THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
SHARON DENNIS Employee	
v.	OEA Matter No. 1601-0176-97
METROPOLITAN POLICE DEPARTMENT Agency	Date of Issuance: September 17, 2003

OPINION AND ORDER
ON
PETITION FOR REVIEW

On December 26, 1996, Employee filed with the Office of Employee Appeals (OEA) a Petition for Appeal from Agency's final decision, effective December 6, 1996, removing her from her position of Police Officer. Agency charged Employee with Neglect of Duty, Failure to Obey Orders or Directives, Willfully and Knowingly Making an Untruthful Statement, and Willfully Disobeying Orders or Insubordination.

On September 10, 1999, the Administrative Judge issued an Initial Decision in which she dismissed Employee's appeal for lack of jurisdiction, concluding that the Office's jurisdiction was lost when Employee made an initial election to pursue her appeal under a negotiated procedure for reviewing adverse actions before she filed her appeal in this Office. Employee filed a Petition for Review of the Initial Decision with this Board. In an Opinion and Order on Petition for Review issued on August 1, 2000, the Board reversed the Initial Decision and remanded the matter to the Administrative Judge, finding that the collective bargaining agreement covering Employee expressly preserves OEA's jurisdiction when, as here, the union does not pursue arbitration.

On August 17, 2001, the Administrative Judge issued a decision on remand in which she found that Agency had proven its Neglect of Duty charge and at least one specification in both the charges of Failure to Obey Orders or Directives and Willfully Disobeying Orders or Insubordination. The Administrative Judge concluded that Agency had not proven its charge of Willfully and Knowingly Making an Untruthful Statement. Nonetheless, the Administrative Judge upheld Agency's penalty of removal as appropriate under the circumstances.

Of specific relevance here, the Administrative Judge arrived at her decision on remand after conducting an evidentiary hearing. Agency argued that the Administrative Judge was required to decide the appeal solely on the record established in a hearing conducted by Agency's trial board and could not conduct a second evidentiary hearing. Agency pointed out that the collective bargaining agreement covering Employee at the time of her appeal provides

that in cases in which a hearing is conducted by the Agency's trial board, as in this case, any further appeal shall be based solely on the record established in that hearing. Further, Agency cited D.C. Code Ann. §1-617.3 (d) (1992 repl.) (currently D.C. Official Code §1-616.52(d) (2001)) as authorizing a collective bargaining agreement to dictate OEA's procedures for adjudicating adverse action appeals, including its ability to conduct an evidentiary hearing. That provision reads as follows: "Any system of grievance resolution or review of adverse actions negotiated between the District and a labor organization shall take precedence over the procedures of this subchapter for members of a labor organization in a bargaining unit." *Id.* As an alternative, Agency requested that the Administrative Judge certify the issue to this Board as an interlocutory appeal or stay the hearing pending a decision of the District of Columbia Court of Appeals in a separate case that presented the same legal question.

Employee argued that, by its terms, the precedence accorded negotiated systems for review of adverse actions under D.C. Code Ann. §1-617.3(d) is restricted to "the procedures of this subchapter," which according to Employee includes the procedures that District government agencies must follow in initiating adverse actions against employees and a general right to appeal to the OEA. The referenced subchapter has no bearing on the adjudicatory powers possessed by the OEA, including the power to conduct a *de novo* hearing, which are set forth in an entirely separate subchapter of the Comprehensive Merit Personnel Act (CMPA). In sum, Employee maintained that under D.C. Code Ann. §1-617.3(d), a collective bargaining agreement could prohibit an employee from appealing an adverse action to this Office, but

nothing in the provision permitted such an agreement to take precedence over the OEA's adjudicatory functions once an appeal was properly filed in the Office. The Administrative Judge agreed and denied Agency's requests.

On September 13, 2001, Employee filed a Petition for Review challenging the decision on remand that upheld her removal. On June 20, 2002, while her Petition was pending before this Board, the District of Columbia Court of Appeals issued a decision in *District of Columbia Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002), which was the case that formed the basis of Agency's earlier request for a stay in this appeal. Like the Employee here, Pinkard was removed from his position of Police Officer by the Metropolitan Police Department after Agency's trial board conducted an evidentiary hearing. The collective bargaining agreement covering Pinkard at the time of his appeal to the OEA similarly provided that any further appeal was to be based solely on the record established in the trial board's hearing. Nonetheless, the Administrative Judge assigned to Pinkard's appeal also conducted a second evidentiary hearing. The Court of Appeals held that "under the [CMPA], the collective bargaining agreement controls and supercedes otherwise applicable OEA procedures, and consequently, that the OEA administrative judge erred in conducting a second hearing." *Id.* at 91.

In reaching its decision, the Court of Appeals acknowledged the broad discretion the CMPA affords OEA in formulating its own procedures for resolving appeals including conducting evidentiary hearings. The Court also noted that a collective bargaining agreement

in and of itself cannot change OEA's procedures. The Court determined, however, that the CMPA explicitly provides that procedures for reviewing adverse actions set forth in a collective bargaining agreement take precedence over OEA procedures. To support that conclusion, the Court did not refer to D.C. Code Ann. §1-617.3(d), which was the provision on which both the parties to this case and this Office had focused its inquiry. Rather, the Court referred to D.C. Code Ann. §1-606.2(b) (1999 repl.) (currently D.C. Official Code §1-606.02(b) (2001)), which states in pertinent part that "[a]ny performance rating, grievance, adverse action, or reduction-in-force review, which has been included within a collective bargaining agreement . . . shall not be subject to the provisions of this subchapter." According to the Court, the subchapter to which that provision refers does govern appellate proceedings before the OEA. Therefore, the Court determined that the provision of the collective bargaining agreement covering Pinkard that restricted OEA's review in adverse actions to the record established in the trial board's hearing controlled. It remanded Pinkard's appeal to this Office to determine whether the decision by the trial board was supported by substantial evidence, whether there was harmful procedural error or whether it was in accordance with applicable law or regulation. *Pinkard*, 801 A.2d at 91.

Upon consideration of the Court's decision in *Pinkard*, the Board must vacate the Initial Decision on remand and further remand this appeal to the Administrative Judge for reconsideration in light of the Court's ruling.[1]

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[1] We note that a Consent Remand Request was filed on August 29, 2003 in which the parties agree that the present appeal is properly remanded in light of the Court of Appeals' decision in *Pinkard*.

ORDER

Accordingly, it is hereby **ORDERED** that the Initial Decision on remand is **VACATED**, Employee's Petition for Review is **GRANTED** and this appeal is **REMANDED** to the Administrative Judge for further action consistent with this order.

FOR THE BOARD:

Erias A. Hyman, Chair

Horace Kreitzman

Brian Lederer

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 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.