Notice: This decision may be formally revised before it is published in the *District of Columbia Register* and the Office of Employee Appeals' website. Parties should promptly notify the Office Manager of any formal errors so that this Office can correct them before publishing the decision. This notice is not intended to provide an opportunity for a substantive challenge to the decision.

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	OEA Matter No.: 1601-0027-24
v.	)	
	)	Date of Issuance: January 16, 2025
DISTRICT OF COLUMBIA	)	
FIRE & EMERGENCY MEDICAL	)	
SERVICES DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Firefighter/EMT with the D.C. Fire & Emergency Medical Services Department ("Agency"). On June 24, 2023, Agency issued a Notice of Proposed Adverse Action, charging Employee with Conduct Unbecoming an Employee (Neglect of Duty) and Insubordination.[2] The charges stemmed from a February 15, 2023, incident wherein Employee refused to assist with cleaning trash in a parking lot/fence line after being directed to do so. Employee pleaded not guilty to each charge and an administrative hearing was held on January 3, 2024. The Trial Board ultimately sustained the charges against Employee, who then filed an appeal

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] *Agency Answer*, Tab 23 (March 11, 2024).

with the Fire Chief. On January 8, 2024, the Chief adopted the Trial Board's findings and sustained the charges levied against Employee. The effective date of his termination was January 13, 2024.

Employee subsequently filed an appeal with the Office of Employee Appeals ("OEA") on February 9, 2024. He argued that Agency failed to conduct a proper analysis of the relevant *Douglas*[3] factors; he was never given a direct order to pick up the trash; witnesses testified before the Trial Board that Employee was of good character; Agency should have imposed a lesser penalty based on the severity of the misconduct; Employee's disciplinary history did not warrant termination; and Agency utilized the incorrect iteration of the District Personnel Manual ("DPM") in its charging documents. As a result, Employee requested that the termination action be reversed.[4]

Agency filed its answer on March 11, 2024. It contended that there was substantial evidence to support a finding that Employee violated Article VI, Sections 6 and 8 of the Department's Order Book. Agency explained that Employee was directed to clean the grounds of a parking lot on February 15, 2023, to which he refused. It claimed that the Trial Board's findings of fact were supported by the record and that Employee failed to provide any testimony to refute

[3]In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth "a number of factors that are relevant for consideration in determining the appropriateness of a penalty." Although not an exhaustive list, the factors are as follows: 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated; 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; 3) the employee's past disciplinary record; 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties; 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; 7) consistency of the penalty with any applicable agency table of penalties; 8) the notoriety of the offense or its impact upon the reputation of the agency; 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; 10) potential for the employee's rehabilitation; 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[4] *Petition for Appeal* (February 9. 2024).

the fact that he refused a lawful order. Additionally, Agency surmised that Employee's termination was conducted in accordance with all applicable laws and regulations. Agency submitted that it utilized the correct version of the DPM and stated that no harmful procedural error occurred in instituting the termination action. Finally, it reasoned that termination was appropriate since this was not Employee's first offense involving the refusal to follow orders. Therefore, it requested that his termination be upheld.[5]

An OEA Administrative Judge ("AJ") was assigned to the matter in March of 2024. On April 10, 2024, the AJ ordered the parties to submit briefs addressing whether Agency's termination action was supported by substantial evidence; whether Agency committed harmful procedural error; and whether Employee's termination was conducted in accordance with all applicable laws and regulations.[6] Agency's brief raised many of the same arguments presented in its answer. It explained that Employee engaged in conduct unbecoming by neglecting his duty to adhere to a fire captain's instructions. Next, Agency contended that it did not commit a harmful procedural error by citing to the wrong version of the DPM in its charging documents. Alternatively, it suggested that even if it did err in this regard, the error was harmless. Agency noted that the Trial Board found that the bulk of the *Douglas* factors weighed in favor of termination. It further cited to what it deemed to be Employee's extensive disciplinary history, providing that the instant adverse action was his third offense involving a refusal to follow orders or policy. Therefore, it believed that Employee's termination was supported by the record.[7]

Employee countered by asserting that Agency's decision to terminate him was not supported by substantial evidence. He claimed that his actions on February 15, 2023, did not

[5] *Agency Answer to Petition for Appeal* (March 11, 2024).
[6] *Aency's Brief* (May 3, 2024).
[7] *Id*.

constitute conduct unbecoming because Agency's ability to perform its functions was neither interrupted nor interfered with. Employee stated that nothing within Captain Steven Himes' report concerning the incident reflected that a direct order was issued to him to collect trash.[8] He clarified that he only sought better directions on why members were being asked to perform such a task. Additionally, Employee maintained that Agency utilized an obsolete version of the DPM in its charging documents and averred that other members were not terminated for similar offenses. Lastly, he contended that the penalty of termination was unreasonable based on the severity of his conduct. Thus, Employee asked that Agency's termination action be reversed.[9]

An Initial Decision was issued on July 10, 2024. First, the AJ explained that the holding in *Pinkard v. D.C. Metropolitan Police Depart*ment, 801 A.2d 86 (D.C. 2002), limited OEA's review to determining whether the Trial Board's decision was supported by substantial evidence; whether Agency's action was taken in accordance with all applicable laws and regulations; and whether there was harmful procedural error. Concerning the substantial evidence requirement, the AJ determined that it was undisputed that Captain Himes was Employee's superior, and Employee refused to clean up the grounds after being instructed to do so by Captain Himes.[10] She went on to highlight Himes' testimony that his original request to the members of the Department to clean up the trash was not an order. However, Himes provided that because Employee and his coworkers did not comply with the request, he told them that they were being issued a direct order to clean

[8] Captain Himes served as Employee's supervisor during the relevant period and was assigned to Agency's Adams Place, Logistics building.
[9] *Employee Brief* (May 31, 2024).
[10] Employee testified before the Trial Board that he was seeking clarification regarding the order, not refusing it. He attested that when he and other members later went to pick up the trash as instructed by Captain Himes, Deputy Chief Andre Edwards arrived at the scene and informed them that they were facing insubordination charges and had to complete a special report. Instead of cleaning the trash site, the members were sent home for the day and told to report to B street the following workday. *Trial Board Hearing Transcript* at p. 68.

up the trash. Consequently, the AJ ruled that the termination action was taken for cause because Employee neglected his duties as an FF/EMT by failing to clean the trash site as instructed.[11]

As it related to the harmful procedural error argument, the AJ explained that the 2019 DPM, not the 2012 DPM, was the applicable iteration of the regulations that should have been utilized in Agency's charging documents. She noted that a charge of neglect of duty – and its corresponding penalty – were reflected in both the older and updated versions of the regulations, hence, any error committed by Agency was harmless. However, she went on to discuss that unlike neglect of duty, a charge of insubordination existed in the 2012 version of the DPM but not the 2019 DPM. The AJ opined that it would be improper to speculate what the appropriate penalty would have been had Agency used the appropriate version of the DPM. Because a charge of insubordination did not exist in the 2019 regulations, and there was no corresponding penalty, the AJ concluded that Agency committed a harmful procedural error. Thus, she held that Agency could only rely upon the neglect of duty charge as a basis for disciplining Employee.[12]

Additionally, the AJ cited the holding in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), which held that in assessing whether the imposed penalty was appropriate, OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Illustrative Actions ("TIA"); whether the penalty is based on a consideration of the relevant factors; and whether there was a clear error of judgment by Agency.[13] She opined that termination was permissible in this case because a first offense of neglect of duty carried a penalty

[11] *Initial Decision* (July 10, 2024).
[12] *Id*.
[13] In *Stokes*, the Court of Appeals held that OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Illustrative Actions ("TIA"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. The Court further provide that an agency's decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion.

of counseling to removal under both the 2012 and 2019 DPM.[14] Moreover, the AJ found that Agency weighed each relevant *Douglas* factor and did not abuse its managerial discretion in selecting the penalty.[15]

Finally, the AJ concluded that Employee established a prima facie case of disparate treatment. She agreed that Employee and his coworkers worked in the same organizational unit -- the Logistics division; were disciplined on the same day; for the same cause of action; and by the same supervisor. However, she made the distinction that Employee received a different penalty than the other employees because of his lengthy disciplinary history, highlighting that he was charged with a total of seven disciplinary infractions during the three years preceding his proposed termination. As a result, the AJ reasoned that Agency successfully rebutted Employee's prima facie showing of disparate treatment. As such, she held that Employee's termination was proper.[16]

Employee filed a Petition for Review with the OEA Board on August 13, 2024. He contends that the Initial Decision is not based on substantial evidence; the AJ did not address all issues of law and fact; and Agency failed to properly consider the *Douglas* factors. He also reasserts the many of the same arguments raised in his May 24, 2024, brief. Employee opines that his past disciplinary actions did not warrant termination because they were not related to insubordination or neglect of duty. He believes that Captain Himes committed perjury during the Trial Board Hearing. Employee further submits that his misconduct did not disrupt Agency's operations. Finally, he reiterates that Agency utilized the incorrect regulations in its charging documents. Employee, therefore, renews his request to reverse the termination action.[17]

---

[14] *See* DPM §1603.3(f)(3)(2012) and DPM § 1607.2(e)(2019).
[15] *Initial Decision* at 16.
[16] *Id.* at 18.
[17] *Petition for Review* (August 13, 2024).

Agency filed its answer on September 19, 2024. It contends that the Initial Decision is based on substantial evidence. Agency disagrees with Employee's assessment of Captain Himes' Trial Board testimony, remarking that the AJ correctly held that witness testimony is largely within the province of the trier of fact. It echoes its position that Employee and his coworkers refused to clean up the parking lot after being instructed to do so by a superior; Employee acknowledged that he delayed picking up the trash; and an employee's admission is sufficient to meet an agency's burden of proof. Additionally, Agency posits that its Order Book does not limit a charge of conduct unbecoming to actions that directly prevent an agency task from being accomplished. Alternatively, it suggests that even if it was required to show an interruption in operations, substantial evidence exists to prove that Agency's operations were adversely affected. Agency argues that the AJ addressed all issues of law raised on appeal and reasons that Employee's previous disciplinary history, in addition to other *Douglas* factors, weighed in favor of termination. Agency also maintains its position that no harmful procedural error was committed. Thus, it requests that the Board deny Employee's petition.[18]

Conduct Unbecoming/Neglect of Duty

Employee submits that the Initial Decision was not based on substantial evidence because he did not refuse an order and because Agency's ability to perform its functions was neither interrupted nor interfered with.[19] Agency's Order Book Article VI, General Rules of Conduct § 6, defines conduct unbecoming to include "conduct detrimental to good discipline, conduct that

[18] *Agency's Answer to Petition for Review* (September 19, 2024).
[19] The Board may grant a Petition for Review when the AJ's decision is not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found 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. *See* Black's Law Dictionary, Eighth Edition; *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).

would adversely affect an employee's or Agency's ability to perform effectively, or any other conduct that violates public trust or a law of the United States, any law, municipal ordinance, or regulation of D.C. while on duty or off duty." Additionally, this misconduct is defined as cause in D.C. Fire and Emergency Medical Services 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." Therefore, counter to Employee's claim, Agency does not have to establish that its operations were actually disrupted. Rather, it may prove that Employee's conduct sufficiently impeded his or Agency's ability to perform effectively.

In this regard, the Trial Board's assessment of *Douglas* factor No. 5 – the effect upon the employee's ability to perform at a satisfactory level – reflects that Employee "is expected to follow orders given to him by his supervisors. If he fails to do so, then he cannot be trusted to perform the basic tasks of a Firefighter/EMT."[20] Captain Himes testified before the Trial Board that his original request to the members of the Department to clean up trash on February 15, 2023, was not an order. However, Himes provided that because Employee and his coworkers did not comply with the request, he told them that it was a direct order to clean up the trash. According to Himes, part of Employee's duties as an FF/EMT was to pick up trash at a site, if needed.[21]

He attested that Agency morale is lowered when members of the department choose not to obey an officer's orders, which may have a ripple effect on other employees who may not take the job seriously.[22] As a result of Employee's refusal to carry out his duties, Himes was forced to dispatch his second in command, Deputy Chief Andre Edwards, to the cleaning site. The members

[20] *Agency Response to Petition for Appeal* at Tab 19.
[21] *Id*. at p. 38.
[22] *Trial Board Hearing Transcript* at pp. 33-34.

who refused the order, including Employee, were subsequently sent home for the day and instructed to return to B Street warehouse the following workday.[23]

This Board agrees with the AJ that Article 6 of the Order Book does not require Agency to prove that Employee's conduct actually interfered with government operations. Agency's Trial Board assessed that no testimony was provided to refute the fact that Employee refused a lawful order issued by Captain Himes. Further, the record supports a finding that Employee's own testimony was that he failed to carry out an order after being directed to perform a function of his job. Employee's conduct constituted a neglect of duty, and we find that the AJ's conclusions flow rationally from the facts. Therefore, we conclude that the AJ's ruling is based on substantial evidence.

District Personnel Manual

The AJ also held that there was substantial evidence in the record to discipline Employee for insubordination. However, because she held that Agency used the incorrect DPM, and failed to provide the exact subcategory/subsection of the corresponding cause of action the charging documents, the AJ concluded that Agency could only discipline Employee under for conduct unbecoming/neglect of duty. This Board notes that a charge of neglect of duty was previously found in DPM §1603.3(f)(3) of the 2012 DPM. However, the 2019 DPM moved each of the adverse action charges to DPM § 1605. Thus, a charge of neglect of duty can now be found in DPM § 1605.4(e), with its corresponding penalty found in DPM § 1607.2(e). Since this charge is found in both the 2012 and 2019 DPM versions, and the penalty for the first offense for the charge under both iterations ranges from counseling to removal, the AJ was correct in her finding that any

[23] *Id*. at pp. 31-44. Captain Himes testified that when Deputy Chief Edwards arrived at the trash site, he informed the members that because they refused to comply with the order to help clean up, and because they did not want to complete special reports, all the employees were being dismissed from their duties and sent home.

error Agency committed was harmless. As a result, we find Employee's argument to the contrary to be unpersuasive.

Credibility Determinations

Employee alleges that Captain Himes committed perjury during the Trial Board hearing and that his testimony was inconsistent. He states that the AJ should have instead relied on the testimony of Deputy Fire Chief Edwards, who provided positive testimony about Employee's work performance. However, the Court of Appeals in *Pinkard supra* held that "OEA, as a reviewing authority, also must generally defer to the agency's credibility determinations."[24] The members of the Trial Board, who were the finders of fact in this instance, assessed the veracity of each witnesses' testimony. Ultimately, the board determined that Agency's witnesses testified credibly in establishing that Employee refused to clean up the grounds after receiving a lawful order to do so. Consistent with the holding in *Pinkard*, the OEA AJ was required to give great deference to the findings related to Captain Himes' and Captain Edwards' testimony. As a result, this Board finds no credible basis for disturbing the Trial Board's credibility determinations.

Penalty

The D.C. Court of Appeals in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised." Additionally, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office. *Love* also provided the following:

> [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]

[24] *See also Gunty v. Department of Employment Services*, 524 A.2d 1192, 1197 (D.C. 1987) and *Dell v. District of Columbia Department of Employment Services*, 499 A.2d 102, 105-106 (D.C. 1985).

> 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, it is appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. (citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981))

Based on the aforementioned, this Board finds that Agency's selection of the imposed penalty is based on the applicable regulations. Termination was an allowable penalty for a charge of neglect of duty under both the 2012 and 2019 versions of the DPM. Agency provided an analysis of each *Douglas* factor it utilized in reaching its decision to terminate Employee. Further, the holding in *Pinkard* limits this tribunal to reviewing the record established at the agency level. Employee's disagreements with Agency's assessment of each factor are insufficient to warrant a reversal the penalty. Thus, we conclude that Agency's selection of the penalty in this case is supported by substantial evidence.

Disparate Treatment

Employee reiterates his previous argument that he was disciplined differently from other employees who were also ordered to pick up trash on February 15, 2023. In *Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-0119-90*, Opinion and Order on Petition for Review* (July 22, 1994), the OEA Board provided guidance as it relates to the disparate treatment of employees. It provided that an employee bears the burden of showing that the circumstances surrounding the misconduct are substantially similar to the circumstances in the cases being compared. In order to establish a claim for disparate treatment, the employee must show that they worked in the same organizational unit as the comparison employees. The employee must also prove that they were

subject to discipline by the same supervisor, within the same general period.[25] If a showing is made, 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.[26]

Here, the AJ acknowledged that Employee made a prima facie showing of disparate treatment, noting that Employee and his coworkers worked in the same organizational unit; were disciplined on the same day, for the same offense; and received discipline from the same supervisor. However, while Employee was terminated, the similarly situated employees were not. To support its penalty decision, Agency differentiated Employee's circumstances as unique because he was charged with a total of seven disciplinary infractions in the three years preceding the proposed termination action. These infractions include but are not limited to charges for conduct unbecoming/insubordination (2021) and absence without leave (2023).[27] We note that Employee served a twenty-four-hour suspension for the 2021 charges. Additionally, Third Battalion Chief, Daniel Loughnane ("BFC Loughnane") testified that he disciplined Employee "a number of times" during the four years he acted as Employee's supervisor.

This Board agrees with the AJ's assessment that Employee met his burden of proof in establishing that he was similarly situated to other members who were ordered to clean the trash site on February 15, 2023. While such a showing may require that the penalty be reduced on this basis, Agency in this instance has presented sufficient evidence to warrant a departure from the guidance established in *Hutchinson* and other relevant case law. Employee's disciplinary record reflects that Agency instituted a total seven charges against him within the three years prior to

---

[25] *See Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, *Opinion and Order on Petition for Review* (December 12, 2011); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, *Opinion and Order on Petition for Review* (May 6, 2009); and *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995).
[26] *See Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15, *Opinion and Order on Petition for Review* (January 30, 2018) (citing *Boucher v. U.S. Postal Service*, 118 M.S.R.P. 640 (2012).
[27] *Agency Response to Petition for Appeal* at Tab 19.

termination. The Trial Board's January 2023 Findings of Fact and Recommendation also clarifies that while his termination was not consistent with those imposed on other employees for similar offenses, Employee's disciplinary history warranted a more severe penalty.[28] Accordingly, we find that Agency has provided a legitimate basis for imposing a different penalty from those who were similarly situated to Employee. Consequently, we find that the AJ's ruling on this issue is consistent with the applicable law.

Conclusion

Based on the foregoing, this Board concludes that the Initial Decision is based on substantial evidence. Because a charge of neglect of duty is found in both the 2012 and 2019 DPM, the AJ was correct in her finding that any error committed by Agency was harmless. Agency met its burden of proof in establishing that its termination action was taken for cause. In accordance with the ruling in *Pinkard*, the AJ was limited to relying on the record established at the agency level and was required to give great deference to any previous credibility determinations. Although Employee made a prima facie showing of disparate treatment, his disciplinary history warranted a different penalty from those received by other members. Finally, Agency did not abuse its discretion in selecting the penalty of termination. Consequently, we must deny Employee's Petition for Review.[29]

[28] *Id*. *See* analysis of *Douglas* factor No. 6.
[29] Employee's petition to the Board contends that the AJ failed to address all issues of law in fact properly raised on appeal. In reviewing the record, this Board concludes that the Initial Decision adequately addressed all relevant claims presented by Employee. We note that Employee has not detailed which issues were not adequately addressed in his petition for the Board; therefore, we are unable to address his arguments related to such.

ORDER

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

FOR THE BOARD:

Dionna Maria Lewis, Chair

Arrington L. Dixon

Jeanne Moorehead

LaShon Adams

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.