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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
SHARON DENNIS)	OEA Matter No. 1601-0176-97R04
Employee)	
)	Date of Issuance: November 28, 2006
v.)	
)	
DISTRICT OF COLUMBIA)	
METROPOLITAN POLICE)	
DEPARTMENT)	
Agency)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Sharon Dennis ("Employee") worked as a police officer with the District of Columbia Metropolitan Police Department ("Agency"). On December 8, 1995, Employee received a notice of proposed termination from Agency. The charges filed against Employee were Neglect of Duty; Failure to Obey Orders or Directives; Untruthful Statements; Willfully Disobeying Orders or Insubordination; and Inefficiency. On November 4, 1996, Agency issued its final notice of adverse action finding Employee

guilty of the charges outlined.¹

On December 26, 1996, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). Employee argued that she was a dedicated police officer who was the victim of sexism and racism imposed by her superiors. She also provided that during the Agency Trial Board Hearing her superiors fabricated and exaggerated the issues. Employee further argued that the penalty of termination was extremely harsh and unfair.²

The Administrative Judge ("AJ") issued her Initial Decision in this matter on September 10, 1999. The AJ found that OEA lacked jurisdiction to consider Employee's case because she was in arbitration with Agency prior to filing her Petition for Appeal. The AJ provided that OEA lacked jurisdiction because Employee elected to use the negotiation procedure before filing a timely appeal to this office.³

Employee responded by filing a Petition for Review on September 23, 1999. The petition alleged that the AJ's decision was based on an erroneous interpretation of the regulation. Employee argued that she merely sent a letter to the Chairman of the Fraternal Order of Police which does not constitute a demand for arbitration under the collective bargaining agreement. Employee further provided that the letter simply notified the union that her case was ripe for a demand for arbitration, not that she elected

¹ *Memorandum from Metropolitan Police Department*, p.2 (November 4, 1996). Agency provided that Employee, while in an on-duty status, was off her designated beat. She was found to be ill-prepared and unequipped to respond to any of her duties as a police officer. Agency alleged that when Employee was located by her superiors, she was on a recliner with her shoes off, and her service weapon was lodged between chair cushions. Agency also provided that Employee did not respond to attempts to reach her by radio. Finally, Agency alleged that Employee violated its policy by riding a motorcycle to her designated beat without permission.

² *Petition for Appeal*, p. 6-7 (December 26, 1996).

³ *Initial Decision*, p. 2 (September 10, 1999).

arbitration. Therefore, it was her contention that OEA had jurisdiction to consider her case.⁴

The OEA Board agreed with Employee and on August 1, 2000, it issued an Opinion and Order ruling that Employee's letter to the union did not on its face constitute an election for arbitration under OEA Rule 604-2(d). The Board found that Employee sent a letter requesting arbitration to the union. The union then declined Employee's request and at that point Employee appealed to OEA. Therefore, when the union did not pursue arbitration, the collective bargaining agreement expressly preserved OEA's jurisdiction. Accordingly, the AJ's Initial Decision was reversed, and the case was remanded for further proceedings.⁵

The AJ then held a pre-hearing conference where she required parties to submit a list of witnesses, documents supporting their positions, and any written motions.⁶ On November 17, 2000, Agency filed a Motion in Opposition to Convening an Evidentiary Hearing. In its motion, Agency argued that the AJ should decide the matter based on the record established by the Agency Trial Board Hearing. Agency provided that OEA is required to adhere to the form of review negotiated between the District and Agency. According to the collective bargaining agreement established between the District and Agency, any appeal hearings should be based solely on the record established at the Agency Trial Board Hearing.⁷ However, the AJ rejected Agency's argument and proceeded with an evidentiary hearing.

⁴ *Petition for Review*, p. 2-3 (September 23, 1999).

⁵ *Opinion and Order on Petition for Review*, p. 1-3 (August 1, 2000).

⁶ *Order Convening a Pre-hearing Conference*, p. 2 (October 30, 2000).

⁷ *Agency's Motion in Opposition to Convening an Evidentiary Hearing*, p. 2-4 (November 17, 2000).

On August 17, 2001, the AJ issued a second Initial Decision which provided that Agency's adverse action was taken for cause. She held that of the four charges brought against Employee, Agency was able to successfully prove the Neglect of Duty charge because Employee was ill-equipped and not prepared to respond to calls when her superiors found her at the firehouse. The AJ also held that Employee neglected her responsibilities by failing to devote her full time and attention to her duties as an officer. Finally, she found that Employee's testimony lacked credibility because of inconsistencies in her testimony at the Agency Trial Board Hearing. Therefore, Agency's decision to terminate Employee was appropriate under the circumstances.⁸

Employee then filed a Petition for Review. Initially, she argued that the AJ did not base her decision on substantial evidence.⁹ However, on August 29, 2003, Agency and Employee filed a Consent Remand Request. The request asked the OEA Board to remand the matter back to the AJ for a decision consistent with *Pinkard v. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). Both parties provided that Employee's appeal should have been decided on the record established at the Agency Trial Board Hearing, and the AJ should not have held a separate evidentiary hearing.¹⁰

The OEA Board responded and on September 17, 2003, it issued another Opinion and Order. Upon considering *Pinkard*, the Board vacated the second Initial Decision and further remanded the appeal to the AJ for reconsideration. As a result, on remand the AJ was only allowed to consider the record as provided at the Agency Trial Board Hearing.¹¹

⁸ *Initial Decision*, p. 7-10 (August 17, 2001).

⁹ *Petition for Review*, p. 1 (July 18, 2003).

¹⁰ *Consent Remand Request*, p. 1 (August 29, 2003).

¹¹ *Opinion and Order on Petition for Review*, p. 4-5 (September 17, 2003).

The AJ issued an Initial Decision on Remand on September 10, 2004. As the OEA Board requested, she only considered the Agency's record when making her ruling. Coincidentally, her outcome remained unchanged as she upheld Employee's removal. The AJ reasoned that Agency's penalty determination was up to it to decide and not subject to OEA's discretion. Since Agency's action was supported by substantial evidence and consistent with the regulations that governed it, the penalty was upheld.¹²

Employee then filed final a Petition for Review in this matter. The petition again alleged that the AJ's decision was not based on substantial evidence. Therefore, Employee requested that she be reinstated with a lesser penalty that is more consistent with the evidence. However, Employee provided no arguments to substantiate this request.¹³

The Court of Appeals in *D.C. Metropolitan Police Department v. Elton Pinkard*, 801 A.2d 86 (D.C. 2002) gave OEA limited review of an agency's decision to terminate an employee pursuant to terms in a collective bargaining agreement. The Court reasoned that in those cases, OEA can only determine whether the agency's decision was supported by substantial evidence; whether there was harmful procedural error; or whether the decision was in accordance with the law or applicable regulations.¹⁴

It is clear from our review of the AJ's Initial Decision on Remand that she considered all of the requirements outlined in *Pinkard*. The AJ clearly provided reasons

¹² *Initial Decision on Remand*, p. 6-9 (September 10, 2004).

¹³ *Petition for Review*, p. 1 (October 15, 2004).

¹⁴ Substantial evidence is defined as "evidence that a reasonable mind could accept as adequate to support a conclusion." *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).

to show that Agency's decision to terminate Employee was based on substantial evidence and was in accordance with the applicable regulations. She reviewed the Agency's Trial Board Hearing and found that Agency's witnesses gave credible testimony while Employee's testimony and written admissions seemed less credible. She also considered the factors outlined by the Police Trial Board regarding its regulations in making her final determination.¹⁵ Accordingly, the AJ met the *Pinkard* requirements.

In determining the appropriateness of Agency's penalty, OEA has consistently relied on *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981). *Douglas* provided the following factors to determine appropriateness:

- (1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
- (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- (3) the employee's past disciplinary record;
- (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
- (6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- (7) consistency of the penalty with any applicable agency table of penalties;
- (8) the notoriety of the offense or its impact upon the reputation of the agency;
- (9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- (10) potential for the employee's rehabilitation;

¹⁵ *Initial Decision on Remand*, p. 6-8 (September 10, 2004).

- (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.

Applying the above-mentioned factors to the facts of this case, it is clear that the Agency and the AJ's decision to terminate Employee did not exceed the limits of reasonableness.¹⁶

Agency clearly outlined the seriousness of the offense and its relation to Employee's duties. Agency successfully proved that Employee neglected her duties by leaving her beat unattended. They also proved that she was not prepared to respond to any of her duties because she did not have her weapon or her shoes on when superiors located her. This was indeed a serious offense in relation to her duty to serve the public. Furthermore, Employee's type of employment required her be in visible contact with the public, so that her presence was known in the community that she patrolled.¹⁷

Agency also considered Employee's past disciplinary record when determining her penalty. There were five other adverse action claims filed against Employee ranging from six to forty-day suspensions. Other mitigating evidence such as Employee's positive work relationships with her co-workers was also considered by Agency.¹⁸

However, Agency properly determined that the offense was one that would severely erode the trust and confidence placed in Employee by the community. It further

¹⁶ *Douglas* provides, "only if the Board finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the Board to then specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness," page 41.

¹⁷ *Memorandum from Metropolitan Police Department*, p. 33 (November 4, 1996).

¹⁸ *Id.*

determined that the penalty of termination was consistent with those imposed in the past, and termination was within the guideline for discipline issued to other members in the department. Moreover, Employee's behavior could have seriously impacted Agency's reputation.¹⁹

Employee was indeed on notice of the rules that she violated, but she deliberately violated them anyway. It was reasonable for Agency to believe that Employee could not be rehabilitated because she was suspended five times before Agency ultimately terminated her. Employee provided no reason why her behavior could have been excused, therefore, it was reasonable for Agency to believe that no other penalty other than termination would deter Employee's behavior in the future.²⁰

Based on the aforementioned, it is clear that the AJ based her decision on substantial evidence. She considered both the reasons for Agency's decision to terminate as well as mitigating factors provided by the Employee. The AJ went through each of the factors outlined in both *Pinkard* and *Douglas*. Therefore, this Board confidently supports her decision to uphold Employee's termination.

¹⁹ *Id.* at 34.

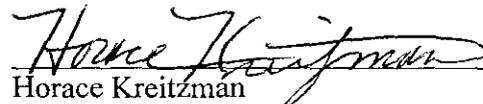
²⁰ *Id.*

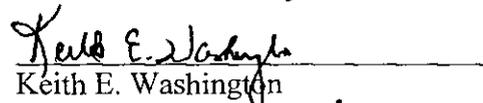
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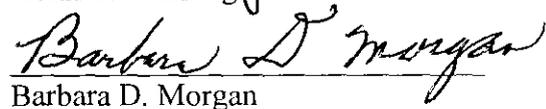
Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED**.

FOR THE BOARD:


Brian Lederer, Chair


Horace Kreitzman


Keith E. Washington


Barbara D. Morgan

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.