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

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ERNEST H. TAYLOR,	)	OEA Matter No. 1601-0101-02
Employee	)	
	)	Date of Issuance: July 31, 2007
	)	
	)	
D.C. FIRE AND EMS DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Ernest H. Taylor ("Employee") worked as a captain with the D.C. Fire and Emergency Medical Services Department ("Agency"). On July 3, 2002, Employee received a notice of decision and removal from Agency. The notice provided that after reviewing evidence and the Fire Trial Board's ("Trial Board") recommendation, the Interim Chief found him guilty of an on-duty or employment related act or omission that interfered with the efficiency or integrity of government operations.[1] As a result, Employee was removed from his position at the close of business on July 5, 2002.[2]

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[1] Employee was specifically charged with creating an unauthorized examination answer guide ("UEAG") for the 2000 fire promotional exams.
[2] *Petition for Appeal*, p. 5-8 (July 29, 2002).

Employee responded to his removal by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 29, 2002. His petition requested that his removal be reversed, that he receive back pay, and that he be awarded attorney's fees. Employee argued that Agency's decision was not supported by substantial evidence; there was harmful procedural error; and the decision was not in accordance with the laws or applicable regulations.[3] Specifically, Employee alleged that because Agency did not consider all possible suspects during its investigation, its conclusion that he created and distributed the cheat sheet was not based on substantial evidence. He also asserted that Agency's investigation was flawed because it relied on unqualified experts during its investigation which further proved that it lacked substantial evidence to remove him. [4]

On May 28, 2004, Agency filed an Opposition to Employee's Appeal. It provided that the Trial Board's findings were supported by substantial evidence. Agency first asserted that Employee's claim that it did not identify other suspects who could have created the UEAG, still would not exonerate him.[5] Additionally, it argued that Employee's allegation that it relied on unqualified experts was also lacking. Agency claimed that Employee merely disagreed with the investigation's findings. Agency also pointed out that it never qualified its lead Office of Inspector General witness as an expert, and Employee never objected to the admission of its forensic document examiner nor its polygraph examiner as experts during the Trial Board hearing. Therefore, Employee's argument lacked merit. Furthermore, it was Agency's position that these objections could not be raised for the first time to the OEA.[6]

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[3] *Id.* at 2.
[4] *Employee's Brief in Reply to Agency's Final Decision to Remove,* p. 19-24 (April 14, 2004).
[5] *Agency's Opposition to Employee's Appeal,* p. 5-6 (May 28, 2004).
[6] *Id.*, 11-12.

Lastly, Agency provided that Employee failed to argue that its investigation caused harmful procedural error. It also alleged that he failed to meet his burden in showing that Agency lacked substantial evidence. Therefore, Agency requested that Employee's Petition for Appeal be denied by the OEA's Administrative Judge ("AJ").[7]

The AJ issued her Initial Decision on November 15, 2004. She found that Employee was properly removed for cause of a disciplinary action.[8] The AJ held that Agency presented substantial evidence to meet its preponderance of the evidence standard. She found that it was reasonable to believe that Agency's witnesses were more credible given their experience and tools utilized during their investigation. Additionally, she found it persuasive that the investigation was conducted by the Office of Inspector General, an uninterested third party to this matter. Furthermore, the AJ found that the penalty was appropriate under the circumstances because removal was within the range of penalties for the offense. Therefore, she upheld the Agency's decision to remove Employee.[9]

Employee disagreed and filed a Petition for Review with the OEA Board. He again argued that Agency failed to prove through substantial evidence that he was the creator and distributor of the UEAG. Employee claimed that at most, Agency created reasonable suspicion that he was the creator. He further argued that there was no direct evidence linking him to the UEAG, only circumstantial evidence as outlined by Agency's unqualified expert witnesses.[10] Employee went on to note that the AJ erred when she provided that he failed to object to

[7] *Id.*, 13-14.
[8] Section 1603.3 of 47 D.C. Reg. 7096 provides that employees may be removed for "any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations."
[9] *Initial Decision*, p. 6-7 (November 15, 2004).
[10] *Employee's Petition for Review*, p. 20-21 (December 20, 2004). Employee provided several cases that address qualifying expert witnesses to establish that the Trial Board abused its discretion.

Agency's handwriting expert witness.[11] Finally, Employee argued that the AJ failed to cite any case law or regulations that prohibit her from reviewing Agency investigation. Accordingly, the AJ's Initial Decision should be reversed.[12]

Agency filed an Opposition to the Petition for Review on January 31, 2005. It provided that the Trial Board relied on the several items to uphold Agency's decision to remove Employee. The Board considered the results from the polygraph that Employee underwent which revealed that he was deceptive when asked if he created the UEAG. It also provided that qualifying an expert witness is within the discretion of the trial court.[13] Agency's position was that many techniques were used by its witnesses in their investigation of who created the UEAG. They relied on interviews with the subject matter experts, reports, personal observations, and comparisons of Employee's reports with the UEAG. As a result, Agency properly concluded that Employee created and distributed the cheat sheet.[14]

Generally, OEA has broad discretion on establishing procedures for handling appeals. However, that discretion is limited when the parties are under a collective bargaining agreement which is present in this matter. The Court in *District of Columbia Metropolitan Police Department v. Elton L. Pinkard,* 801 A.2d 86 (D.C. 2002) held that when there is a collective bargaining agreement involved, any appeal to OEA shall be based solely on the record established at the agency's hearing. Therefore, OEA must determine if the agency's decision is supported by substantial evidence; whether there was harmful procedural error; or whether it was in accordance with the laws or applicable regulations. While considering these points, OEA may

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[11] *Id. at* 28.
[12] *Id.* at 32.
[13] Agency cited *Douglas v. Kingsfield Corporation,* No. 02-CV-711, 2004 LEXIS 231 at 88 (May 13, 2004).
[14] *Agency's Opposition to the Petition for Review,* p. 5-12 (January 31, 2005).

not substitute its judgment for that of an agency, and it must generally defer to the agency's credibility determinations made during its trial board hearings.[15]

Applying the holding in *Pinkard,* the AJ properly decided against holding a de novo hearing and to only consider the record established at the Trial Board hearing. Accordingly, the AJ was charged with determining if the Trial Board's decision was supported by substantial evidence. Employee asserted that there was no direct evidence linking him to the UEAG, only circumstantial evidence as outlined by Agency's unqualified expert witnesses.[16] However, there is no requirement for direct evidence opposed to circumstantial evidence to justify an employee's removal. Therefore, this argument is lacks merit.

As Agency pointed out, the Trial Board considered the results from the polygraph that showed that Employee was deceptive when asked if he created the UEAG. It also considered many interviews with the subject matter experts, reports, personal observations, and comparisons of Employee's reports with the UEAG.[17] Given the above-mentioned facts on which Agency relied, a reasonable mind would accept this evidence as adequate to support its decision to remove Employee. Accordingly, Agency met its substantial evidence burden of proof.

As for the issue of harmful procedural error, Employee never provided reasons to substantiate this as a cause to reverse the Trial Board or the AJ's decisions. Employee does provide that the AJ erred when she wrote in her Initial Decision that he failed to object to Agency's handwriting expert witness.[18] However, after careful review of the record, it appears that Employee merely questioned Mr. Lockhart's qualification as an expert witness. There was

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[15] *District of Columbia Metropolitan Police Department v. Elton L. Pinkard,* 801 A.2d 91-92 (D.C. 2002).
[16] *Employee's Petition for Review,* p. 20-21 (December 20, 2004).
[17] *Agency's Opposition to the Petition for Review,* p. 5-12 (January 31, 2005).
[18] *Employee's Petition for Review,* p. 20-21 (December 20, 2004).

no formal objection raised on the record.[19]

Even if Employee properly objected to the witnesses qualifications, one cannot conclude that he would have prevailed on the objection. According to the Court in *Metropolitan Police Department v. Ronald Baker*, 564 A.2d 1155 (D.C. 1989), great deference to any witness credibility determinations are given to the administrative factfinder. In this case that would be the Trial Board. The Court in *Baker* as well as the Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Although it is hard to determine how much weight the Trial Board gave to witness testimonies, a reasonable mind would accept Agency's witnesses as credible and adequate to support its decision to remove Employee.

The final issue that must be considered is if the decision to remove Employee was in accordance with the laws or applicable regulations. According to the Court in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), when considering this issue, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency.[20]

The Court in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313 (1981), provided that an agency should consider the following when determining the penalty of adverse action matters:

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[19] *District of Columbia Fire and Emergency Medical Services Hearing Transcript*, p. 187-191 (February 21, 2002).
[20] Removal was within the range of penalty for the charge of on-duty or employment related acts or omissions that interfered with the efficiency or integrity of government operations.

(1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
(2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
(3) the employee's past disciplinary record;
(4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
(5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
(6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
(7) consistency of the penalty with any applicable agency table of penalties;
(8) the notoriety of the offense or its impact upon the reputation of the agency;
(9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
(10) potential for the employee's rehabilitation;
(11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
(12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Agency Trial Board applied these factors to the facts of Employee's case and found several reasons to remove him. It found that the offense of creating and distributing an UEAG was extremely serious because of the cost to administer another exam and because it was committed with intent. The Board also provided that Employee was a captain which is the highest level rank that can be achieved through competitive exams, and he was in a prominent position of trust. Although Employee was a nearly 16-year veteran, he would be ineffective as a member of the Department, and the offense with which he was charged would impact the reputation of

Agency. The Trial Board argued that Employee was on notice that this offense violated Agency policies and the D.C. Government Test Security Agreement. He did not present any mitigating circumstances surrounding the offense. Therefore, to ensure the integrity of future exams it had no choice other than removal.[21] This Board agrees with the Agency's Trial Board's assessment and application of the *Douglas* factors.

Agency was able to prove through substantial evidence that Employee was properly removed; there was no harmful procedural error; and his removal was in accordance with laws and applicable regulation. Accordingly, Employee's Petition for Review is DENIED.

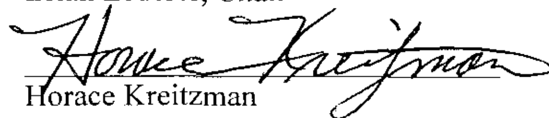
[21] *Respondent's Response to Employee's Petition for Appeal,* Tab 12 (January 10, 2003).

ORDER

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

FOR THE BOARD:

Brian Lederer, Chair



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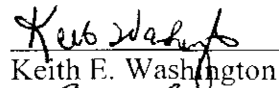

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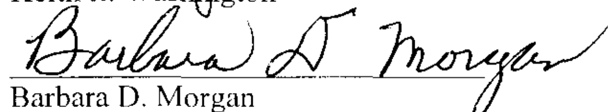
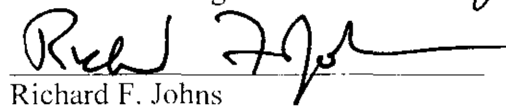


Barbara D. Morgan



Richard F. Johns

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.