



D.C. Superior Court

CRIMINAL LAW & PROCEDURE— POLICE

Postal Patrol Officer employed by U.S. Postal Service is not exempt from the law prohibiting carrying of concealed weapons (D.C. Code § 22-3204) because the job is primarily protecting property.

U.S. v SAVOY

D.C. Super. Ct. Crim. No. F-5748-98 March 16, 2001 Opinion per Natalia M. Combs Greene, J. *K.D. Clark for U.S. J.P. Byrd-Tillman for defendant.*

N.M.C. Greene, J.: This matter came before the Court on the Defendant's Oral Motion to Vacate Guilty Plea, Oral Motion for Reconsideration of Defendant's Motion to Dismiss and Oral Motion for Expungement of Records, made in open Court on October 27, 2000, the Defendant's Addendum to the Above Motions, filed on November 27, 2000, and the Government's Motion to Confirm that the Defendant is not Excepted from the District of Columbia's Gun Licensure Laws, filed on November 21, 2000.¹

This case involves the strict firearms control laws in the District of Columbia and presents issues concerning the scope of the terms "police officer" and "law enforcement officer" as related to persons exempt from those laws. The Court examines these questions with respect to the facts presented in this case.

I.

The facts adduced during hearings on the motions and during the plea colloquy were essentially as follows. On August 8, 1998, defendant drove into the District of Columbia from Maryland for the purpose of driving a friend home. While doing so, defendant was involved in a minor motor vehicle crash in the 300 block of 37th Street in Southeast Washington. Following the crash, a verbal altercation ensued. During this verbal altercation, the driver of other vehicle² (hereinafter referred to as the "other driver") reached into his vehicle and opened the trunk of his car using a remote opening feature. Believing that the other driver might get a weapon from the trunk of his vehicle, defendant retrieved his United States Postal Service issued police badge and identification along with a Beretta semiautomatic pistol from his vehicle. Defendant ordered the other driver to step away from his vehicle. The other driver complied with defendant's commands, whereupon the defendant closed the trunk of the other driver's vehicle. Defendant then left the scene planning to contact the Metropolitan Police Department. In the meantime, the other driver flagged

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D.C. Court of Appeals

ATTORNEYS — DISCIPLINE

Attorney is suspended for 6 months *nunc pro tunc* followed by 2 years probation with conditions, Bar Counsel recommendation for requirement that attorney prove fitness is rejected under deferential standard.

IN RE JOSEPH A. LOPES

D.C. App. No. 97-BG-1927 April 12, 2001 Opinion per Schwelb, J. (Farrell and Reid, JJ. concur) *M.E. Baurley for respondent. T.M. Tait, with J.E. Peters, for the Office of Bar Counsel. E.J. Branda, for the Board on Professional Responsibility.*

Schwelb, J.: In a proposed simultaneous disposition of three District of Columbia disciplinary proceedings instituted by our Bar Counsel and one reciprocal discipline case that originated in Maryland, the Board on Professional Responsibility has recommended that Joseph A. Lopes be suspended from practice for six months, *nunc pro tunc* to July 29, 1998, and that his suspension be followed by a two-year period of probation, with conditions. Bar Counsel agrees that Lopes should be suspended for six months, but excepts to the recommended probation, arguing instead that as a condition of

reinstatement following his suspension, Lopes should be required to demonstrate his fitness to practice law. Although Bar Counsel's position is not unreasonable, we apply our deferential standard of review and direct the imposition of discipline consistent with that recommended by the Board. ***

LEGAL ANALYSIS

Bar Counsel takes issue with the Board's recommendation in two respects. First, according to Bar Counsel, "the Board erred in concluding that [Lopes] established *Kersey* [520 A2d 321 (1987)] style mitigation for any of his multiple instances of misconduct." Second, Bar Counsel challenges the recommended discipline; she asserts that Lopes should be required, at the conclusion of the six-month suspension

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"the primary duties of federal police officers are 'the preservation of peace; the prevention, detection, and investigation of crimes; the arrest or apprehension of violators; and the provision of assistance to citizens in emergency situations, including the protection of civil rights.'"

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down a passing police car. After defendant returned to the scene, he was arrested and charged with carrying a pistol without a license.

II.

In his motions, defendant claimed that he was exempt from the law prohibiting the carrying of concealed weapons, D.C. Code Ann. § 22-3204 (1981) ("Section 22-3204"), because another statute, D.C. Code Ann. § 22-3205 (1981) ("Section 22-3205"), excepts "policemen or other duly appointed law-enforcement officers" from that provision.³ At the time of the incident defendant was employed by the United States Postal Service as a "Postal Police Officer" and claimed that this job fell within the exemption outlined in Section 22-3205. The government contended that defendant, in his position, was actually equivalent to a special police officer and therefore did not fall within the exemption.

The Court agreed to hear arguments on the motions because the Court was concerned as to the legal validity of the defendant's guilty plea. Initially it was not clear that the defendant's position was that of a special police officer. One of the exhibits attached to defendant's sentencing memorandum was a letter from the Fraternal Order of Police National Labor Council No. 2 that indicated that defendant was a Postal Police Officer.⁴ This Court therefore reviewed relevant case law to determine the scope of the terms at issue.

The District of Columbia Court of Appeals has consistently held that individuals whose job is primarily to protect property, rather than life, are not considered "police officers or other duly appointed law-enforcement officers" for the purposes of Section 22-3205. *McKenzie v. United States*, 158 A.2d 912, 914 (D.C. 1960), *Franklin v. United States*, 271 A.2d 784, 786 (D.C. 1970), *Timus v. United States*, 406 A.2d 1269, 1272 (D.C. 1979). Special police officers are not covered Per Se by Section 22-3205 because, by statute, they are appointed "for duty in connection with the property of" their employer. D.C. Code Ann. § 4-114 (1981).

If defendant was, in fact, a special police officer at the time of this incident, he would not fall within the exception found in Section 22-3205. *McKenzie v. United States*, 158 A.2d 912 (D.C. 1960). For purposes of Section 22-3204, the Court of Appeals has held that special police officers are law enforcement officers while on duty in the area of his or her assigned duty location or while travelling without deviation to and from the special police officer's place of employment immediately before or immediately

after the period of actual duty.⁵ *Franklin v. United States*, 271 A.2d 784, 785 (D.C. 1970), *Timus v. United States*, 406 A.2d 1269, 1272 (D.C. 1979). Only under those circumstances would a special police officer fall within the exemption found in Section 22-3205.

In his capacity as a Postal Service police officer, defendant is neither a special police officer as defined by District of Columbia law nor is he a member of a police department with statutory police powers in the District of Columbia. It therefore appeared, from arguments made and facts adduced at the hearing, that the critical question was whether, by his employment, defendant's primary responsibility as a "police officer" was the protection of life and therefore a "policeman or other duly appointed law-enforcement officer" as defined by Section 22-3205.

The defendant's job as a Postal Police Officer (hereinafter "PPO") is more akin to that of a special police officer than of a United States Park Police officer or Metropolitan Police Department officer. The Postal Service utilizes all of its PPOs for the protection of Postal Service property and the mails. The primary function of PPOs is not the preservation of life and the maintenance of law and order. Rather, PPOs control access to Postal Service facilities, escort the mails, and otherwise protect Postal Service property. Postal Service manuals refer to PPOs as a security force. Numerous Memoranda of Understanding between the PPO's labor union and the Postal Service explicitly state that no change in responsibility or authority took place from the time that the uniformed force was known as a security force to the force's present incarnation, the Postal Police.⁶ The hierarchical structure of the Standard Position Description, *infra*, clearly indicates that the primary functions of a PPO involve physical security of property, loss prevention, and access control.

III.

In order to determine whether the defendant is exempt from Section 22-3204, the Court looked to the nature of the defendant's position. The job classification for the defendant's and other similar positions are set out in a United States Office of Personnel Management ("OPM") guide ("OPM Guide").⁷ The defendant's OPM job classification is "GS-0083 Police Officer".

The OPM Guide provides that the primary duties of federal police officers are "the preservation of peace; the prevention, detection, and investigation of crimes; the arrest or apprehension of violators; and the provision of assistance to citizens in emergency situations, including the protection of civil rights."

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Recent Filings in DC Courts

**D.C. SUPERIOR COURT
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- 01-1101. D. Pindle v Aramark Corp., Personal/Tort: Negligence. Pro-se
- 01-1102. n/a
- 01-1103. Primus Automotive Financial Svcs. v L.A. Sinclair. Contract: Collection under \$25,000.00. A.M. Hrehorovich
- 01-1104. Ford Motor Credit Co. v V.W. Strohman. Contract: Collection under \$25,000.00. A.M. Hrehorovich
- 01-1105. n/a
- 01-1106. Primus Automotive Financial Svcs. v E.A. Gudger. Contract: Collection under \$25,000.00. A.M. Hrehorovich
- 01-1107. n/a
- 01-1108. n/a
- 01-1109. A.A. Jefferson, et al. v J. Riddick, et al.. Personal Tort: Negligence, \$500,000.00. Pro-se
- 01-1110. R.R. Jackson v District of Columbia. Personal Tort: Negligence, \$500,000.00. Pro-se
- 01-1111. n/a
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- 01-1113. n/a
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- 01-1116. M.P. Cheeks v MAIF. Contract: Breach of Contract. B.K. Cobbina
- 01-1117. Sullivan & Mitchell, PLLC, et al. v M. Tyree, et al.. Property Tort: Payment on a Forged Instrument. D.M. Schoenfeld
- 01-1118. n/a
- 01-1119. n/a
- 01-1120. M.A. Ramzan v Amalgamated Casualty Ins. Co., et al.. Contract: Breach of Contract. D.F. White
- 01-1121. n/a

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In an administrative decision, the OPM outlined four indicators to determine whether a job has a security-focused mission or a police-focused mission.⁸ These indicators are: 1) the basic mission of the organization; 2) arrest authority; 3) training; and 4) patterns of work. As analyzed by the OPM, however, these factors are not dispositive of the issue as to whether the defendant was a policeman or other duly appointed law-enforcement officer under section 22-3205. *Middleton v. United States* 305 A.2d 259 (D.C. 1973). An examination of the factors outlined by the OPM Guide does, however, provide the Court with a useful algorithm for determining whether the defendant falls within the exemption as outlined in section 22-3205. Although the OPM finds that Postal Service police officers are police officers for purposes of job classification, for the reasons set out below, this Court finds that the defendant was not a policeman or other duly appointed law-enforcement officer under Section 22-3205 of D.C. Code.

The mission of the United States Postal Inspection Service's (hereinafter the "Inspection Service") uniformed arm is as follows:

The purpose of the Security Force at any facility is security and protection. Security Force personnel should restrict their activities in all postal workroom areas to routine patrols, as specified in post instructions, and specific emergency requests by postal supervisors. All instances of Security Force personnel being in postal workroom areas, other than routine patrols called for by duty assignments and emergency situations, should be at the direction of the Security Supervisor.

U.S. Postal Service Postal Police Officer's Manual at 211 (1983). By contrast, the mission statement of the Metropolitan Police Department is "[t]o prevent crime and the fear of crime, as we work with others to build safe and healthy communities throughout the District of Columbia."

As detailed in an affidavit submitted in support of the government's opposition, the uniformed force of the Inspection Service was created in 1970 and at that time was referred to as the "Postal Security Force". The basic mission of the Postal Security Force "was to control access to postal facilities, provide protection of postal property and security for postal service-operated buildings." In 1971, that mission was expanded to include responsibility for "controlling access, maintaining order, preventing mail thefts, safeguarding customers and employees, and providing basic security for buildings operated

by the Postal Service." In 1981, as a result of a collective bargaining agreement with the union representing the officers of the security force, the position title was changed from "Security Police Officer" to "Postal Police Officer". The parties agreed that this change did not augment or otherwise change the duties or authority for the members of this security force.⁹

In support of his argument that his position was that of a bona fide police officer, defendant relied upon the Standard Position Description for Postal Police Officers.¹⁰ That portion of the description subsection entitled "Duties and Responsibilities" is reproduced below in its entirety because the language is instructive in divining the true nature of the defendant's employment.

Performs a variety of duties related to the security of a postal installation, its buildings, employees, equipment, mail, and mail-in-transit, under the guidance and instruction of a security supervisor.

Carries a firearm and exercises standard care required by the Inspection Service on firearms and use of reasonable force. Maintains assigned firearms in good conditions.

Receives training in patrolling an assigned area on foot or by motor vehicle to maintain order and the general safeguarding of the facility, property, and employees. Prevents depredation, loss or damage of mail, by making observations in mail handling areas.

Receives training in controlling access to buildings at an assigned post and enforces regulations requiring identification.

As instructed, maintains a log of all incidents reported and a daily log of orders and basic information for the security force.

As instructed, performs hourly checks: accounts for lost and found items, answers the telephone, and processes reports and inquiries.

Responds to emergencies and other conditions, including burglaries and hold-ups, requiring immediate attention to maintain order and to prevent injury or theft to employees or property.

Makes arrests and testifies in court on law violations within assigned authority.

Performs other job related tasks in support of the primary duties.

The defendant specifically cited to numbers seven (7) and eight (8) to support his argument that his job is more analogous to that of a bona fide police officer. A fatal flaw in this argument, however, is that numbers one (1), three (3), four (4), five (5), and six (6) are most analogous to that of a special police officer whose primary

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Recent Filings in DC Courts *continued*

- 01-1122. R. Ageypong v J.N. Phillips. Personal Tort: Negligence, \$100,000.00. B.F. Selig
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- 01-1124. n/a
- 01-1125. Montague Plumbing & Heating Inc. v I.M. James, et al.. Contract: Interference, Personal Tort: Decelt, \$500,000.00. P.A. Artis
- 01-1126. n/a
- 01-1127. n/a
- 01-1128. n/a
- 01-1129. Patuxent Flooring & Design, Inc. v United American, Inc., etal.. Contract: Collection under \$25,000.00. D.B. Lamb
- 01-1130. District of Columbia, et al. v PSS & Assoes., inc.. Contract: Collection over \$25,000.00. R. Herschthal
- 01-1131. First Select Corp. v M.L. Sweatt. Foreign Judgement. S.A. Kramer
- 01-1132. Bank of America v E.J. Rangel. Foreign Judgement. S.A. Kramer
- 01-1133. EMCC, Inc. v R. Emerson. Foreign Judgement. S.A. Kramer
- 01-1134. Discover Financial Svcs. v R.L. Williams. Foreign Judgement. S.A. Kramer
- 01-1135. MAIF v J.R.D. Cockrell, Jr. Insurance/Subrogation under \$25,000.00. B. Rice
- 01-1136. n/a
- 01-1137. n/a
- 01-1138. F. Barnes v G. Bennett. Personal Tort: Automobile, \$250,000.00. R.F. Silber
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- 01-1141. B. Zeldis v Marriott Corp., et al. Personal Tort: Personal Injury, \$1 million. J. Strum

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mission is that of property protection. While both a special police officer and a Postal Police Officer may respond to emergencies, make arrests and testify in court, these are not their primary responsibilities.

An examination of the second prong of the OPM Guide's algorithm is also instructive. Federal police officers have the same police powers on federal property as do those officers given statutory police authority under District of Columbia law.¹¹ See 40 U.S.C. § 318 and D.C. Code Ann. § 22-581 (1981). Postal Service police officers have police powers only on United States Postal Service property and have only the powers of a citizen in enforcing District of Columbia law. 40 U.S.C. § 318. Provisions do exist to extend statutory police powers found in D.C. Code Ann. § 23-581 (1981) to Postal Service Police Officers. D.C. Code Ann. § 4-192 (1981). The Postal Service can enter into a cooperative agreement with the Metropolitan Police Department coordinated through the United States Attorney for the District of Columbia to "assist the [Metropolitan Police] Department in carrying out crime prevention and law enforcement activities in the District of Columbia. *Id.* However, no such agreement between the Postal Service and the Metropolitan Police Department was in place at the time of defendant's arrest.¹²

A review of the third and fourth prongs of the OPM Guide's algorithm is instructive. United States Postal Service police officers receive approximately 10 weeks of training at the Federal Law Enforcement Training Center at Brunswick, Georgia. Special Police Officers, by contrast, receive approximately one (1) week of private training. Metropolitan Police Department officers receive 600 hours, or 15 weeks of training at the Maurice T. Turner, Jr. Institute of Police Science. From the record, it is impossible to determine the type of training received by Postal Police Officers. Specifically, the Court cannot determine whether the primary emphasis of the Postal Service training is on the protection of life or property. The OPM states that the pattern of work for security guards is oriented toward the protection of property while the work of police officers is oriented toward maintaining law and order. It is clear, however, from the record that the Postal Service employs Postal Police Officers for the primary purpose of securing Postal Service property and controlling access to said property.

Less important to this analysis is the physical jurisdiction of the PPOs. The physical jurisdiction of PPOs extends only to the physical boundaries of Postal Service property – property owned or controlled by the federal government.

Unlike municipal police officers, PPOs do not have jurisdiction over all property, public or private, within the physical boundaries of their jurisdiction.

Because it cannot be shown that defendant's position as a PPO was akin to a policeman or other duly appointed law enforcement officer or that any agreement existed between the Metropolitan Police Department and the United States Postal Service pursuant to D.C. Code Section 4-192, the Court cannot conclude that defendant was exempt from the provisions of the District of Columbia's gun licensure laws. It may be said, however, that this conclusion presents some interesting questions given the state of the law and the apparent change in job title for this particular position. Although an interesting question, the Court must be guided by an honest analysis of the facts and the law.

Accordingly, it is this 16th day of March, 2001

ORDERED that Defendant's Motions are hereby DENIED. It is further

ORDERED that Government's Motion is hereby GRANTED. It is further

ORDERED that the Defendant's guilty plea, entered on October 3, 2000, stands.

SO ORDERED.

Endnotes

¹ Defendant, pursuant to a plea agreement with the government, pleaded guilty on October 3, 2000 to the charge of attempted carrying a pistol without a license, a lesser included offense to carrying a pistol without a license. The Court, prior to sentencing, invited the parties (after some discussion) to submit pleadings on the issue as to whether defendant might in fact be exempt from the District of Columbia gun licensure laws.

² The driver of the other vehicle was cited by Metropolitan Police Department officers for Following Another Vehicle Too Closely, in violation of 18 D.C.M.R. 2201.4.

³ The defendant also claimed, in the alternative, that he was exempt from Section 3204 because he had intended to take the weapon to a pistol range for target practice before he was delayed and diverted into the District of Columbia. This defense is not discussed herein because: 1) the defendant's residence, where he apparently kept the weapon, and the firing range are located in Prince George's County, Maryland, and driving from the defendant's residence to the firing range would not normally necessitate passing through the District of Columbia; and 2) defendant did not advance this argument at the time of the hearing.

⁴ The Fraternal Order of Police is a law-enforcement related labor union representing United States Postal Service police officers, among others; and is, according to the union, "the world's largest organization of sworn law enforcement officers".

⁵ Special police officers in the District of Columbia are imputed to have a registration certificate for the

Recent Filings in DC Courts

continued

- 01-1142. In Re: Mahzad Essalat Changing Name to Read: Mahzad Madeleine Essalat
- 01-1143. n/a
- 01-1144. US Bank Nat'l. Assn v C. James, et al. Contract: Breach of Contract. H.N. Bierman
- 01-1145. n/a
- 01-1146. n/a
- 01-1147. US Bank Nat'l. Assn v E.A. Ferebee. Contract: Breach of Contract. H.N. Bierman
- 01-1148. B.L. Ripley v Washington Ctr., et al. Personal Tort: Malpractice Medical, \$10 million. B.H. Kim
- 01-1149. In Re: Jean Mikhail Meneses. Changing Name to Read: Michael Jean Menese
- 01-1150. Trinity College v A. Hill. Contract: Collection under \$25,000.00. J.O. Curley

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employer-issued weapon and ammunition because their employers hold the registration certificate for the firearm and the ammunition. See *Timus v. United States*, 406 A.2d 1269, 1273 (D.C. 1979). Therefore, special police officers are not held liable for the crimes of possession of an unregistered firearm and possession of unregistered ammunition.

⁶ Through collective bargaining, the Postal Service made changes to the uniformed service. On September 19, 1981, the Postal Service and the then Federation of Postal Security Police signed an agreement to change the name of the uniformed officers from "Security Police Officer" to "Postal Police Officer" and issue a new type of duty holster. On April 2, 1985, the two organizations signed an agreement issuing badges inscribed with the words "Postal Police Officer". On October 12, 1994, the Fraternal Order of Police and the Postal Service signed an agreement to change the graphics on their vehicles from "Security Force" to "Postal Police."

⁷ Classification Programs Div., OPM, *Grade Evaluation Guide for Police and Security Guard Positions* (1988). Furthermore, previous administrative decisions are used to help classify positions.

⁸ See 8 Digest of Significant Classification Decisions and Opinions 6 (U.S. Office of Personal Management 1986).

⁹ Affidavit of Lawrence Katz at 3, *United States v. Savoy* (F-5748-98). See also Memorandum of Understanding (Sept. 19, 1981); Memorandum of Understanding between the United States Postal Service and Federation of Postal Police Officers (Apr. 2, 1985); Memorandum of Understanding between the United States Postal Service and Fraternal Order of Police National Labor Council, U.S.P.S. No. 2. (Oct. 12, 1994).

¹⁰ Standard Position Description - Postal Police Officer (A), PPO-05 at 1 (Feb. 8, 1990).

¹¹ The government argues that postal service police officers are akin to special police officers "because of their limited authority to carry their service issued weapon." This argument is faulty. In *United States v. Pritchett*, the court noted that the District of Columbia Department of Corrections issued firearms to their officers only while on duty at the District of Columbia jail. 470 F.2d 455, 461 (D.C. Cir. 1972). In that case, the court found that District of Columbia corrections officers fall within the exemption outlined in § 22-3205. As Postal Service property, the Inspection Service's regulation of the use of their own firearms, badges, and identifications by employees does not impact upon District of Columbia weapons laws.

¹² Government's Motion to Confirm that the Defendant is not Excepted from the District of Columbia's Gun Licensure Laws at 25 (F-5478-98).

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recommended by the Board, to demonstrate his fitness for the practice of law. In the alternative, if the court declines to require proof of rehabilitation, then Bar Counsel asks us to impose conditions of probation more exacting and more intrusive than those proposed by the Board.

A. The standard of review.

In conformity with the applicable rule of court, our review of the Board's findings and recommendations is deferential: ***

D.C. App. R. XI, § 9 (g)(1). The quoted rule "endorses the Board's exercise of broad discretion in handing out discipline that is subject only to a general review for abuse in that discretion's exercise." *In re Goffe*, 641 A.2d 458, 464 n.7 (D.C. 1994) (per curiam) (quoting *In re Haupt*, 422 A.2d 768, 771 (D.C. 1980) (per curiam)). The Board's recommended discipline comes to the court with a strong presumption in favor of its imposition. *Goffe, supra*, 641 A.2d at 463 (citing *In re Hutchinson*, 534 A.2d 919, 924 (D.C. 1987) (en banc)). "Generally speaking, if the Board's recommended sanction falls within a wide range of acceptable outcomes, it will be adopted and imposed." *Goffe, supra*, 641 A.2d at 463-64. "We must therefore, at the very least, accord respectful consideration to the Board's views." *In re Marshall*, 762 A.2d 530, 536 (D.C. 2000).

B. Kersey mitigation.

*** The *Kersey* issues have been vigorously contested before the Hearing Committee and the Board, and they have been ably briefed in this court. Without reciting in detail all of the relevant testimony, we are satisfied, upon careful consideration of the record as a whole, that the Board's analysis and recommendation are reasonable and consistent with our precedents. Under these circumstances, we must defer to the findings of the Board.

We begin our consideration of this issue with the first element of Lopes' burden under *Kersey*. It is substantially undisputed that, at the relevant times, Lopes was suffering from depression, a disability that has been held to warrant *Kersey* mitigation. See, e.g., *In re Peek*, 565 A.2d 627, 631-32 (D.C. 1989). Bar Counsel and counsel for the Board have energetically debated whether Lopes' depression was comparable to the depression suffered by the respondents in *Peek* and in some of our other cases. In our view, however, there was clear and convincing evidence to support the Board's finding that

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WILLARD
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WASHINGTON

Memorandum

To: Mr. Marshall Freeman Harris
From: Dr. Hoda Elemary *Hoda*

Two Pages

November 18, 2002

Enclosed please find pivotal talking points and a request during the meeting based on the facts of the case.

It is essential I hear from you on Monday morning as discussed. I am at the Willard, extension 1129, telephone (202) 628-9100.