

**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

_____	)	
In the Matter of:	)	
	)	
Steven Campbell,	)	OEA Matter No. 1601-0098-16
Employee	)	
	)	
v.	)	Date of Issuance: August 7, 2017
	)	
Metropolitan Police Department	)	Joseph E. Lim, Esq.
Agency.	)	Senior Administrative Judge
_____	)	
Steven Campbell, Employee <i>pro se</i>		
Nada Paisant, Esq., Agency Representative		

**INITIAL DECISION**

**INTRODUCTION AND PROCEDURAL BACKGROUND**

Steven Campbell (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) on September 21, 2015, challenging the Metropolitan Police Department’s (“Agency” or “MPD”) decision to terminate him based on a domestic violence charge. Agency filed its Answer on November 9, 2015. Employee’s position of record was Police Officer. A December 14, 2016, scheduled Mediation was declined. It was then assigned to the undersigned judge on December 16, 2016.

A Prehearing Conference was held on February 7, 2017. A Post Prehearing Order was issued the next day, requiring the parties to submit legal briefs addressing the issues in this matter. 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*<sup>1</sup>, 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;
2. Whether there was harmful procedural error; and

<sup>1</sup> 801 A.2d 86 (D.C. 2002).

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

#### STIPULATED FACTS

1. Employee was employed as a Police Officer with MPD since September 7, 2004.
2. Employee and his then live-in girlfriend, Jeralyn Wiley ("Wiley"), have one child in common.
3. On August 2, 2015, Employee and Ms. Wiley attended a party at the Quality Inn Hotel located at 1600 New York Ave., N.E. in Washington, D.C.
4. On August 2, 2015, Employee and Ms. Wiley got into an argument in the parking lot of the Quality Inn Hotel which was captured on video.
5. Members of the Fifth District of MPD observed Ms. Wiley on the hood of Employee's take home cruiser and questioned the parties.
6. Following the questioning by MPD officers, the parties went home together to 3241 Stanton Road, N.E. Washington, D.C.
7. Later that night, MPD officers received a call to report to the parties' residence at 3241 Stanton Road, N.E. for an incident that occurred at the residence.
8. Officers from the Seventh District of MPD arrived to investigate the incident and called the Internal Affairs Division ("IAD") to respond.
9. IAD Agent Tracye Malcolm ("Malcolm") arrived on scene to investigate the incident that occurred at the residence.
10. After speaking with the parties, MPD did not arrest Employee for events that occurred at the residence.
11. After speaking with the MPD officers and Ms. Wiley, Malcolm learned of the incident that occurred earlier that evening at the Quality Inn Hotel parking lot.
12. Malcolm retrieved and viewed the video from the Quality Inn Hotel.
13. As a result of Malcolm's investigation, she prepared an affidavit in support of an arrest warrant for Simple Assault for Employee.
14. Mark O'Brien, an Assistant United States Attorney ("AUSA") from the United States Attorney's Office ("USAO") authorized the arrest warrant and Employee was arrested on August 4, 2015, for Simple Assault that occurred at the Quality Inn Hotel parking lot.

15. On August 5, 2015, Employee was arraigned for Simple Assault in case number 2015 DVM 001450.
16. On January 8, 2016, the criminal case 2015 DVM 001450 was dismissed pursuant to a *nolle prosequi*.<sup>2</sup>
17. On May 17, 2016, the Agency issued an Advanced Written Notice (“Notice”) to Employee and proposed to terminate him.
18. The Notice specified that following an investigation, Employee was charged with two charges.
19. The first charge was pursuant to the Agency’s General Order Series 120.21, Attachment A, Part A-7 which provides that an officer is in violation of the General Order when he 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...” The specification that supported this charge provided that Employee was arrested on August 4, 2015, for Simple Assault and subsequently on January 8, 2016, the matter was dismissed.
20. The second charge was pursuant to the Agency’s General Order Series 120.21, Attachment A, Part A-12 which provides that the Employee was in violation of the General Order because his conduct was “Conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would affect adversely on the employee’s or the agency’s ability to perform effectively, or violations of any law...” The conduct was further defined by General Order Series 201.26 Part I-B-23 which provides that “Members shall not conduct themselves in any immoral, indecent, lewd or disorderly manner... They shall be guilty of misconduct, neglect of duty or conduct unbecoming to an officer and a professional...” The specification to support this charge provided that “... on August 2, 2015, [Employee] engaged in a verbal dispute with...Jeralyn Wiley, while at the Quality Inn parking lot... The aforementioned verbal dispute escalated into a physical assault, in which [Employee] pushed Ms. Wiley backward and struck her in the face.”
21. On June 22, 2016, a full evidentiary hearing was held before an Adverse Action Panel (“AAP” or “Panel”) which consisted of three senior officials of MPD.
22. On June 22, 2016, Employee was present and represented by counsel.

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<sup>2</sup> *Nolle prosequi* is Latin for "we shall no longer prosecute," which means the case is being dismissed. The normal effect of *nolle prosequi* is to leave matters as if charges had never been filed. It's not an acquittal, which (through the principle of double jeopardy) prevents further proceedings against the defendant for the conduct in question. Rather, at least when it occurs before trial, *nolle prosequi* typically leaves the decision of whether to re-prosecute in the hands of the government. If the prosecution decides to bring charges again—for example, after it's gathered more evidence—it must file a new charging document. (*People v. Daniels*, 187 Ill. 2d 301 (1999), *Kenyon v. Com.*, 37 Va. App. 668 (2002).) Nolo Legal Encyclopedia.

23. On August 2, 2016, the Panel issued its findings and found Employee guilty of both charges.
24. The Panel recommended a penalty of termination for each charge.
25. On August 2, 2016, Kathleen Crenshaw, the Director of the Human Resource Management Division issued a Final Notice of Adverse Action (“Final Notice”) to Employee.
26. The Final Notice adopted the Panel’s findings and recommendation and removed Employee from service, effective September 30, 2016.
27. On August 15, 2016, Employee appealed the Panel’s findings to the Chief of Police, Cathy Lanier.
28. On September 2, 2016, the Chief of Police sustained the proposed removal and the Employee was subsequently removed from the Agency.
29. The Chief of Police’s decision constitutes the Final Agency decision.
30. On September 21, 2016, Employee appealed the Final Agency decision to the Office of Employee Appeals (“OEA”).

#### SUMMARY OF RELEVANT TESTIMONY

On June 22, 2016, 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.<sup>3</sup> Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their position.

*Agent Tracye Malcolm (“Malcolm”)Tr. 25-166.*

Malcolm testified that she investigated a domestic assault that occurred on August 2, 2015, between Employee and Wiley outside of the Quality Inn Hotel. She responded to a call wherein it was reported that Employee was arrested, and she reported to Employee’s residence. As she was in route, Malcolm received another call informing her that Employee was not going to be arrested. When she arrived on the scene, she spoke with Sergeant Jerry Reyes (“Reyes”), who told her that Wiley was arrested for a gun charge. Malcolm explained that Employee and Wiley had a child together.

Wiley informed her that she and Employee went to a party at a hotel. Wiley explained that before they entered the party, she and Employee got into an argument over text messages between her and other men. Wiley told Malcolm that Employee hit her face outside the club and

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<sup>3</sup> AAP Hearing Transcript, June 22, 2016.

would not give back her phone and debit card. Employee got back into the vehicle without her, so Wiley sat on top of the car to prevent Employee from leaving her stranded.

Malcolm testified that after she learned of the incident at the hotel, she asked the security guards if they had a video. Once she saw the video and identified Employee and Wiley, Malcolm called Agent Young, Agency's technician, to request a copy. Malcolm did not feel that Wiley provoked the attack at the hotel. Malcolm stated that the video showed Employee hitting and pushing Wiley. Malcolm found out that security officers broke up the fight.

Malcolm explained that Employee had two cases against him: an administrative and a criminal case. She was unsure if Employee was disciplined for driving while Wiley was on the hood of the vehicle. Malcolm provided that the United States Attorney's Office ("USAO") charged Employee and he subsequently entered a plea of *nolle prosequi* on January 8, 2016. She interviewed Employee after he entered his plea. Employee explained to Malcolm that Wiley put her hands in his face and he told her not to put her hands on him. Employee then put his hand out and Wiley stumbled backwards. Malcolm stated that her review of the video was not as Employee depicted it. She said that Employee stated that Wiley assaulted him, but did not recount the assault to the officers who arrived on the scene.

Malcolm explained that she ultimately logged the assault charge at the hotel against Employee based on the videotape evidence but stated that there were insufficient facts to sustain charges for the assault at the residence.

Malcolm opined that Wiley lied about Employee hitting her in the head with his gun at the residence because Wiley did not have abrasions on her head and that Wiley asked her daughter, Bailey, to lie about the incident. Initially, Bailey corroborated Wiley's story but when Bailey was interviewed by Detective Shaatal ("Shaatal"), she recanted her story and stated that Wiley brought down her weapon and told Bailey to hide the weapon. Malcolm testified that she attempted to reach out to Wiley regarding her mistruths, but subsequently the charges were dismissed and Wiley refused to speak with Malcolm.

Malcolm stated that she was not aware that Wiley's debit card and phone were taken by Employee until she spoke to Wiley. She explained that Employee was not arrested for the gun charge because Agency did not have probable cause and because of the statement that Bailey gave to the officers.

*Sergeant Paul Johnson ("Johnson") Tr. 166-185.*

Johnson testified that he worked for Agency as a Patrol Officer assigned to the Fifth District. He stated that Officer Geddies called for an official to respond to the scene of a domestic disturbance. When Johnson arrived he saw Wiley outside a vehicle and Employee inside the vehicle.

Johnson stated that he interviewed Wiley and looked to see if she was upset or if she sustained any injuries. He did not see injuries and explained that Wiley was calm, looked fine and Wiley informed him that she had not been assaulted. He asked Wiley if she felt safe leaving

with Employee or if she wanted him to call a cab. Wiley stated that she was fine and wanted to go home with Employee.

Johnson stated that Employee explained to him that he had an argument with Wiley outside of the hotel. Johnson asked Employee if he felt comfortable going home with her and he said that he was. He did not see that Employee was injured and stated that if he did, he would have further investigated the altercation.

On cross-examination, Johnson stated that he spoke with Employee and Wiley for about ten minutes each. The process took about forty minutes. During that time, Johnson contacted the watch commander and he spoke with Geddies about what he should do. While Johnson was on the scene, he was not aware that Wiley was on the hood of the vehicle until a few days later from someone who showed him the video footage on a website called World Star Hip Hop.

*Sergeant Jerry Reyes (“Reyes”), Tr. 186-233*

Sergeant Reyes and Detective Adam Shaatal (Shaatal) of the Seventh District responded to the 3200 block of Stanton Road for the dispute that involved Employee and Wiley. Wiley alleged that Employee pointed his service weapon at her. Reyes then notified the IAD and continued to conduct the investigation with Shaatal.

Reyes interviewed Employee and Wiley’s daughter, Bailey. Bailey originally provided the officers with one story, but when Shaatal further interviewed her, she told them that Wiley told Bailey to lie and say that it was Wiley who pointed the gun at Employee. Bailey informed them that Wiley told her to put the gun back upstairs. Reyes never saw any visible bruises or abrasions on Wiley that would have led him to believe that she was assaulted.

Reyes interviewed Employee who told him that he tried to use his cell phone to videotape Wiley pointing the gun at him at his home. He did not see any bruises or abrasions on Employee. On cross-examination, Reyes stated that he did not review any video footage of the hotel or Employee’s residence, where the alleged assault happened.

Reyes was unable to determine if Employee used his gun to hit Wiley in the back of the head. After further investigation with Bailey, Reyes stated that Wiley was arrested for assault with a dangerous weapon and child endangerment.

On cross-examination by the panel, Reyes explained that he contacted IAD because it was standard procedure, as it involved an officer. Reyes stated that initially, he thought Wiley’s left cheek was swollen. However, after they realized that Wiley told her daughter to lie, she lost credibility and Reyes rationalized that there was a possibility that Wiley did not have a symmetrical face. He could not recall if Wiley sought out medical attention, but stated that if she needed medical attention, they would have went to the hospital instead of bringing Wiley into the police station.

*Detective Adam Shaatal (“Shaatal”) Tr. 235-253.*

Detective Shaatal stated that based on Wiley's 911 call for help, he responded to an apparent aggravated assault in the 3200 block of Stanton Road, Northeast. When Shaatal arrived on scene, he was briefed by Reyes, Bowman, and other officers that there was an argument and during the course of the argument, Wiley alleged that Employee stuck her with his fist and then used his service weapon to hit her on the head. Based on his observation, Shaatal determined that Wiley did not sustain the injuries to support what she alleged. Further, Wiley informed Shaatal that there was a dispute earlier that night at the hotel and that she asked Employee for her phone back. However, during the course of their argument, she got on the roof of Employee's vehicle.

Shaatal interviewed Bailey, who initially told him that she was in her room when she heard arguing going on downstairs. When she went downstairs, she observed Employee pointing a gun at her mother and that was when she went into Wiley's bedroom because she knew that Wiley had a gun in her nightstand. Bailey brought the weapon downstairs to Wiley so that she could defend herself against Employee. Shaatal stated that Bailey's story did not make sense to him, so he explained to her that no matter what happened, she would not be in trouble. Bailey then told Shaatal that she did not see Employee withdraw his service weapon, threaten, or assault Wiley. She also informed him that Wiley had the loaded gun and was told by Wiley to put it away upstairs.

*Sergeant Michael Shuck ("Shuck") Tr. 254-258.*

Sergeant Shuck testified that Employee was very mild-mannered and thus, he was surprised by the charges brought against Employee. Shuck described Employee as a good officer and was proud to work with him. He stated that there was never an issue when he asked Employee to complete a task and felt that Employee should remain with Agency. He acknowledged that Employee made a mistake, but opined that not all mistakes required removal from Agency.

*Sergeant Kerron Roberts ("Roberts") Tr. 258-265.*

Sergeant Roberts of the Third District stated that Employee always displayed a cool and calm demeanor on and off duty. He personally spent time off duty with Employee and never observed any turmoil between Employee and Wiley. He believed that Employee should be retained by Agency because he was a hard worker and was an asset to Agency.

*Sgt. Michael Harrison ("Harrison") Tr. 265-275.*

Sergeant Harrison worked in the Fifth District with Agency and testified that Employee was a good officer and should be retained with Agency.

*Steven Campbell ("Employee") Tr. 274-284*

Employee testified that he and Wiley were in the car on the way to a party when he told her that he knew that she was still talking to her ex-boyfriend. Employee told her that if they were going to remain in a relationship, she would have to stop talking to her ex-boyfriend.

Wiley gave Employee her phone and told him that if he looked through her phone he would not find any messages from her ex-boyfriend. Employee looked through Wiley's phone and noticed that messages were deleted and told her that she was lying and gave her phone back.

They proceeded to the party when Employee mentioned the phone again. Wiley wanted to address the issue before they entered the party; however an argument ensued. Employee stated that Wiley brought up things that Employee did in his past and yelled and cursed at him. He explained that Wiley dropped her cell phone and identification card on the ground. As she picked them up, Employee was walked away and Wiley came behind him and hit him. He stated that the altercation happened so quickly, he could not believe that Wiley did that to him. Employee explained that while Wiley was hitting him, he held his hand up to try to hold her back. He said that Wiley was drinking before he arrived home from work. When he arrived home, Employee fixed himself a drink and made Wiley one as well.

When Employee walked to his car to leave, Wiley jumped on the hood of the car. He rolled down his window and told her to get off of his car. Wiley told Employee that he could not leave her there and said that she would go home with him. Employee saw a police car driving down the street. He pulled forward with Wiley on the car to ask the officer to get Wiley off the hood of his vehicle because he was trying to leave. The officer told Employee to pull over and the officer parked behind his vehicle. The officer told Wiley to get off the car and pulled her to the side and then walked over to Employee to ask what happened. Employee stated that he told the officer he was unable to leave because Wiley jumped onto the hood of his vehicle. Employee explained that the officer spoke with Wiley, while he remained inside his vehicle. The officer told Employee that he called an official to figure out what was going on. Employee asserted that he never struck or put his hands on Wiley.

#### PANEL'S FINDINGS OF FACT<sup>4</sup>

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

1. On August 2, 2015, Employee and his girlfriend Ms. Jeralyn Wiley were arguing outside the Quality Inn Hotel. The argument over infidelity issues escalated to a physical altercation that was captured on video camera. A member of the 5<sup>th</sup> District police force took a domestic incident report. Both parties agreed to go home together.
2. Internal affairs Agent Tracye Malcolm was notified of the incident.
3. Upon arriving home, Ms. Wiley called 911. She informed the responding police officers that Employee had struck her on the head with his service weapon. Sergeant Reyes initially informed Agent Malcolm that he was going to arrest Employee, but later called Malcolm to say he was arresting Ms. Wiley instead.

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<sup>4</sup> Excerpted from Adverse Action Panel Summary of Evidence, Findings of Fact, Conclusions of Law, and Recommendations, Agency Answer, Tab 4.

4. Malcolm arrived at the scene and spoke to Reyes and Wiley. She then watched the video of Employee and Wiley involved in a physical altercation. She had Agent Young download the video as evidence.
5. On August 4, 2015, Employee was arrested for Domestic Violence Simple Assault pursuant to a Superior Court warrant #15CRW2760.
6. On January 8, 2016, D.C. Superior Court Judge Nooter disposed Employee's case as a Nolle Prosequi.
7. Employee was served a Notice of Proposed Adverse Action on May 17, 2016.
8. The June 22, 2016, Panel hearing presented video evidence, reports and testimony of members that responded to the Stanton Road, S.E. incident as well as the New York Avenue, N.E. incident.
9. Wiley could not be located and thus did not testify. Instead, her August 2, 2016, statement that she provided to Agent Malcolm was entered.
10. There is a preponderance of the evidence that Employee engaged in an act which would constitute a crime, whether or not a court record reflects a conviction. Specifically, Employee did assault his girlfriend on August 2, 2016.

#### ANALYSIS, AND CONCLUSIONS OF LAW

Pursuant to the *Pinkard* analysis,<sup>5</sup> 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 Panel Hearing, when all of the following conditions are met:

1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
2. The employee has been subjected to an adverse action;
3. The employee is a member of a bargaining unit covered by a Collective Bargaining Agreement;
4. The Collective Bargaining Agreement contains language essentially the same as that found in *Pinkard*, i.e.: “[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [i.e., Trial Board Hearing] has been held, any further appeal shall be based solely on the record established in the Departmental hearing”; and

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<sup>5</sup> *Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002).

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.<sup>6</sup>

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.<sup>7</sup>

### **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.<sup>8</sup> 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.<sup>9</sup>

Agency states that the Panel’s findings of fact are backed by substantial evidence and its credibility determinations. Agency insists that its Panel’s findings, that Employee engaged in conduct that constitute a crime and conduct unbecoming an officer, were proven by a preponderance of the evidence at the hearing.

Employee argues that Agency’s action should not be upheld because it was not in accordance with law or regulation and is not supported by substantial evidence. To support his argument, Employee took issue with the Panel’s findings of fact and insisted that it was his girlfriend Wiley who assaulted him, not the other way around.

Employee contends that he was in fact trying to walk away from Wiley and that hotel security stopped Wiley from continuing her assault. In Employee’s version of the incident, he tried to defuse the situation by driving away in his police cruiser when Wiley jumped on his car’s hood after falsely accusing him of confiscating her cell phone and debit card. Wiley also refused to get off the vehicle even as he drove down the street. He contradicted Wiley’s account by insisting that it was he, not Wiley, who flagged down a passing police wagon.

Employee also insists that Wiley’s accusation that he struck her with his service gun was determined by the responding police officers as a lie and that Wiley made her young daughter back up her lie. Employee does not explain why these same officers would call the Internal

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<sup>6</sup> See *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Black’s Law Dictionary*, Eighth Edition; *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 230 (D.C.1998); *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).

<sup>9</sup> See *Metropolitan Police Department v. Baker*, 564 A.2d 1155 (D.C. 1989).

Affairs Division after determining he was innocent.<sup>10</sup> Employee asserts that the Panel's fact finding was based on corrupted evidence, specifically, Wiley's false statement.

Employee admits that the Panel unanimously concluded by a preponderance of the evidence that he had engaged in an act which would constitute a crime, whether or not a court record reflects a conviction, specifically, assaulting his girlfriend on August 2, 2015. Nonetheless, Employee insists the Panel's fact finding should not be upheld because it was based on a false statement by his girlfriend and the arrest warrant issued based on a false swearing made by Agent Malcolm. Employee further points out that his criminal charges were dismissed pursuant to a *Nolle Prosequi* on January 8, 2016.

In essence, Employee disagrees with the Panel's fact findings and is attempting to re-litigate the facts of this matter.

First, I note a *Nolle Prosequi* on the criminal charges against Employee is not an acquittal on the criminal charges. It simply meant the prosecutor declined to try the case for reasons such as, giving Employee a chance at a clean record, or a failure of a witness such as Wiley to cooperate, etcetera.

Second, I have examined the record of the Panel hearing, and I find that it does not bear out Employee's claim that their fact finding hinged solely or mainly on his girlfriend's written statement or that Agent Malcolm's arrest warrant was based on falsehood. The record clearly showed that the Agent Malcolm and the presiding Panel placed a lot of weight on the video of the assault.

Finally, Employee's other attacks on the Panel's findings as unreliable amount to an attack on its credibility findings. Agency defended the credibility findings of its Panel.

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 ten specific findings that was the basis of its unanimous decision that Employee was guilty of all charges and specifications set forth in Agency's Notice of Proposed Adverse Action. The Panel's findings clearly showed that it did not find Employee to be credible.

In reviewing an administrative decision's findings of facts, great deference is given to "any credibility determinations of the administrative factfinder."<sup>11</sup> An administrative factfinder's credibility determinations are entitled to greater weight because the examiner has heard the live testimony and observed the demeanor of the witnesses.<sup>12</sup> Although the words spoken can be reviewed in the transcript, the demeanor of the witness cannot be captured.<sup>13</sup>

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<sup>10</sup> Internal Affairs Division investigates alleged offenses committed by Agency's police force.

<sup>11</sup> *Metro. Police Dep't v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989) (*citation omitted*).

<sup>12</sup> *Dell v. Dep't of Employment Servs.*, 499 A.2d 102, 106 (D.C. 1985); *Hillen v. Dep't of the Army*, 35 M.S.P.R. 453, 458 (1987) (recognizing that in trying to resolve issues of credibility, the demeanor of the witness is considered).

<sup>13</sup> *See, e.g., Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951).

The District of Columbia Court of Appeals has emphasized the importance of credibility evaluations by the individual who sees the witness “first-hand.”<sup>14</sup> Such “first-hand” credibility evaluations are paramount in cases where, as here, witness accounts are essential to the final determination. Even if the administrative factfinder does not directly state in the decision that he or she is crediting one witness’s testimony over the other, it can be inferred from findings of fact.<sup>15</sup> (noting that “[a]lthough the appeals examiner summarized the testimony of all the witnesses, it is readily apparent that he substantially credited [one party’s] version of the events” by the examiner’s summary of the events). Administrative factual findings of disputed facts based on credibility determinations may only be rejected if they are not supported by substantial evidence.<sup>16</sup>

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. OEA “must generally defer to the [MPD’s] credibility findings.”<sup>17</sup>

The charges and specifications against Employee were based on the undisputed fact that Employee was arrested and criminally charged with assault based on his victim’s account of the incident in addition to the video recording of their altercation. The record of evidence clearly shows Employee being involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction. Such conduct is also clearly evidence of conduct unbecoming an officer, including acts detrimental to good discipline, conduct that would be a violation of law.

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.**

Agency asserts that the penalty of termination was appropriate given the circumstances and that it engaged in a thorough analysis of the *Douglas* factors.<sup>18</sup> Employee finds fault with Agency’s procedure in choosing the appropriate penalty. He states that Agency erred in looking at his past disciplinary record by using the same incident as an aggravating factor. Agency

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<sup>14</sup> *Stevens Chevrolet Inc. v. Comm’n on Human Rights*, 498 A.2d 546, 549-50 (D.C. 1985).

<sup>15</sup> *Gunty v. Dist. of Columbia. Dep’t of Employment Servs.*, 524 A.2d 1192, 1194 (D.C.1987)

<sup>16</sup> *See Gunty*, 524 A.2d at 1198.

<sup>17</sup> *Lynn Edwards v. D.C. MPD*, OEA Matter No.: 1601-0012-05, *Opinion and Order on Petition for Review* (May 23, 2011) at 92.

<sup>18</sup> *Douglas v. Veterans Administration*, 5 MSPR 280, 303-308 (1981).

responds that driving a police cruiser with his girlfriend on the hood incurred an administrative action with case number DRB #749-15/IS-13-00182, while Employee's assault on his girlfriend was a criminal case. Thus, the two cases are not comparable.

Employee also states that Agency was not consistent with its penalties as it gave another officer, Officer Witkowski, a 45 day suspension for the same action. Agency points out Officer Witkowski was not charged with domestic violence but with drinking while under the influence of alcohol.

I have examined the record and I do not find Employee's complaints to be valid. Agency followed the proper procedure in its adverse action against Employee by providing due process. Employee was given proper notice, and was able to represent himself and cross-examine witnesses in the Panel hearing afforded him. Agency conducted a thorough analysis of the relevant factors in determining his penalty. There was no inconsistency or unreasonableness in Agency's adverse action against Employee. I therefore find that there was no harmful procedural error in this matter.

**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. Given the gravity of the conduct and the proper procedural safeguards of due process that Agency undertook, I find that Agency proved by a preponderance of the evidence that it had cause to remove Employee from service.

**ORDER**

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

FOR THE OFFICE:

JOSEPH E. LIM, Esq.  
Senior Administrative Judge