THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
PETER T. CULVER Employee	OEA Matter No. 1601-0036-01
v.	Date of Issuance: November 30, 2005
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Peter Culver ("Employee") worked as a Lieutenant for the D.C. Fire and Emergency Services Department ("Agency"); Employee was with the Agency for 15 years. Mr. Culver tested positive for the illegal substance benzoylecogonine or cocaine on June 5, 2000. As a result, on June 13, 2000, he entered into the Agency's substance abuse program. It was not until July 3, 2000, that Employee first tested negative for cocaine use. However, on July 7, 2000, test results showed a positive reading for cocaine in his system. Since Employee's July 7th positive test violated Agency's substance abuse

policy, the Fire Trial Board recommended termination. The Trial Board considered all relevant factors including the *Douglas* factors in rendering a decision.[1] On January 10, 2001, Fire Chief Ronnie Few issued a Final Agency Decision upholding the Fire Trial Board's decision to remove Employee from his position on the grounds of insubordination for his failure or refusal to comply with the Department's mandatory substance abuse program.

On March 7, 2001, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") alleging that the Agency's actions were not supported by substantial evidence and were not in accordance with the law and regulations. After the Employee's Petition for Appeal was filed, the Administrative Law Judge ("ALJ") requested that both Employee and Agency submit briefs regarding the *Pinkard* case's relevance to this case.[2]

In Employee's *Pinkard* brief, it was argued that Agency could not provide a chain of custody for the urine sample allegedly taken on July 7, 2000. Employee also asserted that Agency could not prove that he was present for the July 7th test. Finally, he argued that he did not do cocaine from July 3-7, 2000, so there could not have been a positive test result on July 7th. Consequently, Employee contends that the Agency's decision was not supported by substantial evidence.

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[1] *See Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981).

[2] *See D.C. Metropolitan Police Department v. Elton Pinkard,* 801 A.2d 86 (D.C. 2002) where it was held that OEA has limited review of an agency's decision 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.

Agency responded to Employee's *Pinkard* brief by arguing that Employee acknowledged through previous testimony that he tested positive for cocaine on July 7, 2000.[3] Agency also provided testimony from those who handled and tested the urine samples for drug testing to show the procedure in place to safeguard against any break in the chain of custody of the samples. Finally, Agency argued that Employee, not only tested positive on July 7th, but he tested positive twelve times between July 7, 2000 and August 14, 2000.[4]

On April 16, 2004, ALJ issued his Initial Decision in response to Employee's Petition for Appeal. In it the ALJ determined that the Fire Trial Board's findings were supported by substantial evidence; that there was no harmful procedural error; and the Agency's decision was in accordance with the law or applicable regulations. Subsequently, Employee filed a Petition for Review on May 18, 2004, with contrary arguments to those outlined in the Initial Decision.

Substantial evidence is "evidence that a reasonable mind could accept as adequate to support a conclusion."[5] As the ALJ found, the Agency provided a number of witnesses to show an unbroken chain of custody to establish that substantial evidence was considered in making their decision.[6] While Employee presented federal drug testing guidelines that have no bearing on this case.[7]

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[3] *See* Agency's Response to the Petition for Review, page 4 (March 11, 2003).
[4] *Id.* at 6-7.
[5] *See 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).
[6] Agency provided a letter from Dr. Anthony Constantino, American Medical Laboratory's ("AML") Director and Senior Vice President of Toxicology; testimony from Dr. Michelle Smith Jeffries, Medical Director of the Police and Fire Clinic and Medical Reviewing Officer; testimony from Michael Miller,

Employee's argument that he was not present for the July 7th test is waived because he did not raise this issue at the Agency level of review.[8] Additionally, Employee provides no rebuttal in his Petition for Review to his alleged admission to Dr. Michelle Smith-Jeffries that he tested positive on July 7, 2000.[9] Therefore, the Board agrees with the ALJ's assessment that the Agency's decision was based on substantial evidence.

As for the harmful procedural error element of *Pinkard*, it was not until Employee filed his Petition for Review that he raised this argument. In the Petition for Review, Employee contends that he did not receive proper notice of the insubordination charge against him. He claims that he raised the issue in his *Pinkard* brief, but the ALJ did not rule on this issue. It should be noted that this alleged harmful procedural error argument is not found on any page of Employee's *Pinkard* brief.[10] As previously stated, because Employee failed to raise this issue at the Agency level the argument is deemed waived. Furthermore, OEA rule 634.4 provides that "any objections or legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board."

Manager of Forensic Toxicology at AML; and testimony from Alva Wilson, a lieutenant who works in Agency's Medical Service Division. Each witness provided the procedures in place to ensure that the chain of custody for the urine sample was not broken in Employee's case.

[7] *See* Employee's Petition for Review, pages 4-5 (May 18, 2004). Employee outlines the mandatory guidelines for the federal workplace drug testing programs. Employee concedes that these guidelines do not affect or impact those outlined for the D.C. Fire and Emergency Medical Service providers.

[8] The Court in *Pinkard* provides that the ALJ is a reviewer of fact and that OEA shall base its decision solely on the record established in the Trial Board's hearing, page 92.

[9] Agency's Response to the Petition for Review, page 4 (March 11, 2003).

[10] *See* Employee's Petition for Review, page 11 (May 18, 2004) and Employee's Pinkard Brief (February 19, 2003).

The final issue is whether Agency's decision was made in accordance of the law or applicable regulations. The Board believes that a review of the Agency's assessment of the *Douglas* is warranted to satisfy that this element was met.[11] 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.

The Agency considered items 1, 5, 6, and 8 in making its decision. It reasoned that Employee's use of cocaine would impair his job performance and would negatively

[11] *See* Fire Trial Board's Recommendation, pages 5-6 (January 10, 2001).

impact the Agency's ability to achieve its mission as drug use by a firefighter would damage the public's trust. Agency also asserted that no supervisor could have confidence in an employee on drugs to perform their job effectively. Cocaine is a mind altering drug, and firefighters have to perform duties that require them to be alert at all times. Agency enforces the penalty of termination on all of those who violate the substance abuse policy because they have an obligation to serve the community. Its tough stance toward Employee's drug use is in place to maintain the public trust in its ability to serve the community at large. The aforementioned clearly shows that the Agency's decision did not exceed the limits of reasonableness as it weighed all relevant factors to impose a proper penalty for Employee's actions.

Taking into account the elements outlined in *Pinkard* as well as the *Douglas* factors, it is the opinion of this Board that Employee was properly removed. Accordingly, we hereby deny Employee's Petition for Review.

ORDER

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

FOR THE BOARD:

Horace Kreitzman

Brian Lederer

Jeffrey J. Stewart

Keith E. Washington

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.