THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BERLIN HILIGH, JR.	)	
Employee	)	
	)	OEA Matter No.: 1601-0020-08
v.	)	
	)	Date of Issuance: December 6, 2010
D.C. FIRE AND EMERGENCY	)	
MEDICAL SERVICES DEPARTMENT	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Berlin Hiligh ("Employee") worked as a Firefighter Technician with the D.C. Fire and Emergency Medical Services Department ("Agency"). Employee began working for Agency in April 2000 and no prior disciplinary actions had ever been taken against him until November 2006. On November 22, 2006, Employee was involved in an off-duty incident which resulted in him being criminally charged with reckless endangerment. Agency then placed Employee on enforced leave commencing December 2, 2006. Also on that date, Agency suspended Employee for 240 duty hours.

Even though the state of Maryland had not sentenced Employee on the misdemeanor charge, Employee and various Agency officials, including Agency's Interim Chief and its General Counsel, entered into a settlement agreement on January 26, 2007. The relevant terms of the agreement provided the following:

> WHEREAS, on or about January 12, 2007, [Employee] entered into an agreement with the State's Attorney under which he agreed to make restitution and to plead guilty to one count of reckless endangerment, a misdemeanor, and will likely receive probation before judgment;
>
> WHEREAS, the parties wish to fully and completely resolve, without further litigation or expense, all charges that were brought or could have been brought against [Employee] resulting from his arrest and conviction, as well as his enforced leave;
>
> NOW, THEREFORE, the parties agree as follows:
>
> 1. [Agency] agrees to impose, and [Employee] agrees to accept, a suspension of two hundred and forty (240) duty hours commencing on December 2, 2006. Any enforced leave hours charged against [Employee] shall be counted towards this suspension. To the extent that [Employee] has served enforced leave hours in excess of the hours of his suspension, he shall receive pay for the balance.

On May 24, 2007, Employee was sentenced on the reckless endangerment charge. Instead of receiving a sentence of probation before judgment, Employee was sentenced to a six-month prison term. Because Employee was incarcerated and could not report to work, Agency charged Employee with being Absent Without Official Leave ("AWOL") beginning June 10, 2007 and continuing through September 20, 2007.

On September 18, 2007, Employee attempted to report to duty but Agency did not allow him to work. Two days later, on September 20, 2007, the Fire Trial Board conducted an evidentiary hearing. On October 18, 2007, the trial board rendered its

decision and therein, upheld Agency's action. On November 2, 2007, Agency's Chief issued the final agency decision. The Chief affirmed the trial board's decision and accepted the penalty recommended by the trial board. The penalty for the AWOL charge was a suspension for 768 duty hours which was to commence November 5, 2007 and end March 8, 2008.

Thereafter, Employee filed a Petition for Appeal with the Office of Employee Appeals on December 3, 2007. In an Initial Decision issued July 20, 2009, the Administrative Judge vacated the disciplinary actions brought against Employee and reversed the suspension of 768 duty hours. Finding that the *Pinkard* standard applied to this appeal, the Administrative Judge determined that his review of this case was "'limited to a determination of whether [the trial board's decision] was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with [the] law or applicable regulations.'"[1]

Based on his review of the entire record, the Administrative Judge held that even though the trial board's decision was supported by substantial evidence, the decision, nevertheless, constituted harmful procedural error and was in violation of the applicable laws and regulations. The January 26, 2007, settlement agreement led the Administrative Judge to arrive at this conclusion. Even though Agency argued that the settlement agreement was based on their belief that Employee would receive a sentence of probation before judgment, the Administrative Judge found that by its own terms, the settlement agreement provided that such a sentence "was likely as opposed to . . . being a

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[1] *Initial Decision* at 10-11 (quoting *Pinkard v. D.C. Metropolitan Police Dep't*, 801 A.2d at 92 (D.C. 2002).

certainty."[2] According to the Administrative Judge, if Agency had wanted to limit the scope of the settlement agreement and render it inapplicable in certain situations, "Agency simply could have either, included clauses within the settlement agreement that would [have] account[ed] for different scenarios if Employee was incarcerated; or Agency could have simply waited until Employee's criminal proceeding concluded before entering into negotiations . . . with Employee."[3] For these reasons, the Administrative Judge reversed Agency's actions.

Subsequently, Agency filed a Petition for Review. In the petition Agency argues that the Administrative Judge erred by making a credibility determination and by ordering that the last chance agreement be vacated. According to Agency, the Administrative Judge "considered *de novo* the credibility of [Assistant Fire Chief] Lee and the Employee."[4] Assuming, without deciding, that the Administrative Judge made a credibility determination, he did not base his decision on the credibility of that witness. Rather, the Administrative Judge made it clear in the Initial Decision that his ruling was based on the entire record as well as the plain language of the settlement agreement. For these reasons, Agency's Petition for Review on this issue is denied.

With respect to Agency's second argument, Agency contends that the last chance agreement "addressed the period subsequent to Employee's arrest and the length of his enforced leave for that period."[5] This issue, according to Agency, was not part of the hearing before the trial board. It is not entirely clear as to what agreement is considered

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[2] *Initial Decision* at 15.
[3] *Id.*
[4] *Petition for Review* at 5.
[5] *Id.* at 6.

by Agency to be the last chance agreement. Nevertheless, it seems to us that the January 26, 2007, settlement agreement cannot be considered the last chance agreement mentioned by the Administrative Judge and by Agency otherwise it is unlikely that the Administrative Judge would have relied upon it in making his decision and then subsequently vacated it. Even so, if Agency is correct in its contention that the last chance agreement was not "part of the hearing before the [trial board]"[6], then the Administrative Judge should not have made a ruling on it. Therefore, for this reason, Agency's Petition for Review on this issue is upheld.

[6] *Id.*

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED in part and GRANTED in part.**

FOR THE BOARD:

_____
Clarence Labor, Jr., Chair

_____
Barbara D. Morgan

_____
Richard F. 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.