THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
MICHAEL MINOR,	) OEA Matter No. 1601-0052-18
Employee	)
	) Date of Issuance: August 26, 2019
v.	)
	) JOSEPH E. LIM, Esq.
METROPOLITAN POLICE DEPARTMENT,	) Senior Administrative Judge
Agency	)

Marc Wilhite, Esq., Employee Representative
Milena Mikailova, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL HISTORY

Michael Minor ("Employee"), worked as a Police Officer with the Metropolitan Police Department ("Agency") in Career Service status. The events which formed the basis for Employee's termination occurred between approximately February 17, 2016, and April 20, 2016. Specifically, Employee's termination was based on the following charges: 1) Commission of an act which would constitute a crime, whether or not a court record reflects a conviction; 2) Insubordination; and 3) 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 of law of the United States or any law, municipal ordinance, or regulation of the District of Columbia.

On February 14, 2018, Agency's Adverse Action Panel ("Panel" or "Trial Board") held a hearing regarding the administrative charges against Employee in accordance with the Collective Bargaining Agreement ("CBA") between Agency and Employee's union. On March 22, 2018, the Panel issued its Final Notice of Adverse Action, finding Employee guilty on all charges and recommended that he be terminated. Employee's termination became effective on May 11, 2018.

On June 8, 2018, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the D.C. Metropolitan Police Department's ("Agency") action of terminating his employment.

The matter was assigned to the undersigned Administrative Judge on October 5, 2018, after an October 3, 2018, mediation was attempted. A Prehearing Conference was held on December 21, 2018, for the purpose of assessing the parties' arguments with respect to Employee's appeal. I subsequently ordered the parties to submit briefs on the issue of whether or not the decision of the Trial Board should be overturned. Employee and Agency submitted written briefs by March

11, 2019. Because the Undersigned is precluded from conducting a de novo examination on the merits of this appeal, as discussed *infra*, an evidentiary hearing was not held.[1] 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 the Trial Board's decision was supported by substantial evidence.

2. Whether there was harmful procedural error, or

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

STATEMENT OF THE CHARGES

Pursuant to the Notice of Proposed Adverse Action received and acknowledged by Employee on Wednesday, November 1, 2017, the charges and specifications against Employee came before the Adverse Action Panel on Wednesday, February 14, 2018.

> **Charge No. 1**: Violation of General Order Series 120.21, Table of Offenses and Penalties, 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 officers."
>
> Specification No. 1: In that, on April 20, 2016, you were arrested and charged with Assault with a Dangerous Weapon (ADW). Specifically, you, without just cause, after being involved in a traffic dispute while off duty, and by your own admittance, did remove and point your service pistol at Mr. Wilson Sanchez. Subsequently, on June 23, 2017, the Honorable Judge Patricia Broderick, "Nolle Prosequi," the charge against you.
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> Specification No. 2: In that, on February 20, 2016, you committed a criminal offense, namely, Assault with a Dangerous Weapon (ADW)-Gun. You, without just cause, after being involved in a traffic dispute while off duty, and by your own admittance, did remove and point your service pistol at Mr. Wilson Sanchez.
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> Specification No. 3: In that, on February 20, 2016, while off duty, and driving on or near I-295 and Kenilworth Avenue, Circle-7, you engaged in a verbal dispute with Mr. Wilson Sanchez who was also driving on or near 1-295 and Kenilworth Avenue, Circle-7. The aforementioned verbal dispute escalated

[1] *See District of Columbia Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002).

into a physical assault wherein you threw an empty water bottle at Mr. Sanchez, striking him in the legs. During this incident, you and Mr. Sanchez stopped and exited your vehicles and approached one another.

Specification No. 4: In that, on February 20, 2016, while off duty, you followed Mr. Wilson Sanchez southbound on I-295, you physically assaulted Mr. Sanchez a second time. Mr. Sanchez pulled over and exited his vehicle after noticing that you were following him. You in turn pulled over and exited your vehicle. You then approached Mr. Sanchez, grabbed him, and choked him as he attempted to return to his vehicle. During this incident, Mr. Sanchez sustained an abrasion to the front of his neck.

Charge No. 2: Violation of General Order 120.21, Part VIII, Attachment A-16, which provides, "Failure to obey orders or directives issued by the Chief of Police." This misconduct is further specified in General Order RAR-901-01 (Handling of Service Weapons), Part V, B,1-b, which states, "Members shall not display their firearms unnecessarily (e.g., removing the pistol from the holster to show a friend),"

Specification No. 1: In that on February 20, 2016, you without just cause, after being involved in a traffic dispute while off duty, and by your own admittance, removed and pointed your service pistol at Mr. Wilson Sanchez.

Charge No. 3: Violation of General Order 120.21, Attachment A, Part A-12, which provides, "Conduct Unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or any law, municipal ordinance, or regulation of the District of Columbia." This misconduct is further defined in General Order 201. 26, Part 1-B23, 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 professional..."

Specification No. 1: In that, on February 20, 2016, while off duty, and driving on or near I-295 and Kenilworth Avenue, Circle-7, you became involved in a verbal dispute with Mr. Wilson Sanchez who was also driving on or near I-295 and Kenilworth Avenue, Circle-7. The aforementioned verbal dispute escalated into a physical assault wherein you threw an empty water bottle at Mr. Sanchez, striking him in the legs, grabbing him and choking him. During this incident, Mr. Sanchez sustained an abrasion to the front of his neck. Subsequently, you were arrested and charged with ADW.

Specification No. 2: In that on February 20, 2016, you were captured audibly in the background of a 9-1-1 call to the Office of Unified Communications (OUC), yelling and cursing.

SUMMARY OF THE TRIAL BOARD TRANSCRIPT

On February 14, 2018, Agency held a Trial Board Disciplinary hearing. The following represents a summary of the testimony given during the hearing as provided in the transcript[2] (hereafter denoted as "Tr.") which was generated following the conclusion of Employee's proceeding. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their positions.

1. Employee was employed as a police officer in the Sixth District with MPD since February 17, 2009. Employee impressed several of his colleagues and superiors with his dedication to the job, his leadership potential, as well as his skills as an investigator. He took and passed the detective's exam.

2. On February 20, 2016, Employee was heading to work at the Sixth District substation. February 20, 2016 was supposed to be Employee's last day on patrol before he became a detective.

3. The traffic was extremely heavy that day. In order to enter Interstate 295 ("I-295"), Employee got behind a line of cars to merge onto I-295 Southbound from the Kenilworth access road, one at a time.

4. When it was Employee's turn to merge, the car immediately behind him driven by a civilian, Mr. Wilson Sanchez ("Sanchez") on I-295 suddenly sped up in order to get ahead of Employee. This action almost caused the two cars to collide. Employee managed to avoid a collision by quickly jerking his car back into the merging lane.

5. After Sanchez did not allow Employee to enter the travel lane from the feeder lane, the two drivers pulled up next to each other and exchanged hostile words through their open windows.

6. At this point, while the two cars were stopped in traffic, abreast to each other, Employee testified that the other driver, Sanchez, began yelling at him. Employee yelled back while waving with his left hand to signal to Sanchez that he should move forward ("I actually went to wave at him, I just told him, just go ahead, just go on.")

7. While their vehicles were next to each other, Sanchez asserted that Employee threw an empty water bottle through his driver's side window at him, striking him in the leg.

8. Employee said that while he was waving his left hand, the water bottle slipped out of his hand and landed in Sanchez's car.

9. Sanchez responded by picking up the water bottle and throwing the empty water bottle back in Employee's car.

[2] The transcript pages are provided as approximations as the copy provided to the undersigned had no page numbers.

10. While Employee continued to yell, Sanchez pulled his vehicle in front of Employee's vehicle and suddenly slammed on the brakes in their lane of traffic.

11. Employee was able to stop in time, but he then observed Sanchez get out of his car and come in Employee's direction, while simultaneously popping open the trunk of his car.

12. Both Sanchez and Employee exited their vehicles. Sanchez walked toward Employee. Fearing for his safety, Employee exited his car and pointed his service pistol at Sanchez. Employee announced, "I'm the police, do not go into your trunk."[3]

13. Sanchez raised both hands, stretched his arms out, and replied, "Shoot me, go head and shoot me. I don't give a fuck about you being the police."

14. Employee then holstered his gun and persuaded Sanchez to get back in his car. Employee and Sanchez then returned to their cars and drove forward on I-295.

15. As soon as he returned to his car, Employee picked up his police radio, called the dispatcher, and requested assistance with stopping an aggressive driver. When asked for his location, Employee advised that he was traveling southbound on I-295 in his personal vehicle near the *Riverside* Exit (*sic*, River Terrace Exit).

16. Several officers who heard the radio transmission thought that Employee sounded like he was in distress. Lieutenant Jimmie Thompson, who was then a sergeant, even stopped working on roll-call and went to assist Employee.

17. Employee did not inform the dispatcher that Sanchez might have been armed.

18. While driving away, Sanchez observed Employee on the radio and realized Employee was reporting him to the police, so Sanchez stopped and exited his vehicle to call 911.[4]

19. Sanchez decided to call 911 and reported the incident because he did not want the police to think that he was the aggressor.

20. Then, as Employee was attempting to pass, Sanchez cut in front of him and slammed on his brakes, thereby forcing Employee to stop once more.

21. Employee said Sanchez immediately got out of his car and ran towards Employee.

22. Employee, who had continued to follow Sanchez, also stopped, exited his vehicle and began grabbing and choking Sanchez as Sanchez called 911.[5]

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[3] Agency Exhibit 1 at Attachment 7a.
[4] *Id*.

[5] Agency Exhibit 1 at Attachment 7a, Transcript at 107, 114.

23. Employee informed Sanchez that the police were coming, but Sanchez then began pushing Employee. After ignoring Employee's repeated requests to stop pushing him, the two men struggled with each other as Employee tried to prevent Sanchez from leaving.

24. Sanchez suffered an abrasion and a cut to the right side of his neck while being physically assaulted by Employee.[6] Employee did not sustain any injures.

25. At some point during their struggle, the driver of a passing car, Brenda Garrett, stopped to find out what was going on. Ms. Brenda Garrett, who was driving with Ms. Venice Golding, witnessed the altercation and stopped her vehicle to intervene.

26. Ms. Garrett asked whether the police had been called, to which Employee responded, "I am the fucking police."

27. Keith Rushing was also travelling on 1-295 Southbound when he witnessed Employee moving aggressively and grabbing Sanchez.[7]

28. MPD Officers Jason Boockholdt and Robert Van Dyke responded to the scene and separated Sanchez and Employee.[8]

29. Employee directed Officer Boockholdt to "lock the motherfucker up" for an assault on a police officer, although he did not provide specifics. Sanchez was placed in handcuffs.[9]

30. After additional MPD officials arrived on the scene, Sanchez was released from handcuffs without being arrested.

31. That same day, February 20, 2016, then Sergeant Thompson revoked Employee of his police powers at the scene of the incident.[10]

32. While still on the scene of the incident, the Agency's Internal Affairs Division ("IAD") was notified of the incident and on February 20, 2016, an Incident Summary Number ("IS") was obtained, and a Preliminary Report was prepared.[11]

33. On February 20, 2016, a Cobalt Offense report for Simple Assault was prepared.[12]

34. On February 29, 2016, the case was assigned to an IAD Agent Kimberly Metivier for investigation.[13]

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[6] Agency Exhibit 1 at Attachment 22; Agency Exhibit 2.
[7] Agency Exhibit 1 at Attachment 20.
[8] Agency Exhibit 1 at 2.
[9] Agency Exhibit 1 at 2; Transcript at 141-42.
[10] *Final Investigative Report* at p. 3. Agency Exhibit 1 at 2-3 and Attachment 1.
[11] Agency Exhibit 1 at 3, Attachment, 2 and Attachment 2a.
[12] Agency Exhibit 1 at 3 and Attachment 3.
[13] Agency Exhibit 1 at 3. *Final Investigative Report (AR-TAB 1)* at p. 3.

35. On March 2, 2016, the United States Attorney's Office ("USAO") was notified of Employee's alleged criminal misconduct.[14]

36. On April 20, 2016, an Affidavit in Support of an Arrest Warrant was presented to and approved by both the United States Attorney's Office ("USAO") and the Superior Court of the District of Columbia as confirmed by their signatures, Assistant United States Attorney ("AUSA") Kevin Flynn and D.C. Superior Court Judge Joan Zeldon.[15]

37. That same day, April 20, 2016, Employee was arrested pursuant to an arrest warrant for Assault with a Dangerous Weapon ("ADW") (Gun), and was held overnight in jail.[16]

38. On April 21, 2016, Employee's case was papered by the USAO and Employee was formally arraigned in D.C. Superior Court.[17]

39. On May 20, 2017, Employee and Sanchez agreed to mediation in lieu of proceeding to trial.[18]

40. On May 24, 2017, Employee and Sanchez completed mediation. Sanchez agreed not to pursue criminal charges against Employee.[19]

41. On June 23, 2017, Superior Court of the District of Columbia Judge Patricia A. Broderick dismissed via *Nolle Prosequi* the charge against Employee pursuant to the agreement reached by the parties at mediation.[20]

42. On November 1, 2017, Agency issued to Employee a Notice of Proposed Adverse Action and proposed to terminate him based on three (3) charges stemming from his February 20, 2016 misconduct.[21]

43. On February 14, 2018, a full evidentiary hearing was held before an Adverse Action Panel ("Panel"). Employee was present and represented by counsel.

44. The Panel found Employee guilty of all charges and recommended termination.[22]

45. In its Findings of Fact, the Panel found that Employee, without just cause, intentionally threw a water bottle, physically choked, and threatened Sanchez with a gun during a traffic dispute.

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[14] Agency Exhibit 1 at 3 and Attachment 4.
[15] *Final Investigative Report (AR-TAB 1)* at pp. 3, 35; *Complaint, Warrant and Affidavit in Support of Arrest – Attachment 5 to Final Investigative Report (Agency Exhibit 1)* at pp. 066-071, 074.
[16] AR Tab 3, Attachment 5, and Attachment 5a; *Final Investigative Report (AR-TAB 1)* at pp. 3, 35, 37; *Complaint, Warrant and Affidavit in Support of Arrest – Attachment 5 to Final Investigative Report (Agency Exhibit 1)* at pp. 073-088.
[17] *Final Investigative Report (AR-TAB 1)* at p. 35.
[18] Agency Exhibit 1 at 3.
[19] Agency Exhibit 1 at 3 and Attachment 6.
[20] Agency Exhibit 1 at attachment 6a. *Nolle Prosequi* is defined by the Superior Court of the District of Columbia as an action indicating that the Government has decided that it will no longer pursue prosecution in the case.
[21] AR Tab 2.
[22] AR Tab 3.

The Panel also found that Employee yelled and cursed during his 911 call to the Office of Unified Communications ("OUC"). Lastly, the Panel found Employee guilty of conduct unbecoming an officer.

46. The Panel weighed all the relevant mitigating and aggravating factors to come up with its proposal to terminate Employee's employment.

47. The Panel did not address Employee's 90-day rule objection.

48. On March 21, 2018, Agency issued to Employee a Final Notice of Adverse Action which adopted the Panel's findings and recommendations. Employee's termination was effective on May 11, 2018.[23]

49. On April 5, 2018, Employee appealed the Panel's findings to the Chief of Police.[24]

50. On April 25, 2018, the Chief of Police sustained the proposed removal.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Employee is a member of the Fraternal Order of Police (the "Union"), and is covered by a provision of the collective bargaining agreement that specifically restricts the scope of this Office's review in adverse actions to the record previously established in the Trial Board's administrative hearing. Therefore, based on the holding in *District of Columbia Metropolitan Police Department v. Pinkard*,[25] my role as the deciding Administrative Judge is limited to reviewing the record previously established, and determining whether the Trial Board's decision was supported by substantial evidence; whether there was harmful procedural error; or whether it was in accordance with applicable law or regulation.[26]

In *Elton Pinkard v. D.C. Metropolitan Police Department*[27], the D.C. Court of Appeals limited the scope of OEA's review in certain appeals. The Court of Appeals in *Pinkard* overturned a decision of the D.C. Superior Court holding that, *inter alia*, this Office had the authority to conduct *de novo* evidentiary hearings in all matters before it. In its decision, the Court held in pertinent part that:

> 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), re-codified as D.C. Code §§ 1-606.02 (a)(2), 1-606.03 (a), (c), 1-606.04 (2001); *see also* 6 DCMR § 625 (1999).

[23] AR Tab 4.
[24] AR Tab 5.
[25] 801 A.2d 86 (D.C. 2002).
[26] *See Pinkard*, 801 A.2d at 91.
[27] 801 A.2d 86 (D.C. 2002).

> 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 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 [trial board] hearing" -- controls in Pinkard's case.
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> 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 trial board in the MPD's favor -- is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. The OEA, as a reviewing authority, 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 trial board.[28]

Thus, pursuant to the holding in *Pinkard*, an AJ of this Office may not conduct a *de novo* hearing in an appeal before him/her, but must rather base his/her decision solely on the record below, when all of the following conditions are met:

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
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> 2. The employee has been subjected to an adverse action;
>
> 3. The employee is a member of a bargaining unit covered by a collective bargaining agreement;

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

> 4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard, i.e.*: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, Trial Board] has been held, any further appeal shall be based solely on the record established in the Departmental hearing"; and
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> 5. At the agency level, Employee appeared before a Trial Board that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.

Based on the documents of records and the position of the parties as stated during the Status Conference held in this matter, I find that all of these criteria are met in the instant appeal. Therefore my review is limited to the issues as previously mentioned. In addition, according to *Pinkard*, I must generally defer to the Trial Board's determinations of credibility when making my decision.

1. Whether the Trial Board's decision was supported by substantial evidence.

In reviewing Agency's decision to terminate Employee, this Office will evaluate the Trial Board's findings under a "substantial evidence" test.[29] Substantial evidence defined as "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[30] "If the administrative findings are supported by substantial evidence, we must accept them even if there is substantial evidence in the record to support contrary findings."[31] Accordingly, Agency must present substantial evidence before this Office to support its conclusions at Employee's hearing before the Trial Board.

Agency contends that there is substantial evidence in the record to support the Trial Board's findings that Employee committed the misconduct for which he was charged. Employee argues the Panel's findings of fact were not supported by substantial evidence, pointing to the fact the criminal case against him was dismissed without a conviction or a guilty plea. Employee also asserts that the mere fact that he was arrested, and charged does not prove he committed a crime. What Employee fails to note is that he was charged with having been "involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction." Thus, the lack of a criminal conviction is irrelevant.

Employee's contentions about his actions regarding the hand slipping of a water bottle, the justified drawing of his gun to what he perceived was a threat, and his justified struggling with Sanchez after Sanchez ran up to him, are merely disagreements with the Panel's fact findings.

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[29] *Staton v. Metropolitan Police Department*, OEA Matter No. 1601-0152-09 (December 17, 2010).
[30] *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)).
[31] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).

Essentially, Employee complains that the Trial Board did not find his testimony to be credible. As the trier of fact, it is the Trial Board's prerogative to determine credibility. Simply because Employee disagrees with the Board's credibility findings does not mean he was denied a fair trial. My review of the transcript, exhibits, and audio recordings in the record support the Trial Board's findings and conclusions. Accordingly, the Trial Board's findings are supported by witness testimonies, including Employee's admissions, and audio recordings of Employee's misconduct.

The Court in *District of Columbia Metropolitan Police Department v. Elton L. Pinkard*[32] held that OEA may not substitute its judgment for that of an agency, and it must generally defer to the agency's credibility determinations made during its trial board hearings. Similarly, the Court in *Metropolitan Police Department v. Ronald Baker* ruled that great deference to any witness credibility determinations are given to the administrative fact finder.[33] In this case, Agency would be the administrative fact finder.[34] The Court in *Baker*, as well as the Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.[35]

Based on the testimonies and the audio recordings, there is substantial evidence in the record to support the Board's findings. As previously mentioned, *Pinkard* advises the Undersigned, as the "reviewing authority," to "generally defer to the agency's credibility determinations."[36] Based on my own review of the witnesses' testimony, I can find no reason to disturb the Board's credibility determinations. Accordingly, there is no reason to overturn them.

Employee takes issue with the Trial Board's allowing the telephone testimony of a witness, stating that it violated his right to due process. He also alleges that the Panel should not have elicited biased testimony from Agent Metvier. These arguments fail, as his counsel was afforded the opportunity to cross-examine all the witnesses who testified.

Next, Employee takes issue with Agency's choice of termination as the appropriate penalty and asserts that the way it weighed the Douglas factors was arbitrary and capricious. In *Douglas v. Veterans Administration*[37], the Merit Systems Protection Board, this Office's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Although not an exhaustive list, the factors are as follows:

1. The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;

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[32] 801 A.2d 91-92 (D.C. 2002).
[33] 564 A.2d 1155 (D.C. 1989).
[34] *Id*. at 1717.
[35] 527 A.2d 313 (D.C. 1987).
[36] *See Pinkard*, 801 A.2d 86 (D.C. 2002).
[37] 5 M.S.P.R. 280, 305-306 (1981).

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.

In the instant matter, the following are the Trial Board's determination listed along with Employee's objections:

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

The Panel found this to be an aggravating factor. Employee argues that he was acting in self-defense. Again, I find that Employee is repeating his disagreement with the Panel's finding his testimony incredible.

2. The employee's job level and type of employment including supervisory or fiduciary role, contacts with the public, and prominence of the position.

The Panel found this to be an aggravating factor because Employee is a law enforcement officer and sworn to uphold the law. Employee states that simply because he is a police officer does not mean that he must simply wait and see if Sanchez draws a weapon.

3. The employee's past discipline record.

The Panel rightfully found this to be an aggravating factor because of Employee's record. Employee states that the Panel should have made a more thoughtful discussion. He does not elaborate.

4. The employees' past work record, including length of service, performance on the job, ability to get along with fellow officers, and dependability.

The Panel found this to be a neutral factor. Employee complains that the Panel completely discounted his work record and should have found this to be a mitigating factor.

5. The effect of the offense upon the employee's ability to perform at a satisfactory level and its efforts on supervisor confidence in the employee's ability to performed assigned duties.

The Panel found this to be an aggravating factor. Employee complains that the Panel completely discounted his many character witnesses. He points out that his fellow officers found him to be an excellent worker and that the Panel should have found this to be a mitigating factor.

6. Consistency of the penalty with those imposed upon other employees for the same or similar offense.

The Panel found this to be a neutral factor. Employee complains about the lack of analysis.

7. Consistency of the penalty with any applicable agency tables of penalties.

The Panel found its penalty is within the table. Employee complains about the lack of analysis.

8. The notoriety of the offense or its impact upon the reputation of the agency.

The Panel found this to be an aggravating factor due to the negative media coverage and notoriety. Employee complains about the Panel's speculation.

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.

The Panel determined that this is an aggravating factor. Employee complains that the Panel failed to find that he was acting in self-defense.

10. Potential for employee's rehabilitation

The Panel determined that this is an aggravating factor. Employee complains that the Panel failed to find that he was acting in self-defense and that he cannot be rehabilitated and that the only effective action is termination ignores the opinion of his fellow officers.

> 11. Mitigating circumstances surrounding the offense such as unusual job tension, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter.

The Panel held this to be a neutral factor. Employee asserts that it should have found mitigating circumstances.

> 12. The adequacy and effectiveness of alternative sanctions to deter conduct in the future by the employee and others.

Employee complains that the Panel apparently never considered the effectiveness of any alternative sanctions such as a suspension.

The legal standard for the appropriateness of a penalty was established by the Merit Systems Protection Board in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981). In *Douglas,* the MSPB set forth a list of factors to be considered when assessing the appropriateness of a penalty. *Douglas*, at 331-332. The reasoning and factors established in *Douglas* have been adopted by the District of Columbia Court of Appeals in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). The Court in *Stokes* stated:

> Review of an Agency imposed penalty is to assure that the Agency has considered the relevant factors and has acted reasonably. Only if the Agency failed to weigh the relevant factors or the Agency's judgment clearly exceeded the limits of reasonableness, is it appropriate...to specify how the Agency's penalty should be amended. *Stokes*, at 1010.

The court in *Stokes* goes on to state that the reviewing tribunal, may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate. *Stokes*, at 1011. In *Gregory Miller v. Department of Public Works*, OEA Matter No. 1601-0113-98 (2002), this Office held "Selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office."

Here, Agency balanced the Douglas Factors and concluded that termination was an appropriate penalty. Employee has not argued that removal is not within the Department's table of penalties for the charged misconduct. Employee's disagreement with Agency's conclusions regarding the penalty centered on his objections to their fact-finding and the specific way they did the Douglas analysis. This does not provide a basis to reverse the decision to remove Employee, a police officer who was found by the Panel to have used his police weapon against a civilian.

Accordingly, Agency's decision to terminate Employee was within management's discretion and will be affirmed.

2. Whether there was harmful procedural error, or whether Agency's action was done in accordance with applicable laws or regulations.

Lastly, Employee argues that Agency failed to propose its adverse action within 90-days as mandated by D.C. Official Code § 5-1031 and therefore his termination must be reversed. Agency states that it complied with the 90-day rule. It asserts that the 90-day period for commencing the adverse action was tolled pending the completion of Agency's or the Office of the United States Attorney for the District of Columbia ("OUSA")'s criminal investigation.[38] Agency asserts that the 90-day clock was immediately tolled because it began a criminal investigation of Employee on February 20, 2016, starting by revoking Employee's police powers. It referred its Preliminary Report of Employee's Assault with a Dangerous Weapon to the OUSA seven business days later on March 2, 2016. Agency states that the 90-day period for commencing an adverse action began on June 23, 2017, the date when the D.C. Superior Court dismissed the ADW charge against Employee. Agency served Employee with the Proposed Notice of Adverse Action ("PNAA") on November 11, 2017, which is the 90th business day following the end of the tolling. Accordingly, Agency contends that it did not violate the 90-Day rule and Employee's arguments must be rejected.

Employee is skeptical of Agency's claim that Employee was the subject of a criminal investigation by the USAO up until the case was dismissed on June 23, 2017. He demanded proof and asserted, "As the party attempting to toll a statute of limitations, MPD bears the burden of proving circumstances that would toll the statute, i.e., that the USAO continued to conduct an investigation in order to gather evidence or for some other purpose after filing charges."[39] Employee states that MPD failed to present any evidence to show that the USAO was conducting a criminal investigation beyond April 20, 2016, the day on which the arrest warrant was issued. As a result, Employee was formally arrested and detained overnight in jail. Employee was served with the PNAA on November 1, 2017. This was 1 year, 6 months and 10 days (or 385 business days) after April 20, 2016, the day on which the arrest warrant was issued, and also the day Employee was arrested and jailed.[40] As such, Employee argues that Agency's commencement of the adverse action against Employee was untimely. Therefore, as the PNAA was late by 295 business days, *D.C. Code § 5-1031* (the 90-day rule) requires that the adverse action against Employee be dismissed. Employee asserts that the failure of MPD to commence adverse action within 90 days of his alleged misconduct renders its proposed adverse action void and in violation of the law.

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[38] Agency uses the acronym USAO ("United States Attorney's Office") instead of OUSA. As this is the same office, we shall use them interchangeably in this matter.

[39] *MPD v. FOP/MPD Labor Committee (Fowler),* 64 DCR 10115, Slip. Op. 1635 (*Employee Exhibit 11*) at pp. 13-14, PERB Case No. 17-A-06 (2017); *see also, In Matter of: Duane Fowler, DRD #359-09/FMCS Case No. 16-53471-A (Employee Exhibit 10)* at p. 17 (MPD is required to strictly adhere to the 90 day requirement); *see also, In Matter of: Dioni Fernandez, DRD #165-12/FMCS Case No. 170802-54557 (Employee Exhibit 20)* at p. 8 (MPD has the burden of proving that criminal investigation continued until the trial was over).

[40] *Findings of Fact and Conclusions of Law (AR-TAB 3)* at p. 30; H*rg. Transcript (AR-TAB 3)* at p. 80, 254, 256; *Final Investigative Report (AR-TAB 1)* at pp. 3, 35; *Complaint, Warrant and Affidavit in Support of Arrest and Warnings as to Rights – Attachment 5 to Final Investigative Report (Agency Exhibit 1)* at pp. 066-071, 074, 088.

D.C. Official Code § 5-1031 (2015) states:

> (a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department knew or should have known of the act or occurrence allegedly constituting cause.
>
> (a-1)(1) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Metropolitan Police Department had notice of the act or occurrence allegedly constituting cause.
>
> (2) For the purposes of paragraph (1) of this subsection, the Metropolitan Police Department has notice of the act or occurrence allegedly constituting cause on the date that the Metropolitan Police Department generates an internal investigation system tracking number for the act or occurrence.
>
> (b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department or any law enforcement agency with jurisdiction within the United States, the *Office of the United States Attorney for the District of Columbia*, or the Office of the Attorney General, or is the subject of an investigation by the Office of the Inspector General, the Office of the District of Columbia Auditor, or the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) or (a-1) of this section shall be tolled until the conclusion of the investigation. (*Emphasis provided*.)

The following timeline is based on the parties' submissions and is uncontroverted:

February 20, 2016	Employee had a road rage incident with Wilson Sanchez. Agency revokes Emloyee's police powers, generates an internal investigation system called an Incident Summary tracking number, and prepares a Cobalt Offense report with the specified criminal offense of Simple Assault.
February 29, 2016	Agency assigned the case to an IAD Agent for investigation.
March 2, 2016	USAO was notified of Employee's alleged criminal misconduct.
April 20, 2016	Employee was arrested for Assault with a Deadly Weapon (Gun).
April 21, 2016	Employee was formally arraigned at the D.C. Superior Court.

May 10, 2017	Non-jury trial date for United States v. Minor, Case # 2016 CF2 005958. Parties sought referral to mediation.
May 24, 2017	Employee and Sanchez completed mediation in lieu of proceeding to trial.
May 24, 2017	Center for Dispute Settlement informs Prosecutor Crane of successful mediation.
June 23, 2017	Government files to *nolle prosequi*[41] Employee's criminal case.
November 1, 2017	Agency issued to Employee a Notice of Proposed Adverse Action
February 14, 2018	Agency's Adverse Action Panel held a hearing and found Employee guilty of all charges and recommended termination.
March 21, 2018	Agency sent its Final Notice of Adverse Action to Employee.

This case turns on whether a criminal investigation into Employee's actions on February 20, 2016, continued after his April 21, 2016, arraignment and May 10, 2017, trial date. The trial did not occur on May 10, 2017, as both parties sought mediation. In her affidavit, Prosecutor Crane indicated that she continued preparing for trial until May 10, 2017, and would have resumed trial preparation if the mediation had not been successful.

If the criminal investigation was still ongoing until June 23, 2017, the date that the D.C. Superior Court *nolle prosequi* Employee's criminal case, then Agency did not violate the 90-day rule, as Agency issued to Employee a Notice of Proposed Adverse Action on November 1, 2017. November 1, 2017, is exactly 90 business days after June 23, 2017. However, if the criminal investigation ended either on the day of Employee's April 21, 2016, arraignment, or on the May 10, 2017, trial date, then Agency violated the 90-day rule as November 1, 2017, is beyond 90 business days later.

To support its argument, Agency submitted IAD Director Brian Bray's affidavit attesting that Agency's criminal investigation commenced on February 20, 2016. He does not comment on when the criminal investigation ended. There is no evidence or affidavit submitted regarding when USAO's criminal investigation terminated. Employee doubts that USAO or Agency continued their criminal investigation after Employee's arrest and arraignment. However, he does not offer any evidence to support his suspicion.

As further evidence for the continuing criminal investigation, Agency submitted the affidavit of Laura Crane, an Assistant United States Attorney at the United States Attorney's Office.[42] Crane attests that she continued to identify and interview witnesses for trial right up to the trial date of May 10, 2017. She also advised that she learned that the case had been resolved

[41] Latin for "we shall no longer prosecute," which is a declaration made to the judge by a prosecutor in a criminal case (or by a plaintiff in a civil lawsuit) either before or during trial, meaning the case against the defendant is being dropped. Law.com
[42] Sworn affidavit of Laura Crane (July 3, 2019).

through mediation on May 25, 2017, and that she then filed a Notice of *Nolle Prosequi* on Employee's assault charges on June 23, 2017.

Employee points out that Crane's affidavit provides no facts to support a criminal investigation beyond the trial date of May 10, 2017, and that preparing for trial, as Crane's affidavit avers, does not in and of itself constitute a criminal investigation. Employee notes too that even if we take Agency's assertion that Crane's trial preparation counts as a continuation of a criminal investigation, Crane herself avers that she stopped trial preparation after May 10, 2017, when the case was referred to mediation. In her affidavit, Crane states that she would have resumed preparing for trial if the mediation had not been successful. Employee argues that it can be reasonably inferred that from May 11, 2017, to May 22, 2017, Crane had stopped any work on the case. She then resumed work on this case on June 23, 2017, when she informed the Court that the prosecution wanted the criminal charges against Employee dismissed. Employee asserts that regardless of the exact number of days Agency claims that a criminal investigation was ongoing, the facts indicate that Agency violated the 90-day rule of D.C. Official Code § 5-1031. Although Employee's arguments seem compelling, the courts have interpreted this issue differently.

As D.C. Official Code § 5-1031 makes clear, the 90-day period is "tolled" or paused during the period that a case is under criminal investigation. Once the investigation is concluded or stopped, the 90-day clock resumes its ticking; it does not reset back to zero. In *District of Columbia v. District of Columbia Office of Emp. Appeals,* 883 A.2d 124, 128 (D.C. 2005), the District of Columbia Court of Appeals ("DCCA"), interpreting identical language in the predecessor to the 90-day rule, D.C. Official Code § 1-616.01 (Repealed), found that:

> [t]he natural meaning of the statutory language, however, is that the "conclusion of a criminal investigation" must involve *action taken by an entity with prosecutorial authority—that* is, the authority to review evidence, and to either charge an individual with commission of a criminal offense or decide that charges should not be filed. (emphasis added).

The same Court further held that, "in fact, investigation concluded at the earliest when arrest warrant was subsequently issue…" *Ibid*.

"In many circumstances, even an arrest would not mark the conclusion of a criminal investigation." *Id* at 128; *see also McCain v. Office of Employee Appeals,* Case No. 2015 CA 004589 P(MPA) (D.C. Super. Ct. 2017) (finding that the 90-day rule started on the day of Petitioner's conviction, when the prosecutorial body's exercise of its discretionary authority concluded). In imposing the specific 90-day deadline at issue here, the D.C. Council was motivated by the exorbitant amount of time that the adverse action process' was then taking, such that employees had to wait months or even years to see the conclusion of an investigation against them. *See D.C. Fire & Med Servs. Dep't v. D.C. Office of Employee Appeals,* 986 A.2d 419 (D.C. 2010), *citing* REPORT ON BILL 15-194 at 13, 14.

Similarly, the Office of Employee Appeals has opined that MPD may rely upon bright lines, like the declination of prosecution, to determine the appropriate tolling period. *Timothy Ebert v. Metro. Police Dep 't,* OEA Matter No. 1601-0223-98, *Opinion and Order on Petition for Review*

(Dec. 31, 2004 *("Ebert")* (interpreting D.C. Official Code § 1616.01 (Repealed)) ("The date of the declination letter is an objective 'bright line' signaling the end of the criminal investigation. For us to adopt a different rule would require a subjective analysis of the investigative process, on a case-by-case basis. In our view, this is not an appropriate function for a civil administrative agency such as OEA."). Further, a declination is not the only bright line upon which MPD may rely; a guilty plea, for example, can also end a criminal investigation for purposes of the 90-day rule. *McCain v. District of Columbia Office of Emp. Appeals,* Case No. 2015 CA 004589 P(MPA) (D.C. Super. Ct. Feb. 8, 2017). The relevant inquiry as to when an investigation ends is when the prosecuting authority no longer has the discretion to bring charges. *Id.* at 8-9.

In *District of Columbia Metropolitan Police Dept. v. District of Columbia Office of Employee Appeals,* Case No. 2018 CA 003991 P(MPA) (D.C. Super. Ct. Mar. 19, 2019), the Court held that a criminal investigation ended not on the date when Intervenor Sheila T. Bullock pled guilty to the simple assault charge, but on the date that the Court dismissed the matter in accordance with a Deferred Sentencing Agreement ("DSA"). The Court reasoned that that date was when the prosecutorial body's exercise of its discretionary authority concluded, and the case was dismissed pursuant to the DSA between Intervenor and the United States Attorney's Office. Employee interprets the duration of a criminal investigation too narrowly when he insists that it must be actively ongoing to toll the 90-day period dictated by D.C. Code **§** 5-1031. In the instant matter, it is clear that the prosecuting authority in this matter was the OUSA. There is no dispute that June 23, 2017, was the date OUSA formally asked the Superior Court to *nolle prosequi* Employee's criminal case. That was when the prosecutorial body's exercise of its discretionary authority concluded and thus, when the 90-day clock began.

Agency commenced its adverse action against Employee exactly 90 business days later on November 1, 2017, when it issued to Employee a Notice of Proposed Adverse Action. I therefore conclude that Agency complied with D.C. Official Code § 5-1031 (a) (2001). Based on the foregoing, I conclude that the Agency's adverse action of removing the Employee from service must be UPHELD.

ORDER

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

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge