THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EMPLOYEE,	OEA Matter No. 1601-0005-25
	Date of Issuance: July 18, 2025
v.	
	JOSEPH E. LIM, ESQ.
D.C. FIRE & EMERGENCY MEDICAL SERVICES DEPARTMENT,	SENIOR ADMINISTRATIVE JUDGE
Agency	

Jonathan Bolls, Esq., Employee Representative
Jeremy Greenberg, Esq. Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Employee, a Firefighter/Emergency Medical Technician, filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") on October 15, 2024, challenging the D.C. Fire & Emergency Medical Services Department's ("Agency" or "DCFEMS") decision to terminate him effective September 21, 2024, based on Case No. U-23-776.[1] In response to OEA's October 15, 2024, letter, Agency filed its Answer on October 21, 2024.[2] This matter was assigned to the undersigned Senior Administrative Judge ("SAJ") on November 1, 2024.

On December 6, 2024, I issued an Order Convening a Telephone Prehearing Conference to be held on December 20, 2024. Employee submitted a Motion for More Time to obtain legal counsel on December 17, 2024. At the December 20, 2024, Prehearing Conference, I directed both parties to address the following issues: whether the Fire Trial Board ("FTB")'s decision was supported by substantial evidence, whether there was harmful procedural error, and/or whether Agency's decision was done in accordance with applicable laws and regulations.

On February 14, 2025, Employee submitted a Consent Motion to modify the reply deadline to February 25, 2025. Both parties submitted their briefs on or before March 11, 2025. Because this matter is being reviewed under the analysis set forth in *Pinkard v. D.C.*

[1] Employee's Petition for Appeal, Final Agency Decision September 10, 2024.
[2] In its Answer, Agency mislabeled the OEA Matter number as 1601-0080-24.

Metropolitan Police Department[3], an Evidentiary Hearing was not convened. The record is now closed.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (December 27, 2021) states:

> The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
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> That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 631.2 id. States:

> For appeals filed under §604.1, the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

ISSUES

Whether the Trial Board's decision was supported by substantial evidence, whether there was harmful procedural error, and whether Agency's action was done in accordance with applicable laws or regulations.

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW

This Office's review of this matter is limited pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). In that case, the D.C. Court of Appeals overturned a decision of the D.C. Superior Court that held, *inter alia*, that this Office had the authority to conduct *de novo* evidentiary hearings in all matters before it. According to the D.C. Court of Appeals: "The OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives the OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings."[4]

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

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[3] 801 A.2d 86 (D.C. 2002).

[4] *See* D.C. Code §§ 1-606.02 (a)(2), 1-606.03 (a), (c); 1-606.04 (1999), recodified as D.C. Code §§ 1-606.02 (a)(2), 1-606.03 (a), (c), 1-606.04 (2001); *see also* 6B DCMR § 625 (1999).

[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing has been held, *any further appeal shall be based solely on the record established in the Departmental hearing.*[5]

The Court noted that the CMPA itself explicitly provides that systems for review of adverse actions set forth in a Collective Bargaining Agreement must take precedence over standard OEA procedures. D.C. Code § 1-606.2 (b) (1999) (now § 1-606.02 (b) (2001)) states that "any performance rating, grievance, adverse action, or reduction-in-force review, which has been included within a collective bargaining agreement . . . *shall not be subject to the provisions of this subchapter*" (emphasis added). The subchapter to which this language refers, subchapter VI, contains the statutory provisions governing appellate proceedings before the OEA. *See* D.C. Code § 1-606.3 (1999) (now § 1-606.03 (2001)). Since section 1-606.2 (b) specifically provides that a Collective Bargaining Agreement must take precedence over the provisions of subchapter VI, the Court held that the procedure outlined in the collective bargaining agreement -- namely, that any appeal to the OEA "shall be based solely on the record established in the [Adverse Action Panel] hearing" controls in the *Pinkard*'s case.

Not only did *Pinkard* dictate that the OEA's review of the case be constrained to the record produced as a result of the hearing, but it also noted:

> The OEA may not substitute its judgment for that of an agency…. Its review of an agency decision—in this case, the decision of the [Adverse Action Panel] in the MPD's favor—*is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations*….The OEA, as a reviewing authority, also must generally defer to the agency's credibility determinations….Mindful of these principles, we remand this case to the OEA to review once again the MPD's decision to terminate Pinkard, and we instruct the OEA, as the collective bargaining agreement requires, to *limit its review to the record made before the [Adverse Action Panel]*.[6]

Thus, pursuant to *Pinkard*, an Administrative Judge of this Office may not conduct a *de novo* Hearing in an appeal before him/her, but must base his/her decision solely on the record below, when all of the following conditions are met:

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
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> 2. The employee has been subjected to an adverse action;
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> 3. The employee is a member of a bargaining unit covered by a collective bargaining agreement;

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[5] *Pinkard*, 801 A.2d at 91 (emphasis in original).
[6] *Id.* at 90-92. (citations omitted).

> 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.*, Adverse Action Panel] has been held, any further appeal shall be based solely on the record established in the Departmental hearing"; and
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> 5. At the agency level, Employee appeared before an Adverse Action Panel that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.

Based on the documents of records and the position of the parties as stated during the conference held on this matter, I find that all of the aforementioned criteria are met in the instant matter. Therefore, my review is limited to the issues set forth in the Issue section of this Initial Decision *supra*. Further, according to *Pinkard*, I must generally defer to [the Fire Trial Board Panel's] credibility determinations when making my decision. *Id.*

Whether the Trial Board's decision was supported by substantial evidence

According to *Pinkard*, I must determine whether the Fire Trial Board Panel's findings were supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [7] Further, "[i]f the Trial Board's] findings are supported by substantial evidence, [I] must accept them even if there is substantial evidence in the record to support contrary findings." [8]

After Employee challenged his termination, a Fire Trial Board ("FTB") Hearing was held on August 7, 2024. At the FTB hearing, Employee was represented by counsel and pleaded not guilty to all the charges. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their position. The FTB assessed witness testimony and other evidence regarding Employee's alleged misconduct. Included among the exhibits was an audio-visual recording of the interaction between Employee and his supervisor.[9]

In arguing that there was substantial evidence found by the FTB, Agency presented its charges accompanied by summaries of the FTB's fact findings. These findings of fact are based on the testimonial and documentary evidence presented at the FTB Hearing as follows: [10]

On August 11, 2023, Employee and his partner Firefighter E.R. ("ER")[11] were assigned to Ambulance 29 ("A29") and were dispatched to a call for emergency services at the Psychiatric Institute of Washington. Firefighter ER was the Ambulance Crewmember in Charge ("ACIC").

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[7] *Davis-Dodson v. D.C. Department of Employment Services*, 697 A.2d 1214, 1218 (D.C. 1997) (citing *Ferreira v. D.C. Department of Employment Services*, 667 A.2d 310, 312 (D.C. 1995).
[8] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).
[9] *See* Agency Answer ("AA"), Tab 2. Attachments 17 and 18.
[10] These findings of fact are from AA at Tab 21, unless there is a specific cite from Employee's brief as noted in the succeeding footnotes.
[11] To protect his privacy, fellow employee will be identified by just his initials.

Engine 31 ("E31"), a specially equipped Advanced Life Support ("ALS") unit with a Medic onboard, was also dispatched to the same call at the direct request of Captain Kelly and arrived before A29. Captain Joseph Kelly was the officer in charge and inside by the time that A29 arrived in the parking lot. Since the patient was experiencing elevated blood pressure, Medic Unit 21 also arrived on scene.[12]

Upon arriving at the scene of the medical emergency, A29 Firefighters [Employee] and ER made radio communication confirming their arrival. As a Basic Life Support (BLS) unit, A29 was not at the level of care requested for the call.[13] After announcing the unit's arrival via radio, Employee did not exit the ambulance. F/F Employee testified that he called by radio due to the COVID-19 pandemic to stop its spread. Instead, he remained in the ambulance for ten minutes, engrossed in his phone and food, without providing any service or aid.

A29 was alerted to the fact that an ALS transport unit would be transporting the patient.[14] A29 remained on the scene until the ALS unit (Medic Unit 21) arrived and went inside.[15] A29 then made radio communications indicating that they were going to go back in service, which according to Employee would have been heard by all six crewmembers at the scene including Captain Kelly (4 on Engine 31 and 2 on Medic 21). Without any objection, ACIC ER placed A29 back in service.

A determination was then made at the scene by Medic Unit 21 that the patient only required a lower level of care. Medic Unit 21 therefore recategorized the patient as a BLS (Basic Life Support) patient and requested an AMR transport unit (lowest level of care, a level below Employee's Unit). When dispatch confirmed there were no American Medical Response ("AMR") units available at the time, CPT Kelly of Engine 31 requested A29 return back to the transport location.[16]

In his brief, Employee asserted that Captain Kelly violated the communications bulletin by admonishing Employee on the radio. When A29 returned to the Psychiatric Institute of Washington, while en-route with the stretcher, Captain Kelly intercepted Employee and initiated a conversation reprimanding him for putting A29 back in service.[17] Captain Kelly proceeded to accuse Employee of improperly going back in service in front of the patient, EMT personnel, and nursing staff of the Psychiatric Institute of Washington. Employee defended his and Firefighter ER's joint decision in a conversation that lasted several minutes, stating "you could have said, Ambulance 29 stay back, you did not."[18] Firefighter ER could be heard in agreement with this statement. In reference to A29's initial arrival, Captain Kelly also asks, "You said we're available?" At Minute 2:58 Employee affirms, "we went available on the radio."[19]

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[12] Employee Brief February 25, 2025 ("EB") Tab 22 at 216: 16-17.
[13] EB Tab 22 at 160:21-22.
[14] EB Tab 22 at 209:16-18.
[15] Tab 22 at 128:12-21 ("We waited on scene. The Medic 21 arrived. We waited for them to move with their stretcher . . .").
[16] EB Tab 22 at 40:12-15.
[17] EB Tab 22 at 133:12.
[18] EB Def. Ex. 1 (recording of interaction between Employee and Captain Joseph Kelly), Minute 2:40.
[19] *Id*.

Employee contends that throughout their conversation, Captain Kelly did not address ER, the ACIC in charge of A29.[20] When asked at the scene why A29 was placed back in service, Employee replied: "Because the medic on your engine called for a medic transport unit."[21] Employee defended himself by answering Captain Kelly's questions and in his brief indicated that his actions did not affect patient care.

Agency deemed Employee's actions as cause for adverse action warranting termination. Consequently, on September 25, 2022, Agency charged him with various infractions.

These are: **Case No. U-23-776: Charge 1, Specification 1:** Violation of D.C. Fire and Emergency Medical Services Department Order Book Article VI, § 6, which states: "Conduct unbecoming an employee includes conduct detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or any conduct that violates. Public trust or law of the United States, any law, municipal ordinance, or regulation of the District of Columbia committed while on-duty or off-duty."

This misconduct is further defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(f)(3), which states: "Any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations, to include: Neglect of Duty." *See also* DPM § 1603.3(f)(3) (rev. 08/27/2012); *see also* DPM § 1605.4(e) (rev. 06/12/2019).

The specification for Charge 1 described Employee's conduct as unbecoming because he failed to assist with patient care and departed without authorization from the scene in violation of policy. It also cited his disrespectful and argumentative response to Captain Kelly's attempted correction.

Case No. U-23-776: Charge 2:[22] Violation of D.C. Fire and Emergency Medical Services Department Order Book Article VI, § 8, which states: "Insubordination is a failure and/or refusal to comply with lawful orders or instructions, either verbal or written, from a higher ranking member. . ."

This misconduct is defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(f)(4), which states: "Any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations, to include: Insubordination."[23] The specification for Charge 2 described Employee's insubordination for failing to follow orders and conducting himself disrespectfully toward Kelly.

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[20] EB Tab 22 at 232:14-17 ("He [Kelly] was kind of being aggressive towards him [Employee]. And he didn't even say anything to me, he didn't make eye contact with me, *he didn't ask who the ACIC was*"). *See also* at 233:10-12 ("all of the words and attention, everything was towards Employee. Captain Kelly didn't even look at me the entire time").
[21] *Id*.
[22] Agency Brief, Tab 23 at Case No: U-23-776 (Charge 2), page 1-2.
[23] *See also* DPM § 1603.3(£)(4) (rev. 08/27/2012); *see also* DPM § 1605.4(d) (rev. 06/12/2019).

Case No. U-23-776: Charge 3:[24] Violation of D.C. Fire & Emergency Medical Services Department Order Book Article XX.IV, **EMS Administrative and Operational Rules**, which states: EMS Providers will maintain themselves in a courteous, professional manner at all times.

> Section 10. Position Responsibilities: Crewmember (Position No. 2): Duties at the Incident Scene:
> - Stays with the patient from the initial on-scene contact to release at the hospital.
> - Obtains patient history and pertinent information from the patient, family and/or bystanders at the scene.
> - Determines how the patient will be treated and transported. Request additional resources as may be necessary.
> - Administers medications, as needed.
> - Reassesses the patient's condition prior to and during transport.

Further violation of D.C. Fire & Emergency Medical Services Department Bulletin No. 3, Patient Bill of Rights, which states: As our patient, you have the right to expect competent and compassionate service from us ... You may expect:

> 1. To receive timely and appropriate medical services without regard to age, race, religion, gender, sexual orientation or national origin.
> 2. To receive a timely medical assessment and determination of an appropriate level of medical care.

This misconduct is further defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(f)(3), which states: "Any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations, to include: Neglect of Duty."[25] The specification for Charge 3 described how Employee did not enter the treatment facility to examine the patient when he arrived on scene. Instead, Employee spent approximately ten minutes eating and talking on his cellphone in the ambulance before departing without release or placement back into service.

The FTB conducted an Evidentiary Hearing wherein both parties introduced evidence and conducted cross-examination. The FTB found that the evidence presented showed that, besides not providing care or entering the emergency scene, Employee placed Ambulance 29 in service and left the scene. All witnesses testified that when dispatched to a medical local, the standard is to get equipment and go inside to render care alongside the first responders. It deemed Employee's reasons as not justifiable for not rendering timely and prompt service on the local site.

Following the Hearing, the FTB issued its Findings of Fact and Recommendation on August 16, 2023, unanimously finding Employee guilty of all charges and recommending termination for each charge. [26] On September 12, 2024, Chief John A. Donnelly, Sr. notified

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[24] *Id.* Tab 23 at Case No: U-23-776 (Charge 1), page 1-2.
[25] *See also* DPM § 1603.3(t)(3) (rev. 08/27/2012); *see also* DPM § 1605.4(e) (rev. 06/12/2019).
[26] *Id.*, Tab 23. FTB Findings of Fact and Recommendation ("FTB Findings").

Employee that he had accepted the FTB's Findings of Fact and Recommendation, and that Employee would be removed from employment effective September 21, 2024.[27]

In his briefs and submissions, Employee did not dispute the FTB's fact findings. He did not deny that upon arrival at the medical emergency scene, he did not exit his ambulance unit to render aid and that he had an argument with Captain Kelly. Instead, he asserted the FTB ignored his explanations and extenuating circumstances: that his medical skills were not needed at the site, that his unit did not have the equipment needed, and that there was a misunderstanding between himself and Captain Kelly.[28] He also complained about the mistakes of others on the scene and the FTB's disregard for the circumstances that were beyond his control.

Employee asserts that his actions do not amount to Neglect of Duty, Insubordination, or Conduct Unbecoming. Employee disagrees with the way the FTB weighed and interpreted the evidence presented at the hearing. In essence, Employee takes issue with the credibility determinations of the FTB with regards to the charges against him. However, as noted above in *Pinkard*, I must generally defer to the FTB's credibility determinations. The FTB found that based on Agency rules and regulations coupled with the actions that occurred that day, Agency was justified in charging Employee with insubordination, neglect of duty, and conduct unbecoming. Based on the record before me as well as Employee's admissions as to what occurred, I find that substantial evidence exists to support all of Agency's charges against Employee.

Whether there was harmful procedural error.

Agency asserts that it effectuated Employee's discipline wholly in adherence with applicable policies and procedures, including the Collective Bargaining Agreement and Agency's Order Book Article VII. Agency adds that its chosen penalty of termination is appropriate on the grounds that it was made after a thorough "*Douglas* factors" analysis[29] and is within the acceptable range of discipline under the District Personnel Regulations.

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[27] AA at Tab 24.

[28] Along with his brief, Employee submitted a link to the audio-visual recording (EB Def. Ex. 1) of the conversation between Employee and Captain Kelly. The tone of the conversation was confrontational and less than respectful.

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

> 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
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> 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
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> 3) the employee's past disciplinary record;
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> 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

In his brief, Employee complains that despite having common facts and circumstances arising out of the same incident, the penalty imposed by Agency on Firefighter ER, who was the actual ACIC in charge of A29, was no more than a 36-hour suspension for neglect of patient.[30] An employee who raises an issue of disparate treatment bears the burden of making a *prima facie* showing that he or she was treated differently from other similarly-situated employees.[31] In proving a claim for disparate treatment, an agency must apply practical realism to each disciplinary situation to ensure that employees receive equitable treatment when genuinely similar cases are presented.[32] To establish disparate penalties, an employee must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to determine that the agency treated similarly-situated employees differently."[33] If such a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue.[34]

While Employee complained about receiving a more severe penalty than ER, he did not present sufficient evidence to show that they were similarly situated. Employee failed to present evidence that he and ER were in the same organizational unit, had the same supervisor/manager, during the same time period, and incurred the same offenses.[35] Judging from the uncontroverted facts in this matter, ER as ACIC had a different position from that of Employee at the time of the

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> 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
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> 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
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> 7) consistency of the penalty with any applicable agency table of penalties;
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> 8) the notoriety of the offense or its impact upon the reputation of the agency;
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> 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
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> 10) potential for the employee's rehabilitation;
> 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
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> 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[30] EB Tab 22 at 234: 1-4.
[31] *Employee v. Department of General Services*, OEA Matter No. 1601-0077-15, *Opinion and Order on Petition for Review* (January 30, 2018).
[32] *See Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, *Opinion and Order on Petition for Review* (September 29, 1995) and *Lewis v. Department of Veterans Affairs*, 2010 M.S.P.B 98.
[33] *Boucher v. U.S. Postal Service*, 118 M.S.P.R. 640 (2012).
[34] *Id*.
[35] *See Employee v. DCPS Dept. of Transportation,* OEA Matter No. 1601-0129-11R16, *Opinion and Order on Petition for Review* (July 11, 2017).

incident. In addition, Employee did not contend that he and ER faced the same charges while receiving different penalties. Employee's insubordination charge stemmed from his failing to follow orders and conducting himself disrespectfully toward Captain Kelly during their conversation. Employee's own recitation of facts does not indicate that ER had a conversation, much less a heated one, with Captain Kelly. Based on these differences and Employee's failure to carry his burden of proof, his defense of disparate treatment must fail.

Next, Employee complains that Agency's reliance on Employee's prior disciplinary record was an abuse of managerial power because his charges do not independently warrant removal. He disagrees with the way the FTB considered his prior disciplinary history and how they factored it in their choice of termination as the appropriate penalty.

It is uncontroverted that Agency considered the *Douglas* factors when determining Employee's penalty.[36] However, Employee counters by saying that Agency committed harmful procedural error when it incorrectly applied the *Douglas* factors analysis by including his prior disciplinary history. Employee argues that if Agency had not performed such an unsatisfactory analysis of the *Douglas* factors, it would have realized that a lesser penalty would have been appropriate.

The OEA may overturn the agency decision only if it finds that the agency "failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness."[37] "Not all of [the *Douglas*] factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the [petitioner's] favor while others may not or may even constitute aggravating circumstances."[38] Although the OEA has "'marginally greater latitude of review' than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate."[39] The "primary discretion" in selecting a penalty has been entrusted to agency management.[40]

> Selection of an appropriate penalty must ... involve a responsible balancing of the relevant factors in the individual case. The OEA's role in this process is not to insist that the balance be struck precisely where the OEA would choose to strike it if the OEA were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the OEA's review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the OEA finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the

[36] AR at Tab 17. Fire Trial Board Findings of Fact and Recommendation.
[37] *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985).
[38] *Douglas, supra*, 5 M.S.P.R. at 306.
[39] *Stokes*, 502 A.2d at 1011 (citing *Douglas*, 5 M.S.P.R. at 300).
[40] *Id*.

> OEA then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.

Id. (quoting *Douglas*, 5 M.S.P.R. at 300) (internal quotations marks and bracketing omitted).

The D.C. Superior Court noted that *Douglas* outlines the factors that must be considered but it does not require a certain level of consideration be devoted to each factor.[41] I find that Employee's objections to the FTB's *Douglas* factor analysis are simply disagreements with the FTB's evaluation of said factors in his case. There is no requirement that the Agency must conform its *Douglas* factor analysis to Employee's satisfaction.

I note that Employee does not deny that Agency weighed the *Douglas* factors in determining his penalty; rather, Employee disagrees with the way Agency weighed the *Douglas* factors. Despite the fact that the *Douglas* factors specifically included an employee's prior disciplinary history, Employee argues that Agency should not have done so. In Employee's view, Agency should have considered the factors in a way that wholly rebounds to his benefit, without regard to other considerations that reflect upon Agency's ability to achieve its mission. I therefore find that FEMS did not commit harmful procedural error.

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

Agency reiterates that its disciplinary action against Employee was wholly in accordance with applicable policies and procedures. Employee does not allege that there was harmful procedural error. However, Employee argues that while the disrespectful tenor of his conversation with Captain Kelly was unfortunate, he argues that it should have been a learning episode for both of them as he deemed Captain Kelly to have contributed to their heated conversation.

Any review by this Office of the agency decision of selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[42] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."[43] When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[44]

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[41] *Eugene Goforth v. Office of Employee Appeals, et. al.,* Case No. 2020 CA 005084 (D.C. Super. Ct. July 9, 2021).
[42] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).
[43] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).
[44] *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

Employee does not deny that removal is within the range of penalties for each of his sustained charges.[45] In this matter, the record shows that Agency's decision was based on a full and thorough consideration of the nature and seriousness of the offense, as well as any mitigating factors present. I find that Agency exercised its primary responsibility for managing and disciplining its workforce by electing to terminate Employee for his actions which demonstrated several instances of neglect of duty and insubordination. For the foregoing reasons, I conclude that Agency's decision to select removal as the appropriate penalty for Employee's infractions was not an abuse of discretion and should be upheld.

ORDER

It is hereby **ORDERED** that Agency's action of removing Employee is **UPHELD**.

FOR THE OFFICE: /*s/Joseph Lim, Esq.*
JOSEPH E. LIM, ESQ.
Senior Administrative Judge

[45] 6-B DCMR 1607.2 (d) and (e) Table of Illustrative Actions (2017).