

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
Michael Skelly,)	OEA Matter No. 1601-0001-16
Employee)	
)	Date of Issuance: May 17, 2017
v.)	
)	Joseph E. Lim, Esq.
Metropolitan Police Department,)	Senior Administrative Judge
Agency)	
_____)	
Robert Deso, Esq., Employee Representative)	
Frank McDougald, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Michael Skelly (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) on October 2, 2015, challenging the Metropolitan Police Department’s (“Agency” or “MPD”) decision to terminate him based on several drug-related charges. Agency filed its Answer on November 9, 2015. Employee’s position of record was Police Officer with the rank of Sergeant. After Agency declined to mediate on this matter, it was assigned to me on January 4, 2016.

After Agency’s request for a rescheduling, the Prehearing Conference was held on April 4, 2016. Subsequently, a Post Prehearing Order was issued on May 24, 2016, requiring the parties to submit legal briefs addressing the issues in this matter. After Agency was granted an extension of time to file its brief, both parties submitted their briefs accordingly. Because this matter is being reviewed under the analysis set forth in *Pinkard v. D.C. Metropolitan Police Department*¹, no Evidentiary Hearing was convened. 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 the Adverse Action Panel’s decision was supported by substantial evidence;

¹ 801 A.2d 86 (D.C. 2002).

2. Whether there was harmful procedural error; and
3. Whether Agency's action was done in accordance with applicable laws or regulations.

UNDISPUTED FACTS

Employee was employed by MPD in May 4, 1992, and promoted to Sergeant in 2001. During his 23 years of service with MPD, Employee had many performance of duty and non-performance of duty injuries and illnesses, to include a broken foot,² significant continuing dental problems, severe headaches, a broken ankle with bone chips, two knee surgeries, a lumbar spine surgery, and a cervical spine surgery.³

Over the years Employee received some treatments and prescriptions from physicians at the MPD Police and Fire Clinic ("PFC"), but most of his treatments for his various injuries and illnesses were by private physicians, paid for by his personal medical insurance; first Kaiser, then Aetna. PFC physicians only provide limited medical care to MPD members. For the most part, PFC functions as an administrative agency which determines the sick leave/injury status of MPD members - whether an injury or illness which requires the taking of sick leave or being placed on limited duty was incurred in the performance of duty ("POD") or not. Whenever a member misses work due to injury or illness, the member is required to complete a PD 42, Sick or Injury Report, and report to the PFC. If an injury or illness is classified as POD, time lost from work is not charged to the member's sick leave.

Employee's private physicians were specialists in different areas of medicine and they prescribed many medications for Employee, including pain medicine, for his various health problems. Employee often filled his prescriptions at a Rite Aid pharmacy in the Fifth District, near where he worked, while wearing his uniform with his name tag, and he sometimes filled prescriptions at a drug store in Arlington, Virginia, near where he lived.⁴

In late 2011, a Washington, D.C. Rite Aid Pharmacy employee notified Agency's Detective Maria Pena about Employee's frequent large purchases of Hydrocodone, a controlled substance.⁵ Thereafter, Detective Pena conveyed the information about Employee's frequent submission of prescriptions for Hydrocodone to MPD officials and the matter was assigned to Detectives Rahaman Garrett and Karen Taylor of the Narcotic and Special Investigations Division (NSID) for further investigation.

Pursuant to the MPD investigation of Employee in a report marked Incident Summary (IS) number IS# 11-002950 based on "[i]nformation . . . brought to the attention of [MPD] that Employee has been filling prescriptions for a controlled substance" and the "frequency which the

² Employee Brief, Tab 1, Attachment 1.

³ Employee Brief, Tab 4, 5th page, Exhibits 1-5; Tab 3, CD, Employee testimony, pp. 319, 324-327, 331-336, 338-346, 352-354, 357-358, 360-362; Tab 1, Attachment 51, Aetna record of treatment, January, 2009-October, 2011.

⁴ Employee Brief, Tab 1, p. 4; Tab 3, CD, Employee testimony, pp. 315-363.

⁵ July 27, 2016, Agency Brief, Tab 1, Final Investigative Report Concerning Allegations of Misconduct Sergeant Michael Skelly Patrol Services and School Security Bureau (PSSSB)-Fifth District, IS #11-002950; IAD #11307 (FIR) at 3.

prescriptions are being filled,” his police powers were revoked and he was placed on administrative leave with pay on November 5, 2011.⁶ On November 5, 2011, Agency asked that Employee submit a urine specimen for urinalysis.⁷ Thereafter, Employee submitted his urine specimen which tested positive for Xanax but negative for Vicoprofen, which is also known as Hydrocodone.⁸

Following the results of his urinalysis, Employee was directed to report to the Police and Fire Clinic (PFC) and to bring with him all the medications he was taking. There, Employee met with Dr. Oluma Malomo, who informed him of the results of his urinalysis. Among the medications shown to Dr. Malomo by Employee was an empty bottle of Xanax that was last filled for a thirty-day supply on October 26, 2011. With respect to Hydrocodone, Employee informed Dr. Malomo that he uses the drug on and off for left foot pain. Following the meeting, Dr. Malomo reviewed a listing of medications that Employee’s insurance provider, Aetna, had paid for. Based on her review of the amount of medications for which Aetna had been billed, Dr. Malomo concluded that Employee must have been in a lot of pain, addicted to the medications, or both and that he should not be on full duty. Dr. Malomo also noted that the Aetna listing of medications prescribed for Employee was “not consistent with what should be in his urine.”⁹

Over the next 2½ years, from October 2011 through April 2014, the Drug Enforcement Administration (“DEA”)’s Investigator Ikner and MPD’s Officer Karen Taylor jointly investigated Employee, with Ikner acting as lead investigator. Ikner interviewed and investigated some of the physicians and the dentist who had treated Employee over a period of years.¹⁰ The physicians and the dentist confirmed that they had prescribed many medications for Employee, to include pain medicine. MPD investigators also visited pharmacies where Employee had prescriptions filled. They obtained videos of Employee filling prescriptions. There is no evidence that Employee ever attempted to conceal or falsify his identity when he had a prescription filled. The investigators did not find any evidence that Employee was using his prescription medications to deal in narcotics, a criminal offense known as “diversion,”¹¹ or that he ever took prescription pads and wrote prescriptions for himself.¹²

In January 2014, IAD Agent Matthew Shinton was reassigned the investigation of Employee. The investigation involved interviews with several individuals, and the information that was provided by them was presented to the United States Attorney Office (“USAO”) for the District of Columbia for possible criminal prosecution. However, on April 25, 2014, the USAO for the District of Columbia issued a letter informing MPD that it had decided not to prosecute Employee.

⁶ July 27, 2016, Agency Brief, TAB 1, FIR, Attachments 3 and 6.

⁷ *Id.*, Attachment 4.

⁸ *Id.*, Attachment 19.

⁹ *Id.*

¹⁰ Employee Brief, Tab 1, p. 2, pp. 44-45, ROI list of Attachments.

¹¹ Employee’s Brief, Tab 3, CD, Ikner testimony, pp. 104-105.

¹² Employee Brief, Tab 4, 20th page, ¶ 16, 21st page, ¶ 10.

Based on an Arlington County arrest warrant, Employee was arrested on or around July 2014.¹³ However, the Arlington County charges were dismissed in 2014 and Employee's arrest record was expunged by the Arlington County Circuit Court in May, 2015.¹⁴

On August 29, 2014, Employee was issued a Notice of Proposed Adverse Action (Notice) in DRB # 505-14, in which he was informed that the Agency proposed to terminate his employment based on acts of misconduct committed by him.¹⁵

The following charges were levied against employee:

Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-7, which provides, in part, "Conviction of any member off the force in any court of competent jurisdiction of any criminal or quasi-criminal offense, or of any offense in which the member either 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..."

Specification 1: In that, you engaged in behavior that consisted of a crime. Specifically, US Code Title 21-843, which states in part, "Whoever knowingly and willfully executes, or attempts to execute, a scheme or artifice – (1) to defraud any health care benefit program; or (2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery of or payment for health care benefits, items, or services..." You were receiving prescriptions for multiple narcotics from different providers and refilling them at various locations. Subsequently you were arrested and charged in Virginia with "Obtaining Drug: Forgery or Altered Prescription." This incident is currently a pending criminal matter under IS# 14-002009.

Specification 2: In that, you altered a prescription for Percocet written by PFC Doctor Scott Lastrapes by placing the number "1" in the refill area on the prescription.

Charge No. 2: Violation of General Order Series 120.21, Attachment A, Part A-16, which reads "Failure to obey orders and directives issued by the Chief of Police."

Specification 1: In that, you violated the Drug Free Work Place directive, which states, in part, "An employee of the District of Columbia government is prohibited from engaging in the unlawful

¹³ Employee Brief, Tab 3, CD, Employee testimony, pp. 387-388

¹⁴ Employee Brief, Tab 4, 5th page, exhibits 6 and 7.

¹⁵ Agency Attachment 1.

manufacture, distribution, dispensing, possession, or use of a controlled substance in the workplace ... Those who use and/or possess drugs put themselves and those around them in danger of arrest and conviction for drug-related crimes.”

Charge No. 3: Violation of General Order Series 120.21, Attachment A, Part A-12, which reads, “Conduct Unbecoming 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 States or any law, municipal ordinance, or regulation of the District of Columbia, as further specified in General Order 201.26, Part 1-B-22, which states, “Members shall conduct their private and personal lives in such a manner as to avoid bringing discredit upon themselves or the department.”

Specification 1: In that, you were willfully and knowingly untruthful to PFC Dr. Scott Lastrapes when you obtained a prescription for Percocet by fraudulent means, when you reported that your physician was out of town.

Specification 2: In that, you were less than truthful to several Police and Fire Clinic physicians about the narcotic medications you were taking and the injuries and illnesses for which you were receiving treatment.

Charge No. 4: Violation of General Order Series 120.21, Table of Offenses & Penalties, Part A, #25, which reads “Any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or to properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force.”

Specification 1: In that, you obtained narcotics from different providers after being advised by Dr. John Felly and Dr. Z. Chris that Aetna insurance sent out letter regarding you having previously obtained narcotics from several providers. You did so knowing that your behavior was not proper and that you were receiving excessive narcotics.

On October 15, 2014, Employee was issued another Notice of Proposed Adverse Action in DRB # 610-14, in which he was informed that the Agency proposed to terminate his employment based on acts of misconduct committed by him.¹⁶ Employee’s acts of misconduct were set forth in one charge that was supported by three Specifications. The charge and specifications in DRB#610-14 were based on Employee being arrested and charged with criminal offenses in Virginia.

¹⁶ *Id.*

Pursuant to the Notice of Adverse Action DRB 610-14, the following additional charges were levied against employee:

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 a 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 July 10, 2014, the Arlington County Police Department (ACPD) placed you under arrest without incident at 2757 South Glebe Road, Arlington, Virginia, as a result of two Warrants of Arrest-Felony (ACPD Case number 140709-035). In addition, Mr. Frank Frio, States Attorney for Arlington County, reports that you currently have an open indictment pending.

Specification No. 2: In that, on July 9, 2014, Magistrate John David Kuntz of the Arlington County General District Court (ACGDC) issued a Warrant of Arrest-Felony against you for the charge "Obtaining Drug: Forgery or Altered Prescription on or about 12/27/13 in violation of Section 18.2-2581.1 of the Virginia Code.

Specification No. 3: In that, on July 9, 2014, Magistrate John David Kuntz of the Arlington County General District Court (ACGDC) issued a Warrant of Arrest-Felony against you for the charge "Obtaining Drug: Forgery or Altered Prescription on or about 1/2/14 in violation of Section 18.2-2581.1 of the Virginia Code.

Both notices informed Employee that he was entitled to an evidentiary hearing to contest the charges and specifications. Employee elected to have an evidentiary hearing before the Adverse Action Panel ("AAP" or "Panel"). Agency consolidated DRB¹⁷ 505-14 and 610-14 and held an Adverse Action hearing before a three-member AAP on May 21, 2015 and May 29, 2015. Pursuant to the evidentiary hearing, the Panel issued Findings of Fact and Conclusions of Law in which Employee was found "guilty" on all charges and specifications on DRB 505-14 and "not guilty" on all charges on DRB 610-14.¹⁸ The Panel recommended that Employee should be terminated for each charge and specification for which he was found guilty.

Agency accepted the AAP's findings and on July 2, 2015, Employee was issued a Final Notice of Adverse Action (Final Notice) informing him that his employment with MPD would be terminated effective September 4, 2015.

¹⁷ Disciplinary Review Board

¹⁸ Agency's Answer to Employee's Appeal, Exhibit 4, AAP Findings of Fact and Conclusion of Law.

On July 17, 2015, Employee appealed the Final Notice to the Chief of Police (COP), but on August 6, 2015, his appeal was denied by the COP. Agency terminated Employee effective September 4, 2015. Thereafter, Employee filed a Petition for Appeal of the Final Notice to the Office of Employee Appeals.

SUMMARY OF RELEVANT TESTIMONY

On May 21, 2015 and May 29, 2015, Agency held an AAP Disciplinary Hearing. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as “Tr.”) which was generated following the conclusion of Employee’s proceeding.¹⁹ Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their position.

Detective Maria Pena (“Pena”) May 21, 2015, Tr. 40-58.

Pena testified that as a member of Agency’s Narcotics and Special Investigations Division Asset Forfeiture Unit that was detailed to the Drug Enforcement Administration (DEA), she was alerted by a Rite Aid Pharmacy clerk to Employee’s frequent large purchases of Hydrocodone, a controlled substance, over several years. The source stated that Employee would buy the drug in person and over the phone, with prescriptions called in by Employee from other jurisdictions such as West Virginia. Rite Aid produced a printout of prescriptions filled by Employee starting from January 2011. Pena admitted she never interviewed Employee’s doctors.

Pablo Figueroa (Figueroa) May 21, 2015, Tr. 59-71.

Sergeant Figueroa of Agency’s Narcotics and Special Investigations Division testified that Pena met with him and other officers about Employee’s activities. Suspicious of possible fraudulent prescriptions obtained by Employee, Agency then referred the matter to Detective Karen Taylor of the DEA which started an investigation of Employee’s activities. They submitted the matter over to the U.S. Attorney’s Office for possible criminal prosecution.

Detective Rahaman Garrett (Garrett) May 21, 2015, Tr. 72-101.

Garrett is assigned to Narcotics and Special Investigations Diversion Unit of MPD. Garrett stated that during the week of October 27, 2011, he received information that Employee was obtaining scheduled narcotics on numerous occasions. That information revealed that Employee had obtained the following: (1) January 2011, 180 pills of Oxycodone; (2) March 2011, 15 pills of Oxycodone; (3) June 2011, 40 Hydrocodone pills; (4) August 2011, 180 Hydrocodone pills; (5) September 2011, 120 Hydrocodone pills; and (6) October 2011, 300 Hydrocodone pills. Garrett noted that all of the pills had been obtained at the Rite Aid Pharmacy, located at 1401 Rhode Island Avenue, NW. He obtained a Rite Aid video of Employee buying a drug. Garrett did not interview any of Employee’s doctors.

Stevie Ikner (Ikner) May 21, 2015, Tr. 101-362.

¹⁹ AAP Hearing Transcripts, May 21, 2015, and May 29, 2015.

Detective Ikner of the DEA testified that he is trained in investigating diversion cases. He described diversion as a crime whereby someone, whether doctors, pharmacists, or individuals, uses doctor's prescriptions fraudulently to obtain large quantities of drugs from several pharmacies to sell to illicit markets. He testified that a diversion case involves the diversion of controlled substances, and that the prescription drug problem is something that they investigate, from different doctors and pharmacies, importers, exporters, manufacturers, distributors, researchers. He made a spreadsheet of all of Employee's drug purchases from 1992 to May, 2014, containing the prescribing doctors, date of purchases, name of pharmacy, amounts of drugs, dollar amounts. He turned over his investigative report to Paulette Woodson of Agency's Internal Affairs.

In the course of his investigation, he and Detective Taylor interviewed Dr. Dameneon Smith because he was curious as to why a podiatrist would prescribe the narcotic Hydrocone. Dr. Smith indicated it was for Employee's ankle pain. Dr. Smith stated that he referred Employee to Dr. Cherrick for pain management.

Ikner interviewed Dr. Smith on three separate occasions. Dr. Smith stated that he had treated Employee for an ankle injury and that Employee had informed him that he had been shot and had a back problem. While being asked questions about Employee, Dr. Smith wondered if Employee was still addicted to Vicodin. Dr. Smith stated that he had recommended that Employee undergo ankle surgery but Employee declined. Dr. Smith noted that he had referred Employee to a pain management doctor, Dr. Abraham Cherrick ("Cherrick"), and that he had informed Employee he could no longer prescribe Vicodin for him. Ikner noted that Dr. Cherrick dropped Employee as a patient for violating the pain management contract that Employee signed with Capitol Spine and Pain Center.

Dr. Smith reviewed Employee's medical record and acknowledged both writing and calling-in some prescriptions for Employee. However, Dr. Smith denied calling-in a prescription dated April 29, 2010. Dr. Smith stated that his office was open on March 17, 2011, and that he saw patients on that date. He further stated that he did not receive any phone messages from Employee on that date.

Ikner said that 21 USC 843 is a statute that prohibits obtaining controlled substances by fraud or subterfuge. Controlled substances could be obtained by fraud, such as someone forging a prescription and submitting a prescription to the pharmacy or by being untruthful to your physician and thereby obtaining a controlled substance. Ikner indicated that someone going to more than one doctor to obtain a controlled substance such as hydrocodone within the same time frame would be considered suspicious behavior. Receiving this type of medicine from more than three or more doctors within the same time frame, constitutes obtaining drugs fraudulently. Ikner identified other circumstances that would raise suspicions about the acquisition of controlled substances, such as paying cash for the purchase of a prescription, using different pharmacies to fill prescriptions, and travelling long distances to have a prescription filled.

Ikner discussed Schedule 1 through 5 drugs. He stated that Schedule 1 has no medicinal use deemed by the DEA, while Schedule 2 has the highest potential for abuse. Those would be

oxycodones, oxycontin, morphine, fentanyl. Ikner noted that although Vicodin, which is a hydrocodone, had previously been considered Schedule 3 drugs, they had recently been added to Schedule 2. Schedule 4 would be benzodiazepines, ativan, lorazepam. Schedule 5 would be mostly syrups, like promethazine with codeine, hydromet, different hydrocodone liquid mixture type of controlled substances, and many sleeping aids as well.

Ikner stated that Hydrocodone is the number one diverted controlled substance in the United States, and that's why it was added into the Schedule 2 category last year. Ikner also testified about investigatory sources and methods used to conduct investigations, such as the use of subpoenas, pharmacy surveys to review prescriptions records and histories, interviews with physicians and pharmacies, and queries in open source databases, such as the prescription drug monitoring programs that certain states provide to the District. With regard to database searches, Ikner stated that the Prescription Monitoring Program ('PMP') is run by Virginia's Department of Health Professions. The PMP will provide the prescription drug history of any person in the Virginia.

In the investigation of Employee, Ikner began by reviewing Employee's PMP, the PMP of his physician, Dr. Feeley, and the MPD reports. He interviewed the Rite Aid staff regarding the prescriptions and the initial complaint. Using a spreadsheet, Ikner tracked Employee's acquisition of controlled substances from the PMP, information from the Police Department's clinic, all of the records, the different reasons, and the notes obtained from all of the subpoenaed records from 1992 when Employee becomes a MPD officer to May of 2014.²⁰

Ikner also interviewed Dr. Scott Lastrapes ("Lastrapes") at the Police and Fire Clinic (PFC) who treated Employee on March 17, 2011. Lastrapes prescribed Percocet for Employee's pain experienced as a result of slipping in his shower and re-injuring his ankle. Employee told Lastrapes that his treating doctor, Smith, was out of town. Inker's investigation showed that Smith's office was open on March 17, 2011, and that Smith worked that day. As for the prescription that was written for Percocet by Lastrapes, Inker's investigation showed that the signed prescription included a "1" that had been written on it for the purpose of a refill. However, Lastrapes denied that he wrote "1" on the prescription.

Ikner also interviewed Dr. John Feeley ("Feeley") of Luray, Virginia, approximately a hundred miles from the Washington area. Dr. Feeley was another doctor who prescribed controlled drugs for Employee as was reflected in the PMP. Feeley began treating Employee in November 2011 when Employee said he suffered from PTSD from being a member of the bomb squad and had a bad back and sleeping problems. Feeley received "red flag notices" or letters from insurance companies in February 2011 and August 2011 from Employee's medical insurance carrier, Aetna, informing him that Employee was receiving three controlled substances from three different physicians, that this was dangerous and was being monitored by Aetna. Feeley had prescribed large quantities of Hydrocodone for Employee and thus was investigated and that as a result, Feeley was made to resign by his employer.

²⁰ Department's Exhibit 3, pages 425 through 434.

Ikner talked about a dentist, Dr. Paul Harris (“Harris”), who prescribed for Employee an anti-anxiety drug for his fear of dentists and Hydrocodone for pain from late May 2011 to early July 2011. Harris wrote three prescriptions for Hydrocodone that Employee filled at three different pharmacies.

Ikner interviewed Dr. Oluma Malomo (“Malomo”), a PFC physician who prescribed 450 Hydrocodone pills for Employee’s ankle injury. Ikner also testified about PFC Dr. Gloria Morote (Morote), a psychologist who did a fitness for duty evaluation of Employee. Morote said Employee told her about his herniated disk and physical therapy, but never said that he was taking the pain medication. Morote also told Ikner that conceal controlled substance abuse is a significant factor when considering the fitness for duty evaluation.

Ikner also testified about Dmitri Razoumov (“Razoumov”), an Office Assistant to Dr. Armando Figueroa. Dr. Figueroa’s Washington, DC office shut down after Dr. Figueroa went to prison for writing illegal prescriptions. The investigation revealed that a known drug dealer brought Employee to Figueroa. Agency Exhibit 3 shows that in 2001-2002, Dr. Figueroa had prescribed controlled substances for Employee.

Ikner concluded his testimony in stating that the USAO for the District of Columbia was presented with the results of the investigation and had declined prosecution. He also stated that criminal charges against Employee were brought in Virginia, but they were dismissed.

Task Force Officer Karen Taylor (Taylor) May 29, 2015 Tr. 23-149.

Detective Taylor said that the investigation of Employee was conducted by the Drug Enforcement Agency (DEA) along with the Narcotics and Special Investigation Division of MPD. Taylor said the investigation had shown that Employee had made calls to known narcotics distributors that had been investigated by the Federal Bureau of Investigation and DEA and that Skelly was obtaining narcotics from multiple doctors who would prescribe him the same prescription, and had the doctors been aware of this they would have not prescribed any narcotics for Skelly. She also noted that one of Employee’s doctors, Dr. Feeley, was terminated for over-prescribing him with pain medication.

Lieutenant Paulette Woodson (Woodson) May 29, 2015 Tr. 150-237.

Lt. Woodson of Agency’s Special Operations Division testified that she participated, reviewed and prepared the MPD Report of Investigation (Tab 1) with the assistance of others, primarily Ikner and Taylor. Woodson summarized the redacted notes of Ikner regarding statements obtained from various witnesses. After she prepared her summaries of Ikner’s PD 854’s,²¹ she shredded Ikner’s notes. When Woodson was promoted to Lieutenant, she passed the case along to Investigator Shinton, who completed the ROI and signed it. Their investigation centered on Employee’s purchase and use of Hydrocodone, Vicoprofen, and Oxycodone from 2000 to 2011. She explained that even a properly prescribed drug becomes illicit if it is obtained

²¹ P.D. 854 is the form used by Agency to summarize portions of an investigative report.

illegally. Woodson admitted she never interviewed Employee. After her promotion, MPD Agent Matthew Shinton took over the investigation.

Woodson testified that when the letter of declination was issued, the case was completed and because the Drug Enforcement Administration (“DEA”) was unable to record interviews, she relied solely on notes in order to place the notes into her own report. She stated that the DEA interviewed Dr. Malomo because he knew the proper terminologies of the various medicines. She took notes of what happened because she primarily worked as a liaison with the Police and Fire Clinic (“PFC”).

On March 1, 2012, Employee contacted Woodson and told her that his doctors had contacted him about his case. Woodson told Employee that she could not disclose anything about his case because it was pending and she did not want to question him unless he waived his rights to discuss the case.

Woodson provided that a DEA analyst created a Microsoft Excel spreadsheet (“Excel”). The spreadsheet focused on two controlled substances, Hydrocodone and Oxycodone. She explained that the Excel sheet provided a breakdown of the different medications by schedule from 2000-2011. She stated that everyone who was employed with Agency had to sign a form acknowledging and abiding to a drug free work place for illicit drugs. Woodson explained that any drug that was abused or obtained illegally is considered illicit.

Woodson explained that Agency delayed interviewing officers until later on in the investigation because they did not want to put information out too soon. Agency believed that if Employee obtained counsel and obtained copies of the investigation, it would have hindered their criminal investigation with the USAO. She stated that the case became dormant for a few months while she was still at the IAD because the USAO pushed the case back in order to deal with more high-profile cases.

On cross-examination, Woodson explained Dr. Bennet’s statement, “If there is a script for Sergeant Skelly written with my name on it, someone got a hold of my pad and forged it.” *Tr. 194-195*. She stated that in the report, there was a note created stating that it was not proven that Employee forged any prescriptions that had Dr. Bennett’s name on them. He provided that Dr. Bennet was interviewed because the prescriptions he wrote were for a controlled substance that was found in Aetna insurance company’s profile. Woodson stated that the pharmacy made an error in reporting the physician’s DEA number in their system.

Woodson was aware that Employee was treated by several physicians for different ailments and that many of the doctors received red flag letters by Aetna. However, the doctors continued to prescribe prescriptions as they deemed appropriate. She tried to determine if Employee abused his prescribed medication, and to do so, they used Employee’s urine sample to see if the drugs appeared his system. When the results came back, Employee did not have the drugs in his system. Agency believed that it was a diversion due to the amount of pills that were received by Employee versus the amount that appeared in his system.

Woodson stated that she spoke with Dr. Malomo to find out how long it took the drugs to metabolize in Employee's system. She was informed that it would take three to seven days for the medication to be out of Employee's system. He provided that if Employee took the medication on and off within a range of the three to seven days of metabolizing, it would still appear in his system.

Woodson stated that the doctor's initial statements may have been more truthful than their subsequent statements, because in her experience, she found that when the doctors provided initial statements, the doctors were not believed to be the target of the investigation. However, once the USAO and the DEA continued to question them, they retained counsel and modified their answers to the questions for fear of losing their licenses. She explained that Dr. Lastrape's initial interview was regarding the prescription for Employee and whether or not he indicated that there was a number one on the prescription or not. Initially, Dr. Lastrape said that he was "almost certain" he did not put a one on the prescription. However, more than a year later, in his interview, he said "with certainty" that he did not put a number one on the prescription. *Tr. 214-215*. Woodson stated that was why Agency went through the process of pulling original PFC files and re-interviewing Lastrape because he appeared to want to save himself. Also, Agency had to be sure that he did not do anything against the rules.

Woodson acknowledged that Dr. Armando Figueroa ("Figueroa") prescribed Oxycontin, Valium, and three other prescriptions to Employee. He stated that the allegation was that a prescription would be generated and Employee was getting the prescriptions from the PFC.

IAD Agent Matthew Shinton (Shinton) May 29, 2015 Tr. 237-267.

Matthew Shinton ("Shinton") worked for Agency for twenty-eight years and for Internal Affairs for four years. He explained that he received Employee's case from Woodson because she was promoted and Woodson told him that Agency was waiting for a decision from the USAO's office.

Shinton received the April 25, 2014, letter of declination from the USAO declining to prosecute Employee. He stated that a preliminary investigative report was created regarding Employee's charges. The first was an offense on December 27, 2013, and the second date of offense was January 2, 2014. Both charges were for taking drugs from an altered prescription. Shinton stated that Employee never provided a statement, despite being asked on August 4, 2014, if he wanted to be interviewed.

An arrest warrant was issued in Arlington County, Virginia for Employee on July 9, 2014. The executed date was July 10, 2014 for the December 27, 2013, and January 2, 2014, charges. Shinton stated that Employee subsequently received a final notice of indefinite suspension without pay.

On cross-examination, Shinton stated that the two charges were dismissed. He stated that on August 21, 2014, Employee went before the Fort Arlington County General District Court. Judge Thomas Keely declined to prosecute him and advised that there was another indictment

pending against Employee. Shinton stated that he called Arlington County regarding the open indictment, but never received a response.

Michael Derstine (Derstine) May 29, 2015, Tr.267-274

Derstine worked for Cobec Consulting. He stated that he was friends with Employee for four years. Derstine stated that on December 23, 2013, Employee had knee surgery and he picked him up from the hospital after the surgery. Employee's doctor, Dr. Martinelli, discharged Employee and prescribed him pain medication for use after surgery. Derstine stated that Employee called the pharmacy for home delivery and he handed the prescription over to the pharmacist.

Michael Littlejohn ("Littlejohn") May 29, 2015, Tr.275-281

Littlejohn worked in the Fifth District of Agency for thirteen years as a Master Patrol Officer. Employee worked for Littlejohn as his Sergeant on and off for five years. He opined that he was a good official, friend, and that he never had any issues with Employee. He provided that he valued Employee's opinion and that Employee never steered him wrong. Littlejohn testified that he did not have any reason to believe that Employee was using or selling prescription medications.

Michael Callahan ("Callahan") May 29, 2015, Tr.282-292

Callahan worked for Agency in the Homicide department for ten years. He stated that Employee was his first sergeant from 2005-2009 when he got out of the academy and got assigned to the Fifth District. He asserted that Employee was a working sergeant and that he was always on the street. Callahan explained that he went to Employee because he wanted to be involved with the narcotics division and work the streets. He was able to gain knowledge from Employee's career and the other officers he became connected with from knowing Employee. He stated that he was able to get out of patrol quickly and move into a specialized unit with other officers who wanted to make a difference.

Callahan testified that he was involved in a police shooting in 2008 while he was with his partner. He explained that Employee reached out to him and his partner to see how they were doing. They told him that they took it hard. Two days later, Employee invited them over to his home, made them dinner, and spoke with them about the incident. Employee admitted to them that he had been involved in shootings as well and told them that he purchased a book about combat. The book was about people involved in stressful situations where they had to use deadly force. Callahan explained that he thought it was awesome that Employee took the time to show concern for his well-being.

Callahan stated that he did not believe that Employee was abusing or selling prescription medications. Nor did he believe that Employee lacked his full faculties. He stated that if Employee was guilty of the charges, he should not be retained by Agency.

Eric Hairston ("Hairston") May 29, 2015, Tr.293-297

Hairston worked for Agency in the emergency response team for twelve years. Hairston testified that Employee was his supervisor when he worked in the Fifth District. He stated that Employee was a great officer who took care of his troops, and was fair and smart. Hairston stated that he did not know what Employee was formally charged with and he did not know what action Agency should take if Employee was convicted.

Gary Durand ("Durand") May 29, 2015, Tr.300-314.

Lieutenant Durand worked for Agency for twenty-five years. He was Employee's lieutenant. He stated that Employee was an honest man, dedicated to the job, and a hard worker. Durand explained that Employee was an effective supervisor and leader and that he was a person who had the ability to get people to do what needed to be done.

Durand stated that he knew that Employee had back and knee issues, and as a result, took prescription medication. Durand testified that he had to deal with prescription abuse with his mother and it eventually killed her. Durand stated that he would be able to tell if there were obvious signs of substance abuse. He asserted that if he had seen substance abuse issues, he would have said something. If he found out that one of the officers was taking Oxycodone while on duty, he would call the officer, and tell them to go to the clinic, and notify the clinic that they were taking that particular medication. On cross-examination, Durand agreed that employees were required to inform the PFC if they sustained an injury.

Michael Skelly ("Employee") May 29, 2015, Tr. 316-504

Employee was a twenty-three year Agency veteran who worked in the Fourth and Fifth Districts. He worked in a variety of different units as a patrol sergeant. He also assisted the hit-and-run and warrant squads with arrests.

Employee testified that in 2000, he worked as an undercover officer during the International Monetary Fund protests. He explained that they were a plain-clothes unit and he was asked by the FBI and Intel to go undercover as a protester. During the protests, he broke his left foot. Employee stated that he did not immediately take leave from work because he wanted to wait until the protests were over. He reported his injury to a sergeant and stated that Lieutenant Hojava was his supervisor for part of the time. Employee went to the clinic and the X-ray revealed that he had a sprain. The clinic determined that the new injury was unrelated to his previous injury, so he saw a private podiatrist. The doctor stated that he needed to have his left foot re-broken and have surgery. This required Agency's permission because his insurance did not cover the preexisting injury.

Employee testified that he was told by Captain Regis Bryant and Captain Ralph McClain that he needed to get back to work so he could receive his promotion. Employee stated that he received cortisone injections from Dr. Figueroa who also prescribed him the medication. After he was promoted, he stopped seeing Dr. Figueroa and learned to tolerate the pain. Employee stated that he had four or five visits with the doctor between June of 2001 and February of 2002.

In 2001-2002, Employee broke the same foot, but a different metatarsal, while chasing drug dealers. Employee stated that he jumped over a fence and did not originally notice it. He thought it was from the older injury until the following day when his foot was black and blue, so he went back to the clinic and completed the Form 42.²² At the clinic, X-rays revealed that his foot was sprained. He did not take their word and went to Providence Hospital. Employee showed the doctor the clinic's X-rays and the doctor informed him that his foot was broken and that he needed to have it casted. He affirmed that he was not prescribed any medication and stated that he was placed on limited duty at work.

Employee explained that he met Doctor Damian Smith ("Dr. Smith") via a neighbor. He originally saw Dr. Smith because his left foot did not heal properly. Employee stated that Dr. Smith prescribed medication and gave him cortisone injections with lidocaine to help his foot. He stated that after a while, the cortisone stopped working and the only solution was to get his foot re-broken and operated on. He was unable to have the operation because it was a POD injury and Agency would not pay for it. His insurance already had on record that it was a Workers' Compensation injury, so he was forced to live with the pain and bought shoes to help alleviate the pain.

In 2004, Dr. Smith treated Employee for a broken left ankle. Dr. Smith told him that he did not need surgery, but that it would take a long time to heal. Employee received several prescriptions from Dr. Smith and Doctor Z. Chris ("Dr. Chris"), his primary care physicians. He was prescribed Triazolam, a medication for relaxation, Diazepam, and Valium. Employee stated that he had chronic insomnia his entire life. In March 2014, Dr. Chris prescribed him one hundred twenty milliliters of Hydrocodone, in liquid form. Employee stated that it was for his bronchitis. In 2014, Dr. Chris prescribed him Oxycodone for back pain and ankle pain. Employee provided that he had six herniated discs. Four were in his lower back and three were in his neck. He also experienced radiating pain going down his left leg.

Employee was under the care of Dr. A. Cherrick, a pain management specialist, because Dr. Smith received a letter from Aetna stating that he was consuming a lot of medication. Dr. Smith told Employee that it looked like he was doctor shopping or it could appear that he was addicted. He said that Dr. Smith told him that he needed to see one doctor to remove any doubt as to why he was receiving so many medications and so that his medication usage would be centralized under one doctor.

Employee was under the care of a neurologist, Dr. Sharma, in 2009. He stated that he had extreme pain in his right eye and head. He explained that he was diagnosed with having a cluster headache, which was described as more severe than a migraine. Initially, Dr. Sharma prescribed non-narcotic medications, but they did not help Employee. He was prescribed Verapamil and a heavy dose of steroids, which resulted in the headache going away. He stopped seeing Dr. Sharma on September 29, 2009, because the cluster headaches were gone. Employee explained that he was given an MRI of his brain and a CAT scan, and the results were negative for tumors or blood clots.

²² Form 42 is used by Agency to document performance of duty(POD) injuries.

Employee visited Dr. Feely, whom he met through a friend. He stated that Dr. Feely was a Vietnam veteran and a medic. Employee explained to Dr. Feely that he was not sleeping and was having nightmares. He was informed that he could have a type of Post-Traumatic Stress Disorder (“PTSD”) and that there were medications that could help. Dr. Feely told Employee that he specialized in that area and Employee initially went to the doctor’s office. He stated that he took Gabapentin and Zoloft to help his PTSD. Since taking the medication, he has not had a nightmare and has been able to sleep. Employee also stated that he took Gabapentin, Zoloft, and Bisoprolol, a low-level blood pressure medication, on a regular basis.

Under the care of Dr. Smith and Dr. Chris, Employee received different conservative treatments to alleviate his pain. Initially, he had chiropractic treatments, physical therapy, acupuncture, and a TENS unit. He paid for all of the expenses out of pocket because Aetna did not cover them. Employee explained that Dr. Kendall performed nerve burning, and rods were inserted into his neck. While Employee continued to have back pain, the nerve receptors were burned so that they did not radiate down his arms. He explained that it worked for a while until the nerves regrew. Employee further testified that he had spinal decompression therapy and spinal injections in his lower spine and neck. Employee opted for conservative treatment instead of having surgery. Dr. Kendall referred Employee to Dr. Hughes, a top-rated spinal surgeon. Employee explained that Dr. Hughes stated that his back was in horrible condition, but his neck was better. Employee was told that he would be on medication for the rest of his life or have pain. He was told to reconsider the line of work he was in. At that point, Employee opted for the back surgery and knee surgery, due to his pre-existing condition. Employee stated that the surgeries were a success and his last surgery was on April 2014. Within two or three months of the surgery, he had not taken pain medications.

Employee testified that Dr. Paul Harris was his dentist. He was prescribed narcotic medication because he had a bad infection due to his rear molars cracking and required a root canal. Employee explained the reason he went to two different pharmacies was because one was in Arlington, where he resided, and the other was on Rhode Island Avenue, where his foot beat was located. He did not recall filling a prescription in New Jersey and stated that he did not fill a prescription in West Virginia. He filled a prescription in New York because he went to urgent care.

Employee testified that he took the medications to deal with pain and stated that he did not have a problem in stopping use of the medication. He did not feel the need to go to a rehab center. He decided to stop because he did not want to be dependent on them and realized that he was not sleeping at all because he was taking medication around the clock.

Employee read excerpts from Dr. Kendall’s and Dr. Hughes’s records. They did not believe that he was doctor shopping and the amount of medication that he consumed was appropriate based upon the diagnostic studies. In addition, Employee’s symptomology validated the described level of pain that he experienced.

Employee testified about the night he was arrested. He stated that he was aware of the allegations that originated from a discrepancy over a prescription from Dr. Martinelli, his knee surgeon. Employee stated that many of the statements were incorrect and that there was a copy

of a prescription that Agency obtained from Dr. Martinelli's office, but nothing on the prescription was circled. However, the copy from the pharmacy had a number two circled and Employee could not understand why the SWAT team would take him down for circling a number two on the prescription. Employee explained that when he was prescribed the medication, he was in his hospital gown. His friend Derstine drove him home after his surgery.

Employee stated that he overheard the prosecutor speaking with his attorney. He claimed that the prosecutor was shocked when he heard that the charges were based on circling a refill. He explained that after the prosecutor learned that it was about a refill and heard the testimony of Derstine, the prosecutor null processed the case.

Employee maintained that he did not sell drugs or alter prescriptions and provided that he did not want this information in his file, so he filed a petition for expungement. He admitted that he received a Driving Under Influence ("DUI") and acknowledged that although he did not crash or hurt anyone, it was something that he did. He stressed that he did not commit fraud. Employee stated that the judge agreed with him and stated that any evidence should be removed from his record, except what already existed. Employee stated that his record would not have been expunged if there was an open indictment against him.

Employee testified that in March of 2011, he slipped in his bathtub and torqued his already broken ankle. He went to the clinic to inform them of the injury and met with Dr. Lastrapes. The doctor asked him about the previous medication he took, which was Vicoprofen, a refillable medication. Dr. Lastrapes prescribed him Oxycodone and Employee filled it at the Rite Aid pharmacy on Rhode Island Avenue. The pharmacist was unable to fill it because she said that there was a mistake. Dr. Lastrapes mistakenly put a number one in the refill section and she circled it and refills are not allowed for a Schedule I drug. Employee stated that he went back to the clinic, gave the doctor the old prescription, and was given a new prescription.

Employee testified that he did not receive illicit drugs and that the only medication that he received were legitimate medications prescribed by his doctors. He asserted that the medications did not have any impact on his job performance. He explained that if they did, he would have been counseled or sent for more than two drug screenings. Employee stated that he never lied to the Police and Fire Clinic (PFC) doctors, but he did not want to discuss the severity of his injuries with them because he did not trust them.

On cross-examination, Employee stated that his medications were authentic, so it could not be considered illicit. He explained that he contested that the prescription provided by Dr. Lastrapes was presented to Rite Aid without the doctor's signature. The original prescription that he went to have filled had a signature on it.

Employee stated that while he did not fully trust the PFC, he did not lie to them. He did not trust them with receiving any type of diagnosis or performing any surgeries. He did notify them of his surgeries but did not receive any help from them.

Employee testified that on August 15, 2011, Dr. Feely prescribed him medication that he filled at a Rite Aid pharmacy located on Georgia Avenue. On August 16, 2011, Employee went

back to the same pharmacy and received a refill of the same medication. He explained that Dr. Feely called in a refill of his medication because he did not prescribe enough medication in the original prescription. He explained that the reason there were two different prescription numbers for the same medication was because one prescription was hand delivered and Dr. Feely called in the other the following day. Employee stated that the original prescription had a dosage quantity of twenty pills and the refill amount was increased to ninety pills. He argued that if it were a refill, it would have to be for the same quantity which is why there were two different prescription numbers.

On November 5, 2011, Employee was drug tested. He tested positive for Benzodiazepine Alprazolam, but not for Hydrocodone. He originally picked up his prescription on October 18, 2011. Employee took Hydrocodone, but he told Agency that it did not appear in his system because he only took the medication periodically. He provided that Hydrocodone metabolizes out of the body's system within two days. There was a possibility that he had not taken the medication two days before he was tested.

Employee admitted that he took more medication than the instructions stated and that he was resistant to the medication. He explained that there were times when he would take the medication and run out of medication or he would stop for a couple of days if the pain was not bad. He did not deny that there were days that he was taking more than the four day amount.

When questioned by the Panel, Employee stated that he went to a variety of pharmacies because he moved several times. He also stated that certain pharmacies did not always have his medication in stock. Other pharmacies only had enough to give him part of his prescription and he would have to go back to get the rest of the medication when they were back in stock. He also explained that there were times when he would run out of medication and it would be too soon to refill, so he would pay one hundred dollars for the refill instead of using his co-pay insurance. According to Employee, Aetna would not authorize the refill before the proper refill date. He explained that this was not illegal because the pharmacy was not hiding it from the insurance company and the insurance company was informed. Employee stated that he discussed this issue with Dr. Feely, who prescribed him a larger dosage of medication so that he would not run out.

Employee stated that he was not a drug dealer. He argued that if his financial records were to be revealed, it would show that he is not a rich man and he is not hiding any money. He stated that Arlington had no interest in serving or executing a search warrant, which is something that would have been done if they were trying to prosecute a drug dealer. He admitted that it was not wise of him to not inform the clinic of his medication intake, but stated that he did not trust the clinic. He explained that he did not take the pills consecutively for twenty-three years, as there was a period of six years in which he did not take any medication.

Panel's Findings of Fact²³

Apart from the undisputed facts listed above, the Panel also made the following findings of fact:

²³ Adverse Action Panel Findings of Fact and Conclusions of Law, Agency Answer, Tab 4.

1. Dr. Lastrapes told Ikner with certainty that he did not enter “1” on the prescription for Employee.
2. Employee was under the influence of narcotics while in full duty status and did not notify Agency.
3. Employee lied about his personal physician being out of town which led PFC Dr. Lastrapes prescribing Percocet for him.
4. Employee failed to inform PFC physicians regarding the medications he was taking.
5. In his own testimony, Employee acknowledged manipulating the system in order to refill prescriptions.
6. In his own testimony, Employee acknowledged refilling prescriptions prior to the new refill date.
7. In his own testimony, Employee acknowledged refilling prescriptions prior to exhausting his current medication due to increasing his original amount.
8. DEA and Agency members observed Employee’s cell phone number calling known drug targets for active DEA investigations.
9. In his own testimony, Employee admitted transferring prescriptions to different pharmacies when some pharmacies proved resistant to filling his prescriptions.
10. Ikner credibly testified that all the “red flags” that DEA looks for when investigating diversion were present in Employee’s case, such as multiple prescriptions, transfer of prescriptions, use of different pharmacies and doctors, using cash instead of insurance, etc. to avoid detection by prescription insurance companies.
11. Ikner and Woodson both credibly testified that Dr. Smith asked them if Employee was still addicted.
12. Ikner credibly testified that there were no logs or records on the VA pharmacy home deliveries to Employee.
13. Derstine credibly testified that he handed over the prescription to the pharmacist for a home delivery.
14. Ikner credibly testified that 120 hydrocodone pills were prescribed on November 5, 2011, and January 24, 2012. One hundred eighty hydrocodone pills were prescribed three and five days later by the same doctor.

15. Employee used his position to gain favor with different doctors by claiming to be shot in the line of duty and being a member of the bomb squad.
16. Woodson credibly testified that there was nothing in Employee's personnel file to indicate that Employee was ever assigned to the bomb squad.
17. Employee admitted that he never worked for NSID, a narcotics investigatory division.
18. Employee signed a drug free workplace memo located in his personnel file.
19. Employee admitted that Dr. Christ was his primary physician and that he knew his brother.
20. Employee admitted that he was treated by Dr. Feeley and that he knew his cousin.
21. Employee admitted that although he was supposed to take only three pills a day, he took ten pills daily.
22. Detective Garrett credibly testified that he obtained copies of the suspect prescriptions and signature pads from the Rite Aid Pharmacy in 1401 Rhode Island Avenue, N.E., Washington, D.C.
23. Employee was terminated from his pain management contract because he violated the agreement by obtaining narcotics from other doctors.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Pursuant to the *Pinkard* analysis,²⁴ an Administrative Judge of this Office may not conduct a *de novo* hearing in an appeal before him/her, but must rather base his/her decision solely on the record below at the Fire Trial Board ("FTB") 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.,

²⁴ *Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002).

Trial Board Hearing] has been held, any further appeal shall be based solely on the record established in the Departmental hearing”; and

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.²⁵

Based on the documents of record and the position of the parties as stated during the Prehearing Conference, I find that the aforementioned criterion is met in the instant matter. Therefore, my review is limited to the issues as set forth in the “Issues” section of this Initial Decision. Further, according to *Pinkard*, I must generally defer to the [Trial Board’s] credibility determinations when making my decision.²⁶

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.²⁷ If the [Trial Board’s] findings are supported by substantial evidence, I must accept them even if there is substantial evidence in the record to support contrary findings. See *Metropolitan Police Department v. Baker*, 564 A.2d 1155 (D.C. 1989). As only the charges and specifications in DRB# 505-14 were sustained by the Panel, I will only discuss these and not the charges in DRB# 610-14.

Agency states that the Panel’s findings of fact are backed by substantial evidence and its credibility determinations. Agency insists that its Panel’s finding that Employee committed acts of misconduct that were set forth in the Notice is supported by substantial evidence. Agency points out that at the evidentiary hearing, the Agency presented the testimony of seven witnesses regarding Employee’s acquisition of prescription medication in excess of the prescribed amounts and with the use of misrepresentation, fraud, forgery, deception, or subterfuge. In contrast, Agency asserts that Employee’s defense consisted of testifying on his own behalf and presenting the testimony of five character witnesses, who all extolled Employee’s work performance.

Employee argues that he was charged by MPD administratively with the same criminal violations which had been rejected by Federal prosecutors in D.C. and Virginia, and had been expunged in Arlington County, Virginia. However, criminal charges are different in scope and nature from administrative charges. The declination of criminal prosecution does not automatically mean that administrative personnel charges should be dropped.

Next, Employee attacked each charge and accompanying specification(s) as failing to allege misconduct. He states that most of the Agency Charges and Specifications are legally

²⁵ See *Id.*

²⁶ *Id.*

²⁷ *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).

insufficient, either because they fail to allege facts which constitute misconduct, or they are stated so broadly that they fail to give due process notice of specific alleged misconduct.

In response, Agency asserts that the specifications that support each charge set forth clear misconduct committed by Employee. Charge One makes it an act of misconduct if a member of MPD, *inter alia*, “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. . .” Specification One of Charge One alleges that Employee violated US Code Title 21-843, which makes it a crime, *inter alia*, to knowingly and willfully execute, or attempt to execute a scheme or artifice to defraud any health care benefit program. Employee clearly engaged in a scheme to obtain controlled substances as stated in Specification One, by “receiving prescriptions for multiple narcotics from different providers and refilling them at various locations.” Under Title 21-843, Employee’s action was a scheme and was misconduct that would be deemed a crime. Similarly, the misconduct alleged in Specification Two of Charge One, an alteration of a prescription, is misconduct that would be deemed a crime. Accordingly, Charge One, Specifications One and Two allege misconduct.

Agency states that Charge Two makes it an act of misconduct when a member fails “to obey orders and directives issued by the Chief of Police.” Specification One of Charge Two alleges that Employee violated the Drug Free Work Place Directive (Directive) which, *inter alia*, prohibits use of controlled substances in the workplace. The record of evidence clearly shows that Employee was taking excessive controlled substances in the workplace and while on duty. Accordingly, Charge Two, Specification One alleges misconduct.

Agency adds that Charge Three makes it an act of misconduct when a member commits an act that is unbecoming to a police officer. Specification One of Charge Three alleges that Employee was untruthful to Lastrapes when he told him his physician was out of town. Specification Two of Charge Three alleges that Employee was untruthful to PFC physicians about the narcotics he was taking and the injuries and illnesses for which he was receiving treatment. It is readily apparent, that both specifications allege misconduct in the nature of being untruthful, which is conduct unbecoming a police officer.

Agency states that Charge Four makes it an act of misconduct when a member commits an act not in accordance with MPD’s General Order 120.21, which reads, “Any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force, or involving failure to obey, or properly observe any of the rules, regulations, and orders relating to the discipline and performance of the force.” Specification One of Charge Four alleges that after being notified by his doctors that his insurance company had sent out letters regarding his acquisition of controlled substances from several providers, Employee continued to acquire controlled substances from different doctors. Agency states that Employee’s actions of continuing a pattern of obtaining controlled substances, which the record of evidence shows his doctors informed him was a problem, alleges misconduct under Charge 4.

I have examined the charges and specifications outlined in DRB 505-14 and find that Employee’s argument that the Notice’s Charges and Specifications fail to state discernable offenses is without merit.

Employee argues that the evidence failed to show that he was guilty of the Federal crime of “diversion” in violation of 21 U.S.C. § 843, which Employee defines as obtaining prescription medications which controlled substances by fraud and then selling them illegally.

However, Employee’s definition is faulty and misleading. 21 U.S. Code § 843 (a)(3) states, “It shall be unlawful for any person knowingly or intentionally to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception, or subterfuge...” Thus, a reading of the statute’s plain meaning requires only the fraudulent acquisition of a controlled substance; it does not require the illegal sale of such substances.

Employee also attacks the Panel’s findings of fact as based upon hearsay and not supported by substantial reliable, probative evidence of record. Employee asserts that the best and only competent evidence, of whether he acted in a deceitful or fraudulent manner in dealing with his treating physicians and dentist, or whether he knew that his behavior was “not proper” because he was receiving “too much narcotics” required testimony by the physicians and dentist who treated and prescribed medications for him over the years. Employee points out that neither Ikner nor the MPD Panel members were qualified to determine whether the various narcotic medications prescribed for Employee by different physicians and a dentist over the course of 22 years were excessive; or whether Employee should have known he was receiving excessive medication. Employee argues that type of determination required expert medical testimony, but Agency presented no expert medical testimony or evidence at the hearing. Employee decried the denial of his due process in that he was not able to confront and question these healthcare providers whom he allegedly defrauded. Employee points out that MPD did not even provide affidavits or other statements from these witnesses.

While it is true that the Panel accepted and used hearsay evidence regarding the medical providers’ statements, I note that it was an administrative hearing where hearsay evidence is routinely allowed. Employee does not provide any statute, rule, or regulation that would prohibit Agency’s admission of hearsay evidence. It was for the Panel to weigh such evidence. I also note that the Office of Employee Appeals has accepted and used hearsay evidence in its own administrative hearings.²⁸

I also note that nothing indicates that Agency hindered or prevented Employee from calling upon these medical providers to testify on his behalf. While Agency chose not to call them as witnesses, Employee himself declined to do so.

It should be noted that MPD’s case against Employee was not, as he asserts, that he was unlawfully prescribed controlled substances. The case against Employee was based on his acquisition of controlled substances through his own devised schemes which allowed him to obtain excessive amounts of controlled substances. The conduct of the doctors in prescribing the controlled substances for Employee was not an issue before the Panel.

²⁸ See *Lynn Edwards v. D.C. MPD*, OEA Matter No.: 1601-0012-05, *Opinion and Order on Petition for Review* (May 23, 2011) for a discussion on the use of hearsay evidence as substantial evidence.

Employee also claims that Agency's witness Ikner gave false hearsay testimony regarding critical issues that was impeached by Agency's own documentary evidence. Agency counters by asserting that contrary to Employee's argument, the charges and specifications against Employee were based on undisputed facts of his acquisition of excessive amounts of controlled substances. His acquisition of controlled substances was based upon a record of prescriptions that were maintained by the State of Virginia, as well as other reliable sources. The record of evidence clearly shows, and based on Employee's own admission, that he was obtaining and taking large quantities of controlled substances. The investigation of Employee included charts and records of the prescriptions he obtained over a period of several years.

For example, Agency Tab 1, Attachment 47 are records of the Prescription Monitoring Department of Health Professions for Virginia dated: (1) November 15, 2011 (6 pages), (2) December 5, 2011 (16 pages), and (3) June 6, 2014 (5 pages). Those records cover the period from June 2006 through June 2014. Agency Tab 1, Attachment 49 is a DEA chart that shows the prescription drugs obtained by Employee during the calendar year 2011. During that period, for example, Employee obtained 1,085 pills of Hydrocodone. Another chart in Attachment 49 shows that between 2000 through 2011, Employee obtained 3,241 pills of Hydrocodone, 490 pills of Oxycontin, and 120 pills of Triazolam. The chart also includes other prescription drugs obtained by Employee during that same period of time. Agency Tab 1, Attachment 50 are records that include prescriptions for Employee from Dr. Figueroa. Page 1 of the Attachment clearly shows that Employee was obtaining Oxycontin and Vicodin from Dr. Figueroa in 2001 and 2002.

I have examined the record of the Panel hearing, and I find that it does not bear out Employee's claim that the documentary evidence impeached Ikner. There is substantial documentary evidence of record that shows the excessive amounts of controlled drugs that Employee was taking, and the methods by which he was able to obtain prescriptions for those controlled drugs.

Employee complains that Agency did not conduct its own investigation, relying instead wholly on Ikner. He states that Agency's Woodson simply summarized portions of Ikner's redacted hearsay notes on PD 854 forms, and then used those notes as the basis of its administrative prosecution of Employee.

An examination of the record shows that while Ikner conducted the investigation and compiled much of the evidence that was presented by the Agency at the evidentiary hearing, MPD's case was not built on Ikner. MPD's Woodson also conducted her own investigation, although it was limited. The remaining Agency witnesses presented testimony regarding their participation in the investigation of Employee. Their roles were supportive and corroborative of the investigation conducted by lead investigator Ikner. Additionally, the documentary evidence gathered from different jurisdictions such as Virginia, lent credibility to Ikner's testimony. I therefore give little credence to Employee's complaint.

Finally, Employee's other attacks on the Panel's findings as either irrelevant or unreliable amount to an attack on its credibility findings. Agency defended the credibility findings of its Panel. Agency pointed out that its witnesses corroborated the testimony of its star witness,

Investigator Ikner. To show the fairness of its Panel, Agency points out that the Panel unanimously found Employee guilty of all charges and specifications in DRB# 505-14 but not guilty of the charge and specifications set forth in DRB# 610-14.

Employee asserts that the Trial Board panel relied entirely upon the opinions of Ikner as to the medical and legal significance of Employee's treatment and medications, notwithstanding Ikner's lack of medical training or credentials.

This argument is misleading, as Agency did charge Employee with the use of controlled substances to deal with his pain, but rather with the acquisition of excessive amounts of these substances through the use of fraud and subterfuge.

In his testimony, Employee denied making several false statements to the doctors who had prescribed controlled substances for him. Employee denied that he told one of his physicians that he had been shot or doctor that he was a member of the bomb squad. Employee also denied telling Lastrapes that Smith was out of town. Employee also denied that he had inserted a "1" on the prescription written by Lastrapes. Further, Employee denied the statements made by Razoumov regarding his acquisition of controlled substances prescribed by Dr. Figueroa. Aside from his denials, Employee's overall testimony provided explanations and reasons for his acquisition of large quantities of controlled substances over a period of several years.

Pursuant to the evidentiary hearing, the Panel issued Findings of Fact and Conclusions of Law (Findings). In the Findings, the Panel first set forth a detailed summary of the testimony of all of the witnesses. The Panel then set forth twenty-seven specific findings that was the basis of its unanimous decision that Employee was guilty of all charges and specifications set forth in DRB# 505-14. The Panel's findings clearly showed that it did not find Employee to be credible.

The Panel had the opportunity to observe the witnesses' demeanor while testifying and to thereby assess their credibility. In that regard, the Panel did not find Employee to be credible and the credibility finding of the Panel should not be disturbed. As noted, *supra*, OEA "must generally defer to the [MPD's] credibility findings."²⁹

Employee's character witnesses presented testimony that he was a very good police officer. However, the issue was not whether he was or was not a good officer. The issue was whether Employee was guilty of Agency's charges brought about by the way he used and acquired controlled substances.

The charges and specifications against Employee were based on undisputed facts of his acquisition of excessive amounts of controlled substances. His acquisition of controlled substances was based upon a record of prescriptions that was maintained by the State of Virginia as well as other reliable sources. The record of evidence clearly shows, and based on Employee's own admission, that he was obtaining and taking large quantities of controlled substances.

²⁹ *Lynn Edwards v. MPD, Id.* at 92.

I note that Employee acknowledged refilling prescriptions prior to the new refill date and that he would transfer prescriptions to different pharmacies because some pharmacies were resistant to filling his prescriptions. I also note that Employee never denied the contents of the database showing the amounts of the drugs he purchased or of the many locations he purchased his drugs at places far from his home or work. I also note that Employee did not present any of his doctors to verify that none of his drug acquisition was excessive but medically justified. I further note that Employee himself acknowledged in his testimony that he took more drugs than he was prescribed. It is also undisputed that the volume and frequency of Employee's drug purchases were such that it caused a pharmacy employee to alert the drug authorities.

While I am sympathetic to Employee's need for painkillers due to his injuries and ailments throughout the years, my examination of the record leads me to conclude that the Panel's credibility determinations are based upon substantial evidence. If the Panel's findings are supported by substantial evidence, I must accept them even if there is substantial evidence in the record to support contrary findings. Therefore, I am compelled to accept the Panel's credibility findings.

In summary, I find that there is substantial evidence to support all of Agency's charges against Employee.

Whether there was harmful procedural error.

Neither party alleged that there was harmful procedural error. Thus, this issue will not be discussed.

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

Neither party alleged that Agency's action was not done in accordance with applicable laws or regulations. My examination of the record reveals that Agency's action was proper.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's decision is **UPHELD**:

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge