Department of Consumer and Regulatory Affairs
Building and Land Regulation Administration

NOTICE OF PUBLIC INTEREST

Forwarded for your information is the weekly listing of **raze permit applications** filed with the Permit Service Center of the Building and Land Regulation Administration, requesting a permit to raze the following listed structures:

Application Date	Address	Lot	Square	Use
4/4/07	620 Michigan Ave, NE	0044	3821	1-Shed & 2-Story Comm Bldg
	1050*60 Montana Ave, NE	Par 1530083	4268	2-Story Comm Bldg
4/10/07	1801 Good Hope Rd, SE	0800	5618	1-Story Library
	3935 Benning Rd, NE	Par 175/35		1-Story Library
4/12/07	1309 "H" St, NE	0088	1027	1-Story Comm Bldg
	1311 "H" St, NE	0089	1027	3-Story SFD
	2332 California St, NW/Rear	0297	2519	1-Story Poolhouse
4/23/07	440 "N" St, NW	0932	0513	2-Story SFD
	438 "N" St, NW	0933	0513	2-Story SFD
	3236 Ely Pl, SE	0045	5447	1-Story SFD
4/25/07	522 10th St, NW	0820	0347	1-Story Restaurant
4/27/07	1830 Wiltberger St, NW	0807	0441	2-Story Apt Bldg
5/2/07	908 3rd St, NW	0842	0527	3-Story Comm Bldg
	910 3rd St, NW	0838	0527	3-Story Comm Bldg
	914 3rd St, NW	0831	0527	3-Story Comm Bldg
5/9/07	1347*45 S Capitol St, SW	0111	0653	2-Story Auto Repair
	401 "M" St, SW	0089	0542	2-Story Shopping Mall
5/11/07	5135 "F" St, NW	0009	5317	2-Story SFD

5/25/07	4008*10 Minn Ave, NE	0060	176P	2-Story Comm Bldg
	4012 Minn Ave, NE	0006	5052	2-Story Comm Bldg
	4014 Minn Ave, NE	0007	5052	2-Story Comm Bldg
	4016 Minn Ave, NE	0800	5052	2-Story Comm Bldg
	4020 Minn Ave, NE	0010	5052	2-Story Comm Bldg
	4024 Minn Ave, NE	0010	5052	2-Story Comm Bldg
	4030 Minn Ave, NE	0009	5052	2-Story Comm Bldg
	4032 Minn Ave, NE	0070	176P	2-Story Comm Bldg
	4046 Minn Ave, NE	0068	176P	2-Story SFD
6/1/07	201 Bryant St, NW	Par 1080/8		3 1-Story Comm Bldgs
	515 20th St, NW	0025	0122	6-Story Parking Garage
6/5/07	2221 14th St, NW	0234	0028	2-Story Comm Bldg
	5412 Nevada Ave, NW	0015	1993	2-Story SFD
	1220*10 Cushing Pl, SE	0822	0701	1-Story Warehouse
	1259 Cushing Pl, SE	0830	0701	1-Story Warehouse
	1245 Cushing Pl, SE	0050	0701	2-Story Warehouse
	1271 1st St, SE	0156	0701	1-Story Retail
	86 "N" St, SE	0825	0701	3-Story Comm Bldg
	1263 1st St, SE	0818	0701	1-Story Comm Bldg
	84 "N" St, SE	0821	0701	1-Story Comm Bldg
6/21/07	3003 GA Ave, NW	0111	3052	2-Story SFD
	1100 6th St, NW	800*859	0449	2 1-Story Comm Bldgs
	436 Ridge St, NW	0066	0513	2-Story SFD/Saving Façade
6/26/07	1414 Montello Ave, NE	807*808	4059	2-Story SFD
7/3/07	3900 Shoemaker St, NW	0003	2231	2-Story SFD
7/9/07	700 "R" St, NW			2-Story Library Bldg
7/10/07	2829 Jasper Rd, SE			2-Story SFD

BOARD OF ELECTIONS AND ETHICS

CERTIFICATION OF ANC/SMD VACANCIES

The District of Columbia Board of Elections and Ethics hereby gives notice that there is one vacancy in Advisory Neighborhood Commission office, certified pursuant to D.C. Official Code 1-309.06(d)(2); 2001 Ed.

VACANT: **3C01**

Petition Circulation Period: **Monday, August 20, 2007 thru Monday, September 10, 2007**
Petition Challenge Period: **Thursday, September 13, 2007 thru Wednesday, September 19, 2007**

Candidates seeking the Office of Advisory Neighborhood Commissioner, or their representatives, may pick up nominating petitions from 8:30 am to 4:45 pm, Monday through Friday at the following location:

D.C. Board of Elections and Ethics
441 - 4th Street, NW, Room 250N
Washington, DC 20001

For more information, the public may call **727-2525**.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of: WALTER K. FERGUSON Employee v. DISTRICT OF COLUMBIA METROPOLITAN POLICE DEPT. Agency	OEA Matter No. J-0003-07 Date of Issuance: November 28, 2006 Rohulamin Quander, Esq. Senior Administrative Judge

Walter K. Ferguson, *Pro se*
Frank McDougald, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

On October 10, 2006, Employee, a former uniformed office with the D.C. Metropolitan Police Department (the "Agency") filed a Petition for Appeal with the Office of Employee Appeals (the "Office"), challenging Agency's Notice of Proposed Adverse Action. The document proposed the removal of Employee from Agency's employment, allegedly due to his having committed misconduct during the process of his being rehired or evaluated by Agency for reemployment as a sworn officer.

The charging document which gave rise to the filing of Employee's Petition was a Notice of Proposed Adverse Action, apparently dated May 30, 2006.[1] Charge No. 1, alleged a violation of General Order Series 120, No. 21, Part A-17, i.e., "Fraud in securing appointment, or falsification of official records or reports." Charge No. 2, alleged a violation of General Order Series 120, No 21, Part A-6, i.e., "Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Office to, or in the presence of, any superior officer, or intended for the information of any superior officer, or making

[1] The rubber stamped date on the charging document is largely obscured, but indicates both "May" and "2006". The exact date of the month is less clear, however, but appears to be "30".

an untruthful statement before any court of any hearing."

The adverse action letter, issued by Shannon P. Cockett ("Cockett"), Assistant Chief, Office of Human Services, advised Employee that he had 21 days to submit a response to the proposal, and to indicate whether he wished to have a departmental level (Police Trial Board) hearing, which letter also listed the names of the designated hearing panel, the date, time, and place of the hearing, if one was requested, as well as the right to be represented by legal counsel or a union representative and to call witnesses to testify on Employee's behalf.

The record of documents submitted to the Office by Employee does not indicate whether there was a Trial Board proceeding. However, he submitted a letter, dated August 31, 2006, also from Cockett, which made reference to Employee's appeal in which he sought to have an Agency imposition of a $5,000.00 fine rescinded. The appeal to have the fine rescinded was denied. No other subject or issues related to Employee's employment at Agency or the circumstances of his termination were addressed in the letter.

During this same general time frame, Employee had an opportunity to relocate, and stated, "I opted to resign from the department and accept a position as a Deputy Sheriff with the Henrico County [, Virginia,] Sheriff's Department, the county I currently reside in." His sole request before this Office is that the Office direct Agency to rescind the assessment of the $5,000.00 fine. Further, Employee asserts, "I am certain that I would have been successful in fighting these allegations had I chosen to. I feel that this fine is a penalty based solely on an allegation, not any proven fact."

Since the matter could be decided on the basis of the documents of record, no further proceedings were held. The record is now closed.

JURISDICTION

As will be discussed, the Office lacks jurisdiction over this matter.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act [CMPA], sets forth the law governing the current jurisdiction of this Office. *D.C. Official Code* § 1-606.03, Appeal procedures, reads in pertinent part as follows:

> (a) An employee may appeal [to this Office] a final agency decision affecting a performance rating which results in

> removal of the employee . . ., an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more . . ., or a reduction in force [RIF]. . . .

In the matter at hand, the record indicates that Employee elected to voluntarily resign from his position in order to accept another law enforcement position in a different jurisdiction. He could have elected to challenge the allegations in an effort to disprove them, and if successful, to then voluntarily resign, with his name having been cleared. In addition, his petition never alleges nor provides any documentation to indicate that he was in fact terminated from Agency employment as a result of the proposal to remove him, nor did he submit a Final Agency Decision letter, indicative of his employment having been formally terminated for cause or due to some other reason.

His action of voluntarily resigning truncated Agency's pending termination action, which well might have even been set aside had Employee successfully rebutted the allegations and provided a suitable explanation in reply to Cockett's having extended the opportunity to file a written response to the proposal for his termination. Under the circumstances, Employee failed to exhaust the available and mandatory administrative remedies before filing a petition at the Office. Further, it appears that no final agency document was ever created. Agency's personnel records most probably reflect that Employee elected to resign, after having been notified that adverse action for termination was pending, with the proposed adverse action removal never implemented.

The only specific request that Employee sought before this Office was that the Office rescind Agency's assessment of a fine of $5,000.00, which fine is referred to by Employee as, " ... a penalty based solely on an allegation, not any proven fact." Nothing in the enabling law which created this Office bestows jurisdiction to address the imposition or rescission of any fines or penalties imposed by any other D.C. Government agency. Employee's remedy to address such lies elsewhere, with Employee noting in his petition that he has counsel who is taking action to address the fine issue and other personnel matters.

I conclude that Employee voluntarily resigned from Agency, in order to accept a law enforcement position in another jurisdiction, that Employee failed to exhaust administrative remedies, that the Office has no jurisdiction over either the imposition or rescission of fines imposed by another D.C. government agency, and that Employee has failed to state a claim upon which relief can be granted. Thus, the Office is without jurisdiction to hear and decide this case.

ORDER

It is hereby ORDERED that this matter is DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

ROHULAMIN QUANDER, ESQ.
Senior Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
LENORE VERRA,	)	
Employee	)	OEA Matter No. J-0040-07
	)	
v.	)	Date of Issuance: May 21, 2007
	)	
DISTRICT OF COLUMBIA	)	
PUBLIC SCHOOLS,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge
	)	

Lenore Verra, Employee *Pro-Se*
Audrey J. Anderson, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On January 3, 2007, Lenore Verra (hereinafter "the Employee") filed a petition for appeal with the Office of Employee Appeals (hereinafter "OEA" or "the Office") contesting the District of Columbia Public Schools' (hereinafter "the Agency") adverse action of removing her from service. After reviewing the Employee's petition for appeal, I have determined that the jurisdiction of this Office was in question. Consequently, I ordered the parties to file briefs regarding whether the OEA may exercise jurisdiction over this matter. The parties have each submitted their respective briefs as required. After considering the positions contained therein, I have determined that no further proceedings are warranted. The record is now closed.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

BURDEN OF PROOF

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

The burden of proof with regard to material issues of fact

shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

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

OEA Rule 629.2, id. states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing.

JURISDICTION

As will be explained below, the jurisdiction of this Office has not been established.

FINDING OF FACTS, ANALYSIS AND CONCLUSION

The proceeding statement of facts, analysis and conclusions are based on the documents of record as submitted by the parties. At the time of her removal from service, the Employee was employed with the Agency as an Attorney Advisor. The Employee argues that at all times relevant to this matter she was member of the Career or Educational service and as such should be afforded the protections that are provided for aggrieved employee's pursuant to D.C. Official Code § 1-606.03[1], namely appeal rights to the OEA. The Employee provides as evidence of her employment status a Personnel Action Form One dated December 14, 2006, which describes the Employee's position type as "Career".

The Agency counters that at the time of her removal, the Employee was a member of the Legal Service and as such does not enjoy the protections afforded to aggrieved employee's pursuant to D.C. Official Code § 1-606.03. To buttress its contention, the Agency notes that the Employee's job title (Attorney Advisor) and series (090501)[2] would mandate that the Employee job title is statutorily defined as an "attorney" and she was therefore employed as a member of the Legal Service and not the Career or

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[1] Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Protections Act (hereinafter "CMPA"), sets forth the law governing this Office. D.C. Official Code § 1-606.03 ("Appeal procedures") reads in pertinent part as follows:

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

[2] Both also found on the aforementioned Employee's Form One.

Educational service. D.C. Official Code § 1-608.51 (2) states in pertinent part that an Attorney is "any position which is classified as part of Series 905....". The Agency further contends that "[a]s a Legal Service employee, [the Employee] cannot be a Career Service employee. In making this argument, the Agency relies on D.C. Code § 1-608.01 (a) which provides in pertinent part that the Career Service "shall include all persons appointed to positions on the District government, except persons appointed to positions in the ... Legal Service."

The Agency's explains that the discrepancy noted by the Employee relative to her job series designation and the position type as it appears on the Employee's Form One is a "mischaracterization" [3] and that the OEA should not confer jurisdiction on this matter simply as a result of this unintended mischaracterization. The Agency relies on *Johnson v. D.C. Office of Employee Appeals*, 912 A.2d 1181, 1184 (D.C. 2006), which held, *inter alia*, that an error on an employee's Personnel Form One is not, in of itself, legally conclusive of an employee's employment status with the Agency. *See also, Hoage v. Board of Trustees of the University of the District Columbia*, 714 A.2d 776, 781 (D.C. 1998). Considering as much, the Agency contends that, given the Employee' series designation (905) and job title (Attorney Advisor), she was a member of the Legal Service and therefore cannot appeal her removal from service to the OEA. I agree.

This Office has no authority to review issues beyond its jurisdiction. *See Banks v. District of Columbia Pub. Sch.*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (Sept. 30, 1992), __ D.C. Reg. __ ( ). Therefore, issues regarding jurisdiction may be raised at any time during the course of the proceeding. *See Brown v. District of Columbia Pub. Sch.*, OEA Matter No. 1601-0027-87, *Opinion and Order on Petition for Review* (July 29, 1993), __ D.C. Reg. __ ( ); *Jordan v. Department of Human Services*, OEA Matter No. 1601-0110-90, *Opinion and Order on Petition for Review* (Jan. 22, 1993), __ D.C. Reg. __ ( ); *Maradi v. District of Columbia Gen. Hosp.*, OEA Matter No. J-0371-94, *Opinion and Order on Petition for Review* (July 7, 1995), __ D.C. Reg. __ ( ).

Based on the foregoing, I find that the Employee, when she was removed from service, was a member of the Legal Service regardless of what her position title or type is described as on her Personnel Form One. I further find that pursuant to D.C. Official Code § 1-608.56 (c), the Employee's appeal rights relative to this matter lie *possibly* with either the Mayor of the District of Columbia or the Agency head, but in any event her appeal rights *do not* lie with the OEA. Consequently, I conclude that the Employee has failed to establish the jurisdiction of this Office in the instant matter and I must therefore dismiss this matter for lack of jurisdiction.

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[3] Additional Response of the District of Columbia Public Schools to OEA's Question of Jurisdiction at 3.

ORDER

It is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ARMER GASTON, SR.	OEA Matter No. 1601-0024-07
SHERMAN JACKSON	OEA Matter No. 1601-0025-07
VALERIE A. HOLT	OEA Matter No. 1601-0026-07
Employees	
	Date of Issuance: July 2, 2007
v.	
	Rohulamin Quander, Esq.
D.C. PUBLIC SCHOOLS	Senior Administrative Judge
Agency	

Armer Gaston, Sr., Employee *pro se*
Sherman Jackson, Employee, *pro se*
Valerie A. Holt, Employee, *pro se*
Sara White, Esq., Agency Representative
Harriett Segar, Esq., Agency Representative
Michael Levy, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION

Between November 27, and 29, 2006, Employees filed with the D.C. Office of Employee Appeals (the "Office"), three individual petitions for appeal from Agency's decision to separate them from employment as a Business Managers, EG-11, effective December 8, 2006. The identical termination letters (the "separation letter(s)"), dated November 9, 2006, advised Employees of the necessity to, "equitably distribute resources across the district to align those resources with student enrollment."

This matter was assigned to the undersigned judge on January 17, 2007. I held three separate prehearing conferences on February 13, 2007, and because the issue and fact pattern in each of the three cases is identical, pursuant to Office Rule 612.2, 46 D.C. Reg. 9305 (1999), I have decided to consolidate the three individual petitions into one decision for the purpose of judicial economy.[1]

[1] OEA Rule 612.2, provides, "[i]f two or more employees have appeals involving similar or identical issues pending before the Office, the Administrative Judge may join the appeals for adjudication as

Because of the hotly contested nature of the circumstances of how Employees were separated from the Agency, each side contributed a plethora of documents related to the issue, and based upon the implementation of Agency-claimed policies that related to the use of several terminologies, including "Excessing"[2], "Reconciliation", "Weighted Student Formula", and "Adjusted Student Enrollment." Each of these terms has been and continues to be used by Agency as an explanation and justification for the realignment and reallocation of available monetary and personnel resources, with the consistent effect of an ongoing, targeted reduction or elimination of certain services, including the termination of approximately 10 budget officer positions.

Based upon the total record, including submitted documents and respective arguments by the parties, I determined that further proceedings, including an evidentiary hearing, are not warranted. The record is closed.

JURISDICTION

Agency has questioned whether the Office has jurisdiction in these matters pursuant to the provisions of *D.C. Official Code* (the *Code*) § 1-606.03 (2001).

ISSUES

1) Whether this Office has jurisdiction in these matters; and

2) If so, whether Employees' separation was improper and should be overturned.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

By advance notice dated November 9, 2006, Employees were advised that they would be separated from employment as business managers, effective December 8, 2006. The notice read, in pertinent part, as follows:

> It is necessary for the District of Columbia Public Schools (DCPS) to equitably distribute resources across the district to align those resources with student enrollment. In order to effectuate this goal, DCPS must align staff to meet the needs of the school system. Based on student enrollment, your position has been identified as surplus at

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one action."

[2] Although Agency did not use the term, "excessing" in this separation process, Employees, through the Council of School Officers, their collective bargaining unit, identified Agency's actions as, "the Excessing Process for School-Based Business Managers."

> the school to which you are currently assigned. We regret to inform you that your services as Business Manager at [the name of their respective schools was inserted into this space] are no longer required. . . . Your separation is not the result of any adverse action.

Positions of the Parties

Agency asserts that Employees were each separated from their respective employment positions due to a "reconciliation" action, implemented pursuant to Agency's reconciliation process set forth in Resolution R07-04, the Local School Budget Reconciliation For School Year 2006-2007 (the "Resolution" or "Reconciliation"). The implementation and effect of the Resolution is proffered as a change in the school's budget allocation based on student enrollment.[3] Agency did state on the record, that, as a result of having been terminated, Employees were placed on a retention register for two years, and are eligible for re-employment if any suitable vacancies occur.

During the Pre-Hearing Conference, Agency staked two positions. First, Agency challenged the Office's jurisdiction, contending that since this matter is a "reconciliation", it does not fall within the statutorily stated jurisdiction of the Office.[4] Agency concludes that since Employees' separations are not a matter cited in Title 1-606.03(a) of the *D.C. Official Code* (Appeal Procedures), i.e., "a performance rating which results in removal of the employee..., an adverse action for cause that results in removal, reduction in grade, or suspension for 10 days or more...," this Office has no jurisdiction over these appeals.

Second, and in the alternative, Agency argues that even if the Office has jurisdiction, § 38-102(a) of the *Code* gives the D.C. Board of Education the authority to determine all questions of general policy relating to the schools.[5] Included within that policy is authority to: appoint and

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[3] This process is called the "Weighted Student Formula". The number and type of positions assigned to each school are evaluated by the principal, who determines, based on the school's needs and budget, and within certain guidelines, what services will be offered and required at that school. In the cases at hand, each of the relevant principals made the decision to eliminate the budget officer positions. *See* Memorandum to Assistant Superintendents from Ava Greene Davenport, Director, Office of Human Resources, addressing the subject of the Weighted Student Formula and the Excess Process for School-Based Maintenance Employees, May 26, 1999, which process was parallel to how these business manager employees were separated in 2006.

[4] The *D.C. Official Code*, § 1-606.03(a), Appeal procedures, states, "An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee, ... , an adverse action for cause that results in removal, reduction in grade, or suspension of 10 days or more, ... , or a reduction-in-force ... to the Office [of Employee Appeals] ... "

[5] The D.C. *Code* § 38-102(a), General policies, provides that "The Board of Education shall determine all questions of general policy relating to the schools and the Superintendent shall

evaluate the Superintendent, who is responsible for the day to day operation of the schools; and conducting the day to day operations, which includes monitoring and adjusting the budget allocation, pursuant to the weighted student formula. To implement these policies, the Superintendent, through the staff, allocates the budget for schools each year based on student population. If that population decreases from the projected number, the Superintendent must realign the staff at the schools in order to comply with the budget and the weighted student formula.

Agency concluded its argument by asserting that even if jurisdiction could be established, Employees can assert no basis in law or fact that would entitle them to relief, since the Board of Education and Superintendent have broad authority in the day-to-day operations of the school system to realign staff to conform with the requirements of the reconciliation process as established and implemented pursuant to Board Resolution R07-04. In addition, Agency asserted that the existing Collective Bargaining Agreement (the "CBA") reached between Agency and the Council of School Officers, the bargaining unit to which business managers belong, does not contain any provision that addresses limitations upon Agency's authority with regard to employee separations or terminations resulting from reconciliation.

Employees acknowledged that the current CBA does not address the issue of reconciliation and its effect of separating employees in this manner, who are a part of the bargaining unit. The current CBA was implemented prior to the creation of the reconciliation concept, which was not anticipated as a means of separating them and other similarly situated budget officers or other members of the bargaining unit. Ever since Agency implemented this new method for separating Agency employees, the Council of School Officers has repeatedly attempted to get a full explanation of Agency's supposed authority for its *en masse* action without there first being some identifiable legal authorization, such as the implementation of a reduction in force (the "RIF") that was fully compliant with established regulations and procedures.[6] Agency has thus far declined to give any adequate explanation for its actions, other than claiming that under broad policy considerations, the Superintendent has authority to oversee the day to day operations of Agency's public school system.

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implement such policy. The Board of Education shall appoint and evaluate the Superintendent who shall be responsible for the day-to-day operation of the schools." This section of the *Code* does not address personnel matters, and is particularly silent with regard to appropriate procedures that are to be incorporated in the event that employees are separated from employment with the Agency.

[6] See the Council's letter of December 28, 2006, addressed to Dr. Clifford B. Janey, Superintendent, from Bernard Lucas, President, referring to three prior requests for information regarding the specifics of the definitive process utilized by the Agency in its excessing several Council of School Officers members. As of that date, Agency had declined to respond to Mr. Lucas's inquiries. The letter also noted that the Agency had implemented several prior staff excessing protocols in the past, but unlike in the present situation, Agency has published a Department of Human Resources Memorandum (a "DHRM") for all supervisors and Human Resource Management staff to follow, as a component of exercising oversight of the separation process.

OEA has jurisdiction

Agency argues that the implementation of the reconciliation policy merely constitutes an action taken that is consistent with the weighted student formula, in accordance with the broad powers of the Board of Education and the Superintendent, which is charged to adopt policies for the efficient and effective daily operations of the public school system. As such, Agency's actions are those over which this Office has no jurisdiction. However, Agency has not presented any supporting statutes or regulations in lieu of existing RIF procedures. These existing procedures, as stated in Chapter 15, of the Board of Education Rules, take into consideration, as a component of any school-based RIF's or separation of employees, encumbered positions[7], competitive areas[8], competitive levels[9], retention criteria[10], the abolishment of jobs process, and what happens when there is a elimination of all positions in an area or level of competition.[11]

The separation letters advised Employees that they would be "separated from service," effective December 8, 2006. The letter recited their rights to appeal the separation action to this Office, using language that is typically consistent with a RIF notice or a proposed removal or summary removal notice. Both proposed removal and summary removal actions are cause-related, utilized where disciplinary action is contemplated. If this was a removal, the notice should contain a statement of "cause" for the action, and a paragraph explaining how Employees could respond to the action and/or appeal it.[12] Since the above referred document did not state a cause, Agency's action is indicative of an adverse action without cause. Nothing in this record indicates that Employees were separated for any cause-related element. As well, the separation letter affirmatively states, "Your separation is not the result of any adverse action pursuant to Title V, [DCMR], Chapter 14, Adverse Actions."

On many prior occasions, Agency has implemented a reduction in the size of its labor force. These reductions, separate from a recognition of "excessing" and the "weighted student formula", have been implemented pursuant to a multi-step process that evaluated the potentially affected employees, and gave consideration to their competitive levels and competitive areas. Where there was only one incumbent serving in the particular position at the location in question, a determination was made, and the employee was notified that the competitive level process need not be utilized. The

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[7] *See* 5 DCMR 1500.4(e).
[8] *See* 5 DCMR 1501.1.
[9] *See* 5 DCR 1502.1.
[10] *See* 5 DCMR 1503.2.
[11] *See* 5 DCMR 1503.1.
[12] These requirements would not be necessary if Employee was in an "at-will" position. However, there is no indication in the record that any of them was in such a status.

affected positions were identified, and the persons who occupied the positions were subsequently given a proper RIF notice. This process requires a certain amount of Agency staff time, to assure that the positions are properly identified, that the incumbents are given proper notice, and that all of the statutory compliances have been met. These employees have dedicated years of faithful service to Agency, and are entitled to such consideration, despite the fact that they will, in all likelihood, still be separated from employment, if the pre-RIF legal requirements have all been satisfied?

No cause for separation was presented to support Employees' respective separations, the alternative basis for Employees' removal is a RIF action. But if this action was a RIF, Agency has presented no evidence that it followed the proper RIF procedures, such as placing and evaluating each employee in his/her proper competitive level before the RIF action was taken.

Employee's separation was improper

My assessment is that Agency has attempted to implement an end run around the Council of the District of Columbia's duly established RIF procedures, by claiming a full justification to separate these Employees, and several other similarly situated Career Status business managers, in the name of budgetary considerations and a programmatic delivery policy. Agency has attempted to justify and legitimize what it has done by wrapping its actions into a relatively recently adopted new term, "Reconciliation". Agency now claims that, based upon the guidelines and mandates of the "weighted student formula", which requires that the budgetary allocations for each of the schools where these employees formerly worked be realigned, Agency can no longer sustain the staff expenditure, including their continued employment.

This issue has been addressed by the Office before. In *Marion Lomas-Scott v. D.C. Public Schools,* OEA Matter No. 1601-0017- 07, ___ D.C. Reg. ___, (March 13, 2007), the Office held that Agency's argument that a business manager position was abolished due to budgetary reasons, and as a component of "Reconciliation", was no more than an improperly implemented RIF. In addition, the OEA Board, in *Jamal Johnson v. D.C. Public Schools,* OEA Matter No. 1601-0011-07, ___ D.C. Reg. ___, (June 20, 2007), rejected Agency's termination of Employee from his position as an Attendance Clerk in the name of "equalization", another term that has been frequently used when the issue of "excessing" or "reconciliation" has been raised.

Despite Agency's mandate to address staff needs and programmatic efficiency, the Board noted in *Johnson* that Agency failed to cite in its Petition for Review, and in its Agency's pleadings at the Office level, any relevant regulation that Agency implemented to justify Employee's termination from employment. The Board took particular note of the fact that, despite having been accorded more than ample time and opportunity to provide supporting regulations or evidence to justify the termination of the affected employee, Agency still failed to do such on appeal. The Board then concluded in *Johnson* that, "It is without question that Agency failed to provide evidence which a reasonable mind would accept as sufficient to prove that it followed proper procedures to terminate

Employee."

In *Aygen v. DCPS*, OEA Matter No. 1601-0004-04, __D.C. Reg.__ (2005), where the Office, confronted with essentially the same issue, rejected Agency's two assertions. First, Agency argued that Ms. Aygen's position as a Visiting Instruction Service Teacher was "excessed", pursuant to Article IV, Teacher Transfer Policy, § C of the labor agreement ("Excessing"); and second, that the position was abolished due to [a reduced] funding level. The Office held that, although the facts did not support a finding that Employee's separation was the result of a RIF, Agency's removal action did constitute taking adverse action without cause, and without giving Employee an opportunity to respond.

I conclude that Agency's actions have overreached its authority. Agency has not supported its conduct or this record with any documentation that would otherwise exempt the Agency from the Office's statutorily granted jurisdiction, or which exempts Agency from extending standard procedural protections to employees who are facing separation. The only other option to conclude, then, is that Agency has engaged in an improper and unpermitted termination of employment. I further conclude that, without a proper legal basis, Agency cannot legitimize an unlawful separation of these three Employees simply by calling its actions a "reconciliation". This matter is an improper termination of employment, over which this Office does have jurisdiction. In addition, Agency's argument that the position was abolished due to budgetary reasons, is indicative that its action was, in reality, a reduction-in-force (RIF),[13] but was handled in a manner that was not compliant with existing RIF regulations and procedures.

Further, Agency's admission that its CBA with Employee's union does not provide for or contemplate a separation from service due to a "reconciliation" casts further doubt on the legitimacy of the use of this avenue as a basis for separation actions.

Based on the entire record, this Administrative Judge concludes that Agency's action in removing the three affected Employee was either an improper RIF or an adverse action taken without cause. In either event, and because of Agency's non compliance with mandatory regulations and procedures, Agency's actions were improper and must be reversed.

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[13] Title 5 DCMR 1500.2(a) provides that a, "Reduction-in-force (RIF) is a process whereby the total number of positions is reduced for one (1) or more of the following reasons: (a) Budgetary reasons ... "

ORDER

It is hereby ORDERED that:

1) Agency's action removing Employees is REVERSED; and

2) Agency reinstate the three affected Employees and reimburse them all back pay and benefits lost as a result of the removal; and

3) Agency file with this Office documents showing compliance with the terms of this Order within thirty (30) days of the date on which this decision becomes final.

FOR THE OFFICE:

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JASON A. WILLIAMS	)	OEA Matter No. 1601-0087-06
Employee	)	
	)	Date of Issuance: October 26, 2006
v.	)	
	)	
	)	Rohulamin Quander, Esq.
D.C. PUBLIC SCHOOLS	)	Senior Administrative Judge
Agency	)	

Jason A. Williams, *pro se*, Employee
Michael D. Levy, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a petition for appeal with the Office of Employee Appeals (the "Agency") on July 12, 2006, appealing Agency's final decision, dated June 21, 2006, to terminate his employment effective June 30, 2006. Although the termination letter indicated that June 30th was the effective date of Agency's action, the letter also advised Employee that he would receive a summer pay credit. Therefore, a question arises of whether Employee's actual termination date was extended to the day on which the summer payment credit ended, as Agency had the option of reversing the termination notice, returning Employee to work, without a break in service, pay, or benefits.[1]

This matter was assigned to me on September 11, 2006. I convened a prehearing conference on October 24, 2006. Prior to the prehearing conference, both parties submitted prehearing statements to supplement the record. I have determined that an evidentiary hearing was not needed and rely upon the documents submitted. The record closed on October 24, 2006.

[1] Because of the ultimate ruling in this case, the issue of whether a letter dated June 21, 2006, effective June 30, 2006, constitutes sufficient legal notice is not being addressed here. I take administrative notice, however, that Agency has served this type notice upon other teachers, but then reinstated them to teaching positions without a break in service, or loss of pay and benefits during the pendency of the summer pay credit, the effect of which cancelled the effect of the letter of termination.

JURISDICTION

This Office's jurisdiction was not established.

ISSUE

Should this matter be dismissed?

ANALYSIS AND CONCLUSIONS

Employee began teaching at one of Agency's public schools, pursuant to a contract entered into in August 2002. Prior to being hired, Employee submitted several documents for evaluation, but he was never awarded a provisional license, although he was still accepted by Agency and allowed to teach. It is disputed whether, pursuant to a letter from Agency issued on May 2, 2006, Employee made a timely submission of all requested documents needed for certification and licensure consideration by the May 15, 2006, deadline. Employee asserts that he submitted his documentation in a timely manner, although Agency claims not to have received it at that time. His subsequent resubmission was then labeled as "untimely", since there was no definitive proof that the first submission was timely. In mid 2005, his principal reminded Employee of the necessity of certification and licensure, and advised him to enroll in courses being offered by the Educational Training Service (the "ETS"). He enrolled and subsequently passed the Writing and Mathematics Components of the Praxis examination. However, he is yet to pass the Reading Component of the Praxis test, a condition precedent to licensing.

The threshold issue in this case is one of jurisdiction. This Office's jurisdiction is conferred upon it by law, and was initially created by the District of Columbia Comprehensive Merit Personnel Act of 1978 (the "Act"), *D.C. Official Code* (the "Code") § 1-601-01, *et seq.* (2001) and then amended by the Omnibus Personnel Reform Amendment Act of 1998 ("OPRAA"), D.C. Law 12-124, which became effective on October 21, 1998. Both the Act and OPRAA confer jurisdiction on the Office to hear appeals, with some exceptions not relevant to this case, of permanent employees in the Career or Education Service who are not serving in a probationary period. The Code § 1-608.01(a)2)(E) confers permanent Educational Service status upon employees who have been appointed to a position, upon completion of a probationary period of at least one year. It is undisputed that Employee was not in a probationary status. However, there is no evidence in the record that Employee became a permanent employee of Agency at the expiration of his probationary period. He was unable to achieve permanent status because he lacked the requisite license. *See* 5 DCMR § 1601.1. Indeed, by his own admission he never had so much as a provisional license.

Under such legal circumstances, the nature of the contractual relationship between Employee and Agency was nebulous at best, since there is no contract document in this record which serves as the official measure of when his working relationship with Agency began or expired. But one thing is certain in this record. Employee did not complete the certification requirements and obtain his license by June 30, 2006, and once his teaching contract expired, after that date he served solely in an "at will" capacity, subject to Agency's determinations with regard to whether he qualified for continued

employment. It is well established that in the District of Columbia, an employer may discharge an at-will employee "at any time and for any reason, or for no reason at all". *Adams v. George W. Cochran & Co.,* 597 A.2d 28, 30 (D.C. 1991). *See also Bowie v. Gonzalez*, 433 F.Supp.2d 24 (DCDC 2006). As an "at will" employee, Employee did "not have any job tenure or protection." *See* Code § 1-609.05 (2001). Further, as an "at will" employee, Employee had no appeal rights with this Office. *Davis v. Lambert,* MPA No. 17-89, 119 DWLR 204 (February 13, 1991).

Employees have the burden of proof on issues of jurisdiction, pursuant to OEA Rule 629.2, 46 D.C. Reg. 9317 (1999). Employee must meet this burden by a "preponderance of the evidence" which is defined in OEA Rule 629.1, *id*, as that "degree of relevant evidence, which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue". I conclude that Employee did not meet the burden of proof, and that this matter must be dismissed for lack of jurisdiction.

However, assuming *arguendo* that Employee had met the burden of proof on the issue of jurisdiction, the claim would still fail because he lacked the credentials required to challenge the standards set by Agency. In *Nunez v. Simms*, 341 F.3d 385 (5th Cir, 2003), Nunez was hired by the El Paso, Texas Independent School District in 1996 and issued a three-year probationary license, because like Employee, she did not qualify for a standard teaching certificate at the time of hire. She was terminated in November 2000 for failing to meet the requirements and sued the school district.[2] The Court concluded that Nunez was not qualified to serve as a teacher following the expiration of her provisional license because she lacked the credentials and had no reasonable expectation of or property interest in continued employment.

Further, in a recent decision from this Office, I concluded that by failing to obtain the qualifying performance standards and obtain a teaching license, an employee, terminated under circumstances not too dissimilar to the employee in this case, failed to meet the enumerated performance standards and "[s]uch deficiency is, without a doubt, a condition affecting the performance standards, which is itself a basis for removing an employee". *Carson v. District of Columbia Public Schools*, OEA Matter No. 1601-0032-06 (June 13, 2006), _____ D.C. Reg. __ ( ). See also, *Sandra Weekes v. District of Columbia Public Schools,* OEA Matter No. 1601-0022-06 (July 14, 2006), _ D.C. Reg. __ ( ). Thus, this analysis provides an alternative basis for sustaining Agency's action.

Agency provided Employee with information regarding his appeal rights to this Office. Agency was incorrect, since this Office has no jurisdiction. The confusion this caused Employee is regrettable. However, it is well established that this Office's jurisdiction cannot be enlarged by misinformation to Employee regarding his appeal rights. *Alvarez v. Department of Veterans Affairs,*

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[2] Unlike the instant case, in *Nunez*, the teacher initiated her lawsuit while she was teaching under a "continuing contract" authorized by Section 21.153 of the Texas Education Code. The District of Columbia has no similar provision. Employee's last contractual relationship with Agency ended with the expiration of his contract.

49 M.S.P.R. 682 (1991). This Office simply has no authority to review matters that are beyond its jurisdiction. *Banks v. District of Columbia Public Schools,* OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (July 7, 1995), _ D.C. Reg. ___ ( ). Unless an employee has permanent status in the Career or Educational Service or is appointed under special authority in the Excepted Service, the employee has no statutory right to be given a statement of cause for a discharge and no statutory right to utilize the appeal processes of this Office.

Employee argues that Agency's action in terminating him was "unjust". However, as the Court stated in *Nunez*, he "knew at the time [he] entered into the contract, or should have known from the language in the contract and the provisions of . . . law, that the contract gave [him] no right to continued employment while [he] remained uncertified when [his] certificate[3] expired by its own terms. Accordingly, [he] could have no reasonable expectation of continued employment". *Nunez* at 391. While it could be argued that Agency could have communicated with Employee more regularly regarding his lack of credentials, it did remind him of this deficiency prior. Agency was under no obligation to continuously remind Employee of his need to comply with the licensure requirements. The onus was on Employee to do so if he wanted to continue employment with Agency. Hopefully Employee will obtain the necessary credentials so that he can resume the important mission of educating the youth of the District of Columbia.

ORDER

It is hereby ORDERED that the petition for appeal is DISMISSED.

FOR THE OFFICE:

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge

[3] In the instant matter, Employee's rights terminated when the contract ended, as he had no certificate document, such as a temporary provisional nonrenewable license.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
WENDEL PALMER	)	
Employee	)	OEA Matter No. 1601-0048-05
	)	
v.	)	Date of Issuance: March 6, 2007
	)	
DISTRICT OF COLUMBIA	)	
METROPOLITAN POLICE DEPT.	)	Rohulamin Quander, Esq.
Agency	)	Senior Administrative Judge
	)	

Sean G. Ryan, Esq., and J. Michael Hannon, Esq., Employee's Representatives
Ronald B. Harris, Esq., Agency's Representative

INITIAL DECISION

BACKGROUND

On May 5, 2005, Wendel Palmer (the "Employee"), a sworn officer and career service employee with the D.C. Metropolitan Police (the "Agency"), filed an appeal with the D.C. Office of Employee Appeals (the "Office"), taking exception from Agency's final decision, dated February 15, 2005, suspending him for thirty-five (35) days. Initially, there were four charges: 1) Conduct Unbecoming an Officer ("conduct unbecoming"); 2) Failure to Obey Orders or Directives of the Chief of Police ("failure to obey orders"); 3) Neglect of Duty ("neglect of duty"); and 4) Making an Untruthful Statement ("false statements"). Charles Ramsey, Agency's then Chief of Police, upon his review of the Agency-issued Final Notice of Adverse Action, elected to dismiss Charge Four.

The specifics of the three remaining allegations accused Employee of 1) Giving a female citizen a ride in his marked police vehicle to purchase food without authorization; 2) Leaving his assigned patrol duties to enter the woman's apartment without authorization, and subsequently being found by the woman's husband and his aunt in an alleged inappropriate mode of undress; and, 3) Failing to prepare a police report to document a possible domestic related dispute incident between the female citizen and her estranged husband.

Despite Agency's assertions to the effect that Employee admitted to having committed at least some components of the impermissible behavior cited, Employee, through counsel, disputed the three remaining allegations. Employee admitted to aiding Ms. Timeca Rountree Kelly ("Ms. Kelly"[1]) by taking her in his marked police vehicle to purchase some food and paying for it from his personal funds. He also admitted that after driving her back to her residence, he entered her apartment to obtain information relative to an ongoing domestic dispute between her husband, Brian Kelly ("Mr. Kelly") and herself. Employee challenged Agency's assertions that such conduct was violative of known police regulations. He vociferously refuted the conduct unbecoming charge, and its specification that he was observed in a mode of improper dress in the apartment, i.e., clothes unbuttoned or shirt out of his pants.

Further, Employee likewise challenged Agency's assertions that he failed to obey established orders and also neglected his assigned duties by leaving the immediate environs of his assigned marked vehicle, and likewise not preparing a PD 251 Incident Report (the "PD 251"), to document an alleged ongoing dispute between the female and her husband, which may have resulted in the creation of two temporary protective orders ("TPO's"). The matter was assigned to me on November 10, 2005. I convened a Pre-Hearing conference on December 8, 2005, and an Evidentiary Hearing on March 15, 2006. Both parties submitted a proposed final brief. The record is now closed.

JURISDICTION

The Office has jurisdiction over Employee's appeal pursuant to *D.C. Official Code* (the "*Code*") § 1-606.03(a) (2001).

ISSUES

The issues to be decided are:

1. Whether Agency has proven, by a preponderance of the evidence, that Employee committed the acts of which he is accused.
2. Whether Employee's actions constitute "cause" for taking an adverse action to justify Employee's suspension by the Agency for 35 days, as that term is defined by District of Columbia Office of Personnel (the "DCOP"), Rule 1603.3, 47 D.C. Reg. 7094, 7096 (2000).
3. If Agency's action was taken for cause, whether Employee's violation of the cause standard was "*de minimus*". Agency could not have subjected Employee to an adverse action if his violation of the cause standard was *de minimus*. *See* DCOP Rule 1603.5, 47 D.C. Reg. at 7097. The DCOP rules do not, however, define the term "*de minimus*", and this Office has not considered whether a violation of the new cause standard was *de minimus*.

[1] As a rule, I do not use titles such as "Mr." or "Ms." However, I will in this matter, as the case revolves around a domestic dispute between Mr. Brian Kelly and his estranged wife, Timeca Rountree Kelly.

4. If Employee's violation of the cause standard was not *de minimus*, whether the penalty Agency imposed was appropriate under the circumstances, given any aggravating or mitigating circumstances that may have existed.

CHARGES LODGED AGAINST EMPLOYEE

On February 15, 2005, Agency served Employee with a Notice of Proposed Adverse Action, dated February 11, 2005, advising him of Agency's proposal to suspend him for thirty-five (35) days. *(Agency Exhibit #1)* In pertinent part, the adverse action notice provided as follows:

> Charge No. 1: Violation of General Order Series 1202, Number 1, Part I-B-12 which reads in part: "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 . . .", (hereafter, "conduct unbecoming").
>
> Specification No. 1: In that on October 1, 2004, you were on duty working the daywork tour of duty . . . You were flagged down by a complainant in reference to a domestic situation. During the conversation, you agreed to take the complainant to the store to purchase food. Shortly thereafter, you responded to the complainant's residence. While at the home, you were observed according to witnesses on the scene undressed with your shirt open, exposing your vest and your uniform pants unbuttoned.
>
> Charge No. 2: Violation of General Order 1202.1, Part 1, B-16, which reads, "Failure to obey orders or directives issued by the Chief of Police", (hereafter, "failure to obey orders").
>
> Specification No. 1: In that on October 1, 2004, upon request of the complainant, you gave the complainant a ride in a mark (sic) police vehicle to an unknown location in order to buy food . . . without the express approval of an official nor did you advise the dispatcher . . .
>
> Specification No. 2: In that on October 1, 2004, after obtaining the food for the complainant, you responded to 1620 29th Street, Southeast with the complainant. At no time did you advise the dispatcher of your actions nor did you receive permission from an official to leave your assigned patrol duties.
>
> Charge No. 3: Violation of General Order Series 1201, Part I-B-14, which reads in part: "Neglect of any [duty] to which assigned or required by rules and regulations adopted from time to time by the department. . . ," (hereafter, "neglect of duty").
>
> Specification No. 1: In that on October 1, 2004, you failed to properly investigate the possibility of an outstanding Temporary Protection Order against the complainant's husband and/or complainant. Also, in that you failed to prepare an incident report (P.D. 251) for a domestic incident that occurred while inside of 1620 29th Street, Southeast between the complainant and her husband.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

The *Code* at § 1-616.51 (2001) provides the general discipline policy parameters for employees in the Career and Educational services. The statute requires creation of a disciplinary system including, in pertinent part:

(1) A provision that disciplinary actions may only be taken for cause;
(2) A definition of the causes for which a disciplinary action may be taken.

District of Columbia Office of Personnel Rule ("DCOP") 1603.3, 47 D.C. Reg. 7094 (2000) sets forth the definition of "cause" and provides, in pertinent part:

> 1603.3 For the purpose of this chapter, "cause" means . . . any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary and capricious. This definition includes, without limitation . . . negligence, incompetence, insubordination, misfeasance, malfeasance . . . *Id.* at 7095.

In this case, Employee was charged with conduct unbecoming, failure to obey orders, and neglect of duty. These charges, if proven, each constitute "cause" for adverse action under a plain reading of the above-quoted definition.

OEA rule 629.1 *et seq.*, provides that Agency, in order to make its case, must prove by a preponderance of the evidence presented that Employee committed the alleged offenses. This rule defines "preponderance of the evidence" as:

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

The following facts are not in dispute:

1. On October 1, 2004, Timeca Rountree Kelly ("Ms. Kelly"), a distraught citizen, flagged down Employee as he drove his marked police cruiser in front of her apartment located at 1620 29th Street, S.E., #104, Washington, D.C. She asked to speak with Employee about a situation with Brian Kelly, her husband, ("Mr. Kelly"), and upon her request, was given permission to enter the cruiser to conduct the conversation. *(Transcript ("Tr."), 125-126; 132)*

2. After Ms. Kelly expressed her hunger and an inability to acquire any food because she lacked funds, Employee drove her to a local food vendor, purchased a meal for her with his personal funds, and then immediately drove her back to her apartment, escorting her into her residential unit while they talked. *(Tr., 126, 133-134)*

3. With the exception of the bedroom, the apartment lacked furniture. Employee and Ms. Kelly stationed themselves in the bedroom, with Employee standing and Ms. Kelly eating while seated on the floor, explaining in some detail her marital travails. *(Tr., 127)*

4. Both Employee and Ms. Kelly briefly used the bathroom, but while Ms. Kelly was in the bathroom, Mr. Kelly, and his aunt, Marsha Smith (Smith) entered the Kelly apartment, and seeing Employee in the bedroom area and Ms. Kelly rapidly and excitedly exiting the bathroom, questioned exactly what was transpiring between the two of them. To Mr. Kelly and Smith's query, Employee immediately asserted that no inappropriate conduct had occurred and that nothing untoward was going on. *(Tr., 128)*

5. Shortly after Mr. Kelly and Smith left the apartment, Employee was summoned to the Sixth District station, where he was interrogated by Inspector Alton Bigelow and Lieutenant Ronald Netter concerning the incident and Mr. Kelly and Smith's allegations against Employee. *(Tr., 130)*

6. As a result of this incident, in-station interviews with Mr. Kelly, Ms. Kelly, Smith, Employee, and comments made to MPD officers by neighbors who lived at or near the residential unit, and whose respective statements were made a part of the record when Agency filed documents relative to its case in chief, Employee was charged with the above-noted allegations at the conclusion of an investigatory period. The recommendation stated in Lt. David Hutchinson's Final Investigative Report, was, " . . . that Officer Wendel Palmer be cited for ADVERSE ACTION on the ... charges and specifications."

Charge I - *Conduct Unbecoming An Officer*

General Order 1202, No 1, Part I, B-12, 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, . . ." The first allegation in this matter, conducting unbecoming an officer, is complicated by the absence of credible sworn testimony from Agency's two key witnesses, i.e., Brian Kelly, chief complainant and estranged husband of Tomeca Rountree Kelly, and Marsha E. Smith, his aunt. Despite making the initial allegation, they subsequently refused to cooperate with the administrative process, by honoring the subpoenas for them to testify before me under oath at the Evidentiary Hearing. Agency, conceding that it was unable to secure its two key witnesses' testimony, despite having certified mail return receipt proof of service, elected to waive their presence and testimony and to proceed without them. Agency elected not to seek an enforcement order from the Superior Court of the District of Columbia for the complainants' contumacy.[2] *(Tr., 12)*

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[2] On January 20, 2006, and pursuant to OEA Rule 619, 47 D.C. Reg. 9310 (1999), I issued subpoenas to both Mr. Kelly and Ms. Smith. The subpoena stated, "In case of contumacy or failure to obey a subpoena issued by the Office of Employee Appeals, the Superior Court of the District of Columbia may issue an order requiring such person to appear at any designated place to testify or to produce documentary or other evidence. Any failure to obey the Order of the Court may be punished by the Court as contempt thereof."

Agency argued that there were sufficient other facts that, when considering the record as a whole, still compel a finding that the two missing complaining witness respective statements to Agency's sworn officers at the Sixth District are reliable. *(Tr., 13)* Agency maintained that, recognizing that the two statements were signed under the penalty of perjury, they should be accorded due consideration in making both a cause determination and in support of the conduct unbecoming allegation.

Agency underscored that Mr. Kelly and Smith immediately proceeded to Employee's Sixth District duty station to report his misconduct, and did not wait several days to concoct a story that would support Mr. Kelly in his then forthcoming divorce proceeding. As well, their respective statements are consistent on the material facts, i.e., that they found Employee in the apartment with his shirt and pants unbuttoned, and were likewise consistent in reporting what they saw to Sixth District Officers, Sgt. Denise Calhoun, Timothy Hennigan, and Theresa Douglas. *(Agency Exhibit, #1, Attachments 8, 14, 5, 6, 7, and 8, respectively of the Investigative Report)*

Lt. David Hutchinson ("Hutchinson"), the investigating official, testified that there was absolutely no official police purpose for Employee to be in Mr. and Ms. Kelly's apartment under these circumstances, and that Employee would have everyone believe that he was simply being kind to a citizen in need of police assistance. If this was Employee's purpose for his actions, there was no reason why he could not have followed police procedures for handling a potentially dangerous domestic situation or simply letting his supervisor or even the police dispatcher know his whereabouts. *(Tr., 51-52;61)*

At the conclusion of its case and more particularly in the submitted proposed Final Order, Agency once again urged that, despite two key witnesses' refusal to testify, there was still a preponderance of the evidence to support a finding and conclusion that Employee was guilty of conduct unbecoming. Furthermore, even Employee corroborated that Ms. Kelly's pants were unbuttoned at the time her husband and his aunt made an unannounced, surprise entrance into the residential unit.

In response, Employee took exception to Agency's characterization of this charge. Employee argues that Agency, realizing that it lacked credible sworn testimony to substantiate the conduct unbecoming allegation, has instead sought to build up the strength of this allegation by creating a pattern of solely relying upon unsubstantiated reassertions made in the initial complaints. For example, beyond the initial complaint made on October 1, 2004, there is nothing in the record that could be credibly considered as qualified or competent information obtained during an investigatory process for inclusion in the investigative report. In their effort to get beyond the glaring fact that both of Agency's complainants promptly disappeared or otherwise made themselves unavailable after registering their initial complaint, Agency has alternatively, placed reliance upon statements made by Hennigan, Calhoun, and Douglas, each relating what they allegedly were told by the two complainants. However, none of these officers personally witnessed any unbecoming conduct. Whatever information they received while performing their job-related duties, still did not begin to measure up to the standard of proving the allegations by a preponderance of the evidence.

Conversely, Employee, who has both a stellar employment record over a sustained period of time, and whose credibility that I, as the presiding administrative judge, evaluated, has testified that there was no unbecoming conduct between Ms. Kelly and himself, and that he was not in any state of undress. While Employee admitted that Ms. Kelly's pants were unbuttoned, he asserted, and the complainants did not dispute, that upon hearing someone unexpectedly come into the apartment, and perhaps as much due to fear as for any other reason, she hurriedly and excitedly exited the bathroom at the precise moment that her estranged husband and his aunt appeared, saying, "See, this is what I'm talking about! This is what I'm talking about!". *(Tr., 128)*

Employee argues that nothing in either Ms. Kelly's or his own personal conduct or pattern of behavior was indicative of misconduct. If anything, Mr. Kelly's sudden, unannounced appearance was itself enough reason for her apprehension. Further, Ms. Kelly's own statement, given to Officer Netter on the same October 1, 2004, date, when he was sent to conduct an incident-related interview in her apartment, corroborates Employee's own statement, and later his sworn testimony, to the effect that no unbecoming conduct occurred. *(Agency Exhib. #1, Tab "G", Attach. # 12)* Although Employee sought to secure Ms. Kelly's sworn testimony for the Evidentiary Hearing, she could not be located to obtain her testimony for the record.

As the presiding judge, and taking the record into consideration on the issue of conduct unbecoming, I find there is insufficient credible evidence, circumstantial or otherwise, to support a finding that Employee engaged in such conduct. While Employee, himself, admitted to having exercised poor judgment in handling this entire matter, still there is nothing worthy of consideration that supports this charge.

Agency asserts that both Mr. Kelly and Smith's respective statements are corroborative, and entitled to a higher level of credibility than Employee or Ms. Kelly's respective denials, allegedly because the immediacy of proceeding to file the complaint, including the absence of deliberative time in which to concoct a joint lie, somehow underscores their credibility. However, I consider their "shirt unbuttoned, pants open" allegation, to be one that would take but a moment to concoct, and could easily have been agreed upon as a common allegation they decided to make while they were proceeding to the Sixth District. Once made, this simplistic allegation is easy to recollect and reassert, as there is not much to it, specifics wise. Neither during the formal investigating, nor subsequently in anticipation of the Evidentiary Hearing, has there been any follow-up inquiry to determine the substantive nature of the charges, beyond the single assertion alleged on October 1, 2004, the date of the heated confrontation between Mr. and Ms. Kelly.

The issue here revolves around credibility. Employee is the only witness with personal knowledge to testify. Having closely observed his demeanor, I likewise accept his testimony as credible. I find that there is no evidence of conduct unbecoming an officer, although the Employee exercised poor judgment throughout the unfolding of this matter, and unnecessarily put himself into a compromising situation when he entered Ms. Kelly's apartment, and stationed himself in her bedroom, the only room that all acknowledge had any furniture. I further find that Ms. Kelly had cause for alarm at the moment of her sudden and excited exit from the bathroom. Her estranged husband's unannounced entry into their residential unit was an occasion of instant fear for her personal safety. However, the alarm was not so much due to her having co-engaged in inappropriate conduct, as it was due to her uncertainty about why Mr. Kelly suddenly reappeared

at the apartment a day or two after their domestic dispute. According to the record, during the dispute he was escorted from the unit by MPD and his residential keys were taken from him. I conclude that Agency has not met its burden of proof by a preponderance of the evidence presented as there is insufficient evidence to support a finding which sustains Charge #1, conduct unbecoming, a violation of General Order 1202, No. 1, Part I, B-12. I further conclude that this charge must be dismissed.

Charge II - *Failure To Obey Orders Or Directives*

General Order 1202, No 1, Part I, B-16, reads, "Failure to obey orders or directives issued by the Chief of Police." *(Agency Exhib. #2)* There are two specifications listed as Employee's alleged misconduct. Specification #1, asserts that on October 1, 2004, Employee gave Ms. Kelly, at her request, a ride to an unknown location for the purpose of purchasing some food. Agency asserts that said action violated the General Order, as Employee neither advised the dispatcher of his actions, nor sought permission from a Sixth District official for a ride-along passenger. Specification #2 asserts that upon returning to Ms. Kelly's apartment, Employee left the immediate environs of his marked cruise to enter Ms. Kelly's apartment, without first notifying his supervisors. Agency maintains that both actions were taken in violation of Agency's established directives and the General Order, initially issued on November 10, 1983, and periodically updated. The General Order was established for a definitive purpose, including for the welfare and personal safety of Agency's sworn officers.

During the investigatory period Employee admits to giving Mrs. Kelly a ride in his marked police vehicle in order to purchase food for her, and that he did so without first advising his superiors or notification to a dispatcher of his actions, or to document receipt of the expressed approval of an Agency official. During the Evidentiary Hearing, Employee acknowledged that his freely taking Ms. Kelly back and forth in his vehicle to purchase food was a mistake in judgment. Likewise, he had no permission to leave either his vehicle or his assigned patrol duties. *(Tr., 153-154; Employee Appeal to Chief Ramsey, 3-25-05)* He stated that, retrospectively, he should have done things differently.

In my assessment of his testimony, I note that Employee emphasized that there is a "ride along" policy which requires that the person riding must execute consent forms. He could pick up an errant student or lost child, or a dignitary as examples of no specific prior consent – all clearly police business. But I have seen nothing which addresses, justifies, or accommodates taking a private citizen to a carry out to buy food. Despite the police-related component of addressing the domestic dispute, his transport actions clearly bordered on the personal side.

Taking into consideration the circumstances as a whole, buttressed by Employee's own admission that he performed actions which were perhaps violative of the plain meaning and intent of the General Order, I find that he committed two specific violations of the General Order, specifically: 1) General Order 1202.1, Part I, B-16, which reads, "Failure to obey orders or directives issued by the Chief of Police", and 2) General Order Series 1201, Part I-B-14, which reads, "Neglect of any duty to which assigned or required by rules and regulations adopted from time to time by the department."

I conclude that Agency has met its burden of proof, and established that on October 1, 2004, Employee failed to obey established Agency's orders or directives. Employee's poor judgment of not informing Agency of his exact whereabouts placed not only himself in harms way or a situation of potential jeopardy, but likewise potentially compromised the safety of other people, especially at a time when a domestic dispute was ongoing, a circumstance which could easily have deteriorated into a violent and potentially deadly situation.

Charge III - *Neglect of Duty*

Agency maintained that Employee committed a neglect of duty in at least two respects. First, Agency argued, Employee failed to investigate the current status of the ongoing domestic dispute between Mr. and Ms. Kelly, despite being apprised of the existence of at least one TPO, and possibly two, issued during the domestic dispute administrative process. He failed to immediately call for backup as soon as Mr. Kelly made a surprise appearance at the apartment. Employee's inaction subjected himself, the estranged spouses, and other persons, to potential danger. His inaction violated established rules and regulations that were adopted to address the exact potential situation that Employee faced at the moment.

Second, Agency maintained that Employee's pattern of neglect continued when he, an experienced law enforcement officer, tolerated Mr. Kelly's unannounced presence, in violation of his having been removed from the premises by MPD a day or two earlier. His neglect of duty continued when he failed to specifically inquire of Ms. Kelly concerning the status of her TPO to enjoin his presence. Third, he also neglected to prepare a P.D. 251 Incident Report to document the domestic incident and possible law violation, by Mr. Kelly's possibly having ignored the "stay away" component of Ms. Kelly's TPO, if one had been sought or obtained by her.

Although Employee admitted that he did not investigate the possibility of the existence of any pending or outstanding TPO's against either spouse,[3] the respective written complaint of Mr. Kelly and responsive comments of Ms. Kelly, each refer to some notification or attempt to give notification to Employee regarding TPO actions each had initiated against the other. *(Agency Exhibit #1, Tab "G", Attach. #9, 10, and 12)*

Even if neither of them had advised Employee of the existence of a TPO, and while he denies that either of them advised him of such, I find that the situation that Employee faced at this crucial moment created a duty to inquire whether either or both of them had sought a TPO. Depending upon their respective answers, there was a duty to immediately act accordingly to address the situation. If either party answered in the affirmative, Employee's first action should have been to call for backup. His second action should have been to prepare a P.D. 251 incident report to document a possible violation by Mr. Kelly of the stay away aspect of the TPO. He did neither.

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[3] The record reflects that Mr. Kelly had applied for a TPO, and had been assigned a hearing date of October 15, 2004. Although Ms. Kelly indicated that she too had sought or obtained a TPO, and likewise advised Employee of such, no document was submitted into this record to corroborate the statement that she provided to MPD, as reflected on her in Attachment #12.

Employee also admits that he failed to prepare a report for a domestic incident involving the Kellys, regardless of whether he had any prior knowledge about the TPOs. *(Employee's appeal to Chief Ramsey dated March 25, 2005; Tr., 156.)* The fact that Ms. Kelly had reported to Employee about her husband's alleged errant conduct, and then his sudden and unannounced appearance at the apartment unit with a new set of keys, was enough of an event. It dictated that an incident report needed to be filed, to create a record of the ongoing, escalating domestic dispute. I find that Employee's failure to prepare an incident report was a continuation of the poor judgment he used with regard to addressing this entire matter, and conclude that Employee's failure to act was indicative of a neglect of duty on his part.

EMPLOYEE'S VIOLATIONS OF THE CAUSE STANDARD IS NOT DE MINIMUS

Hutchinson testified that Employee ". . . didn't notify officials, didn't call out a location, didn't - - pretty much did it without anyone's knowledge, which is a - - a direct violation of several of the general orders. And it's a safety issue as well, for himself as well Ms. Rountree." *(Tr., 52)* He testified further that when one engages in this type of misconduct, ". . . you open yourself up to all sorts of allegations, possible violence, possible injury to the person you have on board the - - the scout car." , and that, " . . . if she [Ms. Kelly] decided she was going to attack him or whatever - - you know, nobody knows where he is or whatever; he may or may not be able to get to the radio and tell somebody his situation - - he just put himself in a very, very bad - - very, very bad situation." *(Tr., 53)* While Employee has admitted to making "some mistakes", which he characterized as "judgment", I conclude that his transgressions were quite severe and potentially dangerous. His misconduct, therefore, cannot be considered a *de minimus* violation of the cause standard.

APPROPRIATENESS OF THE PENALTY IMPOSED

Having concluded that Agency has not sustained its burden of proof with reference to cause for adverse action against the Employee for conduct unbecoming an officer, but has established, by a preponderance of the evidence, both Employee's failure to obey orders and neglect of duty, the next issue to be considered is the appropriateness of the penalty imposed. For the listed violations, Agency proposed suspending Employee for thirty-five (35) days. Lieutenant Steven Porreco ("Porreco"), Office of Professional Responsibilities, Disciplinary Review Division, MPD, testified specifically about the appropriateness of the penalty imposed for each of the three cited offenses. *(Tr., 83)* Agency's Exhibit # 2, governing Agency's disciplinary guidelines and procedures, contains penalty range recommendations.

He testified that the practice of his office is to consider a penalty with respect to all of the circumstances of an incident. *(Tr., 83-84)* Although the false statement allegation was not before me during the Evidentiary Hearing, Porreco stated that:

> With regard to the false statement or the untruthful statement, typically, that's a 15-day penalty for a first offense. There was nothing less or more egregious than the average false statement that comes through our office, so we - - we earmarked that as a 15 days [sic] out of - - out of the total penalty.

(Tr., 84) Porreco's testimony made it clear that 15 days of the 35-day penalty were originally ascribed to the false statement component of this initially four-count citation.

When the matter ultimately was decided by Chief Ramsey, pursuant to Employee's direct appeal to him, the Chief's response letter to Employee, dated April 8, 2005, stated:

> After a review of the record developed in this matter, with particular attention to your letter of appeal, I have decided to dismiss the "Untruthful Statement" charge. However, due to the severity of your misconduct and the resulting discredit brought upon the Department, your appeal is, hereby, denied. The 35-day suspension shall be imposed.

Ramsey's decision was to uphold the three remaining allegations, based upon the record presented to him as of that time. Further, and within his discretion as the Chief of Police, he likewise elected to not lessen the imposed 35-day penalty, based upon the severity of the allegations, which he indicated brought discredit to Agency. Without more, Employee's penalty was within the parameters of the established table of penalties, even with the dismissal of the false statement charge. Indeed, Porreco testified that a penalty of termination could have been easily justified, on the three remaining charges. *(Tr., 116)*

The Table of Penalties enumerated in the General Order provides that for Item # 14 violations, neglect of duty, the penalty range for the first offense can be from a reprimand to a removal. For the first offense of failure to obey orders or directives, Item # 16 violations, the penalty range is from reprimand to a possible removal. I have considered the breath of the penalty range in this case, and credit that the accumulated four-part accusation and the subsequent initial 35-day penalty all emanated from one single act, i.e., the improper handling of the domestic incident.[4]

With regard to carrying its burden of proof on the remaining three charges, Agency faced a dilemma. Agency presented no sufficiently credible direct evidence to sustain conduct unbecoming. Without sworn testimony, and an opportunity for me to both judge the credibility of the complainants and to assess their demeanor, there is nothing but bare allegation on this charge.

Conversely, Employee, who has consistently denied the charge from the outset, did appear and testified. I paid particularly close attention to every word that he said, likewise observing his demeanor and candor in answering the questions. I find that his testimony, demeanor, and candor were credible, and that his sworn testimony regarding how and why this charge came to be lodged was consistent with statements he made to the investigating officer on October 1, 2004, and during the subsequent investigatory period. I find that Agency did not meet its burden of proof with regard to Employee's alleged unbecoming conduct.

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[4] At the outset, this incident also included a dispute of whether Employee was out of service and obtaining gasoline during a portion of the domestic dispute time frame. Verification documents addressing the gasoline issue could not be located to sustain or refute his claim, and Chief Ramsey elected to dismiss this charge.

I further find that the testimony of both Hutchinson and Porreco, Agency's two sworn witnesses, was likewise credible. However, neither of them had personal knowledge about the incident, with Hutchinson's testimony being a rehashing of what absent complainants allegedly indicated in their complaints. As well, he does not appear to have personally ever met with the complainants, but rather to have adapted components of his Investigative Report based upon what the complainants told the various sworn officers who were on duty at the Sixth District when they initiated the complaint. Although Agency submitted these various officers' respective statements in an attempt to support and corroborate the allegation, none of those officers testified at the Evidentiary Hearing. Indeed, had any or all of them testified, none of them could have added much to the record.

I find that these statements from the officers and the two complainants, were hearsay. While hearsay is sometimes admitted into administrative proceedings records, there are limitations. See *Wisconsin Avenue Nursing Home v. District of Columbia Commission on Human Rights,* 527 A.2d 282, 288 (D.C. 1987). The District of Columbia Court of Appeals held in *Compton v. D.C. Board of Psychology*, 858 A.2d 470, 476 (D.C. 2004), "that duly admitted and reliable hearsay may constitute substantial evidence." See also, *Coalition for the Homeless v. District of Columbia Dep't of Employment Services.*, 653 A.2d 374, 377-78 (D.C. 1995) ("Hearsay found to be reliable and credible may constitute substantial evidence . . . ."); *Richardson, 402 U.S. at 402; Hoska v. United States Dep't of the Army*, 219 U.S. App. D.C. 280, 287, 677 F.2d 131, 138 (1982). Thus, nothing in the hearsay nature of evidence inherently excludes it from the concept of "substantial" proof in administrative proceedings.

However, the Court of Appeals went on to explain that "just because hearsay may constitute substantial evidence does not mean that it will do so in every case. The circumstances under which hearsay rises to the level of substantiality are not ascertained by any definitive rule of law, but rather by a set of considerations applied to the particular facts of each case. See *Robinson v. Smith*, 683 A.2d 481, 488-89 (D.C. 1996) (citing *Washington Times v. District of Columbia Dep't of Employment Servs.*, 530 A.2d 1186, 1190 (D.C. 1997) (stating that even hearsay "that lacks indicia of reliability may be entitled to some weight"). The weight to be given to any piece of hearsay evidence is a function of its truthfulness, reasonableness, and credibility. *See Wisconsin Ave. Nursing Home*, 527 A.2d at 288 (quoting *Johnson v. United States*, 202 U.S. App. D.C. 187, 190-91, 628 F.2d 187, 190-91 (1980)). We have said that:

> [A]mong the factors to consider in evaluating the reliability of hearsay evidence are whether the declarant is biased, whether the testimony is corroborated, whether the hearsay statement is contradicted by direct testimony, whether the declarant is available to testify and be cross-examined, and whether the hearsay statements were signed or sworn. *Id.*; *see also Gropp*, 606 A.2d at 1014 n.10. *Emphasis added.*

Compton v. D.C. Bd. of Psychology, 858 A.2d 470, 476-477 (D.C. 2004).

Agency's charge of conduct unbecoming consisted of seriously questionable hearsay statements which I determined are not credible enough to support the allegation. Further, I have

given consideration to Chief Ramsey's determination that the 35-day suspension would remain in place. However, when I consider that Agency failed to sustain the most serious charge, from which the remaining charges emanate, I see no other option but to separate the penalty components of the charges into three parts.

The first question is whether the two extant charges should be considered as errors of judgment on the part of Employee, rather than an intentional and deliberate election to ignore a specific order or directive? The second question is, if the evidence supports a finding of liability in only two of the remaining charges, does such a narrowed finding justify leaving the imposition of the initially assessed 35-day suspension in place?

Consideration of the Douglas Factors

My review of Agency's decision is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. See *Huntley v. Metropolitan Police Department,* OEA Matter No. 1601-0111-91, (*Opinion and Order* issued March 18, 1994, __ D.C. Reg. __ ( ). I must also consider and evaluate whether there is mitigating evidence in the record which might impact upon the extent and severity of the initially imposed 35-day penalty.[5] Porreco testified that Agency incorporated the *Douglas*[6] factors into the recommended penalty formulation that were

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[5] Section 1603.8 of DCOP, 47 D.C. Reg. at 7097 (1999), states that, "in selecting the appropriate penalty to be imposed in an . . . adverse action, consideration shall be given to any mitigating or aggravating circumstances that have been determined to exist to such extent and with such weight as is deemed appropriate."

[6] In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Although not an exhaustive list, the factors are as follows:

> 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or 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;

deemed to be relevant. In shaping the penalty, and consistent with the direction that Agency was proceeding in the disposition of this matter, Agency gave consideration to: 1) the fact that Employee's conduct was intentional; 2) that the misconduct was known outside police circles and placed negative notoriety on the department; 3) that Employee had a prior disciplinary history with respect to the neglect of duty charge; 4) that Employee's actions adversely affected his ability to perform at a satisfactory level, including with his supervisor's confidence; and 5) that there were no mitigating circumstances found. *(Tr., 88-95)* Accordingly, the essence of Porreco's testimony is that, in his judgment, the penalty imposed in this case was appropriate, with no noticeable mitigation worth mentioning being factored into the penalty recommendation.

Employee challenged Agency's method of incorporating the *Douglas* Factors. He argued that, even if Agency had met its burden of proof, the suspension given to Employee was inappropriate, as several mitigating factors were present which Agency ignored when evaluating what penalty to recommend. Employee asserted that, recognizing that not all of the factors apply in this case, there are a number of mitigating considerations.

In my consideration and evaluation of the appropriate penalty, I considered the following:

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5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;

6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;

7) consistency of the penalty with any applicable agency table of penalties;

8) the notoriety of the offense or its impact upon the reputation of the agency;

9) the clarity with which the employee was on notice of any rules that where violated in committing the offense, or had been warned about the conduct in question;

10) potential for the employee's rehabilitation;

11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

12) The adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

- The first *Douglas* factor addresses the issue of the nature and seriousness of the offense. Although Agency argued that the nature of the offense was serious enough to have justified a termination, I have already determined that Agency's allegation of conduct unbecoming has not been proven by a preponderance of the evidence, and therefore, is to be dismissed at this time. The other two charges are sustained.
- The third *Douglas* factor looks at Employee's past disciplinary record. While Agency cited Employee's past disciplinary history, Agency ignored the fact that Employee had no prior disciplinary record of the nature of the violation that Agency asserts in this action.[7] Under these circumstances, his excellent disciplinary record mitigates against the level of suspension imposed in this case.
- The fourth *Douglas* factor looks to past work record. Employee's has an excellent, consistent work performance record, including 16 years of service. He has demonstrated the ability to get along well with fellow workers. Even Hutchinson, Agency's chief witness, testified about the excellent police work that Employee displayed in apprehending a homicide suspect in a high-speed pursuit, and referred to the "brilliance" Employee has displayed in the discharge of his work-related duties.
- The fifth and tenth *Douglas* factors look at the effects of the offense on Employee's ability to perform at a satisfactory level and the potential for Employee's rehabilitation. The events in this case took place more than two years ago, and in that time, there has been no evidence that the events of October 1, 2004, have ever affected Employee's ability to perform at a satisfactory level. On the contrary, Hutchinson's testimony, despite his being called as Agency's primary witness, was greatly to Employee's favor and benefit, and at times effusive in demonstrating that Officer Palmer performs excellent police work.
- The sixth and seventh *Douglas* factors look to the consistency of the penalty of that imposed to that given to other employees for similar conduct, and to the consistency of the particular penalty with Agency's own established table of penalties. It is established that Agency's officers routinely come to the aid of, and interact with citizens, without the immediate approval or knowledge of their supervisors or dispatchers, but no evidence was presented indicative of their being subjected to discipline based upon unsubstantiated accusations. Testimony on the record indicates that civilians are routinely placed in police cars without the express approval of a supervisor, and that sworn officers at Agency routinely interact with estranged husbands and wives. While it would be inconsistent to unreasonably punish Employee based upon contradictory, unsubstantiated hearsay statements, there is evidence that he exercised poor judgment in more than one aspect of his handling this matter. For this failure, and as a result of consequences related to his shortcomings, a penalty is appropriate.
- The eighth *Douglas* factor looks at the notoriety of the offense or the impact upon the reputation of Agency. While there was some negative notoriety attached to the now unproven allegation of conduct unbecoming, Employee's providing a ride to a citizen to purchase needed food and then entering her apartment as a part of the investigation of the ongoing domestic dispute between spouses, does not, without more, impart a negative impact upon Agency, regardless of whether Employee had notified his superiors of his intent or ongoing actions. To the contrary, his act of compassion displayed an effort to

[7] There are some apparent minor disciplinary actions related to failure to appear or late appearances on designated court dates.

serve the needs of a member of the public who was in great distress about her immediate plight. Had this incident unfolded differently, the public image of both Agency and Employee would have been more positive.

- The ninth *Douglas* factor looks at the clarity with which Employee was on notice of any rule that was violated. Agency has never cited any specific regulation requiring approval of a supervisor in order to provide a citizen a ride to purchase needed food, and indeed there are not specific regulations for the handling of every situation. I fully recognize that Agency's rules exist for very good reasons, and a liberal reading of them would indicate that Employee should have both checked with a supervisor or dispatcher on one or more occasions during the scenario. His failure to do so was extremely poor judgment.
- The eleventh *Douglas* factor embraces both malice and bad faith on the part of others. I do not see the presence of either element in Employee's actions. To the contrary, I am of the opinion that, despite the above-noted poor judgment, Employee acted with good intent in an effort to assist a citizen in need. The attempted generosity with which he handled the situation must be considered as it mitigates against the magnitude of the penalty sought to be imposed in this matter.

Other Considerations

Employee argues that all of the charges lodged against him should be dismissed because Agency's investigation violated his guaranteed rights pursuant to General Order 1202.1, Part I, E-2, which requires that, in order to protect the rights of a member of the Department who is the subject or a witness in an administrative investigation, the investigating official shall: 1) Notify the employee of the complaint being made against that employee; 2) Inform the employee of the nature or information of the allegations against that employee; 3) Notify the employee of who made the complaint against that employee; 4) Inform the employee of his/her right to a union representative; and, e) Provide the employee the opportunity to have a union representative present during the questioning.

Employee asserts that he was not timely accorded any of these rights, and additionally was subjected to abusive and inappropriate questioning, which included both profanity and threatening language by Bigelow. *(Tr., 139-141)* The General Order expressly mandates that the person conducting an administrative investigation not use "offensive language or threats", and Bigelow's use of profanity and threatening language was a glaring violation of Employee's rights. Employee's credible testimony regarding Bigelow's entire pattern of conduct was unrefutted, and said conduct was highly inappropriate, to say the least. Union representation may not have been as timely provided as desired, but I see nothing in the eventual outcome of this matter which adversely affected Employee by reason of the delay. I do not consider Bigelow's or Agency's violations of the General Order as a mandate for removal of all charges against Employee, and the likewise dismissal of the penalty in its entirety. While Agency cannot justify violating the established rights of its sworn officers, as guaranteed under the General Order, I see no justification for Employee's claim of entitlement to having the charges fully dismissed because of Agency's shortcomings in its method of operation. Those shortcomings, while significant, were not determinative of the outcome of the case.

Modification of the Penalty

When assessing the appropriateness of a penalty, this Office has long held that the Office's role is not to substitute its judgment for that of Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."[8] This Office's consistent position has been to leave Agency's penalty "undisturbed", when, "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment".[9]

The situation before me is different from the above-noted pattern. Agency initially elected to impose a 35-day penalty, based upon three allegations related to misconduct. The first allegation was vacated. The other two allegations were upheld, partly due to Employee's admission that he committed an error in judgment. Credible evidence in the record demonstrates that Employee should have: a) At least followed the clearly established practice of notifying a supervisor or dispatcher when a member of the public is allowed into a police cruiser, and likewise when he returned to Ms. Kelly's apartment, exited his vehicle, and entered her residence, particularly since a portion of his effort was more personal in nature, i.e., driving a citizen to a carryout to purchase some food; b) Notified his dispatcher and called for immediate backup, once Mr. Kelly presented himself, unannounced, at the residence; and c) Prepared a PD 251 Incident Report, to document a possible law violation of the TPO/TPO's, and its "stay away" component, which is designed to keep parties from coming into personal and possible physical contact while the TPO remains outstanding.

I have determined that Employee's failures were not *de minimus*, and that a penalty needs to be imposed. Chief Ramsey's letter of April 8, 2005, stated, " . . ., due to the severity of your misconduct and the resulting discredit brought upon the Department, your appeal is, hereby, denied. The 35-day suspension shall be imposed." His decision, which was solely within his discretion, went beyond what Porreco testified to when he was addressing the issue of penalty assessment. Porreco's testimony is as follows:

> Q. All right. And can you explain how the penalty was reached in this particular case, how it was recommended. *(Tr., 84, Ln 6-15)*
> A. With regard to the false statement or the untruthful statement, typically that's a 15-day penalty for a first offense. There is nothing less or more egregious than the average false statement that comes through our office, so we - - we earmarked that as a 15 days [sic] out of - - out of the total penalty.

Chief Ramsey's election to impose the 35-day suspension was predicated upon a belief which subsequently did not devolve into a finding or liability. His initial reasoning underlying the scope of the suspension is now without merit, and the 35-day penalty as adopted by him must be reevaluated. I have determined that the potential penalty should be trifurcated, so that a penalty for each of the established violations can be individually prescribed. Referring back to Porreco's statement and reasoning that his office assessed that 15 of the initially recommended 35 days

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[8] *Stokes v. District of Columbia,* 502 A.2d 1006, 1009 (D.C. 1985).
[9] *Employee v. Agency,* OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg., 2915, 2916 (1985).

should be allocated to the false statement allegation, I have determined that the trifurcation should be based upon the remainder, a possible 20-day penalty. I have reduced the scope of the penalty, considering that conduct unbecoming has been vacated, and that there are mitigating factors.

Dividing the 20 days into three equal parts, equals a six and two thirds day penalty (6 2/3 days) per offense. Elimination of a six and two thirds day penalty (due to my vacating conduct unbecoming), leaves that same amount of days penalty for failure to obey orders and neglect of duty. I have rounded down the number of days that the penalty should be imposed to 13 days.

ORDER

The foregoing having been considered, it is hereby ORDERED, that:

1. Agency's charge of Conduct Unbecoming an Officer is DISMISSED; and

2. The charge of Failure to Obey Orders is UPHELD; and

3. The charge of Neglect of Duty is UPHELD; and

4. A penalty of 13 days suspension shall be imposed by Agency against Employee for the two charges that have been upheld; and

5. Agency shall file with this Office, within 30 days of the date on which this decision becomes final, documentation showing compliance with the first term of this Order, which shall include documentation that Employee received/will receive back wages for the 22 days of suspension which have been vacated, and that his official personnel file shall be corrected to remove all references to his having been suspended for conduct unbecoming an officer incidental to these allegations.

FOR THE OFFICE

ROHULAMIN QUANDER,
Senior Administrative Judge

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SYDNEY DE SILVA	)	OEA Matter No. 1601-0056-06
Employee	)	
	)	Date of Issuance: April 6, 2007
v.	)	
	)	Rohulamin Quander, Esq.
D.C. FIRE AND EMERGENCY	)	Senior Administrative Judge
MEDICAL SERVICES DEPT.	)	
Agency	)	

Sydney DeSilva, *pro se,* Employee
Sandra Little, Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On May 8, 2006, Sydney DeSilva, Employee, *pro se,* ("Employee"), a Fire Investigator with the D.C. Fire and Emergency Medical Services Department (the "Agency") filed a Petition for Appeal with the Office of Employee Appeals (the "Office") pursuant to *D.C. Official Code* § 1-606.03(a) (2001), appealing Agency's imposition of an 84-hour suspension from duty by Adrian H. Thompson, Fire Chief of the Agency, effective May 12, 2006. The charge that generated Employee's suspension was a finding as a result of an evidentiary hearing conducted on March 1, 2006, by the Police and Firefighters Retirement and Relief Board (the "Trial Board") in Case # U-05-201, which sustained the sole charge that Employee, in the course of investigating the scene of a recent automobile fire, failed to maintain custody of the scene of the fire until the investigation was completed.[1]

[1] The Trial Board's Findings and Recommendations was dated March 1, 2006, the same date that the administrative hearing was conducted. Based upon the size of the record, it is doubtful that they issued their final document on the same date that they conducted the hearing. However, no other relevant date for the issuance of their document appears in the record. A copy of the Trial Board's Findings and Recommendations report was attached to Fire Chief Adrian H. Thompson's Final Agency Decision letter, dated April 11, 2006.

Agency was served with a copy of Employee's Petition for Appeal on May 11, 2006, and filed a comprehensive reply document on June 2, 2006, which document contained 14 attachments, including the complete transcript of the Trial Board hearing and all of the underlying documents which Agency maintained were supportive of the basic charge and Agency's election to take action against Employee. The matter was assigned to me, the undersigned administrative judge (the "AJ"), on June 12, 2006. I convened a Status Conference on July 11, 2006, and subsequently received a comprehensive written submission, with attachments, from Employee on August 30, 2006, and a *Response to Appellant's Brief,* from Sandra Little, Agency's representative, on September 26, 2006. The record closed on September 26, 2006.

Employee is a member of the International Association of Firefighters, Local 36 (the "Union"), and is covered by a provision of the collective bargaining agreement (the "Agreement") that specifically restricts the scope of this Office's review in adverse actions to the record previously established in the Trial Board's administrative hearing. Therefore, and based upon the decision of the District of Columbia Court of Appeals in *District of Columbia Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002), my role, as the deciding AJ, is limited to reviewing the record previously established, and determining whether the Trial Board's decision was supported by substantial evidence; whether there was harmful procedural error; or whether it was in accordance with applicable law or regulation. See *Pinkard*, 801 A.2d at 91.

Agency's Position: On April 18, 2005, Employee was dispatched at 14:21 hours (2:21 pm) to investigate a car fire at 2501 12th Place S.E., Washington, D.C., arriving at approximately 14:28 hours (2:28 pm). While at the scene, Employee failed to properly collect evidence regarding the fire, to deploy the canine, or to take photographs of the scene, but departed the scene at about 15:26 hours (3:26 pm), without either completing the investigation or properly securing and maintaining the scene of the fire until the investigation could be completed. Several hours later, by which time it was already dark, Employee returned to the scene, collected evidence, and obtained photographs (which were taken at night). He then completed his investigation report and submitted it for supervisory approval. The following morning, Employee's supervisors reviewed the report and subsequently charged Employee with returning to the scene to collect evidence after initially failing to maintain the scene, in violation of National Fire Protection Agency (NFPA) 921 guidelines, Chapter 25, Motor Vehicle Fires, (Agency Tab #3) and D.C. Fire and Emergency Medical Services Department Bulletin No. 51, Investigation of Fires (Agency Tab #2).

Employee's Position: Employee denies all of Agency's charges, and asserts that, with the exception of obtaining photographs of the crime scene, he completed his investigation. His investigation included: an interview of the four firefighters deployed from Engine Company 25; a close personal inspection of the burned vehicle; deploying the canine and using the canine to determine the site of incineration and presence of petroleum products as the incendiary agent; and obtaining and securing the gasoline can used to ignite the fire. His attempts to photograph the scene were frustrated when the digital camera would

not work. He left the site, returned to his Northwest office to obtain another camera, but was dispatched to and investigated two other fires, before returning to the site later that evening, to take photographs. He maintained that the objective of taking the photographs was not for evidentiary purposes, but rather to establish a venue that demonstrated where the collected evidence was placed at the time that he inspected the site earlier in the day. For example, he returned the gasoline can to the exact spot from which it was earlier removed by him, but solely for the purpose of verifying the location where the can was originally observed.

> **Charge:** Employee was formally charged on December 1, 2005, by William FitzGerald, Assistant Fire Chief, with an on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations, a violation of the D.C. EMS Order Book, Article VII, § 2.2. (Agency Tab #11)
>
> **Specification:** Fire Investigator Sydney DeSilva, an employee of the District of Columbia Fire and Emergency Medical Services Department, and subject to the rules and orders governing said Department did, nevertheless, on the 18th day of April 2005, fail to maintain custody of the scene of an automobile fire located at 2501 12th place, S.E.
>
> Investigator DeSilva responded to the scene at approximately 14:28 hours to conduct an investigation. Lt. Sean Egan and Sgt. Phillip Proctor allege that Investigator DeSilva left the scene at 15:26 hours, then returned that night and collected evidence in violation of National Fire Protection Agency (NFPA) 921. The guidelines specifically require an investigator to maintain custody of the fire scene until the investigation is completed.

JURISDICTION

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

ISSUE

The issues to be decided by the AJ are: a) Whether Agency's decision to impose an 84-duty-hour suspension upon Employee, based on the Trial Board's recommendation, was supported by substantial evidence; b) Whether Agency committed harmful procedural error; and c) Whether the decision was in accordance with law or applicable regulations.

Uncontested Material Facts:

1. Employee, a member of the International Association of Firefighters, Local 36 (the "Union"), was initially employed as a firefighter by Agency on July 15, 1990, and assigned to his current position of Fire Investigator on January 28, 2001. He continues to serve Agency in that capacity.
2. On April 18, 2005, Employee was dispatched at 14:21 hours (2:21 p.m.) from his office located at 5101Georgia Avenue, N.W., to investigate an automobile fire at 2501 12th Place, S.E. Arriving at the scene at approximately 14:28 hours, Employee discussed the fire incident with the four firefighters who were members of Engine Company 25, the fire crew that extinguished the blaze. According to Agency records, Engine Company departed the site at 15:26 hours (3:26 p.m.). Employee remained on site after the fire crew left the scene.
3. Other than asking the standard investigatory questions of the firefighters who had extinguished the blaze, and making a visual inspection of the burned vehicle, Employee did not collect any physical evidence, deploy the canine, or take photographs of the scene while the firefighters were still present..
4. Immediately after Engine Company 25 departed, Employee placed himself back into service, which Agency records indicate was 15:26 hours, 53 seconds (3:26:53 p.m.).[2] Contacting his supervisors to advise of his availability to conduct another fire investigation, if there was another pending, was a standard procedure, indicative of his judgment, based upon prior training and experience, that his services at the present site would not be required for a sustained period, and that he anticipated departing that scene shortly. He subsequently departed the scene within two to three minutes, and returned to his office quarters.
5. After performing two subsequent fire investigations that same afternoon, Employee returned to the scene after dark and took photographs. He then completed a report and attached photographs which had been taken at night, during his return visit to the scene. He submitted everything to his supervisors for review.
6. The following morning, Employee's supervisors reviewed the report and charged him with belatedly returning to the scene to collect evidence and failing to maintain custody of the scene in violation of the National Fire Protection Agency (NFPA) 921 and Agency's Bulletin No. 51. The guidelines specifically require an investigator to maintain custody of the fire scene until the investigation is completed.
7. Employee appealed the charges and subsequently appeared before the Fire Trial Board on March 1, 2006, for an administrative hearing. Agency submitted a complete transcript of the March 1, 2006. (Agency Tab #12) He was represented by Jennifer Hunter, Esq., of the Law Offices of Bredhoff & Kaiser, P.L.L.C. The Trial Board issued its Findings and Recommendations with a bearing date of

[2] It is disputed whether Employee conducted an investigation of the scene immediately upon the departure of Engine Company 25. That issue is addressed elsewhere in this decision.

March 1, 2006[3] The Findings and Recommendations, which included a unanimous recommendation for an 84-duty hours suspension, were accepted as Agency's Final Decision by Adrian H. Thompson, who was at that time the Fire and EMS Chief for Agency. Employee was notified of the Fire Trial Board Recommendations by a Final Agency Decision document dated April 11, 2006, but served upon Employee on April 14, 2006. (Agency Tab #14)

8. The Trial Board's Findings and Recommendations recited that the selection of the proposed penalty was made after considering the "Douglas Factors" and Employee's past record. The relevant components of the Douglas Factors were enumerated and discussed as a component of selecting the proposed appropriate penalty. They also noted that, in light of their findings and recommendations, Employee's credibility as a Fire Investigator was now in question.
9. After discussing the issue of Employee's credibility in light of the findings and recommendations, the Board recommended that the information relevant to [the handling of] this incident be brought to the U.S. Attorney for determination by the Lewis Committee whether Employee can continue to testify on behalf of the government in cases of arson or other matters investigated by the Fire Marshal's Office.[4] If a determination is made that Employee is no longer credible, the Board recommended that Employee should be demoted from his rank of Fire Investigator and reassigned other duties in Agency where the likelihood of having to testify as a government witness is greatly diminished.

SUMMARY OF MATERIAL TESTIMONY RECEIVED DURING THE MARCH 1, 2006, TRIAL BOARD PROCEEDINGS

Agency's Case:

Sergeant Alvin Brown: Sergeant Alvin Brown was the commanding officer for Engine Company 25, on April 18, 2005, the fire unit that responded to the car fire. (Transcript, Page 18, hereafter *"Tr., 18"*, etc.) When Employee arrived at the scene, he initiated his investigation with this witness, asking him what he observed upon the fire crew's arrival at the scene. Employee subsequently interviewed each member of the fire company, a total of four persons, including this witness. The witness did not see "Penny", the trained arson canine, and was not specifically familiar with the job-related duties of a fire investigator. As the witness and engine company departed, Employee was still on the scene. *Tr., 21* No photographs were taken of the scene prior to the witness's departure from the site. *Tr., 24* In response to a request from Lieutenant Sean Egan, the witness prepared a special report, documenting the fire scene from his perspective. *Tr., 25* (Agency Tab #9) It was also the witness's decision to call for an investigator, as there

[3] The Trial Board hearing was held on March 1, 2006. However, when the Board issued its Findings and Recommendations, they used the same date, March 1, 2006, as the date of issuance. It cannot be determined from the record before me whether the Board did indeed issue its recommendations on that same day or shortly thereafter.

[4] A full explanation of the "Lewis Committee", aka "Lewis List", appears at Footnote 7, *Infra*.

was a gas container within the immediate vicinity of the burned vehicle and, considering that the city was experiencing a series of arson fires, it was appropriate to have an investigator evaluate the scene. *Tr., 26*

Sergeant Philip Proctor: Sergeant Philip Proctor, Fire Investigations Unit, Fire Protection Division, is Employee's direct supervisor. The witness explained that there was no special report or endorsement executed by him in Agency's evidentiary packet, because he did not initially have any knowledge of the incident. It was Lieutenant Egan, who was new to this work assignment, and without input from this witness, who decided that he wanted to handle this disciplinary matter and elected to initiate the charges that gave rise to this disciplinary action. *Tr., 30-37*

To the Board's query of whether all or only some of the evidence collected at a crime scene would be tainted if the investigator processed a scene, left it unsecured, and then returned later to continue the investigation and retrieve physical evidence, the witness stated, "It would be the evidence he left that he came back and collected later. . . . He would not be able to show that he maintained the chain of custody of that evidence." *Tr., 33*

When asked to express his perspective on the manner in which Employee handled this incident, the witness underscored that while his perspective is limited by the fact that he was not at the fire scene, he could only attest to what happened and [what was said] by anyone else that was on the scene with {Employee]. *Tr., 35* However, when Employee returned to the office, Lieutenant Egan, who was totally new to fire investigation and was actually on his first day of this work assignment, asked Employee specific questions about the fire scene. Based upon Employee's responses, the witness concluded that Employee did not take pictures during the initial investigation, did not collect any evidence at the scene, and essentially neglected to conduct much of a fire investigation, while at the fire scene. Although the Egan-Employee conversation was long enough to reveal the non investigation, perhaps 10 to 15 minutes, Employee was called out on another investigation before the conversation was totally completed. *Tr.,36, 43*

Despite Employee having essentially stated that no investigation was conducted, and that Engine Company 25 should not have called him out to investigate a car fire, the witness was surprised the following morning, when he reported to work and discovered that Employee had prepared a report, collected evidence, and submitted photographs, converse to Employee having specifically told Egan that he took no photographs. Egan directed that the photographs be developed, which revealed that they were all taken at night (it was dark), not close to the time that Employee initially reported to the scene at about 14:28 hours (2:28 p.m.). This discovery and suspicion that came with it, resulted in Egan's decision to initiate the disciplinary charges that are the subject of this proceeding. *Tr., 36-37*

Bulletin 51 enumerates several criteria for when a fire investigator might be summoned to a fire scene. The first of the stated criteria is that an investigator can be

requested anytime that a fire appears to be the result of arson or is incendiary in nature.[5] Essentially, the engine company can call for an investigator anytime that they believe that something of a suspicious nature has occurred, and a gasoline can observed located next to a burning vehicle was enough to arouse that suspicion. Not all of the criteria need be present in order to summon an investigator. *Tr., 37-38*

Although the standard procedure for post fire reports is for the reports to come through the official chain of command, which would have included the witness's endorsement sign off, as Employee's direct supervisor, in this particular case that procedure did not occur. *Tr. 40-41* The witness told Employee that Egan was electing to file charges, based upon Employee's answers to questions about the investigation, and that Egan, as the officer in charge, had every right to do so. As well, although the witness was not personally present when the contact was made, it is apparent that Egan contacted Sergeant Brown from Engine Company 25, and requested information from him relative to crafting a special report related to the fire scene. Since Egan was considering placing charges against Employee, it was Egan's responsibility to first investigate the matter fully [before moving forward to place the charges] and check with the individuals present at the fire scene at that time. *Tr., 44-45*

When asked on cross examination whether he would have placed charges against Employee, had the matter come to his direct attention rather than through Egan, the witness replied:

> I probably would have ended up putting him on charges because it's clear he did not take any action at the fire, especially the pictures. It he had come back and took the pictures - - after having a conversation with me and telling me one thing and then doing something totally different and submitting a report, and then trying to cover that up, that's going a little bit too far in my opinion. *Tr., 47*

To a subsequent question of whether the witness interpreted Employee's actions as an attempted cover up of the fact that he had not done the investigation at the outset, he replied:

> It's my interpretation that when he came back to the fire house that incident - - after that incident, he was not intending on retrieving anything to go back to finish. One, because he would have never left the fire scene. Investigator DeSilva has been investigating fires for some time and trained exactly what to do on the fire scene. He would have not left a fire scene like that. So it's my interpretation that when he came back he was

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[5] The other criteria are related to the above enumerated, and address fires observed under suspicious circumstances; damage expected to exceed $100,000; fires where serious injury or death occurs; apparent fire code or life safety hazard violations; and vehicular loss which exceeds $30,000, when the vehicle is inside a structure or when serious injury or death occurs.

> complete because his responses to Lieutenant Egan were, 'I went for a fire that they should have never called me for.' He was not intending to go back. He didn't make any mention that the camera was inoperable[, or state,] I couldn't finish my investigation. He was done. *Tr., 48*

Lieutenant Sean M. Egan: Lieutenant Sean M. Egan was newly assigned to the Fire Investigation Unit, Fire Prevention Division, and on April 18, 2005, the date of the incident, was serving his first day in that capacity. It was he, who upon completion of his investigation into the matter, decided that Employee had not followed the established rules of the Fire Prevention Division in conducting the investigation into this vehicle fire scene. Likewise, it was he who wrote the special report on the investigation of the car fire, Incident No. F0045223. (Agency Tab #7) His report was done without the endorsement of Proctor, who was Employee's immediate supervisor. However, he did consult Proctor, as well as the relevant order book and manuals when preparing the report. *Tr., 80* As well, when the report was initiated by this witness, he passed it along through the upward chain of command, where the report was endorsed at each ascending level. *Tr., 79* Specifically, after concluding his investigation, it is the witness's assertion that Employee left the scene unattended, thereby losing the evidentiary chain of custody of the site and the evidence. *Tr., 65*

Trial Board Chairman Battalion Fire Chief Alfred Jeffery, III, (the "Chairman") stated to the witness, "We heard earlier that [Employee] indicated to you and Sergeant Proctor that there was no reason for him to be on the call to do an investigation and that he did not initiate an investigation nor take pictures nor deploy Penny, the arson dog?" In reply to this statement, the witness responded, "Or collect evidence, that's correct." The Chairman next asked, "Did [Employee] ever mention to you at that time that the camera didn't work?", to which the witness replied, "Much later. Not – I don't recall exactly when but it was not at that specific time when we were asking him questions about the call that he responded on." *Tr., 65*

During the initial conversation concerning the fire and what had occurred, Employee told the witness, "Oh, it was unnecessary for me to respond," which carried a strong implication that Engine Company 25 had erred by summoning Employee. Follow up questions from the witness, in pursuit of the details of the incident, revealed that Employee had not taken photographs, and had not collected the evidence. The incident occurred at the height of a serial arsonist problem that the District was then facing, which made the necessity of investigating this particular fire a matter of significance. *Tr., 77*

In his Incident Report, #F0045223, Agency's Submission Tab #7, the witness wrote that, "[Employee] stated that he did not take photographs, initiate a report, not did he collect any evidence.", which statement the witness referred to as a "direct statement" from Employee to the witness. *Tr., 67* As well, the witness contacted and questioned Sergeant Brown, commander of Engine 25, who indicated that Employee took no pictures, collected no evidence, and did not deploy the canine arson dog while the engine

company was still on site at the fire scene.[6] The witness, having evaluated the matter, was emphatic that Employee never mentioned on the date of the incident that he was returning to the office to obtain another camera, as the reference to the need to obtain another (working) camera was mentioned later, on another day. *Tr., 67-70, 81*

Beyond the issue of whether Employee left the scene of the fire before the investigation was completed, the witness also testified that the evidence secured from the scene was not handled properly. Acknowledging that he was very new to the job, having only been assigned to the post within the prior few days, the witness accompanied Proctor to the evidence locker. When Proctor retrieved the evidence, he said to the witness, "This can't even be used. This is not how we collect the evidence." To the witness's query about what was wrong with the evidence, and noting that the gas can had been squeezed into a plastic zip lock bag that could not be sealed, Proctor replied, "With it being so tight in there, if there was a chance for any finger prints to come off of that, they wouldn't be able to collect that because they would have been smeared just by jamming it in this bag that was not the correct size." *Tr., 73*

Regardless of exactly when the conversation occurred between the witness and Employee, concerning Employee taking the photographs, the issue has now turned to credibility, and the proper collection procedures for evidence, since fire investigation reports and fire investigator testimony are important components in the courts. Any indication that a fire fighter might have left the scene and returned later, becomes a credibility issue, both for the evidence and the fire investigator, and might result in the investigator being placed on the "Lewis List."[7] If that happens, Agency's attorneys, as well as defense attorneys, can nix what the professional fire witness testifies to on the stand, because his credibility had officially been called into question. *Tr., 87*

Rodney M. Taylor: Rodney M. Taylor is a fire investigator in Employee's unit. He testified that his personal method of operation, and the ideal practice, is to finish whatever investigation the investigator has undertaken before putting yourself back into

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[6] Employee testified that he performed all of those investigatory procedures, except for picture taking, after the engine company left the scene, and that although he had placed himself back into service upon the engine company's departure, he only needed an additional few minutes on site to complete the investigation, before he left the scene.

[7] This is a reference to the list that the United States Attorney for the District of Columbia, the chief prosecutor in the local and the federal courts, maintains of police officers who are under investigation. The term, "Lewis List," emerged from *Lewis v. United States,* 408 A.2d 303, 306 (D.C. 1979), where the testimony of a sworn police officer, in his or her official capacity as a law enforcement officer, might be deemed as not credible if said officer or individual was under investigation for suspected wrongdoing at the time he/she was called to testify in a criminal matter before the court. Although the record reflects that some consideration might be made whether Employee's name should be placed on the Lewis List, the circumstance of how the list might also be applicable to fire investigators was not made a part of the record.

service. He acknowledged, however, that some investigators might elect to do otherwise, i.e., put themselves back into service before completing the present investigation. *Tr., 90*

He admitted that on some occasions the then newly acquired digital cameras did not work. While there was no formal training provided on the proper operation of the cameras, there was some in-house training among the coworkers on how to use the digital camera. *Tr.,* 93 There was formal training on the proper techniques for investigating car fires in particular, as outlined by the NFPA 921 publication, which was considered to be a guide, rather than a mandate.[8] *Tr., 92*

In a situation where the camera does not work, and if there is no back up camera at the site, if the investigator determines that photographs are necessary, the proper procedure is to maintain custody of the scene. This could include holding over the engine company at the site until another camera could be obtained. Disposable cameras are acceptable and have been used in the past. If no photographs are deemed necessary, or could not be taken for whatever reason, your report must document why no photographs were taken or are available, and said report should itself specifically state that the camera did not work. If the situation dictates, the fire investigators have authority to direct that the engine company temporarily return to the fire site, in order to secure it and the chain of custody, until the investigation can be completed. *Tr., 94-95*

Employee's Case:

Battalion Fire Chief Garland Graves: BFC Garland Graves was called by Employee as his first witness, and devoted his testimony primarily to Employee's character. The witness, who had about 27 years of service at the time of his testimony, recruited Employee for the fire cadet program, and has also served as his direct line supervisor. In that capacity, he has interacted with Employee as a fire investigator. He described Employee as "diligent", and that he had never had a problem with Employee's work product, including his fire reports, and likewise received no complaints about Employee. *Tr., 12-17*

Fire Investigator Sydney DeSilva, Employee: Sydney DeSilva, Employee, testified before the Board on his own behalf. Upon arriving at the scene at approximately 14:50 hours (2:50 pm), and following standard procedures, he questioned each of the four firefighters who were dispatched to the scene as part of Engine Company 25. *Tr., 121* He observed the scene of the fire, and evaluated the extent of the damage to the burned automobile, noting a red, one gallon gasoline container on the ground, about two feet from the driver's side rear bumper. He initially requested that the engine company staff begin the compilation of the incident's "902 Report", a request that is routinely made by fire investigators, who often rely upon the on-site fire fighters informational input as one of the first steps towards the fire investigator's facility in completing investigational

[8] See *National Fire Protection Agency, 921,* Chapter 25, Motor Vehicle Fires, which underscores the importance of documenting car fires by obtaining photographs.

reports. However, despite his request, no action was taken to initiate the 902 report, and Employee subsequently completed the 902 report himself. *Tr., 121*

Underscoring that he only left the fire scene after he completed his investigation, he explained in detail the problem that he had with trying to get the digital camera to work, and that the fire investigation staff never received any training on the proper operation of the camera. *Tr., 125-126* Engine Company 25 left the scene at 15:26 hours (3:26 p.m.). Now alone at the site, Employee placed himself back into service, and acknowledged that Agency's computer assisted records, which reflected that he placed himself back into service at 15:26 hours, 53 seconds (15:26:53), are correct. *Tr., 127*

He continued with his investigation, including closely inspecting the burned vehicle and deployed Penny, the arson canine, who alerted on the presence of petroleum-based products both in front of the drivers side door and on the gas can. His investigation included taking a liquid sample from the gasoline can and properly securing it for later use as evidence, if necessary, and placed the evidence in a secure place – a zip lock bag – for potential future use. *Tr., 128-130* He remained at the scene from two to three minutes after Engine Company 25's departure, testifying that that was a sufficient amount of time to deploy the canine, identify the presence of petroleum products, collect the evidence, and depart the site. *Tr., 132*

Having put himself back into service at about 15:26 hours (3:26 p.m.), and it already being rush hour, it was about 16:15 hours (4:15 pm) by the time he arrived back at Agency's Georgia Avenue, N.W. station, which Employee used as his job-related base of operation. He left the collected evidence in the trunk of the car, rather than place it in the evidence locker, allegedly because he did not yet have the photographs, and did not consider the investigation to be complete without the photographs. He still intended to take them, once he obtained another camera. Acknowledging that he had secured the gasoline can by removing it from the scene, he testified that when he returned to the scene, his intent was to place the gasoline can back at the exact location where it had previously been observed, which spot could easily be determined, based upon the "shadow burn", i.e., the easily detected clean space that was directly underneath the gasoline car at the time that the incineration occurred. *Tr., 133*

His objective in returning to the scene with a different camera was not for the purpose of photographing the burned vehicle for evidentiary purposes, but rather to take photographs of where he had obtained the gasoline can from during his earlier visit to the site that afternoon. To the Board's questions concerning whether his vacating the scene before the investigation was completed compromised the protection of the site, Employee replied that, from his perspective, at the time he left the scene earlier in the afternoon, there was nothing at the scene that needed protecting, as he had completed his investigation during the afternoon. *Tr., 133, 167-168*

Although he did not have a working camera at the site, Employee did not consider requesting the engine company to return to the site while he obtained another camera, because he felt that there was no further need, since he had collected all of the evidence

he required, and the sole purpose for taking the photographs, according to the witness, was to establish the exact location of the spot where the fire started. *Tr., 134-135, 160* In reply to Chairman Jeffery's questions:

> Q/ If you came back like you did and placed that evidence back where it was and took pictures and used those pictures as evidence, say we had a suspect, would it be admissible in court?
>
> Employee replied as follows:
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> A/ I personally don't think so because the purpose of taking the photos wasn't to – like I said, to document a match inside the car. It was to document that this is where I collected the evidence from. You know, it wasn't to say, well – oh well, I see the guy standing over there and I'm going to take a picture of the guy and this can. It was just to say this is where I got it from. I figured if I collected evidence, I had to say I got it from somewhere, and if I have another camera, let me take a picture of where I got it from. That is the only reason I went back to the scene. *Tr., 160-161*

Employee admitted to the Board that although his time at the site overlapped by 36 minutes the time that Engine Company 25 was also at the site, other than talking casually and also asking questions of the four firefighters regarding the vehicular fire, he did not deploy the canine, who witness Brown said he never saw. Further, he did not take out the camera and attempt to take photographs, and did not pick up and secure the gasoline can in Engine Company 25's presence. He did, however, inspect the burned vehicle and obtained some evidence from it prior to Engine Company 25's departure. *Tr., 165-166*

FINDING OF FACTS, LEGAL ANALYSIS, AND CONCLUSIONS OF LAW

On April 21, 2005, Employee, a then 15-year veteran of the Agency, was charged by Lieutenant Sean M. Egan with failing to properly maintain custody and control of the scene of a car fire. This charge emanated from a review of a fire report Employee submitted on April 19, 2005, based upon Employee's April 18, 2005, investigation of the fire. The investigation was questioned on several accounts, with Egan concluding that Employee had failed to maintain proper custody of the fire scene while conducting the investigation. Egan also questioned whether Employee was willing or capable of continuing to serve in the capacity of Fire Investigator. Egan's charge statement did not list or recommend any specific proposed disciplinary action. (Agency Tab # 7)

Employee filed a timely appeal at Agency level, which triggered an investigation into the basic charge and specifications. An evidentiary hearing was convened on March 1, 2006, before a properly constituted Fire Trial Board. Employee participated at the hearing, testified on his own behalf, and was represented by counsel. Through his legal

counsel, he also presented one character witness testimony, documentary evidence, and cross-examined each of Agency's witnesses.

After considering the evidence presented, including the mandatory components of the Douglas Factors[9], the Trial Board found Employee guilty of the charge and

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[9] In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Although not an exhaustive list, the factors are as follows:

> 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
>
> 2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
>
> 3) The employee's past disciplinary record;
>
> 4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
>
> 5) The effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
>
> 6) Consistency of the penalty with those imposed upon other employees for the same or similar offenses;
>
> 7) Consistency of the penalty with any applicable agency table of penalties;
>
> 8) The notoriety of the offense or its impact upon the reputation of the agency;
>
> 9) The clarity with which the employee was on notice of any rules that where violated in committing the offense, or had been warned about the conduct in question;
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> 10) Potential for the employee's rehabilitation;

specification, and recommended the above-noted 84-duty hour suspension without pay. The Board's Findings and Recommendations report was submitted to Chief Thompson, who upon reviewing and evaluating the evidence and the Board's recommendation, adopted it as the official position of Agency. On April 11, 2006, Agency issued Agency's Final Decision. The adverse action took effect at 0700 hours (7:00 a.m.), May 12, 2006.

In *D.C. Metropolitan Police Department v Pinkard,* 801 A.2d, 86, the District of Columbia Court of Appeals overturned a decision of the D.C. Superior Court that held, *inter alia*, that this Office had the authority to conduct *de novo* hearings in all matters before it. Although the *Pinkard* case was initiated by the Metropolitan Police Department, because there is a precluding collective bargaining agreement negotiated between Employee's union and Agency, the holding likewise applies to Fire Trial Board proceedings. According to the Court:

> On this appeal from the Superior Court, the MPD contends (1) that an evidentiary hearing before the OEA administrative judge was precluded by a collective bargaining agreement between the MPD and the Fraternal Order of Police, a labor union to which Pinkard belongs, [and] (2) that the OEA administrative judge abused her discretion in ordering a second [and *de novo*] evidentiary hearing. . . .
>
> As a general rule, this court owes deference to an agency's interpretation of the statute under which it acts. There is, however, an exception to this general rule, which is that we will not defer to an agency's interpretation if it is inconsistent with the plain language of the statute itself. This case falls within the exception because the OEA's reading of the [Comprehensive Merit Personnel Act or CMPA] is contrary to its plain language and inconsistent with it. We therefore hold that, under the statute, the collective bargaining agreement controls and supersedes otherwise applicable OEA procedures, and consequently, that the OEA administrative judge erred in conducting a second hearing.

> 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.

The OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives the OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings.

The MPD contends, however, that this seemingly broad power of the OEA to establish its own procedures is limited by the collective bargaining agreement in effect at the time of Pinkard's appeal. The relevant portion of the collective bargaining agreement reads as follows:

> [An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing has been held, *any further appeal shall be based solely on the record established in the Departmental hearing.* [emphasis added]. . .
> .

It is of course correct that a collective bargaining agreement, standing alone, cannot dictate OEA procedures. But in this instance the collective bargaining agreement does not stand alone. The CMPA itself explicitly provides that systems for review of adverse actions set forth in a collective bargaining agreement must take precedence over standard OEA procedures. D.C. Code § 1-606.2(b) (1999) (now § 1-606.02 (2001)) states that A[a]ny performance rating, grievance, adverse action, or reduction-in-force review, which has been included within a collective bargaining agreement . . . *shall not be subject to the provisions of this subchapter.* (emphasis added). The subchapter to which the language refers, subchapter VI, contains the statutory provisions governing appellate proceedings before the OEA. *See* D.C. Code § 1-606.3 (1999) (now § 1-606.03 (2001)). Since section 1-606.2(b) specifically provides that a collective bargaining agreement must take precedence over the provisions of subchapter VI, we hold that the procedures outlined in the collective bargaining agreement, namely, that the appeal to the OEA "shall be based solely on the record established in the [trial board] hearing", controls in Pinkard's case.

The OEA may not substitute its judgment for that of an agency. Its review of the agency decision in this case, the

> decision of the trial board in the MPD's favor is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. The OEA, as a reviewing authority, must generally defer to the agency's credibility determinations. Mindful of these principles, we remand this case to the OEA to review once again the MPD's decision to terminate Pinkard, and we instruct the OEA, as the collective bargaining agreement requires, to limit its review to the record made before the trial board.

See *Pinkard* at 90-92. (citations omitted).

Thus, pursuant to *Pinkard*, an AJ of this Office may not conduct a *de novo* hearing in an appeal before the Office, but must rather base the decision solely on the record below, when all of the following conditions are met:

> 1. The appellant (Employee) is an employee of either 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] 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 a Trial Board 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 (employee's removal, suspension, demotion, or personal performance rating) or a reduction-in-force.

All of these conditions are met in this matter. Thus, according to *Pinkard*, my review of the final Agency decision to impose a suspension upon Employee is limited "to a determination of whether [the final Agency decision] was supported by substantial

evidence,[10] whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations."[11] Further, I "must generally defer to the agency's credibility determinations."[12] My review is restricted to "the record made before the trial board."[13]

The Trial Board unanimously concluded that Employee committed the violation as charged, which included a finding and conclusion that he failed to maintain custody of the scene of the automobile fire during the period that the investigation was ongoing.

1. Whether the Trial Board's findings were supported by substantial evidence.

According to *Pinkard*, I must determine whether the Trial Board's findings were supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[14] Further, "[i]f 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."[15]

As noted earlier, *Pinkard* counsels me, as the "reviewing authority", to "generally defer to the agency's credibility determinations." Based on my own review of the several witnesses' testimony, I can find no reason to disturb the Trial Board's credibility determinations. As to the Trial Board's findings regarding the charge brought against Employee, my review shows that there was certainly substantial evidence to support those findings. Thus, there is no reason to overturn them.

2. Whether Agency committed harmful procedural error, or 3) Whether the decision was in accordance with law or applicable regulations.

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[10] According to OEA Rule 629.3, 46 D.C. Reg. 9317 (1999), an agency has the burden of proof in adverse action appeals. Pursuant to OEA Rule 629.1, *id.*, that burden is by "a preponderance of the evidence", which is defined as "[t]hat degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue." In *Pinkard*-type cases previously decided by this Office (including the initial decision in *Pinkard* itself that resulted from the remand), we have held that there must be substantial evidence to meet the agency's preponderance burden. *See, e.g.; Hibben, supra; Davidson, supra; Kelly, supra; Pinkard v. Metropolitan Police Department*, OEA Matter No. 1601-0155-87R02 (December 20, 2002), _ D.C. Reg. ___( ); *Bailey v. Metropolitan Police Department*, OEA Matter No. 1601-0145-00 (March 20, 2003), _ D.C. Reg. __ ( ).

[11] See *D.C. Metropolitan Police v. Pinkard,* 801 A.2d 86, at 91.
[12] *Id.*
[13] *Id.* at 92.
[14] *Davis-Dodson v. D.C. Department of Employment Services*, 697 A.2d 1214, 1218 (D.C. 1997) (citing *Ferreira v. D.C. Department of Employment Services*, 667 A.2d 310, 312 (D.C. 1995)).
[15] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the agency, but is simply to assure that "managerial discretion has been legitimately invoked and properly exercised."[16] When the charge is upheld, the Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation or guidelines and is clearly not an error of judgment."[17]

Under the circumstances, I see no basis to conclude that Agency acted capriciously in deciding to impose an 84-duty hour suspension upon Employee. Based upon my review of the record below, I conclude that the penalty was reasonable and should not be disturbed. Since Agency's action was not in error, there is no harmful error to remedy. I further conclude that substantial evidence exists to support Agency's final decision and thus find no reason to overturn its findings.

ORDER

It is hereby ORDERED that Agency's decision to impose an 84-duty hour suspension upon Employee is UPHELD.

FOR THE OFFICE:

ROHULAMIN QUANDER, ESQ.
Senior Administrative Judge

[16] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).
[17] *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).