THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter Nos.: 1601-0083-19
NIKEITH GOINS and	1601-0084-19
SHAWNEE NOWLINS-GOINS[1],	
Employees	
	Date of Issuance: December 3, 2020
v.	
	ARIEN P. CANNON, ESQ.
METROPOLITAN POLICE DEPARTMENT,	Administrative Judge
Agency	

Marc L. Wilhite, Esq., Employees' Representative
Rahsaan Dickerson, Esq., Agency Representative

INITIAL DECISION[2]

INTRODUCTION AND PROCEDURAL HISTORY

Nikeith Goins and Shawnee Nowlins-Goins (collectively "Employees") filed Petitions for Appeals with the Office of Employee Appeals ("OEA") challenging the Metropolitan Police Department's ("Agency" or "MPD") decision to remove them from their positions as Police Officers. Nikeith Goins filed his Petition for Appeal on August 26, 2019. Shawnee Nowlins-Goins filed her Petition for Appeal on August 28, 2019. Employees' removal were based on two separate charges and associated specifications. Agency filed its Answer in both appeals on September 17, 2019. I was assigned these matters on January 8, 2020.

A Prehearing Conference was held via teleconference on March 17, 2020, where all parties were present. A Post Prehearing Conference Order was issued the same day which required the parties to submit briefs addressing the issues under a *Pinkard* analysis.[3] Agency's brief was due

[1] The Petitions for Appeals in these matters have been consolidated. The issues addressed in both matters are nearly identical with the exception of the specifications for each employee.
[2] This decision was issued during the District of Columbia's COVID-19 State of Emergency.
[3] *Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002). Based on the collective bargaining agreement

on or before April 30, 2020; Employee's brief was due on or before June 15, 2020; Agency's sur-reply was due on or before June 29, 2020. Agency submitted its brief on April 30, 2020. On June 11, 2020, Employees filed a request for a 30-day extension of time to file their respective briefs. On July 14, 2020, Employees filed another request for an extension of time. Employees' new deadline was July 29, 2020 and Agency's sur-reply was extended to August 12, 2020. Employees filed their briefs on July 29, 2020. On August 11, 2020, Agency filed a request for an extension of time to file its sur-reply brief. Agency filed another request for an extension of time on September 1, 2020. This extension was granted and Agency had until September 16, 2020 to file its sur-reply. Agency's sur-reply briefs were filed on September 16, 2020. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency's Adverse Action Panel's decision was supported by substantial evidence;
2. Whether there was harmful procedural error; and
3. Whether Agency's action was done in accordance with applicable laws or regulations.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

In two separate Notices of Proposed Adverse Action (Notice) served on Employees on October 1, 2018, Agency proposed termination for Employees' alleged commission of misconduct that occurred over the course of several years, from 2000 through 2017.[4] Employees' termination actions were based on the following causes: (1) Conviction of a crime whether or not a court record reflects a conviction; and (2) Prejudicial Conduct. The Charges and associated Specifications are as follows:

Charge No. 1:[5] Violation of General Order Series 120.21, 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 conviction. Members who are accused of criminal or quasi-criminal offenses shall promptly report, or have reported their involvement to their commanding officers."

between the two parties, Employee's appeal to this Office is limited to the issues listed below in the "Issues" section.
[4] Agency Answer, Tab 2 (September 17, 2019).
[5] Charge 1, Specification 1 is identical for both Employees.

Specification No. 1: In that, you and [] committed Fraud in the First Degree by knowingly accepting educational services for your children that they were not legally entitled to during the 2010-2017, school years. This resulted in a financial loss to the D.C. Government of $108,295.00. Your misconduct is further described in DC Code 22-3221(a), which states: "Fraud in the first degree – A person commits the offense of fraud in the first degree if that person engages in a scheme or systematic course of conduct with intent to defraud or to obtain property of another by means of a false or fraudulent pretense, representation, or promise and thereby obtains property of another or causes to lose property."

Specification No. 2:[6] In that, on April 18, 2014, April 22, 2015, and April 18, 2016, you knowingly falsified and signed student enrollment verification forms affirming that your children were residents of the District of Columbia. You electronically signed these forms knowing that the information was false. Your misconduct is further described in DC Code 22-2405(a), which states: "A person commits the offense of making false statements if that person willfully makes a false statement that is in fact material, in writing, directly or indirectly, to any instrumentality of the District of Columbia government, under circumstances in which the statement could reasonably be expected to be relied upon as true provided, that the writing indicates that the making of a false statement is punishable by criminal penalties or if that person makes an affinition by signing an entity filing or other document under Title 29 of the District of Columbia Official Code, knowing that the facts stated in the filing are not true in any material respect or if that person make an affinition by signing a declaration under § 1-1061.13, knowing that the facts stated in the filing are not true in any material respect"

Charge No. 2:[7] Violation of General Order 120.21, Attachment A, Part A-25, which states: "Prejudicial Conduct – Any conduct not specifically set forth in this order, that is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force."

Specification No. 1: In that, between the years 2010 and 2017, you conspired with [your spouse], Ms. Glendora Harris, and Ms. Deshawn Bell, to fraudulently register your children in the D.C. Preparatory Academy Public Charter School.

Employees pleaded "Not Guilty" to both charges and all associated specifications at the Adverse Action Panel Hearing, which was conducted by a panel of MPD's Disciplinary Review

[6] This specification only applies to Officer Nikeith Goins. Officer Shawnee Nowlins-Goins was not charged with this specification.
[7] Charge 2, Specification 1 are applicable to both employees.

Division on May 1, 2019, and May 7, 2019.[8] Officer Nikeith Goins was found "Guilty" on two out of three specifications under Charge 1, and under the only specification on Charge 2; Officer Shawnee Nowlins-Goins was found "Guilty" on one of two specifications under Charge 1, and under the only specification on Charge 2. Agency elected to terminate Employees effective at 4:00 p.m. on July 5, 2019.

Summary of Adverse Action Hearing Transcript

An evidentiary hearing held by Agency's Adverse Action Hearing Panel ("AAH") commenced on May 1, 2019, and reconvened for a second day on May 7, 2019.[9] Agency called multiple witnesses, and introduced twenty-five exhibits that consisted of, among other things, Agency's investigative report, various school enrollment documents that Employee either personally completed or assisted others with completing, and a settlement agreement through which Employee and his spouse, Officer Shawnee Nowlin-Goins, assumed joint and several responsibility for $108,295.00 amount of tuition owed to the District for the multiple years that Employee's children were enrolled at the D.C. Preparatory Academy.[10] Both Agency and Employees presented documentary and testimonial evidence during the hearing to support their positions. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the proceeding.

Resa Wynn appeared at the hearing and testified during Agency's presentation of its case-in-chief. Ms. Wynn is a lead investigator for the D.C. Office of the State Superintendent of Education (OSSE). OSSE is the District agency charged with investigating residency fraud cases for the city.[11] Ms. Wynn testified about how an individual obtains "other primary caretaker status" or becomes the legal guardian of a non-biological child or children. Ms. Wynn testified that OSSE received an anonymous tip in March of 2017 that notified the agency of Employees' children's enrollment at the D.C. Preparatory Academy ("D.C. Prep"), and that Employees' children were not residents of the District.[12] Ms. Wynn testified that after OSSE's investigation of Employees children's attendance at D.C. Prep was underway, a mediation session was held between OSSE employees and Employees where the parties reached a settlement.

Ms. Wynn testified that while the parties were in the process of mediating, she was asked about a letter Officer Nikeith Goins provided that purported to give partial custody of Employees' children to non-parent Deshawn Bell due to Employees' work scheduling issues.[13] When Ms. Wynn was asked by another OSSE employee if the letter would suffice to give Ms. Bell either "other primary caregiver status" or legal guardian status for Employees' children, Ms. Wynn explained why the document was insufficient to provide Ms. Bell with either "other primary caregiver" or legal guardian status over the

[8] *See* Tr. Vol I, pp.6-7
[9] Throughout this decision, Vol. 1 denotes the transcript for Day 1 (May 1, 2019) and Vol. 2 denotes the transcript for Day 2 (May 7, 2019).
[10] See Agency Answer, Tab 3
[11] *See* Tr. Vol 2 at 11.
[12] Tr. Vol 2 at 13
[13] Tr. Vol. 2 at 17.

Goins children.[14] Ms. Wynn testified that the Goins parents' work-related scheduling issues and/or daycare issues was not a satisfactory basis for providing a non-parent with other primary caregiver status based on established criteria and applicable law[15].

Ms. Wynn testified about each year the Goins' children were enrolled at the D.C. Preparatory Academy, and why neither Ms. Glendora Harris, who was the grandmother of the Goins children and who initially registered the children at D.C. Preparatory Academy, nor Ms. Deshawn Bell, who was the cousin of the Goins children and who took over the enrollment process after Ms. Harris' death, were the legal guardian or the other primary caregiver for Employee's children for any of the years that the Goins children were enrolled at the D.C. Prep. Ms. Wynn pointed out that Ms. Glendora Harris' household composition forms, and Housing and Urban Development lease occupancy forms showed that Ms. Harris did not establish either other primary caregiver status or legal guardianship status for Employee's children during the years that Ms. Harris was held out as the other primary caretaker of Employee's children.[16] Regarding Ms. Glendora Harris' time as the purported other primary caregiver of the Goins' children, Ms. Wynn highlighted the fact that Ms. Harris received government aid that was based on the number of occupants in the aid recipient's residence. Ms. Wynn further pointed out in the documents that Ms. Harris had a two-bedroom apartment which she shared with two other individuals who were neither the Goins' children nor the parents of the Goins children.[17]

Ms. Wynn testified that OSSE also discovered that some of the school enrollment forms for the Goins children contained Employee's signature confirming that Employee was unable to provide care to his children, which, Ms. Wynn testified, is one basis for affording a non-parent caretaker other primary caretaker status. Ms. Wynn testified that Employees' claim that they were unable to provide care to his children was contradicted by additional records evincing Employees' completion of health forms for the children, the existence of doctor's notes stating that the children lived with their parents out-of-state, and forms listing Employees' Maryland address as the address where the children resided.[18] Ms. Wynn went on to testify that Employees demonstrated an ability to take care of their children, coupled with the lack of consistency in the various residency and enrollment forms for Employee's children, further established that the Goins children were not legitimately enrolled at the Preparatory academy because Ms. Harris was not legitimately the other primary caretaker of the Goins children.[19]

Based on the voluminous inconsistent enrollment documents completed during the time when Ms. Harris held herself out as the other primary caregiver of Employees' children, Ms. Wynn summed up OSSE's impression of Ms. Harris' other caregiver status by stating that although it might be convenient for Employees to designate Ms. Harris as the other primary caregiver of his children due to the scheduling demands of his position with MPD, Ms. Harris' role as other primary caretaker to Employees' children was invalid. It was deemed invalid because the children had two parents (both of whom were members of MPD) who could and *did* take care of the children, however difficult and challenging the parents' schedules were. Ms. Wynn stated that other primary caregiver status is not

[14] Tr. Vol. 2 at 20
[15] Tr. Vol 2 at 24.
[16] Tr. Vol. 2 at 40.
[17] Tr. Vol 2 at 41.
[18] Tr. Vol. 2 at 44.
[19] *Id.*

based on convenience, but instead based on a legitimate inability of the parents to take care of their children, which was not present in Employees' case.[20]

Ms. Wynn testified that Ms. Deshawn Bell, who was a cousin of Employees' family, also failed to meet the criteria necessary to establish other primary caretaker status for Employees' children for the same reasons that Ms. Harris failed to establish other primary caretaker status for Employees' children.[21] Ms. Wynn testified that just as there was no legal document giving Ms. Harris legal custody/guardianship of Employees' children, there was no legitimate basis provided to establish Ms. Bell as other primary caretaker of Employees' children. Ms. Wynn also stated that there was nothing establishing Employees' legitimate inability to act as the primary caretaker for his children.[22]

Ms. Wynn pointed out that Ms. Bell's sworn affidavit of other primary caregiver certified that she was the primary caregiver of Employees' children "because the parent, custodian, or guardian, *Glendora Harris* is deceased."[23] Ms. Wynn testified that Ms. Bell's sworn affidavit was problematic because Glendora Harris "wasn't the parent, custodian, or guardian. There's clear definition for that, which is your parent—natural parent, step-parent, or your custodian or guardian through a court. [Ms. Harris] wasn't any of those. The parents were Shawnee and Nikeith Goins who they should have been listed as the parent regardless of who took over."[24]

Ms. Wynn testified that the parties reached an agreement at mediation. However, she later learned that Officer Nikeith Goins filed for bankruptcy protection and listed OSSE and the agreed upon settlement amount that the parties reached as a dischargeable debt.[25] Ms. Wynn testified that when she learned of the bankruptcy filing, she notified Jane Drummey of the D.C. Office of the Attorney General (OAG) for further action.[26] Ms. Wynn testified that OAG filed a claim against Employee in D.C. Superior Court, and the parties reached a settlement.[27]

Both Employees testified on their own behalf at the AAH. Employees also called Deshawn Bell to testify on their behalf, along with some of their Agency colleagues who offered testimony about Employees' character. During questioning, Officer Nikeith Goins acknowledged that many of the enrollment documents that he filled out and/or signed after Ms. Harris' passing contained numerous discrepancies and errors. [28] For example, the documents listed Ms. Bell as the aunt of the children when

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[20] *See* Tr. Vol. 2 at 45. Ms. Bell testified during the AAH that Employee and his spouse told her that they needed her to care for their children due to the passing of Ms. Harris, and that she believed Ms. Harris previously cared for the Goins' children for the same reason she did, and that was due to the Goins' work schedule, because the "schedule [the Goins'] had wasn't conducive with them being able to care for [their children]." Agency Answer, Tab 3 at 29; Tr. Vol. 2 at 262.

[21] Tr. Vol. 2 at 71.

[22] *See* Tr. Vol. 2 at 45. Ms. Bell, who represented herself as the other primary caregiver to Employee's children after Ms. Harris's passing, testified that during the period when she held herself out as the other primary caretaker to Employee's children, she resided in a four bedroom apartment with six other people (including Employee's children) and she often worked twelve-hour shifts. HT day 2 at 242:1; AR Tab 3 at 24.

[23] Tr. Vol. 2 at 72.

[24] Tr. Vol. 2 at 72.

[25] Tr. Vol. 2 at 31.

[26] Tr. Vol. 2 at 33.

[27] Tr. Vol. 2 at 34; See Agency Answer, Tab 1, Attachments 5 and 14.

[28] See Agency Answer, Tab 3, Adverse Action Panel's Findings of Fact and Conclusions of Law, at 28.

she was a cousin of the family. The records also listed Officer Shawnee Nowlin-Goins as a D.C. resident, and the records contained contact numbers that neither Ms. Bell nor Officer Nikeith Goins could identify.[29] Officer Nikeith Goins also acknowledged that, despite his belief that Ms. Harris, and later Ms. Bell, were legitimately the other primary caretakers of his children, he continued to claim the children as dependents on his tax returns, and the children remained under Officer Shawnee Nowlins-Goins' health insurance during the entire period when they were enrolled at D.C. Prep.[30]

Officer Nikeith Goins also testified that he did not perform any research about the quality of D.C. Prep or the Academy's enrollment/residency requirements prior to his mother-in-law, Glendora Harris, putting his children in the Academy. Rather, he simply accepted whatever information Ms. Harris shared with him.[31] Officer Nikeith Goins testified that he did not appear at D.C. Prep when his first child was enrolled in the school, rather Ms. Harris appeared at the school, and it was his understanding that Ms. Harris explained the situation to school officials, including why the Goins' child would be attending the Preparatory Academy.[32] Employee stated that he was "under the assumption" that if the children were staying in D.C. for the major part of the week, they would be considered D.C. residents.[33] Officer Nikeith Goins further testified that he did not bother completing the forms when Ms. Harris was acting as his child or children's other primary caretaker because "Ms. Harris had went [to the Academy] and talked to them and they told her what she needed to do, so she just told me and she was just doing the forms. So, I just went off what she told me."[34] Officer Nikeith Goins also testified that during the period that he was having difficulty caring for his children due to work commitments, he was working a lot of overtime with MPD, as well as doing outside, part-time work.[35]

At the conclusion of the AAH, the Panel unanimously found Officer Nikeith Goins "guilty" of three of the four specifications he faced for the two associated Departmental charges. Officer Shawnee Nowlins-Goins was found "guilty" of two out of the three specifications she faced associated with the Departmental charges. The Panel recommended termination for both Employees as an appropriate penalty for each of its guilty findings.[36] Agency served both Employees with a Final Notice of Adverse Action (Final Notice), dated June 17, 2019.[37] The Final Notice referenced the Panel's findings of fact and conclusions of law, informed Employees that Agency agreed with the Panel's findings, and advised Employees that they were terminated from the Department, effective July 5, 2019.[38] The Final Notice further informed Employees of their right to appeal their termination to the Chief of Police ("COP") within ten days of the issuance of the Final Notice. Both Employees subsequently appealed Agency's decision to the COP.[39] On August 2, 2019, the COP notified Employees via correspondence that their

[29] See Agency Answer, Tab 3, Adverse Action Panel's Findings of Fact and Conclusions of Law.
[30] Tr. Vol. 2 at 530.
[31] *See* Tr. Vol. 2 at 567.
[32] Tr. Vol. 2 at 567.
[33] Tr. Vol. 2 at 568.
[34] Tr. Vol. 2 at 569.
[35] Tr. Day 2 at 591.
[36] See Agency Answer, Tab 3, pp.54-60.
[37] Agency Answer, Tab 4 (in both OEA files).
[38] *Id*.
[39] Agency Answer, Tab 5.

appeals were denied.[40] On August 26, 2019, Officer Nikeith Goins filed his petition for appeal with the Office of Employee Appeals (OEA).[41] Officer Shawnee Nowlins-Goins filed her Petition for Appeal on August 28, 2019.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

Pursuant to the D.C. Court of Appeals' decision in *Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002), an Administrative Judge of this Office may not conduct a *de novo* hearing in an appeal before him/her, but rather must base his/her decision solely on the record below at the Adverse Action Panel Hearing, 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;
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> 3. The employee is a member of a bargaining unit covered by a Collective Bargaining Agreement;
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> 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 Hearing] 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 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.[42]

Based on the documents of records and upon consideration of the legal briefs submitted, I find that all the aforementioned criteria have been met. Thus, according to *Pinkard*, my review of the final Agency decision to remove Employees from their position is limited "to a determination of whether [the Final Notice of Adverse Action] was supported by substantial evidence, whether there was harmful procedural error, [and] whether Agency's action was in accordance with the law or application regulations."[43]

[40] Agency Answer, Tab 6.
[41] Agency Answer, Tab 7.
[42] *Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002).
[43] *Id.*

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

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[44] If the Adverse Action Panel's findings are supported by substantial evidence, I must accept them even if there is substantial evidence in the record to support contrary findings.[45] Agency contends that there is substantial evidence in the record to support the Trial Board's findings that Employees committed the misconduct for which they were charged. Employees argues that the Panel's findings of fact were not supported by substantial evidence, asserting that there is insufficient evidence to support a finding that they committed fraud in the first degree, falsified student enrollment forms, and conspired to fraudulently register their children as D.C. residents to attend D.C. Prep Academy.

Both charges and the associated specifications levied against Employees stem from an investigation conducted by the Office of the State Superintendent of Education ("OSSE") alleging that Employee committed residency fraud by enrolling their child in the District's public schools although they were not District residents.

<u>Charge 1, Specification 1</u> – Conviction of a Criminal or Quasi-criminal Offense Whether or Not a Court Record Reflects a Conviction—Fraud in the First Degree

Regarding Charge 1, Specification 1, the Panel found that there was a preponderance of evidence to sustain the charge that Employees committed fraud in the first degree by knowingly accepting tuition-free educational services for their children that they were not entitled to receive.[46] The Panel evaluated witness credibility, and voluminous documentary evidence from every year that Employees' children were enrolled in D.C. Schools. The documentary evidence included residency verification forms and school enrollment forms for multiple years which were determined to be erroneous. The Panel indicated in its findings that Employees' children attended the Preparatory Academy under the pretense that the children were District residents, but the record evidence established that: (1) Employees were Maryland residents during the years in question; (2) Officer Nikeith Goins claimed the children as dependents on his taxes during the years in question; (3) Employees had no legal documentation establishing the children as D.C. residents; and (4) Employees lacked any documentation or completed forms that displayed to D.C. Prep that he was a Maryland resident.[47]

The Panel also pointed out that the instruction on the 2014-2015 enrollment form to "[c]heck here if Parent/Guardian lives at a different address than student" was not checked on either of the enrollment forms for Employees' children who attended D.C. Preparatory Academy

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[44] *Black's Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).
[45] *See Metropolitan Police Department v. Baker*, 564 A.2d 1155 (D.C. 1989).
[46] Agency Answer, Tab 3, Findings of Fact and Conclusions of Law, at 54.
[47] *See generally*, Agency Answer, Tab 3, Findings of Fact and Conclusions of Law, pp. 50-67.

during the 2014-2015 school year.[48] Furthermore, the Panel considered numerous documents that Officer Nikeith Goins signed that contained information which turned out to be erroneous, notwithstanding acknowledgement that the information provided in the forms was true and accurate. The Panel determined Employees' responses to questions about the erroneously prepared forms to be insufficient and found that the false information on the forms was submitted intentionally to circumvent the registration process with the D.C. Prep.[49]

The Panel also found that while Officer Nikeith Goins completed a large majority of the enrollment forms, Officer Shawnee Nowlins-Goins admittedly did not bother reviewing and vetting these documents and did not get involved in the enrollment process because of her decision to "check out." The panel further found that although Officer Shawnee Nowlins-Goins did not want to be involved in the enrollment process of her children and pleaded ignorance to absolve herself from any responsibility, her admitted ignorance did not absolve herself of any liability or responsibility for the fraudulent documents that were submitted. Additionally, the Panel found that as a parent, and as a sworn member of MPD, she had a responsibility to ensure that she and her children were properly receiving District resources. Officer Shawnee Nowlins-Goins had a close relationship with all parties involved and it was determined that she knew her children were attending D.C. Preparatory Academy tuition-free despite them being Maryland residents.

Ultimately, the Panel found that a preponderance of evidence existed to establish that Employees committed fraud in the first degree for the 2010 through 2017 school years. The Panel's finding that both Employees were guilty of Charge 1, Specification 1, was based upon substantial evidence derived from witness testimony and credibility determinations, including Officer Nikeith Goins' admission at the hearing that he was able, and did in-fact, care for his children, although he had work scheduling issues that created challenges in doing so. As OSSE investigator Ms. Wynn testified, Employees work challenges, coupled with their continued care of their children, did not establish Employees' inability to care for their children, which is a prerequisite to establish a necessity for giving another individual other primary caretaker status of a child. Accordingly, I find that the Panel's guilty finding for this Charge and Specification "flows rationally from the facts which are supported by substantial evidence in the record."[50] The D.C. Court of Appeals has held that great deference to any witness credibility determinations are given to the administrative fact finder.[51] The AAH Panel was the administrative fact finder in the instant case. The Panel did not find Employees' explanations regarding the discrepancies in the enrollment related forms throughout the record credible. Thus, the undersigned will not second guess these determinations.

<u>Charge 1, Specification 2</u> - Conviction of a Criminal or Quasi-criminal Offense Whether or Not a Court Record Reflects a Conviction—Making of False Statements.[52]

[48] Agency Answer, Tab 3, Findings of Fact and Conclusions of Law.
[49] *See generally*, Agency Answer, Tab 3, Findings of Fact and Conclusions of Law, pp. 50-67.
[50] *District of Columbia v. Davis*, 685 A.2d 389, 393 (D.C. 1996).
[51] *See Metropolitan Police Department v. Ronald Baker*, 564 A2d. 1155 (D.C. 1989).
[52] This charge pertains to Officer Nikeith Goins only.

The Panel found that there was a preponderance of evidence to sustain the charge that on April 14, 2014, April 22, 2015, and April 18, 2016, Officer Nikeith Goins knowingly falsified and signed student enrollment verification forms affirming that his children were residents of the District of Columbia despite knowing that the content of the forms was false. In determining its finding related to this charge and specification, the Panel addressed numerous inaccuracies in the documents Officer Nikeith Goins signed and indicated were accurate despite the clear inaccuracies contained in these documents. The documents included Officer Nikeith Goins's spouse (Office Shawnee Nowlin-Goins) being listed as a resident of the D.C. address where Employee's children purportedly lived, despite Officer Nikeith Goins's acknowledgement that neither he nor his spouse resided in the District during *any* of the years at issue. The Panel relied upon Officer Nikeith Goins's electronic signature on the forms which signaled that he affirmed that information in the forms were true and accurate; however, the Panel found the information in the forms to be inaccurate and misleading. Because Officer Nikeith Goins repeatedly signed forms attesting to the accuracy of the information contained therein, I find that the Panel reasonably determined that the false information provided in the forms over three consecutive years was by design.[53]

Officer Nikeith Goins acknowledged the errors in the forms relied upon by the Panel in making its determination and further acknowledged that the importance of accurately preparing documents was stressed to him throughout his training with MPD. Despite these acknowledgements, Officer Nikeith Goins failed to provide the Panel a satisfactory explanation of why the enrollment records he signed contained numerous inaccuracies that appeared to cover up the true dynamic between Ms. Bell, himself, his spouse, and their children. Accordingly, I find that Officer Nikeith Goins's statement, along with the corroborative documentary evidence, presents substantial evidence in the record to support the Panel's finding regarding Charge 1, Specification 2 pertaining to Officer Nikeith Goins.

Charge 2, Specification 1 - Prejudicial Conduct—Conspiracy to Fraudulently Register Children in the D.C. Preparatory Academy

Upon review of all the evidence and testimony presented at the Adverse Action Hearing, the Panel determined that a preponderance of evidence existed to establish that Employees conspired with each other, Officer Shawnee Nowlins-Goins's mother, Ms. Glendora Harris, and family cousin, Ms. Deshawn Bell, to register their children in the D.C. Preparatory Academy. As a basis for its finding, the Panel cited Employees' submission and approval of student enrollment forms and knowledge of Ms. Harris's and Ms. Bell's submission of student enrollment forms that portrayed Employees' children as D.C. residents when their children were Maryland residents. Furthermore, the Panel cited Employees' claim that the school was aware of their situation despite there being no corroboration in the record that any officials at D.C. Prep were aware of their "situation."

As further support for this charge and specification, the Panel relied on Officer Shawnee Nowlins-Goins's reluctance to be involved with the enrollment process, and her decision to "see no evil" through her hands-off approach to the enrollment process, despite knowing her children were attending the D.C. school first under her mother's address, and then under Ms. Bell's address,

[53] The Panel detailed numerous material inaccuracies in the forms that Employee signed. See Agency Answer, Tab 3, p.51.

as proof that she knew, or should have known, that the children were attending the D.C. school as Maryland residents. The Panel further pointed out how Officer Shawnee Goins left enrollment of the children up to her husband, Officer Nikeith Goins, while admitting that she should have done more research for the children attending school. The panel cited Officer Shawnee Goins's action of allowing the children to be incorrectly enrolled at the school tuition-free while attempting to distance herself from the enrollment process as support for its determination that all parties conspired to enroll the children at D.C. Prep.[54] As such, I find that the Panel's determination regarding Charge 2, Specification 1, is also supported by substantial evidence in the record.

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

90-day Rule

Employees argues that pursuant to D.C. Official Code § 5-1031 (2015) and MPD General Order 201.22, no corrective or adverse action against a sworn member of the Metropolitan Police Department shall commence more than 90 days (excluding Saturdays, Sundays, and legal holidays) after the date MPD either knew or should have known of the act or occurrence alleged to constitute cause. The 90-day rule provides that when there is an ongoing criminal investigation by Metropolitan Police Department, the United States Attorney's Office, the Office of the Attorney General, or the Office of Police Complaints, the 90-day time period shall be suspended until the conclusion of the investigation. Employees assert that the facts in the instant case demonstrate that they did not receive the Notice of Proposed Adverse Action until October 1, 2018, after the 90-day period had expired.

The D.C. Official Code § 5-1031 (2015) ("90-day Rule") states:

(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.

[54] It is noted that Ms. Bell admitted during the AAH that she also entered into a settlement agreement with the District wherein she assumed joint and several liability for repayment of the Goins children's tuition for the years that she held herself out as the other primary caretaker of Employee's children who were attending D.C. Preparatory Academy. *See generally* Tr. Vol. 2 at 290.

> **(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 added).

For purposes of the 90-day rule, MPD has notice of the act or occurrence allegedly constituting cause on the date that it generates an internal investigation system tracking number ("IS number").[55] Here, an IS number was obtained by Agent Donald Phillips on October 18, 2017, (IS Number 17-003346) which served as an investigation number for both Employees.[56] Thus, the 90-day clock began to run on October 18, 2017. On October 1, 2018, nearly a year later, Employees received a Notice of Adverse Action, which commenced the administrative disciplinary process. The dates on which the 90-day clock was tolled between October 18, 2017 (IS number drawn) and October 1, 2018 (Notice of Adverse Action issued) is disputed between the parties.

Employees avers that after the IS numbers were generated, only two events could have tolled the 90-day clock—(1) a referral to the U.S. Attorney's Office ("USAO") for possible criminal prosecution and (2) a referral to the D.C. Office of Attorney General ("OAG") for potential criminal prosecution. In essence, Employees contends that MPD never conducted its own criminal investigation and any criminal investigation in this matter only occurred while either the USAO or OAG were considering charges. However, MPD contends that it conducts its own investigations that are both administrative and criminal in nature, and in such cases, the 90-day rule is tolled until the conclusion of any of its own criminal investigation. The undersigned agrees with MPD's contention that it conducts both administrative and criminal investigations. Thus, the rationale flows that a criminal investigation conducted by MPD would also toll the 90-day period. However, whether MPD conducted its own *criminal* investigation is controverted.

The events which served to toll the 90-day clock after Agency issued an IS number is in dispute. This matter was referred to the USAO on October 25, 2017, which was immediately declined for prosecution on October 26, 2017.[57] This amounted to the 90-day clock being tolled for one day. Employees assert, and MPD does not dispute, that OAG began its criminal investigation of this matter on December 18, 2017, when MPD's Internal Affairs Division ("IAD") issued a presentment package to Assistant Attorney General Peter Saba, Chief of OAG's Criminal Section, which referred this matter to OAG for criminal prosecution.[58] The criminal investigation

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[55] *See* D.C. Code § 5-1031(a-1)(2).
[56] Agency Answer, Tab 1, Final Investigative Report at 3.
[57] Agency Answer, Tab 1, Final Investigative Report at 10.
[58] The presentment package is undated. However, the record reflects that it was issued on December 18, 2017. The parties do not dispute this date. (See Agency Answer, Tab 1, Attachment 11).

by OAG concluded on June 6, 2018, when OAG issued a letter declining to prosecute this matter.[59] Thus, the 90-day period was tolled without question from December 18, 2017 to June 6, 2018.

Questions surround whether MPD ever actively pursued its own criminal investigation at any point in this matter. Only two opportunities existed where MPD could have conducted its own criminal investigation which would serve to toll the 90-day clock. The first opportunity was from October 18, 2017 (date IS number drawn) to October 25, 2017 (date referred to USAO for criminal prosecution). The second opportunity was from October 26, 2017 (date USAO declined criminal prosecution) to December 18, 2017 (date matter referred to OAG for prosecutorial review). Both opportunities are discussed in turn below. MPD contends that its ongoing criminal investigation began when an IS number was issued on October 18, 2017, and did not end until June 6, 2018, when OAG issued a letter electing not to file criminal charges against Employee. Based on MPD's arguments, it contends that it continued a criminal investigation even after the USAO declined to prosecute Employee. A seminal issue in this case turns on whether there was an ongoing criminal investigation by MPD at critical points during the pendency of this matter.

The undersigned must determine: (1) whether this matter was the "*subject of a criminal investigation"* by MPD from the time an IS number was generated to when this matter was referred to the USAO for criminal prosecution (October 18, 2017—October 25, 2017); and (2) whether this matter was the "subject of a *criminal investigation"* by MPD from the time the USAO declined to prosecute to when this matter was officially presented and referred to OAG for prosecutorial review (October 26, 2017—December 18, 2017). Whether Employee's conduct was the subject of a criminal investigation by MPD during this time turns on how one reasonably interprets the phrase "subject of a criminal investigation."[60]

In a recent D.C. Court of Appeals decision, the court noted that the 90-day rule is not free from ambiguity.[61] The D.C. Court of Appeals in *District of Columbia v. D.C. Office of Employee Appeals*, 883 A.2d 124 (D.C. 2005) ("Jordan"), has previously held that the conclusion of a criminal investigation must involve an action taken by an entity with prosecutorial authority. The Court further noted in *Jordan* that the circumstances of a particular case may dictate when an investigation concludes under D.C. Code § 5-1031.[62] The administrative charges in the instant case stem from an investigation conducted by the Office of the State Superintendent of Education ("OSSE").

Here, MPD contends that the act by Employees constituting cause was the subject of a continuous criminal investigation by either itself (MPD), the USAO, or OAG from October 18, 2017, through June 6, 2018. Employee contends that a criminal investigation was never pursued

[59] Agency Answer, Tab 1, Attachment 13.
[60] *See Butler v. Metropolitan Police Department*, No. 18-CV-1238, slip op. (D.C. Oct. 29, 2020)
[61] *Fraternal Order of Police/Metropolitan Police Department Labor Committee v. Metropolitan Police Department*, No. 18-CV-228, slip op. (D.C. October 29, 2020).
[62] 883 A.2d at 128

by MPD.[63] Thus, it is Employee's position that any potential criminal investigation was only conducted by the USAO or OAG.

It does not appear that MPD ever initiated its own *criminal* investigation into Employee's conduct. Shortly after MPD was notified on October 18, 2017, that OAG had drafted a civil complaint against Employee for the underlying allegations, it referred the matter to the USAO for criminal prosecution on October 25, 2017. One day later, on October 26, the USAO declined to prosecute. While MPD contends that it was still pursuing a criminal investigation after the USAO declined to prosecute, the record does not reflect that a criminal investigation continued, or was ever conducted, by MPD. Even if it is determined that MPD conducted a criminal investigation from October 18, 2017, through October 25, 2017, it can be reasonably interpreted that MPD's short-lived criminal investigation ended once the USAO declined to prosecute.[64] The record does not reflect that MPD continued a criminal investigation, or even resumed a criminal investigation, between the time USAO declined to prosecute the matter to the time it was referred to OAG for prosecutorial review (October 26, 2017—December 18, 2017).

Testimony adduced during the AAH supports the position that MPD never opened its own criminal investigation. On direct examination, Agent Phillips stated that once an IS number is drawn, if it is a criminal allegation, MPD refers the matter to the USAO or OAG for criminal consideration.[65] He further stated that if either USAO or OAG declines to prosecute, it becomes an administrative investigation and IAD moves forward with the administrative [personnel action] part of the investigation.[66] Furthermore, in the email in which the USAO declines to prosecute, it also states "[p]lease proceed administratively, or refer to the OAG's office for review pursuant to their criminal statute, DC Code 38-312."[67] MPD does not proffer any evidence supporting that a criminal investigation was ongoing between the time USAO declined to prosecute and the referral to OAG. Additionally, the record does not support the contention that MPD had an ongoing criminal investigation after the USAO declined to prosecute. Rather, based on Agency Phillips' testimony, it appears that the matter remained with MPD in an administrative capacity until it officially presented the case to OAG on December 18, 2017, for prosecutorial review. Thus, the undersigned finds that a criminal investigation was not ongoing from the time the USAO declined prosecution (October 26, 2017) through the time the matter was referred to OAG for prosecutorial review (December 18, 2017). The undersigned further finds that MPD did not conduct a criminal investigation from the time it was made aware of the civil complaint and an IS number was drawn (October 18, 2017) to the time it referred the matter to the USAO (October 25, 2018). Accordingly,

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[63] Employee also questions whether an ongoing criminal investigation was ongoing during the time OAG had the case under consideration from December 18, 2017, through June 6, 2018. The undersigned can adjudicate this matter without delving into whether OAG had an ongoing criminal investigation while the case was under its consideration.
[64] Relying on the holding in *Jordan* (*District of Columbia v. D.C. Office of Employee Appeals*, 883 A.2d 124 (D.C. 2005)) and *Thomas-Bullock* (*D.C. Metropolitan Police Department v. D.C. Office of Employee Appeals* OEA Matter No. 1601-0039-17 (April 30, 2018)) that the conclusion of a criminal investigation must involve an action taken by an entity with prosecutorial authority – meaning the authority of a prosecutorial body to review evidence, and to either charge an individual with the commission of a criminal offense, or decide that the charges should not be filed.
[65] *See* Tr. Vol. 1 at 40.
[66] Tr. Vol 1. at 40-41.
[67] Agency Answer, Tab 1 (Final Investigative Report), Attachment 9.

the 90-day clock was not tolled during these time periods. The undersigned does find that the 90-day clock was tolled for one day between October 25, 2017, to October 26, 2017, while under consideration by the USAO.

After being referred to OAG for criminal prosecution on December 18, 2017, OAG declined to prosecute this matter on June 6, 2018. The 90-day clock was tolled from the time this matter was referred to OAG—on December 18, 2017—to the time OAG declined to prosecute this matter on June 6, 2018. After OAG declined to prosecute this matter, MPD continued its administrative investigation and initiated the adverse personnel action against Employee by issuing a Notice of Proposed Adverse Action on October 1, 2018. As such, I find that this Notice was issued 119 business days (this number excludes the days in which the 90-day clock was tolled) from the time an IS number was generated

After calculating all business days between the periods where this matter was not the subject of a criminal investigation by the USAO, OAG, or MPD, it is apparent that the Notice given to Employees was untimely and violates the 90-day Rule. The timeline in calculating the 90-day clock is as follows:

> **October 18, 2017—October 25, 2017**: (Case with MPD for administrative consideration; 90-day clock not tolled; five (5) business days consumed)
>
> **October 25, 2017—October 26, 2017**: (Case with USAO for criminal prosecution consideration; 90-day clock tolled for one (1) day)
>
> **October 26, 2017—December 18, 2017:** (Case with MPD for administrative action; 90-day clock not tolled; 33 business days consumed)
>
> **December 18, 2017—June 6, 2018**: (Case with OAG for prosecutorial review; 90-day clock tolled)
>
> **June 6, 2018—October 1, 2018** (Case with MPD for administrative consideration; 81business days consumed)

Accordingly, a total of 119 business days passed, without being tolled, from the date an IS number was drawn to the date the administrative personnel action was initiated on October 1, 2018.

The OEA Board has held that it is "well-settled that the 90-day deadline is a mandatory, not a directory provision."[68] Therefore, any violation of the statute by an agency would result in

[68] *Michael Minor v. Metropolitan Police Department*, Opinion and Order on Petition for Review, OEA Matter No. 1601-0052-18, p. 11 (June 30, 2020) (citing *McHugh v. Department of Human Services*, OEA Matter No. 1601-0012-95 (November 20, 1995); *Ross v. Department of Human Services*, OEA Matter No. 1601-0338-94 (May 15, 1995); *Robert L. King v. D.C. Housing Authority*, OEA Matter No. 1601-0062-98, p. 16 (May 24, 2000); *Velerie Jones-Coe v. Department of Human Services*, OEA Matter No. 1601-0088-99, p. 3 (June 7, 2002); *Curtis Adamson v. Metropolitan Police Department*, OEA Matter No. 1601-0041-04 (February 14, 2006); and *Sherman Lankford v. Metropolitan Police Department*, OEA Matter No. 1601-0147-06 (March 26, 2007).

a reversal of the adverse action.[69] ("The only exception to this rule lies within subsection (b) [i.e. the tolling provision] of the statute."). The Superior Court of the District of Columbia has also upheld OEA's interpretation that the 90-day rule in mandatory.[70] Accordingly, I find that Agency's decision to terminate both Employees must be reversed for violation of the 90-day rule.

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency's terminations of Employees are **REVERSED**;

2. Agency shall reinstate Employees to the same or comparable position prior to their termination;

3. Agency shall immediately reimburse Employees all back-pay and benefits lost as a result of their removal; and

4. Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

/s/ Arien P. Cannon
ARIEN P. CANNON, ESQ.
Administrative Judge

[69] *Id.*
[70] See *Metropolitan Police Department v. District of Columbia Office of Employee Appeals (Alice Lee)*, No. 2017 CA 003525 P(MPA) at 7 (D.C. Super. Ct. February 13, 2018) (Also recognizing that the Superior Court has issued recent rulings cutting both ways on whether the 90-day rule is a mandatory statute of limitations).