

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
SONYA OWENS,)	
Employee)	OEA Matter No. 1601-0015-06
)	
v.)	Date of Issuance: November 21, 2007
)	
D.C. METROPOLITAN POLICE)	
DEPARTMENT,)	
Agency)	ERIC T. ROBINSON, Esq.
)	Administrative Judge
_____)	

Sonya Owens, Employee *Pro-Se*
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 28, 2005, Sonya Owens (hereinafter “the Employee”) filed a Petition for Appeal with the Office of Employee Appeals (hereinafter “OEA” or “the Office”) contesting her removal from employment with the Metropolitan Police Department (hereinafter “the Agency” or “MPD”). I was assigned this matter on January 13, 2006. On that same day, I scheduled a Status Conference for February 23, 2006. Pursuant to a joint request by the parties, I rescheduled the Status Conference to March 14, 2006.

During the Status Conference, I informed the parties that my review of this matter is limited to a determination of whether the Adverse Action Panel’s (hereinafter “the Panel”) prior decision in this matter was supported by substantial evidence, whether there was harmful procedural error, or whether Agency’s action was done in accordance with applicable laws, rules, or regulations. Furthermore, I informed the parties that according to the District of Columbia Court of Appeals holding in *Elton Pinkard v. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). Pursuant to the guidelines as set forth by Pinkard, I initially determined that I was unable to hold a *de novo* Evidentiary Hearing in this matter. Also, I verbally denied Employee’s February 23, 2006, Motion requesting further discovery in this matter. Consequently, I ordered both parties to submit their final legal briefs in this matter. I issued an Order dated April 24, 2006, denying Employee’s request for sanctions. The parties then submitted their respective final legal briefs as

ordered. After considering the sum and substance of the parties' respective arguments, I determined that *Pinkard* was inapplicable to the instant matter and that an evidentiary hearing was warranted¹. Consequently, a hearing was held on October 26, and November 17, 2006. The record is now closed.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 629.3 *id.* states:

For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUE

Whether the Agency's adverse action of terminating the Employee from service was done in accordance with applicable law, rule, or regulation.

STATEMENT OF THE CHARGES

According to the Panel, which was convened in order to make findings of fact and conclusions of law in the instant matter and whose transcript is part of the documents of record, the Employee was charged with the following violations:

Charge No. 1: Violation of General Order 1202.1, Part I-B-17, which reads: "Fraud in securing appointment or falsification of official records or reports". This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.

¹ It was unknown to the undersigned, at the time of the Employee's initial submission of her petition for appeal, that she was not included in a collective bargaining agreement. This is one of the salient requirements necessary to invoke the administrative review procedures outlined in the *Pinkard* case.

Specification No.1: In that, on or around November 5, 2004, while off duty, you presented a PD Form 251 report of a Theft One/Burglary One to the Director of the Animal Welfare League of Arlington. You presented the report as a legitimate and genuinely documented report of the MPD, knowing that it was fictitious.

Charge No. 2: Violation of General Order 1202.1, Part I-B-6, which reads: “Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Officer to, or in the presence of any superior officer, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing”. This misconduct is defined as cause in Section 1603 in the D.C. personnel manual.

Specification No. 1: In that, on March 3, 2005, during an interview with the Office of Internal Affairs you stated that a MPD Officer responded to your residence on June 4, 2004 and prepared a PD 251 report of Theft One/ Burglary One. You made this statement knowing this to be untrue.

Specification No. 2: In that on March 3, 2005, during an interview with the Office of Internal Affairs you denied surrendering your dog to the Animal Welfare League of Arlington on June 17, 2004, or filling out and affixing your signature on the necessary forms to surrender your dog. You made this statement knowing this to be untrue.

Specification No. 3: In that on March 3, 2005, during an interview with the Office Internal Affairs you [stated] (sic) that you received a call from your next door neighbor saying that he did not hear dogs inside of your house. Mr. Salvatore Anastasi refutes this statement and denies calling you on your cell phone about your dogs. You made this statement knowing it to be untrue.

Charge No. 3: Violation of General Order Series 1202, Number 1, Part I-B-5, which states: “Willfully disobeying orders or insubordination”. This misconduct is defined as cause in Section 1603 of the D.C. Personnel Manual.

Specification No. 1: In that on March 11, 2005, you were given a direct order by Commander Jennifer Greene to respond to the Office of Internal Affairs and provide information. You responded to the Office of Internal Affairs but did not stay to be interviewed.

Instead, you handed an envelope to the receptionist, which contained a letter addressed to Commander Greene stating your refusal to submit to an interview or provide the requested information.

Specification No. 2: In that on March 29, 2005, you were given a direct order to provide the name and contact information of the police agency which you alleged, helped to locate and recover your dogs, however, you refused to answer.

Specification No. 3: In that on March 29, 2005, you were given a direct order to provide the name and contact information for the person who arranged the confidential agreement to locate and recover your dogs, however, you refused to answer.

Specification No. 4: In that on March 29, 2005, you were given a direct order to provide the name and contact information for the pet sitter or pet sitting agency that you used who allegedly stole your dogs, however, you refused to answer.

Charge No. 4: Violation of General Order 1202.1, Part I-B-12, which states, "Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law municipal ordinance, or regulation of the District of Columbia."

Specification No. 1: In that you presented a fictitious PD 251 report to the Animal Welfare League of Arlington, Virginia, which you purported to be authentic.

Specification No. 2: In that on June 17, 2004, you voluntarily surrendered your German Shorthair Pointer named "Kona" to the Animal Welfare League of Arlington, Virginia for adoption. You submitted a letter, addressed to "Prospective Owner" which gave specific details about your dog. The letter was signed "Sonya." In October 2004, you returned to the Animal Welfare League of Arlington and informed them that your pet sitter had stolen your dog along with other valuables from your home while you were out of town and requested "Kona" be returned to you. The Animal Welfare League informed you that your dog had been adopted two weeks after you surrendered him. As a Captain of the Metropolitan Police Department, you persisted in deceitful behavior, which has proven to be an embarrassment to the Department.

Charge No. 5: Violation of General Order 1202.1, Part I-B-7, which states: Conviction of any member of the force in any court of competent jurisdiction of any quasi-criminal offense or of any offense in which the member pleads guilty, receives a verdict of guilty or a conviction following a plea of nolo contendere 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 a conviction. Members who are accused of criminal or quasi-criminal offenses shall promptly report or have reported to their commanding officers their involvement.

Specification No. 1: In that on January 27, 2005, the United States Attorney's Office issued a declination wherein they declined to pursue a criminal investigation into the matter.

Charge No. 1: Violation of General Order 1202., Part I-B-10; which states: "A.W.O.L., i.e., reporting late for duty more than six (6) days within a one-year period or absence from duty without official leave for more than eight (8) consecutive hours." This misconduct is defined in Section 1603 of the D.C. Personnel Manual.

Specification No. 1: In that on March 11, 2005, you were absent from duty without supervisory approval.

Specification No. 2: In that on March 13th through March 26th, 2005 you were absent from duty without supervisory approval.

The Panel Transcript at pp. 2-4.

SUMMARY OF THE TESTIMONY

Commander Jennifer Greene

Commander Jennifer Greene (hereinafter "Greene") testified in relevant part that: she has been with the Agency for approximately 24 years and that currently she serves as the Commander of the Fifth District (hereinafter "5D"). Prior to the Employee's removal from service, she was formerly a Captain under Greene's command. Greene relates that in November 2004 she received a message from a Kay Speerstra (hereinafter "Speerstra") of the Animal Welfare League of Arlington, Virginia (hereinafter "AWLA") in reference to the Employee. After calling Speerstra and hearing her initial rendition of events, Greene asked Speerstra for copies of all of the documents associated with the Employee attempts to donate and retrieve her dog, Kona. Speerstra complied with her request. Greene testified that she had some concerns regarding the documents that were forwarded as well as the circumstances as described by Speerstra. Most notably, Greene was concerned with the authenticity of the police report also

known as a PD-251 that was allegedly provided to AWLA by the Employee. While she is not a handwriting expert, Greene testified that the PD-251 appeared to be in the Employee's handwriting. Also cause for concern was that the PD-251 listed the Employee's employer as Microsoft, not the Agency. After hearing Speerstra's account of the situation and reviewing the documents provided by AWLA, Greene notified Internal Affairs of the situation. Internal Affairs instructed Greene to forward all of the materials received to its office and to put the Employee on non-contact duty status. This duty status allowed the Employee to continue working for the Agency. However, her police powers were temporarily revoked.

Greene testified that she did not conduct any further investigation into the Employee's actions relative to her dismissal. She further testified that the Internal Affairs Unit (hereinafter "IA") oversaw the investigation into the Employee's activities that are the crux of the instant matter. Greene later learned that the Employee was uncooperative in the IA investigation and that the Employee was eventually served with a proposed notice of adverse action which eventually blossomed into the instant matter.

Arthur Schwartz

Arthur Schwartz (hereinafter "Schwartz") testified in relevant part that: he is an adoption counselor working for AWLA. He remembered meeting the Employee for the first time in or around June 2004 when she came to AWLA inquiring about giving up one of her dogs for adoption because they were not getting along together. He further related that he was not present when the Employee actually surrendered her dog to AWLA for adoption, he was present for the Employee's subsequent appointment with the Executive Director of AWLA regarding her dog, Kona. As part of the IA investigation into this matter, Schwartz was able to accurately identify the Employee in a photo array provided by IA Agent Ostazeski. He also remembers giving a statement to Agent Ostazeski in relation to the Employee's visit. Schwartz then remembers being provided a transcribed statement of his meeting with Agent Ostazeski, which he signed because the statement comported with his recollection of the interview.

Susan Sherman

Susan Sherman (hereinafter "Sherman") testified in relevant part that: she has been employed for approximately ten years with AWLA as manager of training and support. Sherman testified that she is familiar with the Employee because the Employee surrendered her dog, Kona, to her in the summer of 2004. Sherman recalls talking to the Employee, for approximately 20 minutes. The Employee then completed the surrendering of her dog Kona by signing a release form authorizing the surrender. *See*, Agency Exhibit No. 5 attachment No. 2. This is standard operating procedure for AWLA. Notably, during Kona's surrender, the Employee gave Sherman a signed letter detailing Kona's behavior so that it could be provided to Kona's eventual new owner. *See*, Agency No. 5 attachment No. 3. Like Schwartz, Sherman was able to accurately identify the Employee in a photo array orchestrated by Agent Ostazeski, and she also remembers being provided a transcribed statement of her meeting with Agent Ostazeski,

which she signed because the statement comported with her recollection of the interview.

Kay Speerstra

Kay Speerstra testified in relevant part that: she has been employed by AWLA since 2002. Currently she serves as AWLA's Executive Director. Speerstra remembers meeting the Employee in or around autumn of 2004, when the Employee scheduled an appointment with Speerstra about finding and reclaiming Kona. It was during this meeting that the Employee presented Speerstra with a police report indicating, among other things, that the Employee's two dogs were stolen from her residence and that the Employee was employed by Microsoft and not the MPD. Speerstra also testified that during the Employee's autumn 2004 visit to AWLA, Sherman indicated to Speerstra that the Employee had been to AWLA before to donate Kona. After her meeting with the Employee, Speerstra decided to investigate the Employee's claim that Kona was stolen and that AWLA should therefore assist her in reclaiming Kona. Her inquiry eventually led her to Greene, who asked for a copy of all documents relating to the Employee's visit(s) to AWLA. Speerstra complied with this request.

Theresa Ostazeski

Theresa Ostazeski (hereinafter "Ostazeski") testified in relevant part that: she has been employed with the MPD for approximately 27 years. For the past 12 years she has been working with the MPD Office of Internal Affairs unit. Ostazeski was assigned to investigate the instant matter concerning alleged inconsistencies that were contained in a police report that was presented to AWLA when the Employee tried to inquire about the subsequent adoption of her dog, Kona. Ostazeski's investigation indicated that Speerstra informed the Employee that prior to her releasing any information about the person(s) adopting Kona, that the Employee would have to produce a police report to substantiate her claim that Kona was stolen from her. Ostazeski presented a photo spread to Schwartz, Sherman, and Speerstra. Ostazeski indicated that Schwartz and Sherman were able to positively identify the Employee in the photo spread "... as being the same woman that surrendered the dog in the summer of that year and as being the one that came back with the [PD] 251 report of a burglary." Tr. at 183.

Relative to the PD 251² police report that was allegedly presented to AWLA by the Employee, Ostazeski's investigation indicated that the CCN numbers that are on the report do not correspond to a burglary at the Employee's residence, but rather to an attempt to locate. Ostazeski also cross checked the information in the PD 251 to the fourth district log book (wherein all police reports have to be logged) and at that time there was no report of a burglary at the Employee's residence for that year.

Ostazeski also investigated the MPD personnel listed on the PD 251 by cross checking against their time and attendance records. All of the MPD personnel listed on the document either did not exist or if the name and/or badge number corresponded to a person, that person did not participate in any way, whatsoever, in responding to or

² A PD 251 is the MPD's official term for a police report.

investigating a burglary at the Employee's residence. Furthermore, all of the other MPD employees referenced in the PD 251 were either off duty or were working in another part of town at the time of alleged burglary at the Employee's residence. In making this determination, Ostazeski, *inter alia*, checked the PD 251 against the CCN numbers, the WALES³ computer system, and the Communications unit. In every instance, the PD 251 that was presented to AWLA did not correspond to any legitimate response or investigation conducted by the Agency. When asked about how difficult it would be to obtain an official PD 251 Ostazeski opined thusly:

Witness: Anybody can pick up a piece of paper and fill in the blanks, but the CCN numbers - - this has to be turned in, it has to go through a sequence of events through the [MPD]. So if it's a legitimate, it has to go through a series of signing officials and then it has to go down ... to a report unit downtown that logs and tracks all of these things and files them away.

So filling it out isn't the problem; it's getting the CCN numbers and then sending it through the channels that could be the hard part, I guess.

Administrative Judge Robinson: So from the standpoint of - - an officer could just take one of these forms, fill it out, and as long as it wasn't submitted to anyone else... it would otherwise look - -

Witness: Oh yeah, especially - -

Administrative Judge Robinson: - - official.

Witness: - - if you're not familiar, yes... So any officer can pick this up and fill it out and as long as it's not actually really submitted, it looks like a real report.

Tr. at 188 – 190.

According to Ostazeski, when she questioned the Employee about the aforementioned events, the Employee "... denied that she prepared the report that is Attachment 4. She denied that she ever surrendered a dog to [AWLA], she denied that she ever gave [AWLA] the letter to the prospective adopters. She just denied the whole thing." Tr. at 198.

Ostazeski also found the Employee to be generally uncooperative in her investigation. She had to go through several attempts at conducting an interview in order

³ WALES stands for the Washington Area Law Enforcement System. According to Ostazeski's testimony, WALES is a "... computer system with all the data in it relevant to the [MPD], its actions, reports, runs generated, addresses, complainants, incidents, everything relating to what the [MPD] - - it's all the data that the [MPD] functions on." Tr. at 190.

to get in contact with the Employee, who claimed that she was on vacation from May 31, to June 4, 2005, and that she had hired a pet sitter to watch over her dogs while she was gone. When she returned from her vacation, the Employee found her home burglarized and her dogs, along with assorted papers and jewelry, were missing. The Employee further explained that she was working with a Maryland law enforcement agency to retrieve her dogs and because of the confidentiality agreement that she had entered into with this unnamed Maryland law enforcement agency, she could not reveal the name of the Agency assisting her or the name of the pet sitter service that allegedly burglarized her home. *See generally*, Tr. at 199 – 200.

Agency's Exhibit Number 5 Attachment Number 10, which was first introduced into testimony through Ostazeski, is an application to adopt an animal from the District of Columbia pound. This application indicates that the Employee attempted to adopt a dog but had indicated on the form that she had previously given up a dog for adoption to AWLA.

As a result of her investigation, Ostazeski concluded that the Employee had prepared a false PD 251 report and had presented it as a bona fide document in a failed attempt to retrieve her dog Kona from AWLA. In Ostazeski's opinion, while the Employee was not prosecuted for a criminal offense, she did commit an act that would constitute a crime. *See generally*, Tr. at 211.

While being cross examined, Ostazeski was questioned regarding unfounded reports⁴, of two reports (PD 251) having the same CCN number, and bumped reports⁵. As part of her investigation, Ostazeski did not contact law enforcement agencies in Arlington regarding the Employee's alleged illicit acts at AWLA. Ostazeski was under the impression that Speerstra had contacted the local authorities regarding this matter. Further, after the United States Attorney for the District of Columbia issued a declination in this matter, Ostazeski proceeded on a purely administrative track in her investigation of the Employee. According to Ostazeski, under this track, the Employee would not be subject to criminal prosecution but rather would only face administrative penalties. Consequently, Ostazeski described the interview sessions that she conducted with the Employee to be purely administrative and non-custodial in nature, thereby obviating a need to give the Employee a Miranda warning during these sessions. Ostazeski did however give the Employee a Reverse Garrity warning⁶ which she describes as "... in this case, a Letter of Declination was issued, so now you have to answer questions about it... It's administrative now, it's no longer criminal in nature, and the Reverse Garrity advises you that [you] can't be prosecuted criminally for anything you say now about this particular matter." Tr. at 243 – 244.

⁴ According to Ostazeski's testimony this is a report that for whatever reason has no basis and is consequently dismissed.

⁵ While she was questioned on this term, Ostazeski could not recall having ever heard of it. *See generally*, Tr. at 221 – 222.

⁶ "The protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office..." *Garrity v. New Jersey*, 385 U.S. 493, 500 (U.S. 1967).

After concluding her investigation, Ostazeski ultimately felt that the charges levied against the Employee were substantiated and she recommended to the Agency that the Employee be removed from service.

Wayne Rimel

Wayne Rimel (hereinafter "Rimel") testified in relevant part that: he is an employee of the Agency and currently holds the rank of Sergeant. He is currently assigned to the MPD's Forensic Science Division, Crime Scene Investigation Branch. His name and badge number appear on the PD 251 that is the subject of the instant matter. While Rimel acknowledges that his badge number appears on the form, he denies that the signature that appears on said PD 251 is his. He has no knowledge of ever signing said PD 251.

Andre Ivey

Andre Ivey (hereinafter "Ivey") testified in relevant part that: he is an employee of the Agency and currently holds the rank of Officer. He has worked for the MPD for approximately 16 years and is currently assigned to the Fifth District. The PD 251 in question lists the name of a Detective Ivey. Ivey has never held the rank of Detective. Also, Ivey has no prior knowledge of said PD 251.

Kimberli Ivey

Kimberli Ivey (hereinafter "K. Ivey") testified in relevant part that: she is an employee of the Agency and currently holds the rank of Officer. She has worked for the MOD for approximately 13 years and is currently assigned to the Harbor Patrol. The PD 251 lists that date of June 4, 2004, as the date on which the burglary at the Employee's residence allegedly occurred. On this date as well, K. Ivey was working at the Harbor. On June 5, 2004, K. Ivey was on annual leave. On June 4, 2004, K. Ivey testified that she was not a Detective working in the Fourth District. Furthermore, K. Ivey testified that she had no prior knowledge of the subject PD 251.

Larry Toye

Larry Toye (hereinafter "Toye") testified in relevant part that: he is a neighbor of the employee. He has given his address, however, due to confidentiality concerns, Toye's address shall not be reproduced in this initial decision. Toye has lived in the neighborhood for 13 – 15 years. Sometime during the day at some point in 2004, Toye noticed MPD officers coming through his back yard. When he briefly questioned the officers about their appearance, one officer stated that they were responding to a silent alarm at the Employee's home. He then warned the officer that the Employee has two large dogs living in the home. Toye did not get the name of the officers nor did the officers question him any further. In all, Toye conversed with the officers for approximately two to three minutes. Toye could not recall any further information

regarding what happened at the Employee's residence when the officers responded.

Carmen Sweeney

Carmen Sweeney (hereinafter "Sweeney") testified in relevant part that: she is currently employed by the MPD and holds the rank of Sergeant. She has been with the Agency for approximately 15 years and is currently assigned to Youth Investigations. At one point in her career with the MPD she worked in the Fourth District. She remembers the Employee as a colleague that she worked alongside with while she was in the Fourth District. At some point, the Employee, Sweeney, and Sweeney's mother entered into preliminary discussions about Sweeney's mother possibly adopting one of the Employee's dogs. However, those discussions never resulted in an adoption. Sweeney also notes that the Employee was very fond of her dogs.

Paul Charity

Paul Charity (hereinafter "Charity") testified in relevant part that: he is currently employed by the MPD and holds the rank of Lieutenant. Charity is a 19 ½ year veteran of the MPD and is currently assigned to the Office of Professional Responsibility, Internal Affairs Division. He is somewhat familiar with this matter as it relates to the Internal Affairs division investigation into the Employee. Charity did not carry out the investigation into this matter. He is aware that the United States Attorney for the District of Columbia declined to prosecute the Employee relative to the alleged acts that gave rise to the instant matter.

Sonya Owens

The Employee testified in relevant part that: prior to her removal, she was a veteran of the MPD for approximately 21 years. She believes in the existence of bumped reports within the Agency as a constant necessity on the part of the Agency to correct CCN numbers attached to various reports. She cites as evidence of this miscues Employee's exhibit 7B attachment 24. However, she proffered no tangible evidence that the PD 251 that was presented to AWLA, allegedly by her, is in fact a bumped report. *See generally*, Tr. at 441.

The Employee explains her uncooperative demeanor and general unwillingness to be interviewed by Ostazeski as her asserting her Fifth Amendment rights. She was generally hesitant to meet with Ostazeski without her attorney present. The Employee notes that she was never given a Miranda warning. She also notes a critical point during an interview conducted by Ostazeski where she felt she was not free to leave. In her opinion, Ostazeski was required to give her a Miranda Warning as well as be afforded all other applicable due process rights afforded to persons subjected to custodial interrogation relative to an alleged criminal act. Part of her understanding of the alleged criminal implications of her alleged acts revolve around the United States Attorney for the District of Columbia declining to prosecute as well as the Commonwealth of Virginia's Attorney declining to prosecute this matter.

The Employee asserts that she never willingly gave up either of her dogs for adoption. She calls into question the veracity of Sherman's recollection of the Employee coming to AWLA several years earlier. She is also a member of the American Rare Breed Association. She asserts that her dogs were very valuable, worth well into the thousands of dollars for a dog with Kona's pedigree. This ostensibly buttresses her contention that she did not give Kona up for adoption. In trying to locate Kona after the alleged burglary at her home, the Employee attempted to contact AWLA several times via telephone in order to inquire if Kona was there, all to no avail. After getting no tangible response, she threatened to file a lawsuit against AWLA. At this point, Speerstra contacted her.

The Employee testified that she discovered she was burglarized on May 30 or 31, 2004, when one of her neighbors called her and informed her that he did not hear her dogs. At the time of this telephone call, the Employee was out of town, but after receiving said call, she returned home that same day to discover that her dogs, among other things, were missing. The Employee contends that she called the MPD's Synchronized Operations Command Center (hereinafter "SOCC") on June 5, 2004, in order to report the alleged burglary at her residence. When asked to explain why she waited several days to report the burglary at her home, the Employee stated that she "... wanted to find out what was going on. The dogs were left in the care of a pet sitting service that I had never used before and I wanted to find out what was going on. I wanted to get set as to what may have occurred or what happened, I didn't know." Tr. at 472. At the time of the evidentiary hearing, the Employee could not recall the name of the pet sitting service she hired to watch her dogs while she was out of town. She also does not recall filling out a contract with the pet sitting service, although she remembers receiving a receipt for services rendered. However, she was unable to reproduce a copy of the receipt during the evidentiary hearing⁷ in this matter. On her own volition, the Employee held several talks with the unnamed pet sitting service inquiring about the whereabouts of her dogs. The result of these talks were the eventual discovery and retrieval of her other dog, Swiss, at an unknown location, possibly a vacant lot, somewhere in the state of Maryland. *See generally*, Tr. at 476 – 481. After all of this, the Employee had decided not to report this unnamed pet service to the authorities.

Regarding the June 5, 2004, burglary call to the SOCC and the PD 251 associated with it, the Employee explains that the officers came to her residence and questioned her about the burglary. After the Officers had taken all of the requested information, the Employee asked the officers for a police report. Since the officers did not complete the report on the scene, she asked for them to drop it off in her mailbox. Within the next day or so, the Employee had received a PD 251 police report in her home mailbox. It is the same PD 251 that was subsequently presented to AWLA. In explaining why she listed her business/school as Microsoft as opposed to the MPD, the Employee explained that she had done extensive training with the Microsoft corporation and that "... it didn't make

⁷ Nor has the Employee produced a copy of the alleged receipt during the pendency of her appeal process in this matter.

a difference to her⁸,” because having worked for the MPD, that that particular piece of information was not that important and that since her contact information was correct, anyone from the Agency could contact her regarding any necessary corrections or clarifications needed on the PD 251.

FINDINGS OF FACTS, ANALYSIS, AND CONCLUSIONS

The following findings of facts, analysis and conclusions of law are based on the testimonial and documentary evidence as presented by the parties during the course of the Employee’s appeal process with this Office.

According to the documents of record, the Employee’s removal from service initially arose from a set of alleged circumstances regarding her surrender and eventual attempt to find and reclaim her dog, Kona from AWLA. Ultimately, the Employee was charged as outlined above. By a preponderance of the evidence standard, the Panel unanimously found the Employee guilty of all of the charges and specifications as outlined above. These charges were sustained by then Chief of Police Charles Ramsey and the Employee was subsequently removed from service.

The Employee has raised a number of contentions in this matter relating to a perceived abuse of her Fifth Amendment and criminal due process rights by the Agency. This Office is not a judicial forum of general jurisdiction. Further, this Office has no authority to review issues beyond its jurisdiction. *See Banks v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (Sept. 30, 1992), __ D.C. Reg. __ (). Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 (“Appeal procedures”) reads in pertinent part as follows:

- (a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in removal of the employee . . . , an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . . , or a reduction in force [RIF]...

Based on the preceding statute I may only adjudicate matters that squarely fall within the purview of D.C. Official Code § 1-606.03. The jurisdiction of this Office is limited to performance ratings that result in removals; final agency decisions that result in removals, reductions in grade or suspensions of ten days or more; or reductions in force. OEA Rule 604.1, 46 D.C. Reg. 9299 (1999). I find that issues relative to an aggrieved Employee’s Fifth Amendment and criminal due process rights are not within the jurisdiction of this Office. Accordingly, they shall not be discussed any further or in any way ruled upon in this initial decision. The remainder of this initial decision shall focus on issues relative to the Employee’s removal from service that are within this Office’s authority to adjudicate.

⁸ Tr. at 485.

In the instant matter, as has been stated previously, the Employee has been charged with: fraud in securing appointment or falsification of official records or reports; willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Officer to, or in the presence of any superior officer, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing; willfully disobeying orders or insubordination; and conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law, municipal ordinance, or regulation of the District of Columbia; conviction of any member of the force in any court of competent jurisdiction of any quasi-criminal offense or of any offense in which the member pleads guilty, receives a verdict of guilty or a conviction following a plea of nolo contendere 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 a conviction. Members who are accused of criminal or quasi-criminal offenses shall promptly report or have reported to their commanding officers their involvement. The set of circumstances that gave rise to the aforementioned charges being levied against the Employee arose from the Employee's action relative to her attempting to reclaim her dog Kona. In order to properly assess the evidence that the parties have presented I shall address each charge individually *infra*.

The charge of fraud in securing appointment or falsification of official records or reports arose from an allegation that the Employee presented a fictitious PD 251 to AWLA in an unsuccessful effort to procure that organization's assistance in reclaiming Kona. During the evidentiary hearing in the instant matter, I had the opportunity to hear testimony relative to the subject PD 251 and its authenticity as a valid police report from both Ostazeski and the Employee. In assessing the validity of this document, Ostazeski performed an exhaustive investigation taking into account the normal procedure established by the Agency for logging a police report. This review included:

1. Checking the PD 251 against the registered CCN numbers and the WALES computer system.
2. Checking the veracity of the PD 251 with the MPD Communications unit as well as physically checking the Fourth District log book.
3. Cross checking the name and badge numbers of all of the MPD personnel allegedly listed on the PD 251 with their time and attendance records. This layer of review was further buttressed by the credible testimony of Rimel, Ivey, and K. Ivey who all credibly and consistently testified that they had no prior knowledge of the PD 251 in question.

In each instance, Ostazeski's investigation led her to believe that the PD 251 presented by the Employee to AWLA was a fictitious document. The Employee

countered with the suggestion that the PD 251 in question was possibly a “bumped report” or that it was inadvertently assigned a different CCN number than what was listed. During the evidentiary hearing, I had the opportunity to observe the demeanor, poise, and credibility of Ostazeski. I find that her testimony in this matter to be both credible and persuasive. I find that the Employee presented the PD 251 to AWLA and I further find that the PD 251 presented by the Employee to AWLA to be a false official record. Consequently, I further find that the Agency has met its burden relative to this charge and its attending specifications.

The charge of willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Officer to, or in the presence of any superior officer, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing, arose from Employee’s alleged conduct of knowingly lying during a March 3, 2005, interview with Ostazeski. These falsehood’s included:

1. The Employee allegedly lying to Ostazeski during a March 3, 2005, interview wherein the Employee related that MPD officer’s responded to her residence on June 4, 2004, and prepared a PD 251 report of a Theft One/ Burglary One. And;
2. The Employee again allegedly lying during the aforementioned interview in that she denied voluntarily surrendered Kona to AWLA on June 17, 2004, and further denied filling out and signing the necessary paper work in order to properly effectuate the surrender. And;
3. The Employee again telling another alleged lie regarding an alleged March 3, 2005, telephone conversation with Mr. Salvatore Anastasi, (hereinafter “Anastasi”). Anastasi indicated that he could not hear the Employee’s dogs. The Agency refutes that this conversation occurred and bases that determination on Mr. Anastasi’s own statement (to the Agency) that this conversation never took place.

Schwartz, Sherman, and Speerstra each testified in a collective capacity as employees of AWLA that they have encountered the Employee on at least three occasions. Their collective recollection of events follows three visits by the Employee to AWLA. The first occasion occurred when the Employee came to AWLA in order to review its policy and procedures regarding the surrender and eventual adoption of a dog. The second occasion was when the Employee came to AWLA to order to surrender Kona for eventual adoption. It was during the second visit that the Employee signed a release form as well as submitted a signed handwritten letter to Kona’s eventual new owner(s). Both of these forms were entered into evidence during the evidentiary hearing. The Employee came to AWLA a third time, after Kona had been surrendered in order to inquire about his whereabouts as part of her attempt to reclaim her dog. It was during

this last visit that Schwartz and Sherman confirmed with Speerstra (and later Ostazeski) that the Employee had been to AWLA in the past and that she had inquired about and eventually consented to Kona being surrendered.

During the evidentiary hearing, I had the opportunity to observe the demeanor, poise, and credibility of Schwartz, Sherman, and Speerstra. I find their testimony relative to this matter to be overwhelmingly more credible and persuasive than the Employee's rendition of events. As such, I adopt Schwartz's, Sherman's, and Speerstra's recollection of events as synopsisized in the previous paragraph in its entirety as a duly recognized finding of fact.

Ostazeski credibly testified that she interviewed Anastasi about the alleged telephone conversation between himself and the Employee wherein he allegedly warned the Employee that he did not hear her dogs. According to Ostazeski, Anastasi denied that this conversation took place. The Employee counters that the conversation did in fact occur. Anastasi did not testify in the instant matter. While Anastasi's response is textbook hearsay, it is nonetheless admissible in an administrative proceeding before the OEA⁹. Considering this determination, I find that the Employee did not have a telephonic conversation with Anastasi on March 3, 2005. I further find that the Employee was knowingly untruthful and deceptive when she told Ostazeski that this fictitious conversation with Anastasi occurred. I further find that the Agency has met its burden relative to this charge and its' attending specifications.

The institution of the charge of willfully disobeying orders or insubordination arose from the Employee's conduct during the Agency's IA investigation into the instant matter specifically relating to Employee' failure to follow direct orders including her refusal to:

1. Submit to an interview with Ostazeski after being ordered to do so by Greene. And;
2. To provide the name of the Maryland law enforcement agency that was allegedly helping her to reclaim her dogs. And;
3. To provide the name and contact information for the person who arranged the confidential agreement to locate and recover her dogs. And;

⁹ Regarding the admissibility of hearsay in an administrative proceeding, the District of Columbia Court of Appeals held in *Compton v. D.C. Board of Psychology*, 858 A.2d 470, 476 (D.C. 2004) "that duly admitted and reliable hearsay may constitute substantial evidence. See, e.g., *Coalition for the Homeless v. District of Columbia Dep't of Employment Services*, 653 A.2d 374, 377-78 (D.C. 1995) ("Hearsay found to be reliable and credible may constitute substantial evidence . . ."); *Wisconsin Avenue Nursing Home v. District of Columbia Commission on Human Rights*, 527 A.2d 282, 288 (D.C. 1987) (explaining that reliable hearsay standing alone may constitute substantial evidence); *Simmons v. Police & Firefighters' Ret. & Relief Bd.*, 478 A.2d 1093, 1095 (D.C. 1984); *Jadallah v. District of Columbia Dep't of Employment Servs.*, 476 A.2d 671, 676 (D.C. 1984); see also *Richardson*, 402 U.S. at 402; *Hoska v. United States Dep't of the Army*, 219 U.S. App. D.C. 280, 287, 677 F.2d 131, 138 (1982). Thus, nothing in the hearsay nature of evidence inherently excludes it from the concept of "substantial" proof in administrative proceedings."

4. To provide to Ostazeski the name and contact information of the pet sitting company that allegedly absconded with her dogs.

The Employee explains her conduct in not initially submitting to an interview with Ostazeski on a number of circumstances, including it being a violation of her constitutional rights (which relative to the instant matter I do not have to authority to adjudicate); as well as a skewed interpretation of the written order requiring her to present herself for questioning in this matter. A March 9, 2005, memorandum to the Employee from Greene instructed the Employee to have a meeting with Ostazeski on March 11, 2005. The memorandum further instructed the Employee to provide Ostazeski with the information listed in the previous numbered paragraph. In responding to this order, the Employee dropped off some written materials that she seemingly felt were responsive to the memorandum. The Employee contends that the written order requiring her to submit to Ostazeski for an interview only required her to drop off the requested paper work and nothing more. Of note, the paper work submitted by the Employee failed to effectively answer any of the questions posed in the memorandum. To date, the Employee has yet to proffer the name of the pet sitting agency she employed; the name of the Maryland law enforcement agency that has allegedly assisted her in finding her dogs; as well as the name of a contact person within the unnamed Maryland law enforcement agency. Considering everything mentioned so far, I find that the Employee failed to obey several direct orders by failing to timely submit to the aforementioned interview with Ostazeski; by failing to identify the pet sitting service, Maryland law enforcement agency, and the name and contact information of a contact person within the Maryland agency as referenced *supra*. I further find that the Agency has met its burden relative to this charge and its' attending specifications.

The charge of conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or violations of any law of the United States, or of any law municipal ordinance, or regulation of the District of Columbia, arose from the Employee's alleged act of presenting a fictitious PD 251 to AWLA as an official document, as well as the Employee's alleged conduct before AWLA in an attempt to reclaim Kona. I have previously found that the Employee presented the PD 251 in question to AWLA; and I further found that the PD 251 presented by the Employee to AWLA to be a false official record. I also find the Employee's rendition of events in this matter in its entirety as being self-serving, specious, and in some instances bordering on the ridiculous. The Employee's tale of trying to reclaim her dogs would almost assuredly bring a certain amount of notoriety that the Agency could ill afford to condone if it wanted to be taking seriously within the community as a whole. Consequently, I find that the Agency has met its burden relative to this charge and its' attending specifications.

The charge of conviction of any member of the force in any court of competent jurisdiction of any quasi-criminal offense or of any offense in which the member pleads guilty, receives a verdict of guilty or a conviction following a plea of nolo contendere 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 a conviction, arose from the fact that the Employee, pursuant to District of Columbia law, could have been charged with the crime of forgery and uttering. Ostazeski testified that their seemingly existed two factors that potentially led to the declination issued by the United States Attorney for the District of Columbia. The fact that the presentation of the fictitious PD 251 occurred in the Commonwealth of Virginia (a bordering jurisdiction) and that the original PD 251 was not available for analysis. Ostazeski drew this conclusion from her own knowledge and experience regarding the laws of the District of Columbia. Considering the record as whole, I find that there was enough evidence that the Employee attempted an act that could possibly constitute a crime even though a declination was issued. Consequently, I find that the Agency has met its burden relative to this charge and its' attending specification.

The charge of Absence without official leave (hereinafter "AWOL") i.e., reporting late for duty more than six (6) days within a one-year period or absence from duty without official leave for more than eight (8) consecutive hours, arose from charges that the Employee was absent from duty without official leave on March 11 and from March 13 – 26, 2005.

On March 11, 2005, the Employee left a sealed envelop under Greene's office door. This envelope contained both the aforementioned ineffective written response to Greene's March 9, 2005, memorandum, as well as a written request for leave for that same day, which Greene denied. Greene credibly testified that the Employee should have made a verbal request for leave prior to leaving as was customary Agency procedure. The Employee opted to make her leave request in writing, and then left without receiving final verification of the acceptance of leave. Since Greene was the Employee's commanding officer, it was her managerial prerogative to accept or reject the Employee's leave request. Since the Employee's leave request was duly rejected and there exists no credible fault in Greene's judgment, I find that the Employee was AWOL on March 11, 2005. I find that the Agency has met its burden relative to this charge and its' attending specification.

As for the determination that the Employee was AWOL from March 13-26, 2005, Greene related that she had previously planned to suspend the Employee without pay during this time frame, however the Employee was not properly served with the notice of suspension. Greene contends that for a suspension to be properly effectuated the Employee would have been served with a form PD 77. The Employee however mistakenly received a memorandum from then Chief Ramsey stating that she would be suspended without pay during the dates in question. The Employee relying on that memorandum did not report for duty. I find that, given the reasonable amount of confusion that ensued from the memorandum issued by then Chief Ramsey, the Employee was not AWOL from March 13-26, 2005, but rather was attempting to serve a seemingly duly enacted suspension. I find that the Agency has not met its' burden relative to this attending specification.

The primary responsibility for managing and disciplining Agency's work force is

a matter entrusted to the Agency, not this Office. *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), __ D.C. Reg. __ (); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), __ D.C. Reg. __ (). Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *See Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment. *See Stokes, supra; Hutchinson, supra; Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (Feb.1, 1996), __ D.C. Reg. __ (); *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (Sept. 21, 1995), __ D.C. Reg. __ ().

I CONCLUDE that, given the totality of the circumstances as enunciated in the instant decision, the Agency's action of removing the Employee should be upheld.

ORDER

Based on the foregoing, it is ORDERED that Agency's action of removing the Employee from service is hereby UPHeld.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Administrative Judge