pleading guilty to a misdemeanor does not negate his commission of a felony.[19]

Agency asserts that termination was appropriate. It explains that given the preponderance of evidence of record, the serious nature of the criminal conviction, and Employee's position, Agency found that removal was an appropriate penalty. Agency also states that it performed a Douglas factor analysis which was upheld on appeal. Agency states that the incident is very egregious as Employee engaged in conduct which raised questions about his ability to perform his job duties, responsibilities and his integrity. Agency also argues that termination is within Agency's recommended Table of Appropriate Penalties ("TAP") for first violation of conduct constituting crime and conduct unbecoming.[20]

Agency contends that Employee failed to meet his burden of proof on his disparate treatment claim. It maintains that Employee has failed to provide evidence that the comparison officers were subject to discipline by the same supervisor within the same general time period. He has provided no evidence to indicate the other employees' cases were similar to his in other ways. Agency also notes that OEA's review of the disparate treatment issue should be limited to the information/names Employee provided during the administrative proceeding.[21]

Furthermore, Agency notes that the review of Employee's indefinite suspension claim is not proper before OEA. It explains that based on the statute, OEA does not have jurisdiction to review this claim.[22]

Agency also argues that the doctrine of *res judicata* does not apply in this matter. Agency explains that there is no privy because there was no administrative/departmental hearing as a result of Employee's waiver. Agency also notes that Ms. Bryan and Agency are miles apart from being considered as the same party. Agency was not a named party in the civil litigation between Employee and Ms. Bryan. Further, Agency notes that Employee seeks reconsideration of his termination based on evidence that was not before Agency during the 2012 administrative proceeding. Agency asserts that Employee's attempt to do so violates Section 8 of the Collective Bargaining Agreement ("CBA") and OEA rules which highlights that any further appeal is limited to the department's administrative record. Also, Agency notes that the doctrine of *res judicata* applies only to proceedings litigated after the controlling determination, not to those previously litigated.[23]

Governing Authority

While Agency argues that the standard in *Pinkard* should govern this matter, Employee on the other hand contends that *Pinkard* does not apply because he did not have a departmental hearing as outlined in *Pinkard*. Pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department*,[24] OEA has a limited role where a departmental hearing

[19] *Id*.
[20] *Id*.
[21] *Id*.
[22] *Id*.
[23] *Id*.
[24] 801 A.2d 86 (D.C. 2002).

has been held. According to *Pinkard*, the D. C. Court of Appeals found that OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings.[25] The Court of Appeals held that:

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

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

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
>
> 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 (emphasis added).

In this case, Employee is a member of the Metropolitan Police Department and was the subject of an adverse action; MPD's Collective Bargaining Agreement contains language similar to that found in *Pinkard*. However, Employee did not appear before an Adverse Action Panel. Agency argues that Employee waived the right to appear before the Adverse Action Panel by requesting to submit a written response instead. Although I agree with Agency's assertion that the failure to hold a hearing as stated in *Pinkard* was of Employee's own doing, the fact remains that Employee did not appear before an Adverse Action Panel that conducted an evidentiary

[25] *See* D.C. Code §§ 1-606.02(a)(2), 1-606.03(a),(c); 1-606.04 (2001).

hearing. Based on the documents of records and the position of the parties as stated during the Status Conferences held in this matter, the undersigned finds that all of the aforementioned criteria have not been met in the instant matter. Consequently, I find that *Pinkard* does not apply in this matter. In reviewing this matter, the undersigned must determine where Agency's action was taken for cause, and if so, whether the penalty of removal was appropriate.

1) Whether Employee's actions constituted cause for discipline

Pursuant to OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, District Personnel Manual ("DPM") § 1603.2 provides that disciplinary action against an employee may only be taken for cause. Employee was charged with:

Charge No. 1: Violation of General Order Series 120.01, Attachment A, Part A-7, which states, "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* (emphasis added), 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 their involvement to their commanding officers."

Specification No. 1: In that, on August 22, 2011, in a plea hearing held in the Circuit Court for Prince George's County, Maryland, you pled guilty to one count of Assault in the Second Degree. Subsequently, on October 19, 2011, you were sentenced to a period of 10 years; all but four years suspended. You were also placed on supervised probation for a period of three years upon release.

Agency explains in its brief that Employee pleaded guilty to, and was convicted of a conduct that constituted a crime for the March 27, 2011 incident. There is ample evidence in the record to support this specification. Additionally, Employee does not deny any of the facts as stated in Specification No. 1 above. He explained that because he pled guilty to Assault in the Second Degree, he is legally precluded from pleading not guilty to the related administrative charge. Based on the record, and Employee's own admission, I find that Agency has met its burden of proof with regards to Charge No. 1, Specification No.1.

There is ample documentary evidence in the record to support Agency's conclusion that Employee was guilty of Charge No. 1, Specification No. 1(guilty plea to criminal offense). This cause of action carries a penalty of termination. The undersigned notes that Agency's decision to terminate Employee for violating this cause of action was proper. Further, because Agency has

met its burden of proof with regards to Charge No. 1, Specification No. 1, I will not address the remaining charges and specifications levied against Employee.

Disparate Treatment

In his submissions, Employee alleged that Agency engaged in disparate treatment because there were other employees who faced the same charges as him, but were not terminated. Employee provided the names of ten (10) Agency employees who he explained were charged with similar charges as himself, but were not terminated. However, Agency argued that Employee failed to meet his burden of proof as he has not provided evidence that the comparison officers were subject to discipline by the same supervisor within the same general time period as Employee. Agency further noted that Employee has provided no evidence to indicate that the cases are similar in other ways.

OEA has held that, to establish disparate treatment, an employee *must* show that he worked in the same organizational unit as the comparison employees (emphasis added). They *must* also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period (emphasis added).[26] Additionally, "in order to prove disparate treatment, [Employee] *must* show that a similarly situated employee received a different penalty."[27] (Emphasis added).

Employee was terminated for pleading guilty. After a careful review of the record, of all the comparison employees submitted by Employee, only two (2) pled guilty, Officer Randy Washington (Ofc. Washington) and Officer Juan Johnson (Ofc. Johnson). Consequently, I find that, Employee and these two (2) employees are similarly situated.

Ofc. Washington was suspended for thirty (35) days for his guilty plea in connection to a March 24, 2010, incident. His Notice of Proposed Adverse Action was issued on July 23, 2010, by Michael Eldridge, Inspector/Director Disciplinary Review Branch ("Inspector Eldridge").[28] Ofc. Johnson was suspended for thirty-five (35) days for his guilty plea in connection to a July 18, 2010, incident. His Notice of Proposed Adverse Action was issued on November 22, 2010, by Inspector Eldridge.[29] Employee did not provide this Office with Ofc. Washington's and Ofc. Johnson's Final Notice of Adverse Action. Employee on the other hand, was issued an Amended Notice of Proposed Adverse Action on January 24, 2012 by Inspector Eldridge and a Final Notice of Adverse Action on March 6, 2012, by Diana Haines-Walton, Director, Human Resources Management Division. While all their Notices of Proposed Adverse Action was issued by the same person, Inspector Eldridge, they were not disciplined around the same time frame. Ofc. Washington and Ofc. Johnson were disciplined in 2010, and Employee was

[26] *Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, Opinion and Order on Petition for Review (December 12, 2011), citing *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, Opinion and Order on Petition for Review (May 6, 2009); *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).
[27] *Metropolitan Police Department v. D.C. Office of Employee Appeals, et al.*, No. 2010 CA 002048 (D.C. Super. Ct July 23, 2012); citing *Social Sec. Admin. V. Mills*, 73 M.S.P.R. 463, 473 (1991).
[28] Employee's Brief, *supra*, at Exhibit 11.
[29] *Id.* at Exhibit 9.

disciplined in 2012, more than a year apart. Moreover, the evidence provided by Employee shows that none of these comparison employees were charged with pleading guilty to one count of Assault in the Second Degree. Consequently, I conclude that Employee has not provided sufficient evidence to establish a *prima facie* claim of disparate treatment, and therefore, he has not met his burden of proof.

Res Judicata

Employee asserted that as a matter of law, under the doctrine of *res judicata,* a final judgment on the merits of a claim bars re-litigation in a subsequent proceeding of the same claim between the same parties or their privies. He stated that he is not guilty of Charge No. 1, Specifications 2, and 3; and Charge No. 2, Specifications 1 and 2 because the civil action resulted in a defense verdict which was fully and finally litigated among same parties, and Ms. Bryan did not win her claim of assault, battery, Intentional Infliction of Emotional Distress ("IIED") against Employee for the March 27, 2011, incident. The court order from the jury verdict of March 27, 2011, is a final judgment on the merits.

Agency on the other hand noted that Employee's argument is premised upon the misapplication of the doctrine of *res judicata*. Agency explained that a plea of guilty to a criminal charge may be rebutted or explained in the subsequent civil case which it is admitted, not on the administrative review of a prior matter that has already concluded. Agency further argued that there is no privy because there was no administrative hearing as a result of Employee's waiver. Agency also stated that Ms. Bryan and Agency are miles apart from being considered as the same party. Agency was not a party in the civil litigation between Employee and Ms. Bryan. Agency additionally argues that Employee's attempt to invoke the doctrine of *res judicata* violates the CBA between Agency and Employee's union, as well as OEA rules.

I agree with Agency's assertion that the doctrine of *res judicata* does not apply to this matter primarily because Agency was not a party to the civil litigation between Employee and Ms. Bryan. Although the civil and the administrative actions arose from the same incident of March 27, 2011, the parties in the civil and administrative actions are not identical, the issues are not identical and the relief sought by the parties is not identical. Ms. Bryan is not connected to Agency in any way, shape or form. Additionally, in the civil action, Ms. Bryan was seeking compensation against Employee for assault, battery, IIED, whereas, in the administrative action, Agency is seeking to terminate Employee for pleading guilty to a criminal offense. Thus, I conclude that, the final judgment issued in the civil action is not conclusive as to the matter in the administrative matter. Moreover, the administrative proceeding in this matter commenced years before the final judgment in civil act was issued. Therefore, I find that, the doctrine of *res judicata* does not apply to this matter.

Indefinite Suspension

Employee stated that Agency did not have cause to indefinitely suspend and subsequently terminate him. Agency argued that the review of the indefinite suspension claim is not proper before OEA. It explained that OEA does not have jurisdiction to review this claim. Agency asserted indefinite suspension is not an adverse action. While Agency is correct in its assertion

that indefinite suspension/enforced leave is not an adverse action,[30] I find that this Office has jurisdiction over indefinite suspension/enforce leave.

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the CMPA, sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

> (a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . ., an adverse action for cause that results in removal, reduction in grade, *placement on enforced leave*, or suspension *for 10 days or more* . . ., or a reduction in force [RIF]. . . . (Emphasis added).[31]

Based on the foregoing, OEA has jurisdiction over Enforced Leave; however, the cause of action before this Office is that of Employee's termination and not the indefinite suspension. Employee noted in his Petition for Appeal that "I wish to appeal my *termination* from the M.P.D… (Emphasis added)"[32]

Assuming arguendo that the current appeal was for Agency's placement of Employee on indefinite suspension, I find that Employee's claim is untimely. A "[d]istrict government employee shall initiate an appeal by filing a Petition for Appeal with the OEA. The Petition for Appeal must be filed within thirty (30) calendar days of the effective date of the action being appealed."[33] The District of Columbia Court of Appeals has held that the time limit for filing an appeal with an administrative adjudicatory agency such as this Office is mandatory and jurisdictional in nature.[34] Also, while this Office has held that the statutory thirty (30) day time limit for filing an appeal in this Office is mandatory and jurisdictional in nature,[35] there is an exception whereby, a late filing will be excused if an agency fails to provide the employee with "adequate notice of its decision and the right to contest the decision through an appeal."[36]

Here, according to the parties' submissions to this Office, Employee's indefinite suspension without pay was effective in August of 2011.[37] Therefore, Employee had thirty (30) days after he received the letter from the Chief of Police on August 18, 2011, to file an appeal with OEA, but he failed to do so. He only filed a Petition for Appeal with OEA on Mar 24, 2012, almost nine (9) months later.

---

[30] *See* DPM § 1620.2.
[31] Indefinite suspension and enforced leave are often used interchangeably.
[32] Petition for Appeal at pg. 4 of 6.
[33] DC Official Code §1-606.03.
[34] *See, e.g., District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985).
[35] *King v. Department of Human Services*, OEA Matter No. J-0187-99 (November 30, 1999).
[36] OEA Rule 605.1, 59 DCR 2129 (March 16, 2012); See also *Rebello v. D.C. Public Schools*, OEA Matter No. 2401-0202-04, Opinion and Order on Petition for Review (June 27, 2008) citing *McLeod v. D.C. Public Schools*, OEA Matter No. J-0024-00 (May 5, 2003); *Jones v. D.C. Public Schools, Department of Transportation*, OEA Matter No. 1601-0077-09, Opinion and Order on Petition for Review (May 23, 2011).
[37] Agency's Brief, *supra*, at Tabs 5 & 7.

Moreover, a review of the July 18, 2011 Final Notice of Indefinite Suspension Without Pay corroborates that Employee was notified of his appeal rights to this Office. Employee does not contest that he received a copy of the OEA appeal forms and OEA regulations, in compliance with OEA Rule 605. Clearly, Employee was aware of OEA's jurisdiction over this matter, as well as the rules governing appeals in this Office. Therefore, I conclude that this Office does not have jurisdiction over Employee's indefinite suspension without pay claim. And for this reason, I am unable to address the factual merits, if any, of this matter.

2) Whether the penalty of removal is within the range allowed by law, rules, or regulations.

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of* Columbia, 502 A.2d 1006 (D.C. 1985).[38] According to the Court in *Stokes,* OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Penalties ("TAP"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[39]

In this case, I find that Agency has met its burden of proof and can use Charge No. 1, Specification No. 1 in instituting adverse action against Employee. 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.[40] Employee argued that Agency failed to genuinely consider the *Douglas* factors[41] in reaching its decision to terminate Employee. Employee explained that he served Agency for twenty-one (21) years, pled guilty to a misdemeanor charge and he was indefinitely suspended, and terminated. He maintains that Agency's review of the *Douglas* factors set forth in the July 28, 2011, made a premature determination of his guilt. Additionally, Employee stated that no alternative sanction short of termination was considered. However, Agency argued that given the preponderance of evidence of record, the seriousness of the criminal conviction, and Employee's position, Agency properly found that removal was an appropriate penalty. Agency also noted that it performed a *Douglas*

---

[38] *See also Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[39] *Butler v. Department of Motor Vehicles,* OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).

[40] *Id.*; *See also 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 (Sept. 21, 1995).

[41] 5 M.S.P.R. 313 (1981).

factor analysis which was upheld on appeal.[42] Agency also asserted that termination is within its recommended Table of Penalties for the first violation of Charge No. 1.

In the instant matter, I find that Agency has met its burden of proof for the charge of Violation of General Order Series 120.01, Attachment A, Part A-7, which states, "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* (emphasis added),…."

Further, according to General Order 120.21, Attachment A, Table of Offenses/Penalties, the penalty for a first time offense for Charge No. 1 is removal. The record shows that this is the first time Employee is being charged with this cause of action. Contrary to Employee's assertion that Agency did not genuinely consider the *Douglas* factors, there is ample evidence in the record to support Agency's assertion that it performed an analysis of the *Douglas* factors. Because termination is the only penalty for violation of this cause of action, I conclude that Agency had sufficient cause to terminate Employee. As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[43] 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. I find that Agency has properly exercised its managerial discretion and its chosen penalty of removal is reasonable and is clearly not an error of judgment. Accordingly, I conclude that Agency was within its authority to remove Employee given the Table of Penalties.

Penalty Based on Consideration of Relevant Factors

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[44] The relevant factors are generally outlined in *Douglas v. Veterans Administration*.[45] The evidence does not establish that the penalty of removal constituted an abuse of discretion. This Office has held that a Final Agency Decision that specifically lacks discussion of the *Douglas* factors[46] does not amount to reversible

[42] Agency's Brief, *supra*, at pgs. 11-13. *See also* Tab 11.
[43] *Love* also provided that "[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness." *Citing Douglas v. Veterans Administration.*
[44] *Butler v. Department of Motor Vehicles,* OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C. Reg. 352 (1985).
[45] 5 M.S.P.R. 313 (1981).
[46] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;

error, where there is substantial evidence in the record to uphold the Initial Decision.[47] In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." Here, Agency has presented evidence that it considered relevant factors as outlined in *Douglas,* in reaching its decision to remove Employee.[48] The penalty of termination was within the range allowed for a first offense. As noted above, the evidence does not establish that the penalty of removal constituted an abuse of discretion and/or that Agency engaged in disparate treatment. Accordingly, I further conclude that Agency's action should be upheld.

ORDER

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

FOR THE OFFICE:

MONICA DOHNJI, Esq.
Senior Administrative Judge

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

[47] *See Christopher Lee v. D.C. Department of Transportation*, OEA Matter No. 1601-0076-08, *Opinion and Order on Petition for Review* (January 26, 2011).
[48] Agency's Brief, *supra*, at pgs. 11-13. *See also* Tab 11.