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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
WILLIAM McRAE, Employee)	OEA Matter No. 1601-0004-98R04
)	
)	Date of Issuance: April 2, 2007
)	
D.C. METROPOLITAN POLICE DEPT., Agency)	
)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

William McRae (“Employee”) worked as a police officer with the D.C. Metropolitan Police Department (“Agency”). On July 13, 1996, Employee was arrested for assault with a deadly weapon after pulling his service weapon on a civilian during an altercation at his ex-fiancé’s home. After an investigation was conducted, Employee was charged with conduct unbecoming of an officer; willfully and knowingly make untruthful statements; and a conviction in court.¹ Subsequently, he was terminated on September 26, 1997.

¹ Although Employee was not actually convicted in court, the regulation (General Order Series 1202, Number 1, Part I-B-7) provides the following:
“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

On October 7, 1997, Employee filed a Petition for Appeal with the Office of Employee Appeals (“OEA”). He claimed that the evidence presented on his behalf was not considered by Agency’s Trial Board. Therefore, his termination should be reversed.²

The Administrative Judge (“AJ”) held a hearing on the matter on March 21, 2001. In her Initial Decision, she found that Agency did not prove that the charges were warranted against Employee. Hence, Agency’s decision to remove Employee from his position was reversed.³

Agency then filed a Petition for Review with the OEA Board. It alleged that the AJ acted outside the scope of her authority by conducting a separate hearing rather than relying on the hearing held by the Agency’s Trial Board. Agency also argued that the AJ’s findings that Employee did not engage in the conduct for which he was charged were not supported by the record. Accordingly, Agency requested that the Board reverse the Initial Decision.⁴

The OEA Board agreed with Agency’s rationale. It held that according to *District of Columbia Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002), the AJ erred by conducting an evidentiary hearing. As a result, the Board decided to vacate the Initial Decision and remand the matter to the AJ to reconsider. The Board cautioned

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 could 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 to their commanding officers their involvement.”

² *Petition for Appeal*, p. 2 (October 7, 1997).

³ *Initial Decision* (August 17, 2001).

⁴ *Agency’s Petition for Review*, p. 4-10 (September 21, 2001).

the AJ to base her decision on the evidence presented at Agency's Trial Board hearing.⁵

In her Initial Decision on Remand, the AJ found that Agency proved by preponderance of the evidence that Employee's termination was taken for cause and appropriate under the circumstances. The AJ found that Agency's Trial Board did not consider Employee's version of the events to be as credible as other witnesses. The AJ also held that the Trial Board considered the *Douglas* Factors in making its determination. She relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985) and determined that termination was the appropriate penalty to be imposed on Employee. Therefore, Agency's decision was upheld.⁶

Employee then filed a Petition for Review of the Initial Decision on Remand. In his petition, he offered explanations to evidence presented by Agency that the AJ considered more credible. He also provided that the AJ should not have granted Agency's request for an extension to file its brief. As to his dishonesty regarding prior disciplinary actions taken against him, Employee argued that the prior action taken against him simply slipped his mind. As a result, he reasoned that the AJ's decision on remand should be reversed.⁷

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. The Court reasoned that OEA could only determine whether the agency's decision was supported by substantial evidence; whether there was harmful procedural

⁵ *Opinion and Order on Petition for Review*, p. 3-5 (September 17, 2003).

⁶ *Initial Decision on Remand* (September 17, 2004)

⁷ *Petition for Review* (October 22, 2004).

error; or whether the decision was in accordance with the law or applicable regulations.⁸

It is clear from our review of the AJ's Initial Decision on Remand that she considered all of the requirements outlined in *Pinkard*. Agency's decision to terminate Employee was based on substantial evidence and was in accordance with the applicable regulations. The AJ reviewed Agency's Trial Board Hearing and found that Agency's witnesses gave credible testimony while Employee's testimony and written admissions were less credible. She also considered the factors outlined by the Police Trial Board regarding its regulations in making her final determination.⁹ Accordingly, the AJ met the *Pinkard* requirements.

In determining the appropriateness of Agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). This Board recognizes that the appropriateness of a penalty "involves not only an ascertainment of factual circumstances surrounding the violation but also the application of administrative judgment and discernment."¹⁰ Therefore, the factors that must be considered are whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty was based on a consideration of the relevant factors; and whether there was a clear error of judgment by agency.

Agency provided, and this Board agrees, that removal was within the range of penalties in this matter. The maximum penalty for any of the charges filed against

⁸ 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).

⁹ *Initial Decision on Remand*, p. 5-7 (September 17, 2004).

¹⁰ *Beall Construction Company v. OSHRC*, 507 F.2d 1041 (8th Cir. 1974).

Employee was termination.¹¹ Agency clearly proved the first charge of conduct unbecoming an officer. Employee went to his ex-fiancé's home unannounced to retrieve items he claimed were his. He did this even though he was fully aware, as a police officer, of the proper procedure to retrieve items in a domestic situation. Furthermore, the Employee was engaged in a physical altercation with a civilian that climaxed when he pulled his service weapon and pointed it directly at the unarmed man.

As for the second charge of willfully and knowingly making untruthful statements, the Trial Board and AJ properly found that Employee was dishonest when he was questioned by his supervisors and while under oath. He claimed that he did not have any prior adverse actions taken against him, however, he was previously suspended. Employee was also dishonest about having an argument with his ex-fiancé and about pulling out his service weapon. Additionally, Employee informed two officers that he had a key to his ex-fiancé's home, however, during the trial board hearing he claimed that he did not have a key on the date in question because he gave it back.¹²

Agency also proved the last charge pertaining to convictions. Employee was arrested for assault with a deadly weapon. The regulation clearly states that the mere commission of an act which would constitute a crime, whether or not a court record reflects a conviction, is enough to terminate an employee. Therefore, because Employee

¹¹ See Table of Appropriate Penalties, 34 D.C. Reg. 1862 (1987). Prior to 1998, there were 22 causes for which a career service employee could be charged with in an adverse action. The charges proven by Agency in this case were incompetency, inefficiency, inexcusable neglect of duty, insubordination, discourteous treatment of the public, a supervisor, or other employees, and other conduct during and outside of duty hours that would affect adversely the employee's or the agency's ability to perform effectively.

¹² *Metropolitan Police Department Trial Board Hearing Transcript*, p. 75- 76 (Sergeant Lena Johnson's testimony), 110-111(Sergeant Calhoun's testimony), 168-169 (Employee's testimony).

was charged with assault, he could have been terminated solely on this charge. Based on the aforementioned, Agency clearly proved that termination was within the range of penalty.

Moreover, Agency considered all relevant factors as evidenced in their reference to the *Douglas* factors.¹³ The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

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

Applying the *Douglas* factors to this case, we find several reasons to support Agency's decision to terminate Employee. Assault with a deadly weapon is a serious

¹³ *Final Notice of Adverse Action*, p. 23 (August 29, 1997) and *Initial Decision*, p. 8 (September 17, 2004).

offense for an off-duty police officer involved in a personal dispute. Additionally, this was not the first disciplinary action taken against Employee; he was previously suspended. In light of his dishonesty during the investigation and the hearing, it is highly probable and reasonable that Employee's supervisors would lack confidence in his ability to be truthful and perform his duties. Moreover, this matter could have seriously impacted Agency's reputation especially because Employee was on notice of the proper procedure to handle these matters. Employee's job duties require him to be in direct contact with the public. Therefore, his violent conduct with a civilian in a personal matter could have seriously affected the public's trust in him to protect and serve. Furthermore, it was also reasonable for the Agency to conclude that any sanction other than termination may not have deterred similar conduct by Employee or others in the future.¹⁴

Based on the aforementioned, this Board believes that there was no clear error in the judgment reached by Agency. Agency's discretion to terminate Employee was legitimately invoked and properly exercised. Accordingly, we hereby deny Employee's Petition for Review.

¹⁴ The only mitigating factor that could have helped Employee was that he was an eight-year veteran police officer. This sole element is not enough to mitigate all the other *Douglas* factors that Agency considered and used to prove that his termination was appropriate.

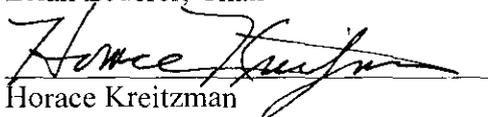
ORDER

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

FOR THE BOARD:

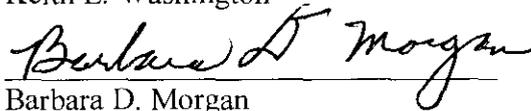


Brian Lederer, Chair

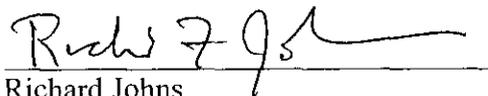


Horace Kreitzman

Keith E. Washington



Barbara D. Morgan



Richard Johns

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.