Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
	OEA Matter No.: 1601-0080-16
SAMSON LAWRENCE, III, Employee	
	Date of Issuance: January 22, 2018
v.	
METROPOLITAN POLICE DEPARTMENT, Agency	
	Arien P. Cannon, Esq. Administrative Judge

Johnnie A. Landon, Jr., Esq., Employee Representative
Maurice Foster, Esq., Employee Representative
Andrea Comentale, Esq., Agency Representative
Rahsaan Dickerson, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On August 17, 2016, Samson Lawrence, III ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA"), challenging the Metropolitan Police Department's ("Agency" or "MPD") decision to remove him from his position as a Police Officer. Employee's removal was effective August 26, 2016. Agency filed its Answer on September 19, 2016. This matter was assigned to me on December 2, 2016.

A Prehearing Conference was initially scheduled in this matter for April 26, 2017. Employee, by and through his attorneys, filed a consent motion to reschedule the Prehearing Conference. Subsequently, the Prehearing Conference was rescheduled for May 23, 2017. A Post Prehearing Conference Order was issued on May 26, 2017, which required the parties to submit legal briefs addressing the issues under a *Pinkard* analysis.[1] On June 22, 2017, Agency filed a Consent Motion for an Enlargement of Time to submit its brief. As such, the scheduling

[1] *See Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002). Based on the collective bargaining agreement between the two parties, Employee's appeal to this Office is limited to the issues listed below in the "Issues" section.

order for the briefs was amended. Agency submitted its brief on July 7, 2017. On August 24, 2017, Employee filed a Motion for an Enlargement of Time to submit his brief. Employee simultaneously filed his Opposition Brief with the Motion for Enlargement of Time. On August 29, 2017, Agency filed an Opposition to Employee's Motion for Enlargement of Time and Motion to Strike Employee's Opposition Brief. On September 7, 2017, prior to an Order being issued on Agency's Opposition Motion and Motion to Strike, Agency filed a Motion for Enlargement of Time to file its Sur-reply brief. On September 13, 2017, Employee filed an Opposition to Agency's Motion to Strike Employee's Opposition Brief. An Order was issued on October 3, 2017, denying Agency's Motion to Strike Employee's Opposition brief, and granting Agency's motion for an enlargement of time to file its Sur-reply brief. Agency submitted its Sur-reply brief on October 24, 2017. The record is now closed.

JURISDICTION

This Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.03 (2001).

ISSUES

1. Whether Agency's Adverse Action Panel's decision was supported by substantial evidence;

2. Whether there was harmful procedural error; and

3. Whether Agency's action was done in accordance with applicable laws or regulations.

FACTS, ANALYSIS, AND CONCLUSIONS OF LAW

Employee was charged with the following:

Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-7, which provides, in part, "…or is deemed to have been involved in the commission of any act which would constitute a crime, whether or not a court record reflects conviction. Members who are accused of criminal or quasi-criminal offenses shall promptly report, or have reported their involvement to their commanding officers."

Specification No. 1: In that on December 19, 2013, you were indicted in the Prince George's County, Maryland, Circuit Court for Attempted First Degree Murder, Attempted Second Degree Murder, First Degree Assault, Second Degree Assault, and two counts of Carrying a Weapon with Intent to Injure (Case # CT140221X).

Specification No. 2: In that, on January 14, 2014, the District Court of Maryland for Prince George's County issued a Final Protective Order (FPO) against you (Case # 0502SP057592013). As a result of the Final Protective Order, you are

not allowed to possess a firearm. The Protective Order expired January 7, 2015.

Charge No. 2: Violation of General Order 120.21, Attachment A, Part A-12, which reads: "Conduct unbecoming [of] an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively, or violations of any law of the United State or any law, municipal ordinance, or regulation of the District of Columbia." This misconduct is further defined in General Order Series 201.26, Part 1-B-23 which provides, "Members shall not conduct themselves in an immoral, indecent, lewd or disorderly manner…They shall be guilty of misconduct, neglect of duty, or conduct unbecoming to an officers and a professional…"

Specification No. 1: In that, on November 24, 2013, the Prince George's County, Maryland Police Department (PGPD) responded to your residence located at [redacted] regarding a domestic dispute between you and your wife, Mrs. Betty Lawrence. The dispute escalated to a physical altercation in which Mrs. Lawrence sustained injuries to her head, neck, and hand. Mrs. Lawrence was transported to Fort Washington Hospital to be treated for her injuries.

Employee pleaded "Not Guilty" to both charges at the Adverse Action Panel Hearing, which was conducted by MPD on April 7, 2016, and April 21, 2017.[2]

Pursuant to the D.C. Court of Appeals' decision in *Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002), an Administrative Judge of this Office may not conduct a *de novo* hearing in an appeal before him/her, but rather must base his/her decision solely on the record below at the Adverse Action Panel Hearing, when all of the following conditions are met:

1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;

2. The employee has been subjected to an adverse action;

3. The employee is a member of a bargaining unit covered by a Collective Bargaining Agreement;

4. The Collective Bargaining Agreement contains language essentially the same as that found in *Pinkard*, i.e.: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [i.e., Trial Board Hearing] has been held, any further appeal shall be based solely on the record established in the Departmental hearing"; and

[2] *See* Agency's Answer, Tab 6 at 2 (September 19, 2016).

> 5. At the agency level, Employee appeared before an Adverse Action Panel that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.[3]

Based on the documents of records and upon consideration of the legal briefs submitted, I find that all of the aforementioned criteria have been met. Thus, according to *Pinkard*, my review of the final Agency decision to remove Employee from his position is limited "to a determination of whether [the Final Notice of Adverse Action] was supported by substantial evidence, whether there was harmful procedural error, [and] whether Agency's action was in accordance with the law or application regulations."[4]

Whether the Trial Board's decision was supported by substantial evidence.

Employee argues that Agency's decision is not supported by substantial evidence due to the lack of forensic evidence, coupled with the "not guilty" verdict in Employee's second criminal trial.[5]

Unlike Employee's criminal trial, the Adverse Action Hearings did not require the same burden of proof as a "beyond a reasonable doubt" evidentiary standard of a criminal trial. The administrative action here required Agency to meet the "preponderance of the evidence" standard to satisfy its burden of proof. Pursuant to *Pinkard*, I am tasked with determining whether the Trial Board's decision was supported by substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[6] The D.C. Court of Appeals has found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding.[7]

It is not disputed that a domestic incident arose between Employee and his former wife. Employee's removal was based on Agency's finding that Employee was "…deemed to have been involved in the commission of any act which would constitute a crime, whether or not a court record reflects conviction" and "Conduct unbecoming [of] an officer, including acts detrimental to good discipline…"[8] As noted above, Agency's burden in the administrative process is a "preponderance of the evidence" standard. Based on *Pinkard*, the undersigned is not to consider this matter *de novo*, but rather to determine whether Agency's decision was supported by substantial evidence.

Parallel with the criminal investigation in the State of Maryland, Agency conducted its

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[3] *Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002).
[4] *Id.*
[5] Employee's first criminal trial ended in a mistrial.
[6] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); *See also Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).
[7] *See Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987).
[8] *See* Agency Answer, Tab 7 (September 19, 2017).

own internal investigation of Employee's actions.[9] At the conclusion of Employee's criminal proceedings, Agency issued its own Findings of Fact, which rely on a thorough summary of several witnesses' testimony at the administrative Adverse Action Hearing. Agency found that Employee intentionally struck his former wife with a metal light fixture and caused visible injuries to her head.[10] Based on this finding, Agency believed this type of conduct reflected poorly on Employee's judgment and character as an Officer. Agency's findings are based on its own internal investigation of several witnesses to the incident between Employee and his former wife. I find that Agency's Findings of Fact and Conclusions of Law issued by Commander Keith Deville, Captain Andre Wright, and Captain Kimberly Dickerson was based on substantial evidence and flowed rationally from the findings of fact.[11]

Whether there was harmful procedural error.

90-day Rule

In Employee's Opposition Brief, filed August 24, 2017, Employee argues that Agency violated D.C. Code § 5-1031 ("90-day Rule") and thereby committed harmful procedural error. It is noted that the 90-day Rule, D.C. Code § 5-1031, has been amended over the years. The latest version of the 90-day Rule went into effect March, 7, 2015, which appears to be the version of the Rule that Employee relies upon in the instant case.[12] However, the misconduct charges against Employee stem from a November 2013 incident. Therefore, the prior version, D.C. Code § 5-1031 (2004) is the appropriate version of the statute to apply in this matter.

Under the 2004 version of the 90-day Rule, Agency must bring an adverse action within 90 business days from the date that it knew or should have known of the act or occurrence allegedly constituting cause. If the act or occurrence allegedly constituting cause was the subject of a criminal investigation by Agency, the Office of the United States Attorney for the District of Columbia, the Office of the Attorney General for the District of Columbia, and the Office of Police Complaints, the time limit was tolled while the criminal investigation was ongoing. Of importance to the instant case, the older 2004 version of the statute did not provide for a tolling of the 90-day period during a criminal investigation in the State of Maryland.

Based on the November 24, 2013, incident that gave rise to this matter, Employee was arrested and his police powers were revoked on November 25, 2013. Because the incident was the subject of a criminal investigation by the State of Maryland, the 90-day period for Agency to commence adverse action was not tolled during the investigation. Therefore, Agency had ninety (90) business days from November 24, 2013, at the earliest, to propose adverse action against Employee.[13] Employee was served with the Notice of Proposed Adverse Action on April 3, 2014, the 89th business day after November 24, 2013. As such, I find that Agency did not violate

[9] *See* Agency's Answer, Tab 1 (September 19, 2016).
[10] *See Id*, Tab 6 at 33. (September 19, 2016).
[11] *Id*., Tab 6.
[12] *See* Employee's Opposition Brief, at 6 (August 24, 2017).
[13] Even if November 25, 2013, the date when Employee had his police powers revoked, was used as the date that Agency knew or should have known about occurrence that constituted cause, Agency still would have been within the 90-day time frame.

the 90-day rule in this matter.

Additionally, as noted above, the older version of the 90-day Rule, which is the applicable version here, was not tolled during the ongoing criminal investigation by the State of Maryland. Agency properly served the Notice of Proposed Adverse Action on April 3, 2014, which is within 90 business days of the date of the occurrence that gave rise to the charges against Employee. After the criminal trials in the State of Maryland, and before the Adverse Action Panel/Departmental Hearing on the administrative charges, Agency elected to serve Employee with an Amended Notice of Proposed Adverse Action on January 16, 2016.[14] The amended notice only removed Specification 2 of Charge 2, while the remainder of the proposed notice was unchanged. Because of this minor amendment, I find that Employee was still fully aware and received proper notice of the allegations made against him in the original Notice of Propose Adverse Action, served on April 3, 2014. Thus, I also find that Agency did not commit a procedural error in serving the Amended Notice of Proposed Adverse Action prior to the Adverse Action Panel.

55-day Rule

Employee further argues that Agency committed harmful procedural error by violating the 55-day Rule. The 55-day Rule is derived from the Collective Bargaining Agreement ("CBA") between MPD and the Fraternal Order of Police MPD Labor Committee, Employee's bargaining agent. Article 12, Section 6 of the CBA provides that:

> The employee shall be given a written decision and the reasons therefore no later than fifty-five (55) business days after the date the employee is notified in writing of the charges or the date the employee elects to have a departmental hearing…[15]

However, Article 12, Section 6 also contains several exceptions. Most notably to this matter, is the exception in subsection (a), which states:

> When an employee requires and is granted a postponement or continuance of a scheduled hearing, the fifty-five (55) business day time limit shall be extended by the length of the delay or continuance, as well as the number of days consumed by the hearing.

Agency provides several letters from Employee's prior attorney who represented him throughout the Adverse Action Panel/Departmental Hearing process, which request numerous continuances while the criminal trial took its course in Maryland.[16] Employee does not address these continuances in his brief submitted to this Office on August 24, 2017. Employee initially requested a Departmental Hearing/Trial Board on April 14, 2014, in response to the Notice of Proposed Adverse Action served on April 3, 2014. Subsequently, Employee requested a

[14] See Agency Answer, Tab 4 (September 19, 2016).
[15] Agency's Sur-Reply Brief, Attachment 11 (October 24, 2017).
[16] *See Id*., Attachments 1 through 10.

continuance and/or agreed to Agency's continuance requests and agreed to waive the application of the 55-day Rule on at least eight (8) occasions until the Adverse Action Panel/Department Hearing was finally commenced on April 7, 2016. When it was decided that a second day of the Adverse Action Panel/Departmental Hearing was necessary on April 21, 2016, Employee again agreed to waive the 55-day Rule during the period between the hearing dates.[17] Thus, the 55-day time period resumed on April 22, 2016. Employee was served the Final Notice of Adverse Action, which adopted the Findings of the Adverse Action Panel, on June 10, 2016, thirty-five (35) business days after the 55-day Rule resumed running. The Final Notice of Adverse Action constituted the "written decision and the reasons therefore". As such, I find that Employee was served with the "written decision and reasons therefore" on the 47th business day after he requested a departmental hearing, excluding the length of continuances and the two day hearing. Accordingly, I find that Agency did not violate the 55-day Rule.

Whether Agency's action was done in accordance with applicable laws or regulations.

Employee asserts that two of the twelve *Douglas*[18] factors were not considered or were misapplied by Agency in its decision to terminate Employee; specifically, factors 6 (labeled factor 7 in the Findings of Fact issued by the Trial Board[19]) and 10. Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not an Administrative Judge.[20] The undersigned may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.[21] When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.[22]

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[17] Agency's Answer, Tab 5, Transcript, Vol. I, at 403-44.

[18] *See Douglas v. Veteran Administration*, 5 M.S.P.B. 313 (1981); The *Douglas* factors are:
(1) The nature and seriousness of the offense, and its 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 the 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 where 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

[19] Agency's Answer, Tab 6, at 35 (September 19, 2016).

[20] *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

[21] *See Id.*

[22] *Id.*

At the conclusion of the Adverse Action Panel/Departmental Hearing, a lengthy and thorough analysis was issued, which also included an analysis of the *Douglas* factors.[23] The *Douglas* factor analysis demonstrates that Agency considered all factors and appropriately exercised its discretion in imposing the penalty in this matter. An analysis of all twelve (12) factors was provided, discrediting Employee's argument that Agency did not consider some of the Douglas factors (namely, factor 10). Furthermore, Agency found ten (10) of the twelve (12) factors to be aggravating. Even if factors 6 and 10 were found to be neutral or mitigating, as Employee suggests, it would still leave eight of the twelve factors as aggravating. Therefore, I find that Agency appropriately considered the *Douglas* factors and managerial discretion was properly exercised when considering the imposed penalty.

Disparate Treatment

Employee asserts that Agency misapplied *Douglas* factor 6, which, in essence, is a disparate treatment argument.[24] In *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, Opinion and Order on Petition for Review (September 29, 1995), this Office's Board set forth the law regarding a claim of disparate treatment:

> [An Agency must] apply practical realism to each [disciplinary] situation to ensure that employees receive fair and equitable treatment where genuinely similar cases are presented. It is not sufficient for an employee to simply show that other employees engaged in misconduct and that the agency was aware of it, the employee must also show that the circumstances surrounding the misconduct are substantially similar to his own. Normally, in order to show disparate treatment, the employee must demonstrate that he or she worked in the same organizational unit as the comparison employees and that they were subject to [disparate] discipline by the same supervisor [for the same offense] within the same general time period.

Furthermore, the court in *Jahr v. District of Columbia,* held that to establish a *prima facie* case of disparate treatment, an employee must show that: (1) he worked in the same organizational unit as the comparison employee; (2) the circumstances surrounding their misconduct are similar; and (3) they were subject to different penalties by the same supervisor within the same general time period.[25]

Here, Employee compares his case with the facts of another MPD member, Detective Witkowski ("Witkowski"), in an effort to demonstrate disparate treatment. As noted by Employee, Witkowski was a Detective with the Joint Terrorism Task Force. Here, Employee was an Officer with the Patrol Services and School Security Bureau, School Safety Division. Thus,

[23] See Agency Answer, Tab 6 (September 19, 2016).
[24] Employee's Opposition's Brief at 10. (August 24, 2017).
[25] 968 F.Supp.2d 186 (D.D.C. Cir. 2013).

Employee and the comparison employee were not in the same organizational unit. Additionally, the circumstances surrounding Employee's discipline and that of Witkowski are not similar. Witkowski was involved in an altercation with a private citizen where no injuries were sustained. Here, the circumstances that led to Employee's discipline involved a domestic dispute which led his former wife receiving medical treatment at the hospital. Lastly, Witkowski's conduct occurred in 2010 and discipline was imposed in 2011. In the instant case, Employee's conduct occurred in 2013 and discipline was imposed in 2016, more than three year after Witkowski's discipline was imposed. Accordingly, I find that Employee and Witkowski were not similarly situated and Employee was not subject to disparate treatment.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's decision to remove Employee from his position as an Officer is **UPHELD**.

FOR THE OFFICE:

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Arien P. Cannon, Esq.
Administrative Judge