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Appendix to SCR Agency Review 1

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

AMENDED
PETITION FOR REVIEW OF AGENCY DECISION

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OFFICE OF EMPLOYEE APPEALS

ERIC MOSELEY
Petitioner(s)

v.

Docket Number 2017 CA 007446 P(MPA)

MPA
DEPARTMENT OF PUBLIC WORKS
OFFICE OF EMPLOYEE APPEALS
Respondent(s)

A. Notice is hereby given that ERIC MOSELEY appeals to the Superior Court of the District of Columbia from the order of ERIC T. ROBINSON, ESQUIRE (*Insert name of agency or official issuing the order from which review is sought*) issued on the 26TH day of SEPTEMBER, ~~19~~ 2017. A copy of that order or decision is attached to this petition.

Description of judgment or order: Upholding Agency Decision to remove Petitioner from employment with Department of Public Works based on positive test for marijuana even though he was not on duty and marijuana is legal in the District of Columbia OEA Matter No.: 1601-0084-16

Concise statement of the agency proceedings and the decision as to which review is sought and the nature of the relief requested by petitioner: A Hearing Officer recommended dismissal without prejudice after which the Agency on 5/18/17 reissued a Written Notice of Proposed Removal Following Appeal to the Office of Employee Appeal, the ALJ upheld the removal decision which Petitioner seeks to vacate.

B. Address of Respondent Agency or Official: Department of Public Works, 2000 14th Street, NW, 6th Floor, Washington, DC 20009; Office of Employee Appeals 955 L'Enfant Plaza, SW, #2500, Wash DC 20024

C. Names and addresses of all other parties to the agency proceeding: Office of Employee Appeals 955 L'Enfant Plaza, SW, #2500, Wash DC 20024

D. Names and addresses of parties or attorneys to be served:

	NAME	ADDRESS
1.	John O. Iweanoge, II	1026 Monroe Street, NE, Washington, DC 20017
2.	Department of Public Works/Nada Paisant, Esq Office of Employee Appeals	441 4th Street, NW, Suite 1180N, Washington, DC 20001 955 L'Enfant Plaza, SW, #2500, Wash DC 200242

E. A copy of the agency decision or order sought to be reviewed is attached to this petition.

F. John O. Iweanoge, II
Printed name of attorney for petitioner

Signature or petitioner or petitioner's attorney

Address: 1026 Monroe Street, NE, Washington, DC 20017

Unified Bar No.: 439913 Telephone No.: 202-347-7026

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ERIC MOSELEY,	)	
Employee	)	OEA Matter No. 1601-0084-16
	)	
v.	)	Date of Issuance: September 26, 2017
	)	
D.C. DEPARTMENT OF PUBLIC WORKS,	)	
Agency	)	Eric T. Robinson, Esq.
	)	Senior Administrative Judge
	)	

John O. Iweanoge, II, Esq., Employee Representative
Nada Paisant, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

According to the documents of record, on April 10, 2015, Eric Mosely ("Employee") was placed on enforced leave by the Department of Public Works ("DPW" or the "Agency") because he was arrested and charged with felony possession of drugs with the intent to distribute, possession of an unregistered firearm and unlawful possession of ammunition stemming from an arrest on March 23, 2015. On January 15, 2016, Employee pled guilty to misdemeanor possession of a controlled substance, possession of an unregistered firearm, and unlawful possession of ammunition. Thereafter, Employee was allowed to return to DPW's ranks however he was required to undergo a urinalysis test prior to his finally being allowed to report for duty. The urinalysis test came back positive for the presence of marijuana. From there, DPW proposed and then ultimately removed Employee from service. Soon thereafter, Employee timely filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office"). This matter was assigned to the Undersigned for adjudication after the parties had participated in a failed attempt at mediation. A Prehearing conference was held on January 5, 2017. During this conference, I determined that an evidentiary hearing was unwarranted. In a Post Prehearing Conference Order, dated January 5, 2017, the partied were provided with a briefing schedule to address whether the Agency's adverse action was taken for cause. Both parties submitted their

respective briefs in this matter. After thoroughly reviewing their submission along with the documents of record, I have determined that no further proceedings are required. The record is now closed.

JURISDICTION

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

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

As was stated above, Employee's last position of record with the Agency was Sanitation Supervisor. Employee's was tasked, in part, with ensuring that subordinate employees performed their duties safely and that they complied with the District Personnel Manual, as well as the Agency's policies and procedures. Of note, Employee was also required to maintain a valid Commercial Driver's License ("CDL"). And he was expected to be prepared to operate sweepers, front loaders, and other specialized heavy machinery. As a CDL operator and as a supervisor, Employee herein was subject to DPW's drug and alcohol policy. These expectations are not subject to credible contention in this matter.

Agency, in its Prehearing Statement, efficiently synopsized the events that preceded Employee's removal as follows:

> On March 31, 2015, Employee was placed on enforced leave because he was arrested and charged with felony possession of drugs with the intent to distribute, possession of an unregistered firearm and unlawful possession of ammunition. On January 15, 2016, Employee pled guilty to misdemeanor possession of a controlled substance, possession of an unregistered firearm, and unlawful possession of ammunition.
>
> On March 10, 2016, Employee submitted to a "pre-employment" urinalysis following his return from a non-work status due to his extended time on enforced leave.[1] On March 23, 2016, Employee's test results revealed positive for marijuana. On May 18, 2016, the Agency issued to Employee an Advance Written Notice of Proposed Removal ("Notice"). The Notice proposed Employee's removal based on two causes. The first cause was pursuant to 6B DCMR § 1607.2(a)(5) for "off-duty conduct that adversely affected the employee's job performance or trustworthiness, or adversely affected his agency's mission or had an otherwise identifiable nexus to the employee's position." The second cause was for violation of the DPW Drug and Alcohol Policy which provided for the removal of an employee without a referral to an employee assistance program.[2]

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[1] Employee's placement on Enforced Leave is not under review as part of this Initial Decision.
[2] Agency Prehearing Statement at 2 – 3 (December 22, 2016).

It is uncontroverted that Employee's urinalysis test was positive for marijuana. Employee defended the presence of marijuana on the basis of a recent change in District of Columbia law that allows for the recreational use of marijuana.[3] It is apparent from the record that Employee did not readily contest his positive marijuana test result but rather took issue with the testing procedure. Agency counters by noting that while recreational marijuana usage may be tacitly legal under District of Columbia law it remains illegal to use or possess marijuana pursuant to Federal law and Agency policy for those whose job descriptions require said persons to hold and maintain a CDL. Agency also asserts that Employee did not reasonably allege or prove that he was legally prescribed marijuana.[4] Agency further notes that Employee was subject to enhanced strictures prohibiting marijuana usage pursuant to Agency's internal drug policy and the requirements placed upon CDL license holders by the United States Department of Transportation ("DOT"). Agency in its submission notes that Employee was made adequately aware of it drug and alcohol policy through his initial onboarding as well as mandated training administered on October 4, 2014.[5] I also note that DPW's Drug and Alcohol Policy § X-A-1 states that "DPW is committed to maintaining a drug and alcohol free workplace. Failure to comply with this policy shall subject a CDL driver to disciplinary action up to and including removal from employment and shall require mandatory referral to Employee Assistance Program ("EAP") where appropriate." Moreover, DPW Drug and Alcohol Policy § X-A-3 ("§X-A-3") states "*in certain circumstances*, DPW may initiate disciplinary action, up to and including removal from employment without referring a CDL driver to EAP."

I find that Employee either knew or should have known of DPW's drug and alcohol policy and that he knew or should have known that as an employee of DPW he was forbidden from using marijuana prior to his positive test result. Operating heavy machinery or directing others who are tasked with operating heavy machinery while under the influence of alcohol or drugs is inherently dangerous and cannot be condoned by the Undersigned given the instant circumstances. Employee's argument that marijuana usage, while tacitly legal, should be stricken as conduct that could lead to dismissal under the instant circumstances must fail. The Undersigned takes note that generally, alcohol consumption by someone who is over 21 years of age is currently legal. However, persons who imbibe alcohol above the legal blood alcohol content limit are prohibited from operating motor vehicles. I find that marijuana usage is subject to a similar interpretation and restriction. What is more disheartening regarding Employee's argument is the fact that Employee herein was a Supervisor, tasked with directing his subordinates on their daily work activities.

I further find that Agency was acting within its discretion to initiate termination proceedings in this matter despite this being a first offense. What Employee's argument fails to adequately counter is § X-A-3. Agency opted to exercise this clause given all of the attendant circumstances surrounding Employee's positive test result; as well as the fact that Agency was

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[3] *See* D.C. Code § 48-904.01 (a)(1)(A).
[4] Agency notes that marijuana that has been medically prescribed is permissible per DPW's regulations. Agency further notes that Employee has not alleged or even attempted to prove that he was prescribed marijuana. *See* Agency's Reply to Employee's Brief at 3 (March 31, 2017).
[5] See Agency Brief at Tab 1 (February 8, 2017).

attempting to onboard him back into the DPW's ranks after he had served a lengthy stint on enforced leave due to another drug related criminal proceeding.[6]

I find that Agency has met its burden of proof with respect to all of the sustained charges levied against Employee. Agency has the primary discretion in selecting an appropriate penalty for Employee's conduct, not the undersigned.[7] This Office may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.[8] When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.[9] Here, it has already been established that Employee created an improper (possibly dangerous) work environment for his colleagues due to his marijuana usage. Employee presented a failing argument that the drug test itself was compromised but failed to take the appropriate steps to timely contest same when the results were provided to him. For this, I see no plausible reason to disturb DPW's selection of penalty in this matter. Therefore, I find that Agency's decision to remove Employee from his position was appropriate based upon the circumstances.

Additionally, it is an established matter of public law that the OEA no longer has jurisdiction over grievance appeals.[10] Based on the above discussion, Employee has failed to proffer any credible evidence that would indicate his termination was improperly conducted and implemented. Employee's numerous ancillary arguments are best characterized as grievances and outside of the OEA's jurisdiction to adjudicate.[11]

ORDER

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

FOR THE OFFICE:

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

[6] It is uncontroverted that on January 15, 2016, Employee pled guilty to misdemeanor possession of a controlled substance, possession of an unregistered firearm, and unlawful possession of ammunition.
[7] *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).
[8] *See Id.*
[9] *See Id.*
[10] Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124.
[11] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

NOTICE OF APPEALS RIGHTS

This is an Initial Decision that will become a final decision of the Office of Employee Appeals unless either party to this proceeding files a Petition for Review with the office. A Petition for Review must be filed within thirty-five (35) calendar days, including holidays and weekends, of the issuance date of the Initial Decision in the case.

All Petitions for Review must set forth objections to the Initial Decision and establish that:

1. New and material evidence is available that, despite due diligence, was not available when the record was closed;

2. The decision of the presiding official is based on an erroneous interpretation of statute, regulation, or policy;

3. The finding of the presiding official are not based on substantial evidence; or

4. The Initial Decision did not address all the issues of law and fact properly raised in the appeal.

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with Administrative Assistant, D.C. Office of Employee Appeals, 955 L'Enfant Plaza Suite 2500, Washington, D.C. 20024. Four (4) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review may file their response within thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review.

Instead of filing a Petition for Review with the Office, either party may file a Petition for Review in the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

CERTIFICATE OF SERVICE

I certify that the attached **INITIAL DECISION** was sent by regular mail on this day to:

Eric Moseley
1924 Campbell Drive
Suitland, MD 20746

John O. Iweanoge, II Esq.
1026 Monroe St. NE
Washington, DC 20017

Nada Paisant, Esq.
441 4th St, NW
Suite 1180N
Washington, DC 20001

Katrina Hill
Clerk

September 26, 2017
Date

CERTIFICATE OF SERVICE

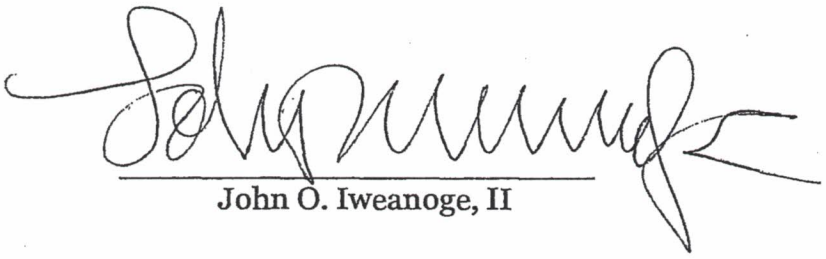
I HEREBY CERTIFY that on April 27, 2018 Amended Petition for Judicial Review was mailed by first class mail postage prepaid to:

Karl A. Racine
Attorney General
Office of the Attorney General
for the District of Columbia
441 4th Street, NW,
Washington, DC 20001

Nada Paisant, Esquire
Office of the Attorney General, DC
441 4th Street, NW, Suite 1180N
Washington, DC 20001

Department of Public Works
2000 14th Street, NW, 6th Floor
Washington, D.C. 20009

Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024



John O. Iweanoge, II

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

REPLY TO:
955 L'Enfant Plaza, S.W.
Suite 2500
Washington, DC 20024
(202)727-0004
FAX (202)727-5631

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

ERIC MOSELEY,

Petitioner,

v.

DEPARTMENT OF PUBLIC WORKS,
Respondent.

Case No. 2017 CA 007446 P(MPA)

Judge Todd E. Edelman

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Eric Moseley v. D.C. Department of Public Works,* OEA Matter No. 1601-0084-16. The record consists of one volume containing fifteen (15) tabs.

Wynter Clarke
Wynter Clarke
Paralegal Specialist

LASHEKA BROWN BASSEY NOTARY PUBLIC DISTRICT OF COLUMBIA
MY COMMISSION EXPIRES 6/14/2021

District of Columbia: SS
Subscribed and Sworn to before me
this 26th day of June, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001
Telephone: (202) 879-1133 • Website: www.dccourts.gov

MICHAEL SKELLY
Vs.
C.A. No. 2018 CA 002463 P(MPA)
DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS

INITIAL ORDER AND ADDENDUM

Pursuant to D.C. Code § 11-906 and District of Columbia Superior Court Rule of Civil Procedure ("Super. Ct. Civ. R.") 40-I, it is hereby **ORDERED** as follows:

(1) Effective this date, this case has assigned to the individual calendar designated below. All future filings in this case shall bear the calendar number and the judge's name beneath the case number in the caption. On filing any motion or paper related thereto, one copy (for the judge) must be delivered to the Clerk along with the original.

(2) Within 60 days of the filing of the complaint, plaintiff must file proof of serving on each defendant: copies of the summons, the complaint, and this Initial Order and Addendum. As to any defendant for whom such proof of service has not been filed, the Complaint will be dismissed without prejudice for want of prosecution unless the time for serving the defendant has been extended as provided in Super. Ct. Civ. R. 4(m).

(3) Within 21 days of service as described above, except as otherwise noted in Super. Ct. Civ. R. 12, each defendant must respond to the complaint by filing an answer or other responsive pleading. As to the defendant who has failed to respond, a default and judgment will be entered unless the time to respond has been extended as provided in Super. Ct. Civ. R. 55(a).

(4) At the time and place noted below, all counsel and unrepresented parties shall appear before the assigned judge at an initial scheduling and settlement conference to discuss the possibilities of settlement and to establish a schedule for the completion of all proceedings, including, normally, either mediation, case evaluation, or arbitration. Counsel shall discuss with their clients **prior** to the conference whether the clients are agreeable to binding or non-binding arbitration. **This order is the only notice that parties and counsel will receive concerning this Conference.**

(5) Upon advice that the date noted below is inconvenient for any party or counsel, the Quality Review Branch (202) 879-1750 may continue the Conference **once**, with the consent of all parties, to either of the two succeeding Fridays. Request must be made not less than seven business days before the scheduling conference date.
No other continuance of the conference will be granted except upon motion for good cause shown.

(6) Parties are responsible for obtaining and complying with all requirements of the General Order for Civil cases, each judge's Supplement to the General Order and the General Mediation Order. Copies of these orders are available in the Courtroom and on the Court's website http://www.dccourts.gov/.

Chief Judge Robert E. Morin

Case Assigned to: Judge NEAL E KRAVITZ
Date: April 13, 2018
Initial Conference: 9:00 am, Friday, July 13, 2018
Location: Courtroom 100
500 Indiana Avenue N.W.
WASHINGTON, DC 20001

ADDENDUM TO INITIAL ORDER AFFECTING ALL MEDICAL MALPRACTICE CASES

In accordance with the Medical Malpractice Proceedings Act of 2006, D.C. Code § 16-2801, et seq. (2007 Winter Supp.), "[a]fter an action is filed in the court against a healthcare provider alleging medical malpractice, the court shall require the parties to enter into mediation, without discovery or, if all parties agree[,] with only limited discovery that will not interfere with the completion of mediation within 30 days of the Initial Scheduling and Settlement Conference ("ISSC"), prior to any further litigation in an effort to reach a settlement agreement. The early mediation schedule shall be included in the Scheduling Order following the ISSC. Unless all parties agree, the stay of discovery shall not be more than 30 days after the ISSC." D.C. Code § 16-2821.

To ensure compliance with this legislation, on or before the date of the ISSC, the Court will notify all attorneys and *pro se* parties of the date and time of the early mediation session and the name of the assigned mediator. Information about the early mediation date also is available over the internet at https://www:dccourts.gov/pa/. To facilitate this process, all counsel and *pro se* parties in every medical malpractice case are required to confer, jointly complete and sign an EARLY MEDIATION FORM, which must be filed no later than ten (10) calendar days prior to the ISSC. D.C. Code § 16-2825 Two separate Early Mediation Forms are available. Both forms may be obtained at www.dccourts.gov/medmalmediation. One form is to be used for early mediation with a mediator from the multi-door medical malpractice mediator roster; the second form is to be used for early mediation with a private mediator. Both forms also are available in the Multi-Door Dispute Resolution Office, Suite 2900, 410 E Street, N.W. Plaintiff's counsel is responsible for eFiling the form and is required to e-mail a courtesy copy to earlymedmal@dcsc.gov. *Pro se* Plaintiffs who elect not to eFile may file by hand in the Multi-Door Dispute Resolution Office.

A roster of medical malpractice mediators available through the Court's Multi-Door Dispute Resolution Division, with biographical information about each mediator, can be found at www.dccourts.gov/medmalmediation/mediatorprofiles. All individuals on the roster are judges or lawyers with at least 10 years of significant experience in medical malpractice litigation. D.C. Code § 16-2823(a). If the parties cannot agree on a mediator, the Court will appoint one. D.C. Code § 16-2823(b).

The following persons are required by statute to attend personally the Early Mediation Conference: (1) all parties; (2) for parties that are not individuals, a representative with settlement authority; (3) in cases involving an insurance company, a representative of the company with settlement authority; and (4) attorneys representing each party with primary responsibility for the case. D.C. Code § 16-2824.

No later than ten (10) days after the early mediation session has terminated, Plaintiff must eFile with the Court a report prepared by the mediator, including a private mediator, regarding: (1) attendance; (2) whether a settlement was reached; or, (3) if a settlement was not reached, any agreements to narrow the scope of the dispute, limit discovery, facilitate future settlement, hold another mediation session, or otherwise reduce the cost and time of trial preparation. D.C. Code§ 16-2826. Any Plaintiff who is *pro se* may elect to file the report by hand with the Civil Actions Branch. The forms to be used for early mediation reports are available at www.dccourts.gov/medmalmediation.

Chief Judge Robert E. Morin

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

MICHAEL SKELLY **140 Spring Court** **Falls Church, Virginia 22046** **Petitioner,** **v.** **DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS** **1100 4th Street, S.W.** **Suite 620 East** **Washington, D.C. 20024** **Respondent.**	*	**Civil Action No.** 2018 CA 002463 P(MPA)

PETITION FOR REVIEW OF AGENCY DECISION

JURISDICTION

This Court has jurisdiction pursuant to D.C. Code § 1-606.03 and Superior Court Agency Review Rule 1.

A. Notice is hereby given that Michael Skelly appeals to the Superior Court of the District of Columbia from the Opinion and Order issued by the Office of Employee Appeals ("OEA") on March 22, 2018. A copy of the OEA Opinion and Order is attached to this Petition.

B. Address of Respondent Agency or Official: Office of Employee Appeals, 1100 4th Street, S.W., Suite 620 East, Washington, D.C. 20024.

C. Names and address of all other parties to the Agency proceeding: District of Columbia Government, Metropolitan Police Department, 300 Indiana Avenue, N.W., Washington, D.C. 20001.

D. Names and addresses of parties or attorneys to be served:

Lasheka Brown Bassey, Esquire
General Counsel
D.C. Office of Employee Appeals
1100 4th Street, S.W.
Suite 620 East
Washington, D.C. 20024

Frank M. McDougald, Esquire
Assistant Attorney General
Office of the Attorney General
441 4th Street, N.W.
Suite 1180 North
Washington, D.C. 20001
Counsel for MPD before OEA

E. A copy of the March 22, 2018 Office of Employee Appeals decision or order sought to be reviewed is attached to this Petition.

F. Petitioner seeks reversal of the Office of Employee Appeals ("OEA") decision and of the underlying termination action of the Metropolitan Police Department. Petitioner, an MPD Sergeant, was terminated by MPD for misconduct based on his taking of prescription medications over a 22 year period. Petitioner appealed to OEA, which denied his appeal essentially on the grounds that there was substantial evidence in the record to support the MPD action. Petitioner contends that OEA committed reversible error because MPD's action is clearly erroneous as a matter of law in several respects, as well as not being supported by substantial, reliable, probative evidence of record.

DESO & BUCKLEY, P.C.

By: /s/ Robert E. Deso
Robert E. Deso, DCBN 174185
1776 K Street, N.W.
Suite 830
Washington, D.C. 20006
(202) 822-6333
(202) 478-2181 - Fax
redeso@dtswlaw.com
Attorney for Petitioner

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
MICHAEL SKELLY, Employee	OEA Matter No. 1601-0001-16
v.	Date of Issuance: March 22, 2018
METROPOLITAN POLICE DEPARTMENT, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Michael Skelly ("Employee") worked as a Sergeant with the Metropolitan Police Department ("Agency"). On October 15, 2014, Agency issued a Notice of Proposed Adverse Action, charging Employee with engaging in conduct constituting a crime; failure to obey orders and directives issued by the Chief of Police; conduct unbecoming of an officer; and prejudicial conduct. The charges stemmed from Employee's arrest for receiving and filling prescriptions for multiple narcotics from different medical providers. Agency also alleged that Employee altered a prescription for Percocet and that he was untruthful in his communications with doctors regarding the prescriptions that he was taking. Employee subsequently requested to have an Adverse Action Panel ("Trial Panel") review the charges and specifications against him. After

holding an evidentiary hearing, the Trial Panel recommended that Employee be terminated based on each of the four charges. On June 2, 2015, Agency issued its Final Notice of Adverse Action, sustaining the Panel's recommendation. Employee's termination became effective on September 4, 2015.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on October 2, 2015. In his appeal, Employee argued that his termination was improper and requested that he be reinstated with back pay and benefits.[1] Agency filed its Answer to the Petition for Appeal on November 9, 2015. It denied that Employee was wrongfully terminated and requested a hearing.[2]

An OEA Administrative Judge ("AJ") was assigned to the matter in January of 2016. On April 4, 2016, the AJ held a prehearing conference to assess the parties' arguments. During the conference, the AJ determined that an evidentiary hearing was not warranted. The parties were then ordered to submit briefs addressing whether the Trial Panel's decision was supported by substantial evidence; whether Agency committed harmful procedural error; and whether Agency's termination action was taken in accordance with all applicable laws, rules, and regulations.[3]

In his brief, Employee alleged that Agency failed to state a specific offense in support of its assertion that he violated U.S. Code Title 21-843 because there was no evidence to prove that he was involved in deception and/or fraud. Employee also contended that he did not commit a crime by altering a prescription for Percocet and that this charge was based upon unsubstantiated hearsay testimony. He further stated that he did not violate Agency's drug policy because the directive does not prohibit employees from possessing or taking lawfully prescribed medications

[1] *Petition for Appeal* (October 2, 2015).
[2] *Agency Answer to Petition for Appeal* (November 9, 2015).
[3] *Order on Briefs* (May 26, 2016).

at work. Moreover, Employee opined that the conduct unbecoming charge could not be supported because the accompanying specifications erroneously relied on the credibility of Dr. Lastrapes, a Police and Fire Chief Physician ("PFC"), who did not testify at the Trial Panel and did not provide an affidavit or written statement.

Next, Employee posited that he was denied due process regarding Agency's allegation that he was less than truthful to PFC physicians because he was unable to adequately defend against the charge provided in Agency's proposed notice. Lastly, Employee claimed that the prejudicial conduct charge could not be sustained because there was no rule or regulation which prohibited him from continuing to take medications prescribed by his treating physicians. Therefore, Employee requested that the Trial Panel's decision be reversed and that Agency's termination action be overturned.[4]

In response, Agency asserted that its conclusions regarding Employee's misconduct were supported by substantial evidence. It stated that the evidence reflected the excessive amounts of controlled narcotics that Employee was taking and the unlawful methods by which he was able to obtain prescriptions for the drugs. In addition, Agency provided that the Trial Panel had the opportunity to observe each witness's demeanor and assess their credibility, ultimately determining that Employee did not provide credible testimony. Agency claimed that the act of engaging in a scheme to obtain controlled substances from different providers was criminal behavior and violated U.S. Code Title 21-843. Further, it argued that Employee committed misconduct by providing untruthful information to PFC physicians about the medications he was taking and the illnesses for which he was receiving treatment. As a result, Agency requested that the AJ affirm its termination action.[5]

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[4] *Employee Brief* (June 10, 2016).
[5] *Agency Brief* (July 27, 2016). Employee filed a Reply Brief on August 23, 2016, stating that the facts recited by

An Initial Decision was issued on May 17, 2017. The AJ first determined that under the holding in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002), OEA was limited to making a decision solely on the record if certain conditions were met.[6] Having determined that each condition set forth in *Pinkard* was satisfied, the AJ stated that the issues to be decided before OEA were whether the Trial Panel's decision was supported by substantial evidence; whether there was harmful procedural error; and whether Agency's termination action was done in accordance with applicable laws, rules, or regulations.[7]

Next, the AJ provided that Agency was not prevented from levying administrative charges against Employee for the same criminal violations which were previously rejected by federal prosecutors in D.C. and Virginia because they were expunged. The AJ noted that criminal charges were different in scope and nature from administrative charges. Thus, the declination letter issued by the U.S. Attorney's Office did not require that the corresponding administrative personnel charges be withdrawn.

Next, the AJ concluded that there was substantial evidence in the record to support a

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Agency did not support the charges and specifications against him. Employee also reiterated his previous arguments and maintained that Agency's charges were based entirely on unsubstantiated, irrelevant, and unreliable hearsay. *Employee Reply Brief* (August 23, 2016).

[6] *Initial Decision* (April 6, 2013). Under *Pinkard*, the following conditions must be met:

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
> 2. The employee has been subjected to an adverse action;
> 3.The employee is a member of a bargaining unit covered by a collective bargaining agreement;
> 4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard*, *i.e.*: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, Trial Board] 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 being taken against Employee.

[7] *Id.* at 2.

finding that Employee engaged in a scheme to obtain controlled substances, in violation of General Order ("GO") 120.21, Attachment A, Part A-7. He stated that under U.S. Code Title 21-843, Employee's behavior constituted misconduct that would be deemed a crime. Similarly, the AJ stated that Employee's alteration of a prescription for Percocet was an act which constituted a crime. Consequently, he held that Charge No. 1 properly alleged misconduct and should be sustained.

With respect to the failure to observe orders charge, the AJ determined that Employee violated Agency's Drug Free Work Place Directive, which prohibits the use of controlled substances in the workplace. According to the AJ, the record reflected that Employee was taking excessive amounts of controlled substances while on duty and failed to notify Agency. Thus, he sustained Charge No. 2.

Regarding the conduct unbecoming accusation, the AJ provided that Agency properly charged Employee with misconduct after he was untruthful to Dr. Lastrapes about his regular physician being out of town in an effort to obtain a prescription. Additionally, the AJ stated that Employee was untruthful to PFC physicians about the controlled substances he was taking and the injuries and illnesses for which he was receiving treatment.

Concerning the prejudicial conduct charge, the AJ concluded that Agency properly alleged misconduct for each specification. He noted that Employee displayed a continuing pattern of obtaining controlled substances from several providers, even after being told by his treating physicians that his actions were problematic. The AJ also dismissed Employee's argument that the record failed to prove that he was guilty of diversion under 21 U.S.C. § 843. He emphasized that a reading of the statute's plain meaning only required a showing that a controlled substance was acquired by fraudulent means, not that the substance be obtained by

fraud and sold illegally. Further, the AJ noted that the Trial Panel correctly admitted and relied upon hearsay evidence during the evidentiary hearing, as such evidence is routinely permissible in administrative hearings. He also stated that the premise of Agency's adverse action was not that Employee was unlawfully prescribed controlled substances. Rather, the case against Employee was based on his acquisition of prescriptions through a devised scheme to obtain excessive amounts of controlled substances. Accordingly, the AJ concluded that the conduct of the treating physicians in prescribing medications to Employee was not the issue before the Trial Panel.

After examining the record, the AJ held that Agency's case was not based solely on the impeachable hearsay of a single witness, Agent Ikner, who was responsible for conducting the investigation into Employee's alleged misconduct. He opined that Agency's case was supported and corroborated by Agency's other witnesses, as well as the documentary evidence obtained from judicial bodies in surrounding jurisdictions.

Finally, the AJ held that the Trial Panel provided a detailed summary of the relevant evidence in its Findings of Fact and Conclusions of Law. He stated that the Panel was well within its right to assess witness credibility. While the AJ was sympathetic to Employee's need for painkillers due to his injuries, he ultimately concluded that the Trial Panel's findings were supported by substantial evidence. Consequently, Employee's termination was upheld.[8]

Employee disagreed and filed Petition for Review with OEA's Board. He argues that the Initial Decision is based on an erroneous interpretation of statute; that the AJ's conclusions of law were not based on substantial evidence; and that the Initial Decision failed to address all issues of law and fact that were properly raised in the appeal. Specifically, Employee asserts that

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[8] *Initial Decision* (May 17, 2017). Neither party alleged that Agency committed a harmful procedural error or that it failed to conduct its adverse action in accordance with all applicable laws, rules, or regulations. Therefore, the AJ did not address these issues in his decision.

the AJ failed to address the requisite elements of the offense for each of the specifications contained in the charges levied against him, including identifying what evidence is considered relevant to each specification. He further states that the Initial Decision lacks compliance with the requisite judicial analysis procedures established by the Supreme Court and the Merit Systems Protection Board ("MSPB") pertinent to burden of proof, reliance on hearsay evidence, and the need for expert witness testimony. According to Employee, Agency failed to meet its burden of proof in showing that he used an excessive amount of controlled medications over the years or that he fashioned a "scheme" to improperly obtain the drugs. Lastly, he disputes the AJ's findings with respect to each of the charges and corresponding specifications provided in Agency's Notice of Proposed Adverse Action. Therefore, Employee asks this Board to reverse the Initial Decision.[9]

Agency filed a Brief in Opposition to Employee's Petition for Review on July 21, 2017. It claims that the Initial Decision is based substantial evidence and details arguments regarding why each charge and specification is supported by the record. Agency also reiterates its position that Employee engaged in a scheme to obtain excessive amounts of controlled substances for personal use; thereby, violating federal statute and Agency's policy related to drugs in the workplace. As such, Agency asks this Board to uphold the Initial Decision and deny Employee's Petition for Review.[10]

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[9] *Petition for Review* (July 21, 2017).
[10] *Agency's Opposition to Employee's Petition for Review* (July 21, 2017). Employee subsequently filed a Reply Brief on August 14, 2017, in which he responds to Agency's arguments regarding its position on the validity of the AJ's findings. On September 6, 2017, Agency filed a Motion to Strike Employee's Reply Brief, arguing that Employee was not permitted to file a Reply Brief to Agency's oppositional brief. Employee then filed an Opposition to Agency's Motion to Strike on September 20, 2017.

Substantial Evidence

On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[11] Under OEA Rule 628.1, 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.

Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-7

Agency's first charge is based on Employee's violation of GO 120.21 for "[c]onviction of any member of the force in any court of competent jurisdiction...or is deemed to have been involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction...." According to Agency, Specification No. 1 alleges that Employee violated U.S. Code Title 21-843 by receiving prescriptions for multiple narcotics from different providers and refilling them at various locations. However, Employee argues that the facts do not allege an actual violation of U.S. Code Title 21-843 or any other crime or misconduct which can constitute a basis for discipline. As a result, Employee claims that the AJ committed a clear error of law. U.S. Code Title 21-843 states the following in pertinent part:

> Whosoever knowingly and willfully executes, or attempts to execute, a scheme or artifice:

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[11] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

> (1) To defraud any healthcare benefit program; or
> (2) To obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery or payment for health care benefits, items, or services...

Here, there is substantial evidence in the record to uphold the AJ's findings with respect to this specification. Employee posits that Agency erroneously relied upon his arrest for "Obtaining Drug: Forgery or Altered Prescription" because the charge was accepted and dismissed by an Arlington County Magistrate after the U.S. Attorney for the District of Columbia declined to prosecute Employee following the conclusion of its investigation. However, the language of GO 120.21 does not require a conviction to sustain a charge for "...conduct which would constitute a crime, whether or not a court record reflects a conviction...." Rather, the underlying conduct must be examined to determine whether the employee's behavior was criminal in nature.[12]

Agency and the Drug Enforcement Agency ("DEA") Task Force conducted a joint investigation in collaboration with the Internal Affairs Department ("IAD") to hold several interviews with the multiple doctors who treated Employee. The evidence "led investigators to believe that probable cause...substantiated [the] allegation that [Employee] was obtaining prescriptions through false pretense, seeking medical care from multiple providers and being prescribed the same narcotic medications in addition to narcotics in excess of what was

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[12] *See Fullord-Cuthbertson v. Department of Corrections*, OEA Matter No. 1601-0018-13R16, *Opinion and Order on Petition for Review* (June 6, 2017). On Petition for Review, OEA's Board addressed whether an arrest is required to sustain a charge for "any act which constitutes a criminal offense whether or not the act results in a conviction" under D.C. Municipal Regulation §1603.3(h). The Board agreed with the AJ's reasoning that the purpose of the crafting the law was to ensure that an employee who commits a criminal act, such as fraud in the unlawful collection of unemployment insurance benefits, can be subject to an adverse personnel action, notwithstanding the disposition of any criminal charges brought against them.

needed."[13] The joint investigation also alleged that Employee was exploiting his health care insurance in a fraudulent manner, and utilized diversion tactics to obtain prescriptions in D.C., Maryland, and Virginia.

While it is true that he was never criminally convicted, Employee admitted to the Trial Panel that he refilled prescriptions prior to exhausting his current medication allowance in order to increase the original amount that was prescribed. Employee even acknowledged that he manipulated the system in order to refill prescriptions.[14] Further, Employee was prescribed medication from a physician after falsely informing the doctor that he suffered from Post-Traumatic Stress Disorder as a result of being a member of Agency's bomb squad.[15] This conduct violates U.S. Code Title 21-843 because Employee utilized false pretenses to obtain controlled substances. It should be noted that this Board agrees with Employee's supposition that the act of filling multiple prescriptions at different locations was not a criminal activity *per se*. However, obtaining said medications through unscrupulous methods and devises for the purpose of obtaining excessive amounts of narcotics is prohibited by statute. While he disagrees with the Panel's finding, there remains a considerable amount of evidence in the record to show that Employee engaged in conduct which constituted a crime. Accordingly, this Board finds that the AJ properly addressed this issue, and we agree with his determination that Charge No. 1, Specification No. 1 is supported by the evidence.

Assuming arguendo that there is insufficient proof in the record to demonstrate that Employee violated Title 21-843, the record is replete with evidence to support Charge No. 1,

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[13] Metropolitan Police Department Internal Affairs Bureau, Final Investigative Report Concerning Allegations of Misconduct by Sergeant Michael Skelly Patrol Services and School Security Bureau—Fifth District, IS #11-002950 (August 19, 2014).
[14] *Agency Answer to Petition for Appeal*, Adverse Action Panel's Findings of Fact and Conclusions of Law, Tab 1 (November 9, 2015).
[15] *Id.* As a part of Agency's investigation, Employee's personnel file revealed that he was never a member of an Explosive Ordinance Unit.

Specification No. 2. Employee claims that he never altered a prescription for Percocet that was written by Dr. Lastrapes by placing the number "1" in the refill area on the prescription (RX 103340). He maintains that Agent Ikner provided false testimony in this regard and that he attempted to influence Dr. Lastrapes' statement by suggesting what may have happened to the altered prescription. Yet, during his first and second investigative interviews, Dr. Lastrapes provided consistent accounts of the incident concerning RX 103340, stating that he did not place a "1" in the refill section for the Percocet prescription because a refill cannot be requested for that type of drug.[16] The Trial Panel agreed with Dr. Lastrapes and concluded that Employee knowingly falsified a prescription for a controlled substance. Conversely, the Panel found Employee's version of events to be untruthful. The Trial Panel was the finder of fact in this case, and the Board will not second guess its credibility determinations. As a result, we find that the AJ did not err in finding that there is substantial evidence in the record to sustain Charge No. 1, Specification No. 2.

Charge No. 2: Violation of General Order Series 120.21, Attachment A, Part A-16

Charge No. 2, Specification No. 1 was based on Employee's failure to obey orders and directives issued by the Chief of Police. Agency explains that Employee violated its Drug Free Work Place Directive, which addresses the regulation of drug use in the workplace. Employee argues that this specification does not allege that Employee engaged in any specific conduct which violated the directive because it does not prohibit the use of controlled substances in the workplace. Thus, Employee opines that even if he was taking excessive prescription medications while on duty, his actions did not violate the District's drug use policy. Under the policy,

[16] During his November 11, 2011 interview with Agent Ikner, Dr. Lastrapes was shown a prescription that Employee attempted to fill at a Rite Aid Pharmacy containing his signature. When asked if Dr. Lastrapes placed the number "1" on the refill line, he replied "[w]ith certainty, I did not write it. There are no refills on Schedule II drugs. You have to get an original every time."

employees of the District of Columbia government are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in the work place.[17] The directive states the following in pertinent part:

> II. Drug Free Workplace Awareness Program
>
> > The use and/or position of illicit drugs by District Employees in the workplace impairs the government's ability to carry out its mission, and poses substantial dangers to employee, clients and the public.
> >
> > Those who use and/or possess drugs put themselves and those around them in danger of arrest and conviction for drug-related crimes.
> >
> > The District values its employees, and urges all individuals with substance abuse problems to seek counseling and rehabilitation.

Here, it is undisputed that Employee used controlled substances for numerous, legitimate injuries that he sustained over the years while on duty.[18] During the administrative hearing, Employee admitted that he was only supposed to take three pills a day. Instead, Employee ingested up to ten pills a day because he became resistant to the effects of the medication.[19] This Board disagrees with Employee's position and finds that there is substantial evidence in the record to uphold the AJ's determination that Employee violated the Drug Free Work Place Awareness Program. Employee obtained controlled narcotics by inappropriate pretenses and failed to notify Agency that he was using excessive amounts of the medications.[20] Under the

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[17] *Agency Answer to Petition for Appeal*, Tab 1.

[18] The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986. The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

[19] *Trial Panel Finding Number* 64.

[20] The Board must note that Title 21, Section 801(a)(1) of the United States Controlled Substance Act recognizes that many controlled drugs have a "useful and legitimate medical purpose and are necessary to maintain the health

program, employees who violate the directives are subject to disciplinary action. Accordingly, Charge No. 2, Specification No. 1 must be sustained.

Charge No. 3: Violation of General Order 120.21, Attachment A, Part A-12 and General Order 201.26, Part 1-B-22.

Next, Employee was charged with "[c]onduct unbecoming of an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively...." In Specification No. 1, Agency alleges that Employee was willfully and knowingly untruthful to Dr. Lastrapes when he obtained a prescription for Percocet by fraudulent means when Employee stated that his private physician was out of town on March 17, 2011. Employee counters Agency's assertion and argues that he never requested a prescription from Dr. Lastrapes and that the doctor decided on his own initiative to write him a prescription for Percocet.

The Trial Panel dismissed Employee's argument, stating that "[Employee] was untruthful when he advised PFC Physician Lastrapes that his personal physician was out of town which resulted in Dr. Lastrapes prescribing [Employee] Percocet."[21] While Employee questions the veracity of Agent Ikner's recitation of events during the investigation, the AJ was reasonable in concluding that Agency met its burden of proof with respect to this specification. The Panel was permitted to rely upon hearsay evidence as a basis for reaching its conclusion and there is no clear error on the part of the AJ. For this reason, we find Employee's argument to be unpersuasive.

Concerning Specification No. 2, Agency purports that Employee was "less than truthful

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and general welfare of the American people." The District's drug use directive does not specifically address its policy with respect to employees who have lawfully obtained a controlled substance from a medical healthcare provider for legitimate reasons. Clarification and specification regarding such would be useful in providing guidance to this Office for adjudication purposes.

[21] *Panel Findings of Fact.*

to several Police and Fire Clinic physicians about the narcotic medications [Employee was] taking and the injuries for which [he] [received] treatment." Even when construed in a light most favorable to Agency, this allegation lacks specificity and is ambiguous, at best. Agency provides no legal standard for assessing misconduct as it relates to Employee being less than truthful. Nor, does it offer any credible facts to support it position that Employee's statements to Dr. Lastrapes violated General Order 201.26. This is not to say that Employee's act of obtaining an excessive amount of controlled narcotics was proper. However, Agency fails to identify which PFC physicians it was referring to in relation to this specification. It further fails to pinpoint the dates on which Employee proffered "less than truthful" information to PFC physicians. For this reason, this Board cannot soundly conclude that Charge No. 3, Specification No. 2 was based on substantial evidence.

Charge No. 4: Violation of General Order 120.21, Table of Offenses & Penalties, Part A.

Lastly, Agency charged Employee with "any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force...." Agency based its charge on Employee's act of obtaining narcotics from different providers after being advised by Dr. John Felley and Dr. Z. Chris that Aetna insurance notified them, in writing, that Employee was receiving prescriptions from several providers. It is Agency's contention that Employee knew that this behavior was not proper. Conversely, Employee disputes this allegation and states that Agency's specification is defective because it fails to state facts which constitute actual misconduct. This Board disagrees and finds that Charge No. 4, Specification No. 1, is based on substantial evidence.

During his investigation with Agent Ikner, Dr. Feeley acknowledged receiving notices from Employee's medical insurance provider, Aetna, in February and August of 2011. Aetna

advised Dr. Feeley that Employee was "red flagged" because he was seeking prescriptions for narcotics from multiple providers. Yet, he stated that he continued to prescribe medications to Employee. Dr. Feeley further stated that he did not think anything was wrong with prescribing a narcotic to Employee for his back pain in spite of Aetna's "red flag" notification.[22] Similarly, Dr. Z. Chris acknowledged receiving notice from Aetna in 2011 stating that Employee was seeing multiple doctors for pain medication. Dr. Z. Chris subsequently called Employee to inform him about the notice and told him that the DEA probably received the same warning letter.

The conduct of Employee's medical providers is not at issue in this case, as they exercised their professional judgment in prescribing Employee medications after being warned by Aetna that Employee had received hundreds of controlled narcotics over the years. However, Employee made misrepresentations to these providers and failed to disclose that he had access to the same prescriptions for identical ailments even after being warned that his activities were problematic. Of most concern, Employee was under the influence of a large amount of controlled substances while on full duty and failed to notify Agency of his status. This misconduct is prejudicial to the good order of the police force because Employee exercised a continuous and deliberate ploy to obtain narcotics, which, if used in excess or improperly, placed both Employee and the public at risk of danger. Therefore, this Board finds that the AJ did not err in upholding Charge No. 4, Specification No. 1.

Conclusion

Based on the foregoing, this Board finds that the Initial Decision was based on substantial evidence in the record, notwithstanding the existence of contradicting evidence to support an alternate conclusion. The AJ properly addressed each charge and specification against Employee. Notwithstanding Charge No. 3, Specification No. 2, the AJ's conclusions of law flowed

[22] *Agency Answer to Petition for Appeal*, Tab 1, Attachment #16.

rationally from the evidence presented. Thus, we can find no credible basis for disturbing the AJ's conclusion that Employee's termination was proper. Consequently, we must deny Employee's Petition for Review.

ORDER

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

FOR THE BOARD:

Sheree L. Price

Sheree L. Price, Chair

Vera M. Abbott

Vera M. Abbott

Patricia Hobson Wilson

Patricia Hobson Wilson

P. Victoria Williams

P. Victoria Williams

Jelani Freeman

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

CERTIFICATE OF SERVICE

I certify that the attached **OPINION AND ORDER** was sent by regular mail on this day to:

Michael Skelly
2757 S. Glebe Road
#303
Arlington, VA 22206

Robert Deso, Esq.
1776 K Street, NW
Suite 830
Washington, DC 20006

Frank McDougald, Esq.
Office of the Attorney General
For the District of Columbia
441 4th St., NW
Room 1180N
Washington, DC 20001

Katrina Hill
Clerk

March 22, 2018
Date

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

REPLY TO:
955 L'Enfant Plaza, S.W.
Suite 2500
Washington, DC 20024
(202)727-0004
FAX (202)727-5631

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

MICHAEL SKELLY,

Petitioner,

v.

DISTRICT OF COLUMBIA
OFFICE OF EMPLOYEE APPEALS,
Respondent.

Case No. 2018 CA 002463 P(MPA)

Judge Neal E. Kravitz

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Michael Skelly v. Metropolitan Police Department,* OEA Matter No. 1601-0001-16. The record consists of two volumes containing twenty-six (26) tabs.

Wynter Clarke
Wynter Clarke
Paralegal Specialist

LASHEKA BROWN BASSEY NOTARY PUBLIC MY COMMISSION EXPIRES 6/14/2021 DISTRICT OF COLUMBIA

District of Columbia: SS
Subscribed and Sworn to before me
this 29th day of June, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

MICHAEL SKELLY, Petitioner v. DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS, Respondent.	Case No. 2018 CA 002463 P(MPA) Judge Neal E. Kravitz **Next Event: Status Hearing** **November 2, 2018 at 10:00 a.m.**

OFFICE OF EMPLOYEE APPEALS'
STATEMENT IN LIEU OF BRIEF

Pursuant to the Scheduling Order that was entered on July 6, 2018, Respondent Office of Employee Appeals submits that it relies on the final decision of its Board in the matter of *Michael Skelly v. Metropolitan Police Department*, OEA Matter Number 1601-0001-16 (March 22, 2018) as its statement in lieu of brief. The final decision is attached hereto as Exhibit #1.

Respectfully submitted

Lasheka Brown Bassey

Lasheka Brown Bassey
D.C. Bar # 489370
General Counsel
D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024
202.727.0738
Lasheka.Brown@dc.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of October, 2018, the forgoing Office of Employee Appeals' Statement in Lieu of Brief was served via the Court's electronic filing system, CaseFileXpress.com to the following:

Robert E. Deso

Andrea Comentale

Frank McDougald

Respectfully submitted,

Lasheka Brown Bassey

Lasheka Brown Bassey
D.C. Bar # 489370
General Counsel
D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024
202.727.0738
Lasheka.Brown@dc.gov

Exhibit 1

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MICHAEL SKELLY,	)	OEA Matter No. 1601-0001-16
Employee	)	
	)	
v.	)	Date of Issuance: March 22, 2018
	)	
METROPOLITAN	)	
POLICE DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Michael Skelly ("Employee") worked as a Sergeant with the Metropolitan Police Department ("Agency"). On October 15, 2014, Agency issued a Notice of Proposed Adverse Action, charging Employee with engaging in conduct constituting a crime; failure to obey orders and directives issued by the Chief of Police; conduct unbecoming of an officer; and prejudicial conduct. The charges stemmed from Employee's arrest for receiving and filling prescriptions for multiple narcotics from different medical providers. Agency also alleged that Employee altered a prescription for Percocet and that he was untruthful in his communications with doctors regarding the prescriptions that he was taking. Employee subsequently requested to have an Adverse Action Panel ("Trial Panel") review the charges and specifications against him. After

holding an evidentiary hearing, the Trial Panel recommended that Employee be terminated based on each of the four charges. On June 2, 2015, Agency issued its Final Notice of Adverse Action, sustaining the Panel's recommendation. Employee's termination became effective on September 4, 2015.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on October 2, 2015. In his appeal, Employee argued that his termination was improper and requested that he be reinstated with back pay and benefits.[1] Agency filed its Answer to the Petition for Appeal on November 9, 2015. It denied that Employee was wrongfully terminated and requested a hearing.[2]

An OEA Administrative Judge ("AJ") was assigned to the matter in January of 2016. On April 4, 2016, the AJ held a prehearing conference to assess the parties' arguments. During the conference, the AJ determined that an evidentiary hearing was not warranted. The parties were then ordered to submit briefs addressing whether the Trial Panel's decision was supported by substantial evidence; whether Agency committed harmful procedural error; and whether Agency's termination action was taken in accordance with all applicable laws, rules, and regulations.[3]

In his brief, Employee alleged that Agency failed to state a specific offense in support of its assertion that he violated U.S. Code Title 21-843 because there was no evidence to prove that he was involved in deception and/or fraud. Employee also contended that he did not commit a crime by altering a prescription for Percocet and that this charge was based upon unsubstantiated hearsay testimony. He further stated that he did not violate Agency's drug policy because the directive does not prohibit employees from possessing or taking lawfully prescribed medications

[1] *Petition for Appeal* (October 2, 2015).
[2] *Agency Answer to Petition for Appeal* (November 9, 2015).
[3] *Order on Briefs* (May 26, 2016).

at work. Moreover, Employee opined that the conduct unbecoming charge could not be supported because the accompanying specifications erroneously relied on the credibility of Dr. Lastrapes, a Police and Fire Chief Physician ("PFC"), who did not testify at the Trial Panel and did not provide an affidavit or written statement.

Next, Employee posited that he was denied due process regarding Agency's allegation that he was less than truthful to PFC physicians because he was unable to adequately defend against the charge provided in Agency's proposed notice. Lastly, Employee claimed that the prejudicial conduct charge could not be sustained because there was no rule or regulation which prohibited him from continuing to take medications prescribed by his treating physicians. Therefore, Employee requested that the Trial Panel's decision be reversed and that Agency's termination action be overturned.[4]

In response, Agency asserted that its conclusions regarding Employee's misconduct were supported by substantial evidence. It stated that the evidence reflected the excessive amounts of controlled narcotics that Employee was taking and the unlawful methods by which he was able to obtain prescriptions for the drugs. In addition, Agency provided that the Trial Panel had the opportunity to observe each witness's demeanor and assess their credibility, ultimately determining that Employee did not provide credible testimony. Agency claimed that the act of engaging in a scheme to obtain controlled substances from different providers was criminal behavior and violated U.S. Code Title 21-843. Further, it argued that Employee committed misconduct by providing untruthful information to PFC physicians about the medications he was taking and the illnesses for which he was receiving treatment. As a result, Agency requested that the AJ affirm its termination action.[5]

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[4] *Employee Brief* (June 10, 2016).
[5] *Agency Brief* (July 27, 2016). Employee filed a Reply Brief on August 23, 2016, stating that the facts recited by

An Initial Decision was issued on May 17, 2017. The AJ first determined that under the holding in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002), OEA was limited to making a decision solely on the record if certain conditions were met.[6] Having determined that each condition set forth in *Pinkard* was satisfied, the AJ stated that the issues to be decided before OEA were whether the Trial Panel's decision was supported by substantial evidence; whether there was harmful procedural error; and whether Agency's termination action was done in accordance with applicable laws, rules, or regulations.[7]

Next, the AJ provided that Agency was not prevented from levying administrative charges against Employee for the same criminal violations which were previously rejected by federal prosecutors in D.C. and Virginia because they were expunged. The AJ noted that criminal charges were different in scope and nature from administrative charges. Thus, the declination letter issued by the U.S. Attorney's Office did not require that the corresponding administrative personnel charges be withdrawn.

Next, the AJ concluded that there was substantial evidence in the record to support a

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Agency did not support the charges and specifications against him. Employee also reiterated his previous arguments and maintained that Agency's charges were based entirely on unsubstantiated, irrelevant, and unreliable hearsay. *Employee Reply Brief* (August 23, 2016).

[6] *Initial Decision* (April 6, 2013). Under *Pinkard*, the following conditions must be met:

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
> 2. The employee has been subjected to an adverse action;
> 3.The employee is a member of a bargaining unit covered by a collective bargaining agreement;
> 4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard*, *i.e.*: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, Trial Board] 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 being taken against Employee.

[7] *Id.* at 2.

finding that Employee engaged in a scheme to obtain controlled substances, in violation of General Order ("GO") 120.21, Attachment A, Part A-7. He stated that under U.S. Code Title 21-843, Employee's behavior constituted misconduct that would be deemed a crime. Similarly, the AJ stated that Employee's alteration of a prescription for Percocet was an act which constituted a crime. Consequently, he held that Charge No. 1 properly alleged misconduct and should be sustained.

With respect to the failure to observe orders charge, the AJ determined that Employee violated Agency's Drug Free Work Place Directive, which prohibits the use of controlled substances in the workplace. According to the AJ, the record reflected that Employee was taking excessive amounts of controlled substances while on duty and failed to notify Agency. Thus, he sustained Charge No. 2.

Regarding the conduct unbecoming accusation, the AJ provided that Agency properly charged Employee with misconduct after he was untruthful to Dr. Lastrapes about his regular physician being out of town in an effort to obtain a prescription. Additionally, the AJ stated that Employee was untruthful to PFC physicians about the controlled substances he was taking and the injuries and illnesses for which he was receiving treatment.

Concerning the prejudicial conduct charge, the AJ concluded that Agency properly alleged misconduct for each specification. He noted that Employee displayed a continuing pattern of obtaining controlled substances from several providers, even after being told by his treating physicians that his actions were problematic. The AJ also dismissed Employee's argument that the record failed to prove that he was guilty of diversion under 21 U.S.C. § 843. He emphasized that a reading of the statute's plain meaning only required a showing that a controlled substance was acquired by fraudulent means, not that the substance be obtained by

fraud and sold illegally. Further, the AJ noted that the Trial Panel correctly admitted and relied upon hearsay evidence during the evidentiary hearing, as such evidence is routinely permissible in administrative hearings. He also stated that the premise of Agency's adverse action was not that Employee was unlawfully prescribed controlled substances. Rather, the case against Employee was based on his acquisition of prescriptions through a devised scheme to obtain excessive amounts of controlled substances. Accordingly, the AJ concluded that the conduct of the treating physicians in prescribing medications to Employee was not the issue before the Trial Panel.

After examining the record, the AJ held that Agency's case was not based solely on the impeachable hearsay of a single witness, Agent Ikner, who was responsible for conducting the investigation into Employee's alleged misconduct. He opined that Agency's case was supported and corroborated by Agency's other witnesses, as well as the documentary evidence obtained from judicial bodies in surrounding jurisdictions.

Finally, the AJ held that the Trial Panel provided a detailed summary of the relevant evidence in its Findings of Fact and Conclusions of Law. He stated that the Panel was well within its right to assess witness credibility. While the AJ was sympathetic to Employee's need for painkillers due to his injuries, he ultimately concluded that the Trial Panel's findings were supported by substantial evidence. Consequently, Employee's termination was upheld.[8]

Employee disagreed and filed Petition for Review with OEA's Board. He argues that the Initial Decision is based on an erroneous interpretation of statute; that the AJ's conclusions of law were not based on substantial evidence; and that the Initial Decision failed to address all issues of law and fact that were properly raised in the appeal. Specifically, Employee asserts that

[8] *Initial Decision* (May 17, 2017). Neither party alleged that Agency committed a harmful procedural error or that it failed to conduct its adverse action in accordance with all applicable laws, rules, or regulations. Therefore, the AJ did not address these issues in his decision.

the AJ failed to address the requisite elements of the offense for each of the specifications contained in the charges levied against him, including identifying what evidence is considered relevant to each specification. He further states that the Initial Decision lacks compliance with the requisite judicial analysis procedures established by the Supreme Court and the Merit Systems Protection Board ("MSPB") pertinent to burden of proof, reliance on hearsay evidence, and the need for expert witness testimony. According to Employee, Agency failed to meet its burden of proof in showing that he used an excessive amount of controlled medications over the years or that he fashioned a "scheme" to improperly obtain the drugs. Lastly, he disputes the AJ's findings with respect to each of the charges and corresponding specifications provided in Agency's Notice of Proposed Adverse Action. Therefore, Employee asks this Board to reverse the Initial Decision.[9]

Agency filed a Brief in Opposition to Employee's Petition for Review on July 21, 2017. It claims that the Initial Decision is based substantial evidence and details arguments regarding why each charge and specification is supported by the record. Agency also reiterates its position that Employee engaged in a scheme to obtain excessive amounts of controlled substances for personal use; thereby, violating federal statute and Agency's policy related to drugs in the workplace. As such, Agency asks this Board to uphold the Initial Decision and deny Employee's Petition for Review.[10]

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[9] *Petition for Review* (July 21, 2017).

[10] *Agency's Opposition to Employee's Petition for Review* (July 21, 2017). Employee subsequently filed a Reply Brief on August 14, 2017, in which he responds to Agency's arguments regarding its position on the validity of the AJ's findings. On September 6, 2017, Agency filed a Motion to Strike Employee's Reply Brief, arguing that Employee was not permitted to file a Reply Brief to Agency's oppositional brief. Employee then filed an Opposition to Agency's Motion to Strike on September 20, 2017.

Substantial Evidence

On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[11] Under OEA Rule 628.1, 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.

Charge No. 1: Violation of General Order Series 120.21, Attachment A, Part A-7

Agency's first charge is based on Employee's violation of GO 120.21 for "[c]onviction of any member of the force in any court of competent jurisdiction…or is deemed to have been involved in the commission of any act which would constitute a crime, whether or not a court record reflects a conviction…." According to Agency, Specification No. 1 alleges that Employee violated U.S. Code Title 21-843 by receiving prescriptions for multiple narcotics from different providers and refilling them at various locations. However, Employee argues that the facts do not allege an actual violation of U.S. Code Title 21-843 or any other crime or misconduct which can constitute a basis for discipline. As a result, Employee claims that the AJ committed a clear error of law. U.S. Code Title 21-843 states the following in pertinent part:

> Whosoever knowingly and willfully executes, or attempts to execute, a scheme or artifice:

[11] *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003) and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

> (1) To defraud any healthcare benefit program; or
> (2) To obtain, by means of false or fraudulent pretenses, representations, or promises, any of the money or property owned by, or under the custody or control of, any health care benefit program, in connection with the delivery or payment for health care benefits, items, or services…

Here, there is substantial evidence in the record to uphold the AJ's findings with respect to this specification. Employee posits that Agency erroneously relied upon his arrest for "Obtaining Drug: Forgery or Altered Prescription" because the charge was accepted and dismissed by an Arlington County Magistrate after the U.S. Attorney for the District of Columbia declined to prosecute Employee following the conclusion of its investigation. However, the language of GO 120.21 does not require a conviction to sustain a charge for "…conduct which would constitute a crime, whether or not a court record reflects a conviction…." Rather, the underlying conduct must be examined to determine whether the employee's behavior was criminal in nature.[12]

Agency and the Drug Enforcement Agency ("DEA") Task Force conducted a joint investigation in collaboration with the Internal Affairs Department ("IAD") to hold several interviews with the multiple doctors who treated Employee. The evidence "led investigators to believe that probable cause…substantiated [the] allegation that [Employee] was obtaining prescriptions through false pretense, seeking medical care from multiple providers and being prescribed the same narcotic medications in addition to narcotics in excess of what was

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[12] *See Fullord-Cuthbertson v. Department of Corrections*, OEA Matter No. 1601-0018-13R16, *Opinion and Order on Petition for Review* (June 6, 2017). On Petition for Review, OEA's Board addressed whether an arrest is required to sustain a charge for "any act which constitutes a criminal offense whether or not the act results in a conviction" under D.C. Municipal Regulation §1603.3(h). The Board agreed with the AJ's reasoning that the purpose of the crafting the law was to ensure that an employee who commits a criminal act, such as fraud in the unlawful collection of unemployment insurance benefits, can be subject to an adverse personnel action, notwithstanding the disposition of any criminal charges brought against them.

needed."[13] The joint investigation also alleged that Employee was exploiting his health care insurance in a fraudulent manner, and utilized diversion tactics to obtain prescriptions in D.C., Maryland, and Virginia.

While it is true that he was never criminally convicted, Employee admitted to the Trial Panel that he refilled prescriptions prior to exhausting his current medication allowance in order to increase the original amount that was prescribed. Employee even acknowledged that he manipulated the system in order to refill prescriptions.[14] Further, Employee was prescribed medication from a physician after falsely informing the doctor that he suffered from Post-Traumatic Stress Disorder as a result of being a member of Agency's bomb squad.[15] This conduct violates U.S. Code Title 21-843 because Employee utilized false pretenses to obtain controlled substances. It should be noted that this Board agrees with Employee's supposition that the act of filling multiple prescriptions at different locations was not a criminal activity *per se*. However, obtaining said medications through unscrupulous methods and devises for the purpose of obtaining excessive amounts of narcotics is prohibited by statute. While he disagrees with the Panel's finding, there remains a considerable amount of evidence in the record to show that Employee engaged in conduct which constituted a crime. Accordingly, this Board finds that the AJ properly addressed this issue, and we agree with his determination that Charge No. 1, Specification No. 1 is supported by the evidence.

Assuming arguendo that there is insufficient proof in the record to demonstrate that Employee violated Title 21-843, the record is replete with evidence to support Charge No. 1,

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[13] Metropolitan Police Department Internal Affairs Bureau, Final Investigative Report Concerning Allegations of Misconduct by Sergeant Michael Skelly Patrol Services and School Security Bureau—Fifth District, IS #11-002950 (August 19, 2014).
[14] *Agency Answer to Petition for Appeal*, Adverse Action Panel's Findings of Fact and Conclusions of Law, Tab 1 (November 9, 2015).
[15] *Id.* As a part of Agency's investigation, Employee's personnel file revealed that he was never a member of an Explosive Ordinance Unit.

Specification No. 2. Employee claims that he never altered a prescription for Percocet that was written by Dr. Lastrapes by placing the number "1" in the refill area on the prescription (RX 103340). He maintains that Agent Ikner provided false testimony in this regard and that he attempted to influence Dr. Lastrapes' statement by suggesting what may have happened to the altered prescription. Yet, during his first and second investigative interviews, Dr. Lastrapes provided consistent accounts of the incident concerning RX 103340, stating that he did not place a "1" in the refill section for the Percocet prescription because a refill cannot be requested for that type of drug.[16] The Trial Panel agreed with Dr. Lastrapes and concluded that Employee knowingly falsified a prescription for a controlled substance. Conversely, the Panel found Employee's version of events to be untruthful. The Trial Panel was the finder of fact in this case, and the Board will not second guess its credibility determinations. As a result, we find that the AJ did not err in finding that there is substantial evidence in the record to sustain Charge No. 1, Specification No. 2.

Charge No. 2: Violation of General Order Series 120.21, Attachment A, Part A-16

Charge No. 2, Specification No. 1 was based on Employee's failure to obey orders and directives issued by the Chief of Police. Agency explains that Employee violated its Drug Free Work Place Directive, which addresses the regulation of drug use in the workplace. Employee argues that this specification does not allege that Employee engaged in any specific conduct which violated the directive because it does not prohibit the use of controlled substances in the workplace. Thus, Employee opines that even if he was taking excessive prescription medications while on duty, his actions did not violate the District's drug use policy. Under the policy,

[16] During his November 11, 2011 interview with Agent Ikner, Dr. Lastrapes was shown a prescription that Employee attempted to fill at a Rite Aid Pharmacy containing his signature. When asked if Dr. Lastrapes placed the number "1" on the refill line, he replied "[w]ith certainty, I did not write it. There are no refills on Schedule II drugs. You have to get an original every time."

employees of the District of Columbia government are prohibited from engaging in the unlawful manufacture, distribution, dispensing, possession, or use of a controlled substance in the work place.[17] The directive states the following in pertinent part:

> II. Drug Free Workplace Awareness Program
>
> > The use and/or position of illicit drugs by District Employees in the workplace impairs the government's ability to carry out its mission, and poses substantial dangers to employee, clients and the public.
> >
> > Those who use and/or possess drugs put themselves and those around them in danger of arrest and conviction for drug-related crimes.
> >
> > The District values its employees, and urges all individuals with substance abuse problems to seek counseling and rehabilitation.

Here, it is undisputed that Employee used controlled substances for numerous, legitimate injuries that he sustained over the years while on duty.[18] During the administrative hearing, Employee admitted that he was only supposed to take three pills a day. Instead, Employee ingested up to ten pills a day because he became resistant to the effects of the medication.[19] This Board disagrees with Employee's position and finds that there is substantial evidence in the record to uphold the AJ's determination that Employee violated the Drug Free Work Place Awareness Program. Employee obtained controlled narcotics by inappropriate pretenses and failed to notify Agency that he was using excessive amounts of the medications.[20] Under the

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[17] *Agency Answer to Petition for Appeal*, Tab 1.

[18] The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986. The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

[19] *Trial Panel Finding Number 64.*

[20] The Board must note that Title 21, Section 801(a)(1) of the United States Controlled Substance Act recognizes that many controlled drugs have a "useful and legitimate medical purpose and are necessary to maintain the health

program, employees who violate the directives are subject to disciplinary action. Accordingly, Charge No. 2, Specification No. 1 must be sustained.

Charge No. 3: Violation of General Order 120.21, Attachment A, Part A-12 and General Order 201.26, Part 1-B-22.

Next, Employee was charged with "[c]onduct unbecoming of an officer, including acts detrimental to good discipline, conduct that would affect adversely the employee's or the agency's ability to perform effectively...." In Specification No. 1, Agency alleges that Employee was willfully and knowingly untruthful to Dr. Lastrapes when he obtained a prescription for Percocet by fraudulent means when Employee stated that his private physician was out of town on March 17, 2011. Employee counters Agency's assertion and argues that he never requested a prescription from Dr. Lastrapes and that the doctor decided on his own initiative to write him a prescription for Percocet.

The Trial Panel dismissed Employee's argument, stating that "[Employee] was untruthful when he advised PFC Physician Lastrapes that his personal physician was out of town which resulted in Dr. Lastrapes prescribing [Employee] Percocet."[21] While Employee questions the veracity of Agent Ikner's recitation of events during the investigation, the AJ was reasonable in concluding that Agency met its burden of proof with respect to this specification. The Panel was permitted to rely upon hearsay evidence as a basis for reaching its conclusion and there is no clear error on the part of the AJ. For this reason, we find Employee's argument to be unpersuasive.

Concerning Specification No. 2, Agency purports that Employee was "less than truthful

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and general welfare of the American people." The District's drug use directive does not specifically address its policy with respect to employees who have lawfully obtained a controlled substance from a medical healthcare provider for legitimate reasons. Clarification and specification regarding such would be useful in providing guidance to this Office for adjudication purposes.

[21] *Panel Findings of Fact.*

to several Police and Fire Clinic physicians about the narcotic medications [Employee was] taking and the injuries for which [he] [received] treatment." Even when construed in a light most favorable to Agency, this allegation lacks specificity and is ambiguous, at best. Agency provides no legal standard for assessing misconduct as it relates to Employee being less than truthful. Nor, does it offer any credible facts to support it position that Employee's statements to Dr. Lastrapes violated General Order 201.26. This is not to say that Employee's act of obtaining an excessive amount of controlled narcotics was proper. However, Agency fails to identify which PFC physicians it was referring to in relation to this specification. It further fails to pinpoint the dates on which Employee proffered "less than truthful" information to PFC physicians. For this reason, this Board cannot soundly conclude that Charge No. 3, Specification No. 2 was based on substantial evidence.

Charge No. 4: Violation of General Order 120.21, Table of Offenses & Penalties, Part A.

Lastly, Agency charged Employee with "any conduct not specifically set forth in this order, which is prejudicial to the reputation and good order of the police force...." Agency based its charge on Employee's act of obtaining narcotics from different providers after being advised by Dr. John Felley and Dr. Z. Chris that Aetna insurance notified them, in writing, that Employee was receiving prescriptions from several providers. It is Agency's contention that Employee knew that this behavior was not proper. Conversely, Employee disputes this allegation and states that Agency's specification is defective because it fails to state facts which constitute actual misconduct. This Board disagrees and finds that Charge No. 4, Specification No. 1, is based on substantial evidence.

During his investigation with Agent Ikner, Dr. Feeley acknowledged receiving notices from Employee's medical insurance provider, Aetna, in February and August of 2011. Aetna

advised Dr. Feeley that Employee was "red flagged" because he was seeking prescriptions for narcotics from multiple providers. Yet, he stated that he continued to prescribe medications to Employee. Dr. Feeley further stated that he did not think anything was wrong with prescribing a narcotic to Employee for his back pain in spite of Aetna's "red flag" notification.[22] Similarly, Dr. Z. Chris acknowledged receiving notice from Aetna in 2011 stating that Employee was seeing multiple doctors for pain medication. Dr. Z. Chris subsequently called Employee to inform him about the notice and told him that the DEA probably received the same warning letter.

The conduct of Employee's medical providers is not at issue in this case, as they exercised their professional judgment in prescribing Employee medications after being warned by Aetna that Employee had received hundreds of controlled narcotics over the years. However, Employee made misrepresentations to these providers and failed to disclose that he had access to the same prescriptions for identical ailments even after being warned that his activities were problematic. Of most concern, Employee was under the influence of a large amount of controlled substances while on full duty and failed to notify Agency of his status. This misconduct is prejudicial to the good order of the police force because Employee exercised a continuous and deliberate ploy to obtain narcotics, which, if used in excess or improperly, placed both Employee and the public at risk of danger. Therefore, this Board finds that the AJ did not err in upholding Charge No. 4, Specification No. 1.

Conclusion

Based on the foregoing, this Board finds that the Initial Decision was based on substantial evidence in the record, notwithstanding the existence of contradicting evidence to support an alternate conclusion. The AJ properly addressed each charge and specification against Employee. Notwithstanding Charge No. 3, Specification No. 2, the AJ's conclusions of law flowed

[22] *Agency Answer to Petition for Appeal*, Tab 1, Attachment #16.

rationally from the evidence presented. Thus, we can find no credible basis for disturbing the AJ's conclusion that Employee's termination was proper. Consequently, we must deny Employee's Petition for Review.

ORDER

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

FOR THE BOARD:

Sheree L. Price

Sheree L. Price, Chair

Vera M. Abbott

Vera M. Abbott

Patricia Hobson Wilson

Patricia Hobson Wilson

P. Victoria Williams

P. Victoria Williams

Elann Freeman

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

CERTIFICATE OF SERVICE

I certify that the attached **OPINION AND ORDER** was sent by regular mail on this day to:

Michael Skelly
2757 S. Glebe Road
#303
Arlington, VA 22206

Robert Deso, Esq.
1776 K Street, NW
Suite 830
Washington, DC 20006

Frank McDougald, Esq.
Office of the Attorney General
For the District of Columbia
441 4th St., NW
Room 1180N
Washington, DC 20001

Katrina Hill
Clerk

March 22, 2018
Date

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

ELLA B. CUFF
3722 Grant Place, N.E.
Washington, D.C. 20019,

Petitioner,

v.

Case Number:

DISTRICT OF COLUMBIA
OFFICE OF EMPLOYEE APPEALS
1100 4th Street, S.W., Suite 620 East
Washington, D.C. 20024,

Serve on: Lasheka Brown Bassey, Esq.
General Counsel
Office of Employee Appeals
1100 4th Street, S.W.
Suite 620 East
Washington, DC 20024

and

DISTRICT OF COLUMBIA,
A Municipal Corporation

Serve: Mayor Muriel Bowser
c/o Lauren C. Vaughan
Office of the Secretary for the
Mayor of the District of Columbia
John A. Wilson Building
Suite 419
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Serve: Attorney General
for the District of Columbia
441 4th Street, N.W.
Suite 600S
Washington, D.C. 20001

Respondents.

PETITION FOR REVIEW OF AGENCY DECISION

Petitioner Ella B. Cuff, through counsel, HANNON LAW GROUP, LLP, respectfully present this Petition for Review of the April 2, 2018 Initial Decision on Remand of the Office of Employee Appeals ("OEA"). A copy of that Initial Decision on Remand is attached to this Petition at Exhibit 1.

STATEMENT OF THE FACTS

Petitioner Ella B. Cuff joined the Department of Real Estate Services, (currently renamed the Department of General Services) in 1987. As a part of her job, she was required to qualify on a bi-annual basis to carry her service weapon. Pursuant to PSPD General Order 901.1 on handling service weapons, the qualification periods ran from January 1st through June 30th and from July 1st through December 31st. According to PSPD General Order 901.1, and the Agency during discovery in this case, the qualification procedures are as follows:

> If a first attempt to qualify is unsuccessful, as directed by the range officer, an officer is required to return to the firing range on his or her next tour of duty to qualify or receive additional training as may be directed by the range officer. If the officer is still unsuccessful on the range after having undergone 40 hours of classroom instruction and retesting, the officer is referred to the PFC Clinic for a medical evaluation to determine if there is a medical problem prohibiting the successful completion of re-training. If the medical evaluation determines that there is no medical problem prohibiting successful completion of re-training, the officer is permitted an additional 40 hours of re-training. This re-training includes another opportunity to re-test at the firing range. If the officer is then unable to qualify, the office is then recommended for termination.

(PSPD General Order 901.1; Agency's Ans. to Interrog.)

Ofc. Cuff was assigned to Phase 1 of the 2011 bi-annual firearms qualifications course, which was scheduled for February 17, 2011. The qualifications took place at the indoor range at the police academy and occurred under the supervision of Lieutenant Matthew Sheldon and Chief Firearms Instructor and Commander James Prentice. Training notes from Lieutenant Sheldon and Commander Prentice indicate that Ofc. Cuff failed to qualify on February 17, 2011

after six attempts. Pursuant to PSPD General Order 901.1, Ofc. Cuff was then served with a PD Form 77 (Notification of Revocation of Police Powers) and surrendered her service weapon. (PSPD General Order, Handling Service Weapons, 901.1(V)(C)(5)-(6)). Lieutenant Sheldon scheduled Ofc. Cuff for the next available day, February 22, 2011, to re-qualify. At this session, Ofc. Cuff completed one passing score.

Pursuant to the PSPD General Order, 901.1(V)(C)(10), Ofc. Cuff was then entitled to and did receive 40 hours of training in efforts to meet the PSPD bi-annual qualification requirements. The training began on February 23, 2011 and included classroom instruction. The training was overseen by Lieutenant Sheldon and Sergeant John Barbusin. After the initial 40-hour training, Ofc. Cuff attempted to qualify again on March 3, 2011. There, she passed the daylight course, but failed the lowlight course.

After the March 3, 2011 qualification attempt, and in accordance with PSPD General Order, Handling Service Weapons, 901.1(V)(C)(10), Ofc. Cuff was sent to the Police and Fire Clinic on July 13, 2011, for a fitness for duty evaluation to determine if she was able to perform the duties of her position and to carry a weapon.[1] The same day, the examining physician determined that Ofc. Cuff had no medical or psychological problems that would prevent her from qualifying at the range.

Five days after the report from the Police and Fire Clinic, Stephen Watkins, Assistant Chief of Police for the Protective Services Police Department, issued a Termination Recommendation for Ofc. Cuff for her failure to qualify to maintain her weapon. Chief of Police, Louis Cannon adopted the Termination Recommendation and issued an Advance Written

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1 The PSPD General Order states in relevant part that "[a]fter a maximum of forty (40) hours of training, should a member fail to successfully complete retraining, the Commander of the Training Section shall direct the member to a qualified medical provider for an evaluation to determine if a medical problem is prohibiting the member's successful completion of retraining."

Notice of Proposed Removal on August 8, 2011, detailing the alleged cause of removal as "neglect of duty and incompetence" for failing her firearms qualification. Ofc. Cuff was then placed on administrative leave effective August 8, 2011. This Agency action was wrong because at that time Ofc. Cuff had not undergone the required 40-hours of additional remedial training and last qualification attempt following her fitness for duty evaluation in accordance with PSPD General Order 901.1(V)(C)(10)(a)-(b).

On September 30, 2011, the Deciding Official, Brian J. Hanlon issued a Final Decision, sustaining the proposed action for removal. The effective date of Ms. Cuff's removal was October 4, 2011 at the close of business. Ofc. Cuff filed her timely *pro se* appeal of the Agency's removal action to the Office of Employee Appeals (OEA) on October 14, 2011.

In early 2012, while her appeal was pending at OEA, Ofc. Cuff received an unsolicited package from the District of Columbia government that included retirement information. Because she did not request this retirement information, Ofc. Cuff contacted the D.C. Department of Human Resources ("DCHR") for an explanation of the process. With the assistance of DCHR, she completed the paperwork given to her and retired under "Discontinued Service Retirement." At the time of her retirement, Ofc. Cuff was not employed by any government agency of the District of Columbia.

Discontinued Service Retirement is a form of "involuntary retirement" based on an employee's involuntary separation. The effective date of her retirement was backdated to October 4, 2011—the same date as her removal. According to DCHR records, Ofc. Cuff's removal remains reflected in her official personnel file following her retirement and DCHR still considers Ofc. Cuff to have been removed from her position at DGS. At no point did DCHR or any other D.C. government agency explain to Ofc. Cuff the import of this retroactive retirement,

or explain what sort of rights she would be forfeiting by completing the retirement paperwork. Ofc. Cuff's retirement documentation properly reflects that the retirement was based on "Discontinued Service" due to "involuntary separation" from the Agency. Soon thereafter, she began receiving retirement payments. However, unbeknownst to Ofc. Cuff, DCHR processed Ofc. Cuff's retirement Standard Form 50 as a retirement in lieu of involuntary action "Retirement-ILIA"—which is a form of "voluntary retirement." At the time of her retirement, Ofc. Cuff never intended for her retirement to be processed as a retirement in lieu of her removal and DCHR did not inform her that her retirement would be processed in such as way. Nor did DCHR provide her with a copy of her Standard Form 50.

STATEMENT OF AGENCY PROCEEDINGS

Ofc. Cuff filed a *pro se* Petition for Appeal with the Office of Employee Appeals on October 14, 2011 in OEA Matter No. 1601-0009-12 claiming that the Agency's action was unjustified and the penalty was otherwise improper. On August 8, 2013, HANNON LAW GROUP, LLP, entered their appearance with OEA as Ofc. Cuff's designated representatives. For nearly two years, the parties litigated the case until they reached a settlement. However, on February 24, 2014, the Agency reneged and filed an Amended Answer and Motion to Dismiss alleging, for the first time, that OEA did not have jurisdiction over Ofc. Cuff's appeal because she voluntarily retired. The Agency rested its entire theory that Ofc. Cuff voluntarily retired—in lieu of her removal (despite continuing to pursue her appeal, and the Agency continuing to defend it)—on the Standard Form 50 following her retirement which reflects "Retirement-ILIA" as the nature of action. On March 4, 2014, the Administrative Judge issued an Order directing the parties to submit briefs regarding jurisdiction.

On March 28, 2014, Ofc. Cuff filed her brief arguing that OEA has jurisdiction over her appeal. In relevant part, Ofc. Cuff averred in part that 1) she was in fact removed and therefore suffered an adverse action; and 2) she did not voluntarily retire under *D.C. Metro Police Dep't v. Stanley*, 942 A.2d 1172 (D.C. 2008), citing *Covington v. Department of Health & Human Services*, 750 F.2d 937 (Fed. Cir. 1984), which holds that an employee can establish involuntary retirement if her retirement is induced by the employer's withholding of material information. On June 30, 2014, the Administrative Judge issued an Initial Decision finding that "there is no evidence in the record to support a finding that the Employee's retirement was wrongfully extracted by deception or coercive agency action which would render her retirement involuntary for purposes of establishing jurisdiction." As a result, the case was dismissed for lack of jurisdiction.

On August 4, 2014, Ofc. Cuff filed a Petition for Review with the OEA Board. The Agency filed its Answer on September 8, 2014, and Ofc. Cuff filed her Reply to the Agency's Answer on September 22, 2014. On March 29, 2016, nearly 20 months after filing her Petition for Review, OEA issued an Opinion and Order denying Ofc. Cuff's Petition.

On April 22, 2016, Ofc. Cuff petitioned the Superior Court for review of the OEA Board's decision. The matter was assigned to the Honorable Robert R. Rigsby in *Cuff v. D.C. Office of Employee Appeals, et al.*, 2016 CA 003043 P(MPA). On April 17, 2017, after briefing by both parties, Judge Rigsby issued an Order granting Ofc. Cuff's petition. Judge Rigsby ruled that OEA erred by limiting how an employee can establish involuntary retirement to only those induced by agency misinformation or coercion, and remanded the case for an evidentiary hearing to determine whether Ofc. Cuff's retirement was involuntary under the standards set forth in

Stanley and *Covington*, which permit a showing if induced by a withholding of information. (Ord., 2016 CA 003043 P(MPA) (D.C. Super. Ct. Apr. 17, 2017)).

On remand, the case was assigned to Senior Administrative Judge Joseph E. Lim and both parties conducted discovery. At the close of discovery, the parties filed their prehearing submissions on September 7, 2017. The same day, Ofc. Cuff filed her motion for summary disposition asking OEA to rule based on the record evidence, and to find as a matter of law that: 1) OEA has jurisdiction over her appeal; 2) Ofc. Cuff was not removed for cause; and 3) her removal was unreasonable. During a phone conference on September 13, 2017, SAJ Lim determined that he could not make a ruling on Ofc. Cuff's dispositive motion without holding an evidentiary hearing on the jurisdiction issue pursuant to Judge Rigsby's Order. Instead, SAJ Lim decided to bifurcate the issues and to hold an evidentiary hearing solely on the jurisdiction issue. SAJ Lim also reminded and gave the Agency the opportunity to file its opposition to Ofc. Cuff's motion for summary disposition in accordance with OEA Rule 610.3 which requires that it be filed within 10 calendar days after service. However, the Agency failed to file an opposition.

The evidentiary hearing was held on November 20, 2017. SAJ Lim heard testimony from Shawn Winslow, the human resources specialist who assisted Ofc. Cuff with her retirement process, and from Ofc. Cuff, who provided information surrounding her removal from DGS and her subsequent retirement. At the close of the evidentiary hearing, SAJ Lim asked the parties to submit post-hearing briefs to assist in his determination as to whether Ofc. Cuff's appeal should be dismissed for lack of jurisdiction. Both parties filed their briefs addressing the issue. In her brief, Ofc. Cuff argued that OEA has jurisdiction over her matter. She argued that 1) her retirement following the filing of her appeal to OEA does not preclude OEA from adjudicating her appeal on the merits; and 2) her retirement was involuntary under *Stanley* and *Covington* by

the District's failure to inform her that her retirement would preclude her OEA appeal and its failure to inform her that it would process her retirement under discontinued service retirement as a retirement in lieu of her removal.

DESCRIPTION OF JUDGMENT OR ORDER

On April 2, 2018, SAJ Lim issued an Initial Decision on Remand dismissing Ofc. Cuff's appeal for lack of jurisdiction. In his decision, SAJ Lim found that Ofc. Cuff's decision to retire was voluntary. Although SAJ Lim heard no evidence on the merits of the removal during the hearing and there was a pending motion for summary disposition before him on that issue, he also found that Ofc. Cuff "[did] not deny that Agency had good cause for removal", claiming that "it is undisputed that Employee could not qualify with her service weapon...and thus, Agency had support for its removal decision." (Initial Decision on Remand at 12.) That decision became final on May 7, 2018. Ofc. Cuff appeals the Initial Decision on Remand dismissing her appeal for lack of jurisdiction.

REQUEST FOR RELIEF

Ofc. Cuff requests that this Court overturn the Office of Employee Appeals April 2, 2018 Initial Decision on Remand, and order that she be reinstated to her respective position with all leave and benefits, and awarded back pay and payments of all costs and attorneys' fees for the cost of defending this action.

NAME AND ADDRESS OF PARTIES

Addresses of Petitioners

Ella B. Cuff
3722 Grant Place, N.E.
Washington, D.C. 20019

Address of Respondent

District of Columbia Office of Employee Appeals
1100 4th Street, S.W., Suite 620 East
Washington, D.C. 20024

Serve on:

Lasheka Brown Bassey, Esq.
General Counsel
Office of Employee Appeals
1100 4th Street, S.W.
Suite 620 East
Washington, DC 20024

NAMES AND ADDRESSES OF PARTIES TO BE SERVED

Name	Address
Counsel for Employees, Petitioners	J. Michael Hannon, Esq. Talon R. Hurst, Esq. Hannon Law Group, LLP 333 8th Street, N.E. Washington, DC 20002
Office of Employee Appeals, Respondent	Lasheka Brown Bassey, Esq. General Counsel 1100 4th Street, S.W. Suite 620 East Washington, DC 20024
Counsel for Agency	C. Vaughn Adams, Esq. D.C. Department of General Services 2000 14th Street, N.W., 8th Floor Washington, D.C. 20009

Dated: May 8, 2018

Respectfully submitted,

HANNON LAW GROUP, LLP

/s/ Talon R. Hurst

J. Michael Hannon, #352536
Talon R. Hurst, #1031716
333 8th Street, N.E.
Washington, DC 20002
(202) 232-1907
(202) 232-3704 Facsimile
jhannon@hannonlawgroup.com
thurst@hannonlawgroup.com

Counsel for Petitioner Ella B. Cuff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing **Petition for Review of Agency Decision** was sent via first class U.S. mail, postage prepaid, this 8th day of May 2018 to:

Karl A. Racine
Attorney General
Office of the Attorney General
for the District of Columbia
441 Fourth Street, N.W., Suite 1180N
Washington, D.C. 20001

C. Vaughn Adams, Esq.
Department of General Services
2000 14th Street, N.W., 8th Floor
Washington, D.C. 20009

Lasheka Brown Bassey, Esq.
General Counsel
Office of Employee Appeals
1100 4th Street, S.W.
Suite 620 East
Washington, DC 20024

Mayor Muriel Bowser
c/o Lauren C. Vaughan
Office of the Secretary for the
Mayor of the District of Columbia
John A. Wilson Building
Suite 419
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

/s/ Talon R. Hurst
Talon R. Hurst

EXHIBIT 1

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
Ella Cuff Employee	OEA Matter No. 1601-0009-12R17
v.	Date of Issuance: April 17, 2018[1]
D.C. Department of General Services[2] Agency	Joseph E. Lim, Esq. Senior Administrative Judge

Talon Hurst, Esq., Employee Representative
C. Vaughn Adams, Esq., Agency Representative

INITIAL DECISION ON REMAND

INTRODUCTION

On October 14, 2011, Ella Cuff ("Employee") appealed to the Office of Employee Appeals ("OEA") from the Department of General Services' ("DGS" or "Agency") action of terminating her employment effective October 4, 2011, for "any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations." Specifically, Employee, a Protective Services Officer, failed to successfully qualify with a firearm as required by her position.

Administrative Judge Sommer Murphy was assigned this matter in July of 2013. On July 10, 2014, Judge Murphy granted Agency's Motion to Dismiss and dismissed Employee's appeal for lack of jurisdiction due to Employee's retirement in lieu of being terminated.[3]

Employee filed a Petition for Review with the Office of Employee Appeals ("OEA") Board, alleging that she had involuntarily retired. On March 29, 2016, the OEA Board upheld

1 This Decision is identical to the one issued April 2, 2018, except that this is correctly titled as Initial Decision on Remand.
2 The Department of Real Estate Services merged into the Department of General Services in 2011.
3 *Cuff v. D.C. Dept. of General Services,* OEA Matter No. 1601-0009-12, (July 10, 2014).

Judge Murphy's Initial Decision, holding that Employee failed to prove involuntary retirement as there was no evidence that Agency coerced her or gave her misleading information.[4]

Employee appealed the OEA Board's decision, and on April 21, 2017, the District of Columbia Superior Court remanded this matter to OEA for a hearing on the voluntariness of Employee's retirement.[5]

Because Judge Murphy moved to the General Counsel's Office, this matter was reassigned to me. I held a Status Conference on May 24, 2017, and approved the commencement of discovery. I held a hearing on November 20, 2017. I closed the record on January 8, 2018, after the submission of closing arguments.

JURISDICTION

Jurisdiction in this matter has not been established.

ISSUE

Whether this matter should be dismissed for lack of jurisdiction.

JOINT STIPULATION OF FACTS

1. Employee Ella Cuff was hired by the Department of General Services, formerly known as the Department of Real Estate Services, in June of 1987.

2. Employee was hired under the Civil Service Retirement System ("CSRS").

3. The U.S. Office of Personnel Management has overall responsibility for administering the CSRS.

4. Protective Services Police Department ("PSPD") General Order 901.1, Handling Service Weapons, describes the protocol for Protective Services Department ("PSD") officers for qualifying for their service weapons at the shooting range.

5. According to PSPD General Order 901.1 and the Agency's Amended Answer to Employee's interrogatories, "If a first attempt to qualify is unsuccessful, as directed by the range officer, an officer is required to return to the firing range on his or her next tour of duty to qualify or receive additional training as may be directed by the range officer. If

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4 *Cuff v. D.C. Dept. of General Services,* OEA Matter No. 1601-0009-12, *Opinion and Order on Petition for Review* (March 29, 2016).
5 *Ella Cuff v. District of Columbia Office of Employee Appeals, et. al.,* 2016 CA 003043 P(MPA) (D.C. Super. Ct., April 17, 2017).

the officer is still unsuccessful on the range after having undergone 40 hours of classroom instruction and retesting, the officer is referred to the PFC Clinic for a medical evaluation to determine if there is a medical problem prohibiting the successful completion of re-training. If the medical evaluation determines that there is no medical problem prohibiting successful completion of re-training, the officer is permitted an additional 40 hours of re-training. This re-training includes another opportunity to re-test at the firing range. If the officer is then unable to qualify, the office is then recommended for termination."

6. On November 20, 2009, Employee received an Advance Notice of Proposed Removal from her position with the Protective Services Police Department.

7. In response to the November 20, 2009 Advance Notice of Proposed Removal, Ms. Ann-Kathryn So filed a response on behalf of Employee.

8. Employee was assigned to Phase 1 of the 2011 bi-annual firearms qualification course which was scheduled for February 17, 2011.

9. On February 17, 2011, Employee failed her first attempt to qualify under Phase 1 of the 2011 bi-annual qualification course.

10. On February 22, 2011, Employee failed her second attempt to qualify under Phase 1 of the 2011 bi-annual qualification course.

11. On February 23, 2011, Employee was assigned to begin remedial training.

12. On March 3, 2011, following 40 hours of remedial training, Employee made her third attempt at qualifying under Phase 1 of the 2011 bi-annual qualification course.

13. On March 3, 2011, Employee successfully shot the daylight course, but failed the low light course three times.

14. On April 12, 2011, Employee, through Attorney J. Michael Hannon of the Hannon Law Group, LLP, filed an appeal on a different matter, OEA Matter No.: 1601-0096-11, *Ella Cuff v. Department of Real Estate Services*. This matter was subsequently dismissed by Judge Sommer Murphy in *Ella Cuff v. Department of Real Estate Services*, OEA Matter No.: 1601-0096-11 (December 22, 2011).

15. On June 27, 2011, Stephen R. Watkins sent a memorandum to PFC Associates, LLC Police and Fire Clinic ("Police and Fire Clinic") Medical Director, Olusola Malomo, M.D., requesting a fitness for duty examination for Employee.

16. On July 13, 2011, Employee was sent to the Police and Fire Clinic for a fitness for duty examination.

17. On July 13, 2011, Police and Fire Clinic issued Employee her evaluation and determined that she was fit for duty.

18. Employee received no additional remedial training following her fitness for duty examination on July 13, 2011.

19. On August 8, 2011, Employee was served with an Advanced Written Notice of Proposed Removal.

20. The Advance Written Notice of Proposed Removal dated August 8, 2011, contained the following sentence: "You have the right to be represented by an attorney or other representative."

21. This Notice stated that Employee had made twenty one attempts at qualifying with only six successes, earning a 32% passing rate, and outlined Employee's right to respond to the notice and review material upon which the proposed action was based.

22. Sometime in September, 2011, Employee's employer, Department of Real Estate Services, merged into the Department of General Services.

23. On September 21, 2011, Hearing Officer Jamie Lantinen issued a recommendation to sustain the proposed removal.

24. On September 30, 2011, the Agency issued a Notice of Final Decision sustaining the proposed removal for neglect of duty and incompetence. The effective date for the removal was close of business on October 4, 2011.

25. On October 14, 2011, Employee filed a Petition for Appeal with the Office of Employee Appeals. The case was assigned OEA Matter No.: 1601-0009-12.

26. On November 14, 2011, the Agency filed its response to Employee's Petition for Appeal, arguing that Employee was removed for cause.

27. On January 25, 2012, Employee submitted her completed retirement application under discontinued service retirement to District of Columbia Human Resources Department (DCHR).

28. DCHR is the D.C. government agency solely responsible for processing Employee's retirement paperwork.

29. Shawn Winslow, then-employee specialist at the DCHR, assisted Employee with her retirement process.

30. Employee's former employer, DGS did not advise or process Employee's retirement paperwork nor did it have any authority to authorize Employee's retirement.

31. DCHR processed Employee's retirement with an effective date set retroactive to her last day of employment on October 4, 2011.

32. DCHR does not provide legal advice to former District employees seeking to retire.

33. According to testimony from DCHR and Mr. Winslow, DCHR does not train its staff to inform employees that by submitting retirement papers and completing the retirement process, they would forfeit any pending appeal.

34. Shawn Winslow of DCHR was not aware that Employee had a pending OEA appeal at the time he processed her retirement paperwork.

35. Mr. Winslow testified that he did not offer Employee any counseling on the effect her retirement may have on her pending appeal of her removal, and would have informed her to seek legal advice if she had asked.

36. DCHR is unaware of any government agencies that inform their employees that by submitting retirement papers, they would forfeit any pending appeals.

37. Mr. Winslow prepared the Standard Form 50 reflecting Employee's retirement.

38. Employee's SF-50, processed on February 3, 2012, states in Section 45. Remarks the following: "***(Separation/Termination) letter dated 09/28/2011. Employee elected to retire on Discontinued Service Retirement."

39. According to DCHR records, Employee's removal remains reflected in her official personnel file.

40. Although Employee was eligible to retire as of October 4, 2011, she was not required to accept retirement as of October 4, 2011. Employee was 61 in February of 2012.

41. On June 30, 2014, OEA Judge Sommer Murphy issued an Initial Decision[6] dismissing OEA Matter No. 1601-0009-12, Ella Cuff v. Department of Real Estate Services.

EVIDENCE

a. Shawn Winslow ("Winslow") testified as follows (Tr. 14-111).

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6 Judge Murphy subsequently issued an Errata and Addendum to the Initial Decision on July 10, 2014, and a second Errata and Addendum to the Initial Decision on July 21, 2014. There were no substantive changes made to the Decision. The Errata merely updated the names of the attorneys involved in the matter.

Winslow worked for Child Protective Services Agency as a Human Resources ("HR") manager.[7] During his tenure, he was the benefits and retirement specialist and processed retirements for District government employees.

Winslow testified that when an employee completed a signed retirement application, it goes to HR. Next, HR processed the Standard Form ("SF") 50, a form that depicted any action that has happened to an employee and Winslow would place the form into their personnel file. So long as an employee met the eligibility requirements of age and service and was not removed for misconduct, the employee may elect to retire.

Winslow explained the process for voluntary retirement under Federal civil service rules.[8] He stated that voluntary retirement could occur when an employee met the age and standard of years of service, eligibility to retire, or if the individual retired on their own volition. An involuntary retirement under civil service occurs when an employee is separated from District employment and choses to retire due to an involuntary separation. He further explained that it was also referred to as discontinued service retirement. Winslow stated that if an employee wanted to retire under the discontinued service retirement, the employee would have to submit an application for retirement. Winslow stated that the only difference between a discontinued service retirement and a voluntary retirement under civil service was that with a voluntary service retirement, it was the employee's choice to leave while they were still employed. With a discontinued service, or an involuntary service retirement, an employee elected to receive retirement because they were separated from their position. To determine if an employee was eligible for discontinued service retirement, HR would review the employee's years of service, age, and Agency's letter stating that they were terminated. The years of service necessary for retirement were the same, but with an involuntary service retirement, an employee had the option to retire because they were removed from their position for any other reason outside of a grievance, egregious act, or misconduct. Winslow stated that an employee would be unable to involuntarily separate or retire if they were separated for an egregious act or misconduct.

Winslow testified that retirement in lieu of involuntary action was the same as a discontinued service retirement. He stated that the age requirement for discontinued service retirement was at least fifty years of age with twenty years of service or any age and twenty-five years of service. Winslow explained that Employee selected involuntary separation as her retirement option because with involuntary separation, an employee had the option of returning to work for the District and resume contributing to her annuity plan. He further explained that an employee could receive their retirement check and receive an annuity. However, if the employee was later rehired by the District, their retirement check would stop and they were eligible to contribute back to the civil service again. When the employee voluntarily retires again, their retirement amount would be higher.

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7 Winslow was not offered as an expert witness, but as a factual witness.
8 D.C. employees hired before 1987 were under the Federal Civil Service. Employees hired afterwards were no longer entitled to be under Federal Civil Service.

Winslow stated that he assisted Employee with her retirement. While he could not recall the method that he used to communicate with Employee, Winslow said that it was either via email or by telephone. He stated that the effective date of Employee's termination was October 4, 2011. Winslow determined that Employee was eligible for discontinued service retirement because of her years of service plus Employee's age at the time of her separation. He said it takes 90 to 120 days to process a retirement and explained that Agency made sure Employee received a retroactive check that paid her from October of 2011 to March of 2012.

Winslow stated that HR does not train its staff to offer counseling to retiring District employees. He further explained that HR does not inform District employees that completing and submitting their retirement papers would cause them to forfeit any pending appeal rights that they might have. Thus he did not inform Employee that by filing for her retirement, she would forfeit her pending appeal before OEA.

Winslow stated that he was not aware that Employee had a pending case with the Office of Employee Appeals ("OEA"). However, if Employee had informed him, he would have told her to seek legal advice to determine how it would have impacted her appeal as that was not his area of expertise. Winslow testified that it took four months to process Employee's retirement. He explained that Employee submitted her paperwork on January 25, 2012, although her termination was October 4, 2011.

Winslow clarified that even if Employee had submitted her retirement application at a later date, she would not have forfeited her right to retire. He further explained that Employee initiated the retirement process because Agency cannot retire an employee unless the employee signed off on the application for retirement Form 2801. If Employee had not gone to HR to process her retirement, no action would have been taken. Additionally, Winslow stated that discontinued service retirement and retirement in lieu of involuntary action could not be initiated without Employee submitting the paperwork. He stated that Employee did not choose to be terminated, but she chose to retire.

Winslow testified that he was not obligated to inform Agency that Employee had submitted retirement papers nor was he obligated or trained to advise an employee the effect that retirement would have on any OEA appeals.

At times, Winslow contradicted himself, saying that an employee being removed for an egregious act does not have the option to retire, and then saying he wasn't sure if such an employee could still retire before the effective date of his termination. He was also unfamiliar with the personnel regulations regarding retirement.

Winslow stated that employees who were removed because of lack of fitness for duty were still eligible for retire. Winslow testified that Employee's personnel file would show that she was terminated and then retired. He explained that her retirement was not in lieu of termination. Winslow stated that the only circumstance that would cancel out termination was if

Employee voluntarily retired before she was terminated. He further explained that if an employee retired ten days before their separation, the employee would still be able to retire voluntarily as long as he or she retired before their effective termination date. Winslow could not recall the protocol for the egregious acts and stated that he would have to review the regulation in the progressive discipline section of the D.C. Human Resources ("DCHR") progressive log and review the District Personnel Manual ("DPM") under progressive discipline and adverse actions. He attested that an employee who was terminated for fitness of duty was not egregious.

b. Ella Cuff ("Employee") testified as follows (Tr. 113-164).

Ella Cuff ("Employee") worked for the D.C. Protective Services ("Agency") as a Protective Services Police Officer for twenty-four years. She began her employment on June 8, 1987, and was terminated on October 4, 2011. She testified that she received a Notice of Proposed Removal on August 8, 2011, and submitted her response to the proposed removal to Agency thereafter. Employee testified that she was not represented by counsel during the time of her removal action. She received her final notice on September 30, 2011, and the effective date of her termination was October 4, 2011. At the time, Employee stated that Agency did not offer the option to retire prior to the effective date of her removal.

Employee filed a Petition for Appeal with OEA on October 14, 2011, without benefit of legal counsel and remained *pro se* until January of 2012. Employee testified that neither Winslow nor anyone in HR informed her that submitting her retirement would cause her to forfeit her right to appeal her removal. She did not seek legal advice about her decision to retire. Employee stated that she filed an appeal because she wanted her job back and that she did not intend to give up her right to appeal her removal when she submitted her retirement application. She explained that she would not have retired under discontinued service retirement had she known that she would lose her right to appeal.

Employee stated that Winslow assisted her with her retirement application. She opted to retire under the discontinued service retirement. Employee stated that it was her understanding that her retirement choice was involuntary and she did not volunteer to retire. Employee testified that she did not choose to retire on October 4, 2011.

Employee attested that she did not understand what it meant to be retired in lieu of involuntary action. She stated that she did not intend to retire in lieu of removal when she submitted her request for retirement. Employee claimed that she still wanted to work and that she was not ready to retire.

On cross-examination, Employee admitted that she was advised of her right to be represented by an attorney or other representative as stated in the Advanced Written Notice of Proposed Removal. Employee stated that she was served with a prior proposed removal from a different District agency in February of 2003. She was represented by attorney Ann Catherine Sowell ("Sowell"), who worked for the same firm that represented her in the current matter.

Employee could not explain why she did not contact an attorney for legal advice before she submitted her retirement paperwork. Employee stated that she had a proposed removal in 2003, 2009, and again in 2011, and that she had legal counsel who represented her in the removal action.

Employee testified that she did not know that she was going to appeal when she applied for retirement and that was why she did not inform the HR representative that she had an appeal. She explained that she did not think that she had any reason to inform HR of her outstanding appeal. Employee stated that she could not explain why she did not inform her attorney that she was considering retirement.

Employee testified that she received some paperwork and went to speak to Winslow about retirement, but could not recall the date that she received the paperwork. She testified that she decided to retire involuntarily because she did not want to voluntarily retire. Employee explained that she retired because she needed the money.

Employee stated that she spoke to Mr. Hannon, an attorney who worked for the same firm that represented her in the current matter. She stated that she spoke to him about the appeal and Mr. Hannon told Employee that she would have to file an appeal with OEA first. Employee filed the appeal and stated that she received a letter from OEA, but could not recall what the letter stated.

Position of the Parties

Employee's position is that her retirement was not voluntary, but rather that she was first removed from her position before she filed for retirement under discontinued service retirement. Thus, Employee argues, her retirement did not replace her removal action. Employee asserts that when she filed her appeal on October 14, 2011, this Office had jurisdiction as determined when the adverse action has already taken effect. Employee insists that her subsequent retirement does not cancel her adverse action, and thus, this Office should exercise jurisdiction over this matter.

Employee contends that because Agency withheld material information regarding the effect her retirement would have on her appeal rights, her retirement was made "with blinders" and thus was involuntary.[9]

Agency argues that because Employee retired voluntarily, OEA has no jurisdiction over this appeal.

FINDINGS OF FACT

The following findings of fact are based on the witnesses' demeanor during testimony and the documentary evidence of record. On the key question of whether Employee's retirement

9 Employee's Post Hearing Brief, p.11 (Dec. 22, 2017).

was voluntary or involuntary, the fact that neither party presented an expert witness on this particular issue presented difficulties. If I find that the retirement was voluntary, then this Office has no jurisdiction.

I hereby make the following findings of fact:

1. Employee was advised of her right to be represented by an attorney or other representative as stated in the Advanced Written Notice of Proposed Removal.

2. Although Employee had an attorney representing her with her other OEA appeals, she chose not to inform her attorney or ask legal advice regarding her intention to retire.

3. Employee did not inform Agency about her retirement.

4. There is no evidence to suggest that Agency coerced or provided misinformation to Employee regarding retirement.

5. Employee did not inform DCHR that she had an OEA appeal pending when she applied for retirement.

6. Even if she had informed DCHR about her OEA appeal, DCHR would have simply told her to seek legal counsel as their personnel are not trained to provide legal advice.

7. There is no statute or regulation that mandates DCHR to inform would-be retirees about the ramifications that retirement would have on any pending appeals.

8. On January 25, 2012, with the assistance of Mr. Winslow, Employee completed the paperwork given to her and retired under "Discontinued Service Retirement." She agreed to this process because she was receiving no income and wanted to return to District employment in the future

9. Employee's Standard Form 50 reflecting her discontinued service retirement used Code 304 as the nature of action code, and "Retirement-ILIA" as the nature of action.

10. Retirement-ILIA means retirement "in lieu of involuntary action." According to Chapter 30 of the CSRS and FERS Handbook issued by OPM, retirements in lieu of involuntary action are voluntary retirements.

11. Code 304 is reserved for voluntary retirements in lieu of involuntary action, which is a voluntary retirement. (Chapter 30 of the CSRS and FERS Handbook, Employee Ex. 16 at 30-9.)

12. Because the retirement was in lieu of involuntary action, the retirement action replaced the prior removal action against Employee. This allowed Employee to receive a retirement pension from her prior removal date.

13. For discontinued service retirements, the effective date for the action would be set to the employee's last day of employment. (Tr. at 48:5-21, 77:22-79:21.) Thus, the effective date of Employee's retirement was backdated to October 4, 2011—the same effective date as her removal. This is done so that the retiree receives money from the effective date of separation.

14. In November 2012, Employee decided to retain an attorney from Hannon Law Group to represent her in the instant matter.

15. It was only during the time period of late 2013 to early 2014 that Agency learned that Employee had retired, thus scuttling their pending settlement of this appeal.

16. On February 27, 2014, the Agency filed an Amended Answer and a Motion to Dismiss, alleging that OEA did not have jurisdiction over Employee's appeal because of her voluntary retirement.

ANALYSIS AND CONCLUSION

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), reads as follows: "The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." Pursuant to OEA Rule 629.1, *id.*, the burden of proof 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."

Here, Employee retired in lieu of being separated. This Office does not have the statutory authority to adjudicate an appeal in connection with a voluntary retirement. However, a retirement wherein the decision to retire was involuntary is treated as a constructive removal and may be appealed to this Office.[10]

The issue of whether a resignation (or retirement) is voluntary or involuntary has been addressed in several cases before this Office. Typically, the issue arises as a jurisdictional question, where, for example, an employee is appealing a reduction in force (RIF) and she or he accepts an early retirement instead of being released in the RIF.[11] Other cases involve employees who resign or retire and then appeal to this Office contending that their resignation or retirement was coerced or was a constructive discharge.[12]

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[10] *See Christie v. United States*, 518 F.2d 584, 587 (Ct. Cl. 1975); *Jefferson v. Department of Human Services*, OEA Matter No. J-0043-93, 47 D.C. Reg. 1587 (2000).

[11] *See, e.g., Banner v. D.C. Public Schools*, OEA Matter No. 2401-0169-96 (August 20, 1998).

[12] *See, e.g., Jefferson v. Department of Human Services*, OEA Matter No. J-0043-93, 47 D.C. Reg. 1587 (2000).

There is a presumption that retirements are voluntary.[13] It is incumbent upon employees to first prove that their retirements were involuntary, that is, were the product of undue coercion on Agency's part, or the product of mistaken information provided to them by Agency and upon which they relied in making their decision to retire. Where an employee resigns or retires to avoid being removed for cause, the resignation or retirement is voluntary if the proposed removal is precipitated by good cause.

Here, Employee does not deny that Agency had good cause for removal nor does she allege that Agency provided her with misleading or mistaken information.

Neither does Employee allege coercion by Agency as would have been the case if her retirement is secured by duress, intimidation, or deception. In order to prove that his or her retirement is the product of duress, intimidation, or coercion, an employee must show each element of the established tripartite test.[14] Those elements are: (1) one side involuntarily accepted the terms of another; (2) circumstances permitted no other alternative; and (3) said circumstances were the result of coercive acts by the other party.[15] The test for duress is an objective one, thus, duress is not measured by the employee's subjective evaluation or perception of a situation.[16]

Instead, Employee argues that OEA has jurisdiction over her appeal despite her retirement on two grounds. First, Employee asserts that her retirement after the filing of her appeal does not preclude OEA from adjudicating her appeal on the merits. Second, Employee's retirement was involuntary because her decision to retire was induced by Agency's withholding of information, specifically, the effect her retirement would have on the viability of her appeal.

To support her first ground for appeal, Employee cites *Elias Covington v. Department of Health and Human Services,*[17] where an employee accepts involuntary separation and then applies for discontinued service retirement.

However, the facts in *Covington* are not analogous to the instant matter and thus, does not apply here. In *Covington,* the Court held that Employee's retirement was involuntary in the context of a reduction-in-force ("RIF") because the agency failed to correct misinformation in its notice informing employee that he had no right to assignment to another position, leading the employee to believe that he had no grounds to believe an appeal of his RIF action might be

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[13] *Christie v. United States, supra.*

[14] *Christie, supra* at 587 (citing *Fruehhauf Southwest Garment Company v. United States,* 111 F.Supp.945, 951 (Ct.Cl. 1953).

[15] *Christie, ibid.* See also *Chambers v. DOC,* at 18-19.

[16] *McGlucken v. United States,* 407 F.2d 1349, (1969) cert. denied, 396 U.S. 894 (1969).

[17] 750 F.2d 937 (U.S. Ct. of Appeals, Federal Cir. 1984).

productive.[18] There, the agency's former Director of Personnel also sent a letter declaring that certain other former CSA employees "may have taken advantage of early retirement, however none of you voluntarily resigned your position" and "[a]ny records to the contrary are in error."[19]

In *Covington,* the agency gave misinformation to the employee and was thus responsible for the employee's uninformed choice to retire. Such is not the case here whereby, Employee is not alleging misinformation, but rather an alleged withholding of information on the effect of retirement upon her appeal.

Employee also cites *Scalese v. Dep't of the Air Force,*[20] *Williams v. DHHS,* [21] and *Dobratz v. HHS,*[22] to support her contention that a retirement retroactive to the same date of the removal does not deprive the Board of jurisdiction to adjudicate the removal or otherwise extinguish the employee's right to challenge the removal.

However, the facts and the rulings in *Scalese, Williams* and *Dobratz* are dissimilar to that of the instant matter. In *Scalese,* the issue of whether the appellant's retirement was involuntary was not even addressed. Instead, the Merit Systems Protection Board ("MSPB") focused on whether Agency could support its removal decision, holding that if the agency is unable to support its removal decision, then appellant could show that his retirement was coerced. MSPB went on to hold that, "Conversely, if the agency is able to show that it properly decided to remove the appellant based on physical inability to perform, then he could not establish that his retirement was involuntary."[23]

In *Williams,* MSPB dismissed appellant's appeal by finding that it was precluded by a valid settlement and thus did not address the voluntariness of appellant's retirement. In *Dobratz,* MSPB found that appellant's retirement was invalid because the removal was improper.

In addition OEA has held that MSPB decisions are not controlling, holding that "Even though we recognize that the Merit Systems Protection Board ("MSPB") is our federal counterpart, we have not, however, adopted every practice of the MSPB. Moreover, there is no law, rule or regulation that requires us to do so."[24]

In the instant matter, it is undisputed that Employee could not qualify with her service weapon, a valid and critical safety requirement for her armed police position, and thus, Agency had support for its removal decision.

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18 *Id.* at page 6.
19 *Id.* at page 3.
20 68 M.S.P.R. 247 (1995).
21 112 M.S.P.R. 628 (2009)
22 53 M.S.P.R. 9 (1992).
23 *Id.* at 2.
24 *Sondra Phillips-Gilbert v. DHS,* OEA Matter No. 1601-0059-99, *Opinion and Order on Petition for Review* (December 21, 2005).

Employee moves on to her second argument to claim that her retirement was involuntary because her decision to retire was induced by Agency's withholding of information, specifically, the effect her retirement would have on the viability of her appeal. Employee avers that her retirement was involuntary under *D.C. Metropolitan Police Department v. Stanley*.[25] *Stanley* recognizes that an employee's retirement or resignation may be involuntary if it is induced by the employer's application of duress or coercion, time pressure, or the misrepresentation or withholding of material information.[26]

Again, the facts and the rulings in *Stanley* are dissimilar and thus not analogous to that of the instant matter. In *Stanley,* the Court held that an employee who was given mere hours to decide whether to accept demotion, retire, or be terminated, could not be said to retire voluntarily as said employee was unable to obtain information about the financial consequences of his election and was thus unable to make an informed choice. The *Stanley* Court did not mandate that the agency must provide all possible information on the ramifications an employee's decision to retire would incur; rather, the Court simply said that the employee threatened with demotion or termination must be given sufficient time to obtain information about the financial consequences of his election and thus be able to make an informed choice.

In the instant matter, there was never any pressure on Employee to accept retirement. In fact, Employee made her decision to retire almost four months after her removal and there was no allegation that Agency pressured Employee to retire.

The Court in *Stanley* went on to hold that the doctrine of coercive involuntariness does not apply to a case in which a public employee decides to resign or retire because he does not want to accept a new assignment, a transfer, or other measures that the agency is authorized to adopt, even if those measures make continuation in the job so unpleasant for the employee that he feels that he has no realistic option but to leave. In the instant matter, Agency had every legal right to insist that its employee meet the statutory requirements of their position, including maintaining a gun qualification. Agency's insistence that Employee qualify with her service weapon does not constitute coercion.

Because there was no evidence of Agency's application of duress or coercion, time pressure, or the misrepresentation to induce Employee to retire, Employee's remaining rationale for OEA's jurisdiction is to allege that Agency withheld material information regarding the effect her retirement would have on her appeal.

There are three problems with Employee's allegation. First, I did not find any evidence that Agency withheld information. Second, even if we were to assume for the sake of argument that Agency had this information, it would not have known to give this information to Employee because Employee never informed Agency about her decision to retire. In the D.C. government, the Department of Human Resources, which alone handles retirement matters, is a separate

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25 942 A.2d 1172 (2008).
26 *Id.* at page 3.

agency from Employee's former employer DGS. There is no evidence that DGS would have the knowledge or expertise to advise its employees regarding retirements or its effect on appeals. The evidence produced at the hearing revealed that even DHS, the sole agency charged with processing retirements, did not train its employees to advise retirement applicants about the effect such a step would have on their appeals.

Third and lastly, Employee's argument rests on the assumption that Agency *had an obligation to inform or educate her on the effect her retirement may have on her appeal.* [Emphasis supplied]. However, Employee could not offer any statute, regulation, or case law that mandates Agency to offer such legal advice. In this instance, Employee has filed several prior appeals with OEA with the assistance of counsel, but chose not to seek their advice when she decided to retire.

Because Employee failed to meet her burden of proving jurisdiction, in other words, proving involuntary retirement, this Office has no jurisdiction over their appeal.

ORDER

It is hereby ORDERED that the petition in this matter is dismissed for lack of jurisdiction.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge

NOTICE OF APPEALS RIGHTS

This is an Initial Decision that will become a final decision of the Office of Employee Appeals unless either party to this proceeding files a Petition for Review with the office. A Petition for Review must be filed within thirty-five (35) calendar days, including holidays and weekends, of the issuance date of the Initial Decision in the case.

All Petitions for Review must set forth objections to the Initial Decision and establish that:

1. New and material evidence is available that, despite due diligence, was not available when the record was closed;

2. The decision of the presiding official is based on an erroneous interpretation of statute, regulation, or policy;

3. The finding of the presiding official are not based on substantial evidence; or

4. The Initial Decision did not address all the issues of law and fact properly raised in the appeal.

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with Administrative Assistant, D.C. Office of Employee Appeals, 955 L'Enfant Plaza Suite 2500, Washington, D.C. 20024. Four (4) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review may file their response within thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review.

Instead of filing a Petition for Review with the Office, either party may file a Petition for Review in the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

CERTIFICATE OF SERVICE

I certify that the attached **INITIAL DECISION ON REMAND** was sent by regular mail on this day to:

Ella Cuff
3722 Grant Place, NE
Washington, DC 20019

Talon Hurst, Esq.
Hannon Law Group, LLP,
333 8th Street, NE
Washington, DC 20002

C. Vaughn Adams, Esq.
Agency Counsel OPEFM
2000 14th Street, NW
8th Floor
Washington, DC 20009

Katrina Hill
Clerk

April 17, 2018
Date

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

REPLY TO:
955 L'Enfant Plaza, S.W.
Suite 2500
Washington, DC 20024
(202)727-0004
FAX (202)727-5631

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

ELLA B. CUFF,

Petitioner,

v.

DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS et al.,

Respondents.

Case No. 2018 CA 003219 P(MPA)

Judge Neal E. Kravitz

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Ella Cuff v. D.C. Department of General Services,* OEA Matter No. 1601-0009-12R17. The record consists of two volumes containing sixty (60) tabs.

Wynter Clarke

Wynter Clarke
Paralegal Specialist

LASHEKA BROWN BASSEY NOTARY PUBLIC MY COMMISSION EXPIRES 6/14/2021 DISTRICT OF COLUMBIA

District of Columbia: SS
Subscribed and Sworn to before me
this 16th day of July, 2018

Lasheka Brown Bassey

Lasheka Brown Bassey. Notary Public, D.C.
My commission expires June 14, 2021

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

REPLY TO:
955 L'Enfant Plaza, S.W.
Suite 2500
Washington, DC 20024
(202)727-0004
FAX (202)727-5631

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

ELLA B. CUFF, Petitioner, v. DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS et al., Respondents.	Case No. 2018 CA 003219 P(MPA) Judge Neal E. Kravitz

CERTIFICATE OF FILING[1]

I hereby certify that this is the true and correct official case file in the matter of *Ella Cuff v. D.C. Department of General Services,* OEA Matter No. 1601-0009-12R17. The record consists of two volumes containing sixty (60) tabs.

Wynter Clarke
Wynter Clarke
Paralegal Specialist

RECEIVED BY: D. Hofman
8-17-18
Time 3:40pm

LASHEKA BROWN BASSEY NOTARY PUBLIC MY COMMISSION EXPIRES 6/14/2021 DISTRICT OF COLUMBIA

District of Columbia: SS
Subscribed and Sworn to before me
this 17th day of August, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

[1] At the request of Judge Kravitz, a courtesy copy of the record was delivered to chambers. The record was filed in Superior Court on July 16, 2018.