THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
GREGORY W. BAILEY	)	
Employee	)	
	)	OEA Matter No.: 1601-0145-00
v.	)	
	)	Date of Issuance: December 21, 2006
METROPOLITAN POLICE DEPARTMENT	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

In 1984 Gregory Bailey ("Employee") was hired as a police officer by the Metropolitan Police Department ("Agency"). Employee's tenure with Agency continued without incident until March 12, 1996. While on duty on that date Employee shot and killed a criminal suspect. As a result of that incident, Agency arranged for Employee to meet with a psychiatrist and attend six counseling sessions. Thereafter in July and August, 1996 and in August, 1998 Agency disciplined Employee for various reasons.

On March 15, 1999 Agency proposed removing Employee for having tested positive for the use of illicit controlled substances and for making an untruthful statement

denying having done so. Specifically Agency claimed that on January 28, 1999 Employee visited the Police and Fire Clinic where he submitted a urine specimen that tested positive for heroin. Additionally, according to Agency, at that same time Employee verbally denied ever having used any illegal drugs.

A Police Trial Board hearing was convened on February 9, 2000. At the request of Employee's then-counsel, the hearing was continued due to Employee's inability to attend and the inability of Employee's newly hired attorney to attend.[1] The hearing was reconvened on March 7, 2000. Employee did not attend the hearing on that date because he had the flu. This led Employee's attorney, who said he was not prepared in any event, to request yet another continuance. Thus on May 2, 2000 the hearing was reconvened for the third time. Employee's attorney stated that because one of the psychologists treating Employee had advised him not to attend the hearing, Employee would not be present.[2] Employee did, however, have present to testify on his behalf the psychiatrist and another psychologist who were also treating him. Through his attorney, Employee pleaded not guilty to the charges and denied the misconduct that led to the charges. Nevertheless Employee, through his attorney, represented that he would not contest the charges at this hearing.

Having exhausted all of his appeal rights afforded by Agency, Employee was terminated effective July 29, 2000. On August 2, 2000 Employee appealed to the Office of Employee Appeals ("OEA"). At the beginning of the appeal process Employee requested that the Administrative Judge convene an evidentiary hearing. The hearing

[1] At that time Employee's counsel stated that Employee was under the care of two psychologists and one psychiatrist.

[2] The psychologist believed that attending the hearing would be too stressful for Employee due to his fragile mental condition.

was eventually scheduled for June 26, 2002. Before the hearing took place, however, the District of Columbia Court of Appeals issued its decision in the case of *D.C Metro. Police Dep't v. Pinkard*, 801 A.2d 86 (D.C. 2002).

Prior to *Pinkard* OEA's administrative judges had very broad discretion to determine whether an evidentiary hearing would be held. If a hearing was held, the administrative judge could base his or her decision on the evidence adduced at that hearing. Under *Pinkard*, however, the Court established a new standard that limited an administrative judge's scope of review in certain cases. Pursuant to *Pinkard* an administrative judge may not conduct a *de novo* hearing where the following conditions are present in a particular appeal:

> (1) The employee works for either the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services;
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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 union covered by a collective bargaining agreement;
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> (4) The union contract allows the employee to appeal to OEA but states that OEA's decision shall be based solely on the record established at the trial board hearing; and
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> (5) The agency conducted a trial board hearing wherein evidence was taken, findings of fact and conclusions of law were made, and a course of action was recommended to the deciding official.

Under these circumstances, the administrative judge must base his or her decision solely on the record established at the agency level. Looking at the record, the administrative judge must determine whether the agency's decision is supported by substantial evidence,

whether there is harmful procedural error, and whether the decision is in accordance with law or applicable regulations.

With the issuance of *Pinkard*, the Administrative Judge concluded that she could not conduct a *de novo* hearing as Employee wished. Employee argued, however, that the trial board hearing before Agency was inadequate because, on the advice of his physicians, he was not present to testify. Employee requested that the Administrative Judge conduct a partial hearing for the sole purpose of allowing him to testify. In denying this request, the Administrative Judge reasoned that "based on the totality of the circumstances presented . . . Employee had other means available to include his 'side of the story,' Employee's Counsel rested his case on the last day [of the hearing], and there is no evidence [to show that Employee's attorney requested] a new hearing before the PTB . . . to include Employee's testimony."[3]

With that issue resolved, the Administrative Judge went on to uphold Agency's action. She determined that because Employee did not dispute the fact that he had tested positive for drugs nor contest the facts and findings related to Agency's investigation of this matter, Agency had met its burden of proving the charges brought against Employee. Further she found that Agency had not committed harmful procedural error despite Employee's claim that Agency's failure to assist or accommodate him after the 1996 shooting incident required that the termination be set aside. Finally the Administrative Judge determined that Agency had not violated any law or regulation in taking the adverse action against Employee. For these reasons, in an Initial Decision issued March 20, 2003 Agency's action was affirmed.

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[3] *Initial Decision* at 4.

On April 24, 2003 Employee filed a Petition for Review. Employee makes four claims in his petition. His first claim is that in the order denying Employee's motion to remand the appeal to Agency or grant a *de novo* hearing, Administrative Judge made a disparaging remark about Employee's case and as a result, was prejudiced against Employee. Secondly he claims that the penalty was inappropriate. Thirdly he believes that because he did not attend the third day of the police trial board hearing, he did not receive a "full" evidentiary hearing. Lastly, Employee claims that because Agency did not provide adequate treatment for him after the 1996 shooting incident, Agency cannot now impose a disciplinary action for the misconduct that occurred on January 28, 1999.

In the order denying Employee's motion to remand the appeal to Agency or grant a *de novo* hearing, the Administrative Judge stated that "[n]evertheless, Employee wants this Judge to believe that his emotional condition has been so fragile for four (4) years that he was not able to attend the hearing, much less testify."[4] According to Employee this remark is evidence that the Administrative Judge was biased against him and that such bias continued throughout the remainder of the proceedings. We disagree. This statement alone does not indicate that at that point in the proceedings, the Administrative Judge had already "decided" the case. Moreover there is nothing within the March 20, 2003 Initial Decision to even hint at a possible bias against Employee. Further it is noteworthy that Employee does not point us to any language within the Initial Decision that could possibly indicate a bias on the part of the Administrative Judge. For these reasons we find that the Administrative Judge was not biased against Employee.

With respect to the penalty, this Office is not to substitute its judgment for that of the agency. Rather we are to simply ensure that "managerial discretion has been

[4] *Order Denying Employee's Motion to Remand or Grant a De Novo Hearing* at 2.

legitimately invoked and properly exercised."[5] The Administrative Judge states in the Initial Decision that the police trial board "considered a number of relevant factors in determining the penalty of termination. Such factors included, but were not limited to: the nature and seriousness of the offense and its relation to the employee's duties, position, and responsibilities; his past disciplinary record; length of service and work performance; consistency of the penalty; and the adequacy and effectiveness of alternative sanctions to deter future conduct."[6] The Administrative Judge went on to conclude that based on Agency's consideration of these factors, its decision to remove Employee was supported by substantial evidence. Even though Employee would like a different outcome, we believe that Agency did not abuse its discretion when it imposed upon him the penalty of termination.

As previously mentioned, the police trial board hearing was first convened on February 9, 2000. Employee did not attend that hearing. The hearing was then rescheduled for March 7, 2000. Again, Employee did not attend. Finally on May 2, 2000, despite the hearing having been reconvened for a third time, Employee did not attend nor did his attorney ask that a second day of hearing be scheduled so that Employee could attend. In his Petition for Review, Employee cites to several rules contained within the police trial board's handbook for conducting administrative trials and hearings. Employee seems to think that these rules actually *require* him to testify at the police trial board hearing. In fact the rules cited by Employee only require that he have an *opportunity* to attend and testify at such a hearing. Employee was given that opportunity on three separate occasions yet he did not, for whatever reason, take

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[5] *See Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).
[6] *Initial Decision* at 11.

advantage of it. Even at this late stage in the proceedings Employee has not proffered any testimony that he might have given.

Moreover Employee seems to think that the only way he could have received a "full" evidentiary hearing was for him to have testified. We disagree. The Court did not define in *Pinkard* what it meant by the term "full evidentiary hearing." That was not the issue before the Court. Therefore we cannot rely on *Pinkard* for that particular proposition. Nevertheless, we believe that if it was necessary to have an employee testify so as to be able to say that the employee received a full evidentiary hearing, the rules would not only require an employee to attend the hearing but they would also *require* an employee to testify at such a hearing. That kind of rule would run counter to several legal protections that an employee enjoys and legal requirements that an agency has such as the requirement to prove the charges brought against an employee.

Lastly Employee argues that because Agency did not provide adequate treatment for him after the 1996 shooting incident, Agency cannot now impose a disciplinary action for the misconduct that occurred on January 28, 1999. Employee believes that because Agency removed him for the January 28, 1999 incident, it committed harmful procedural error that requires reversing. Such is without merit. This issue was addressed thoroughly and extensively by the Administrative Judge and we believe that she used sound legal reasoning to conclude that Agency had not committed harmful procedural error in this regard. We see no reason to disturb that finding. Based on the foregoing we will uphold the Initial Decision and deny Employee's Petition for Review.

ORDER

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

FOR THE BOARD:

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Brian Lederer, Chair

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Horace Kreitzman

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Keith E. Washington

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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.