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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EMPLOYEE,)	OEA Matter No. 1601-0091-13R20
)	
v.)	Date of Issuance: March 4, 2022
)	
D.C. FIRE AND EMERGENCY)	Joseph E. Lim, Esq.
MEDICAL SERVICES,)	Senior Administrative Judge
Agency)	
)	

Frederic Schwartz, Esq., Employee Representative
Milena Mikailova, Esq., Agency Representative

INITIAL DECISION ON REMAND

PROCEDURAL BACKGROUND

Employee was an Emergency Medical Technician (“EMT”) – Intermediate for the D.C. Fire & Emergency Medical Services (“FEMS” or “Agency”). He was removed from Agency on May 3, 2013, for failing to maintain his D.C. Department of Health (“DOH”) certification. Employee filed an appeal with the Office of Employee Appeals (“OEA” or “the Office”) on May 13, 2013. To OEA’s May 15, 2013, request, Agency filed its Answer to Employee’s Petition on June 13, 2013. On February 25, 2014, this matter was assigned to the undersigned senior administrative judge (“AJ”). After several conferences with the parties from May 21, 2014, to February 11, 2015, the parties submitted Motions for Summary Dispositions. I issued an Initial Decision (“ID”) on October 20, 2015, whereby I upheld Agency’s adverse action. The ID found that: (1) Agency timely initiated the adverse action against Employee in accordance with the 90-day rule as set forth in D.C. Code § 5-1031; (2) Agency’s action of removing Employee from service was done in accordance with applicable law, rule or regulation (specifically, Bulletin No. 83); and (3) termination was a valid penalty under the circumstances and was mandated by medical regulations.

On November 16, 2015, Employee appealed the Initial Decision with the Superior Court of the District of Columbia (“Sup. Ct.”) On February 7, 2017, the Sup. Ct. issued Order (Case No. 2015 CA 008873 P(MPA)) affirming Agency’s decision to terminate Employee. The Sup.

Ct. determined that: (1) the OEA's finding that Agency timely initiated the adverse action against Employee was supported by substantial evidence in the record; (2) the OEA properly found that Agency's action of removing Employee from service was done in accordance with applicable law, rule, or regulation (specifically, Bulletin No. 83); and (3) the OEA's findings that there was no clear error in judgment by Agency and that termination was a valid penalty under the circumstances, mandated under medical regulations, were proper. Employee appealed the Superior Court's February 7, 2017, Order to the District of Columbia Court of Appeals ("DCCA").

On December 20, 2019, the DCCA issued a Memorandum Opinion and Judgment (Case No. 17-CV-253) vacating the Superior Court's February 17, 2017, Order and remanding the case to the Superior Court with directions to remand it to the OEA for further proceedings. The DCCA concluded that "remand is required to determine:" (1) "what procedures, if any, should have been followed to deny [Employee] DOH certification before terminating [Employee] for not having a current DOH certification;" (2) "whether these procedures were followed in [Employee's] case;" and (3) "whether [Employee] was given proper notice of an adverse action under D.C. Code § 5-1031, i.e., whether [Agency] denied him notice of a decision not to recertify him, if he was entitled to such separate notice."

On January 16, 2020, the Sup. Ct. issued an Order (Case No. 2015 CA 008873 P(MPA)) remanding the case to the OEA for further proceedings consistent with the DCCA's December 20, 2019, Memorandum Opinion and Judgment. I scheduled a February 3, 2020, Status Conference but Employee failed to appear. After Employee showed cause, I held a Telephonic Status Conference on March 19, 2020, where I determined that an Evidentiary Hearing was warranted on the issues identified by the DCCA. I ordered the parties to submit their list of witnesses and exhibits as well as proposed hearing dates. Following other status conferences and postponements requested by the parties, I scheduled an Evidentiary Hearing for October 13, 2020.

On September 5, 2020, Employee filed a Motion to Disqualify the undersigned. After considering the parties' arguments, I denied Employee's motion and certified my denial to the OEA Board on October 22, 2020.¹ On March 25, 2021, the OEA Board issued an Order and Opinion on Employee's Interlocutory Appeal denying Employee's motion.

Based on the parties' request, I held the Evidentiary Hearing on August 4, 2021. After another requested extension, the parties submitted their closing arguments on November 19, 2021. The record is now closed.

JURISDICTION

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

¹ See OEA Rule 616.3

ISSUES

1. What are all the requirements (National Registry of EMTs (“NREMT”), Department of Health certification, etc.) that Employee must meet in order to be recertified as an EMT I/99?
2. What procedures, if any, should have been followed to deny Employee DOH recertification before terminating Employee for not having a current DOH certification?
3. Whether these procedures were followed in Employee’s case?
4. If so, should Agency’s termination of Employee’s employment be upheld?

FINDINGS OF FACT²

1. D.C. Official Code §7-2341.15(b)(2) gives the Mayor or his designee the power to deny issuance of, deny renewal of, suspend, or revoke a certification to perform the duties of emergency medical services personnel or of an emergency medical services instructor to an individual who is found to have failed to comply with any other federal or District law applicable to the duties of emergency medical services personnel.
2. Under D.C. Official Code § 5-404.01(e)(1), the “provision of pre-hospital medical care by [Agency’s] certified emergency medical technicians and paramedics shall be under the license of the Medical Director.”
3. “The clinical aspects of techniques, procedures, skills, competency, or efficiency, and adherence to medical protocol fall under the investigative and corrective purview of Office of Continuing Quality Improvement within the Office of the Medical Director. The component which the Operations Division has responsibility is in enforcing adherence to standard operating procedure and operational policies.”³
4. In 2008, Agency instituted a policy to align its emergency medical services training and certification with the industry accepted standard as provided through the National Registry of EMTs (“NREMT”).⁴
5. Effective July 1, 2009, the District of Columbia Department of Health (“DOH”) instituted a requirement that all emergency medical services (“EMS”) providers would need to present a valid NREMT card in order to receive a District of Columbia EMS certification card.⁵

² The undersigned lists here the parties’ joint stipulations of facts, uncontested documents and exhibits of record, and my own findings of facts.

³ Agency Bates #7, Transcript p. 84, L. 2-85.

⁴ Agency Bates #3.

⁵ *Id.*

6. Pursuant to Agency's February 3, 2010 Bulletin No. 83, all Agency employees were required to complete the National Registry process at their respective certification level and maintain both National Registry certification and DOH certification.⁶
7. Bulletin No. 83 provides guidance for compliance with the District of Columbia certification requirements. Bulletin No. 83 applied to all of Agency's members, including Employee.⁷
8. Bulletin No. 83 outlined Agency's policy for required certification of EMTs by the National Registry of EMTs ("NREMT"). This policy applied to all those, like the Employee, who provided medical assistance, medical treatment, first aid, or lifesaving interventions, on the scene of an emergency or in transit from the scene of an emergency to a health care facility or other treatment facility, to a person who is ill, injured, wounded, or otherwise incapacitated. This policy states that, "[a]ll DC Fire & EMS Department employees will be required to complete the National Registry certification process at their respective certification level (EMT-B, EMT-I/99, or EMT-P) and maintain both National Registry certification and District of Columbia (D.C. Department of Health) certification."
9. Bulletin No. 83 stated that the certification exam consisted of two parts: the psychomotor (practical skills) examination and the cognitive (written) examination.
10. Regarding the psychomotor (practical skills) examination, Bulletin No. 83 established the following policy for those at the EMT-Intermediate/99 level:

Psychomotor (Practical Skills) Examination Policies: EMT-Intermediate/99

EMT-Intermediate/99 candidates are allowed three (3) full attempts to pass the psychomotor examination (one "full attempt" is defined as completing all eleven (11) skills and two retesting opportunities if so entitled).

Candidates who fail a full attempt or any portion of a second retest must submit official documentation of remedial training over all skills before starting the next full attempt of the psychomotor examination and re-examining over all eleven (11) skills, provided all other requirements for National Certification are fulfilled. This official documentation must be signed by the EMT Training Program Director or Physician Medical Director of training/operations that verifies remedial training over all skills has occurred since the last unsuccessful attempt and the candidate has demonstrated competence in all skills.

DC Fire & EMS Department Employees who fail the third full and final attempt of the National Registry EMT-Intermediate/99 psychomotor

⁶ *Id.*

⁷ *Id.*

examination will be subject to adverse action.

11. During the relevant time-period, the District recognized four (4) levels of EMT certification: (1) EMT-Basic; (2) EMT-Advanced; (3) EMT-Intermediate (or EMT-I/99); and (4) EMT-Paramedic. EMT-Basic and EMT-Advanced were classified within the Basic Life Support (“BLS”) level of care while EMT-Intermediate and EMT-Paramedic were classified within Advanced Life Support (“ALS”) level of care.⁸
12. Prior to his termination, Employee was employed by Agency as a Basic Paramedic, Series DS699, Grade 8.⁹ Employee’s certification as an EMT-Intermediate was equivalent to Employee’s job title as a Basic Paramedic.¹⁰
13. Employee held certifications that designated him as an EMT-Intermediate/99 (“EMT I/99”), which, in Employee’s case, was equivalent to his job title as a Basic Paramedic.
14. Employee possessed a Department of Health (“DOH”) card valid from June 18, 2010, to June 30, 2012, that designated him as “qualified to serve in the District of Columbia as an EMT- Intermediate (I-99), Active” issued on June 18, 2010 and expired on June 30, 2012.¹¹
15. Prior to his termination, Employee possessed an NREMT certification card that designated him as an EMT-Intermediate (I-99) which expired on March 31, 2014.¹²
16. On June 14, 2011, while assigned to Medic No. 27, Employee and his Paramedic partner who was acting as the Ambulance Crewmember in Charge (“ACIS”), and two additional units responded to a call for an unconscious 32-year old female. The patient died.¹³
17. Medical Director David Miramontes, M.D., concluded there were errors in the performance of the responding Emergency Medical Services (“EMS”) team and that Employee failed in his paramedic duties.
18. As a result, Employee was removed from his EMT job duties by the Office of the Medical Director on June 14, 2011, and he was reassigned to Agency’s Training Academy.¹⁴
19. The parties agree that there is no record of any charges or disciplinary action by the Operations Division against the Employee in relation to the June 14, 2011, incident.¹⁵
20. Employee was placed into a Critical Remediation Action Plan at the Training Academy

⁸ Transcript pgs. 22-23.

⁹ Agency Exhibit 1.

¹⁰ Agency Exhibit 1, Transcript p. 22.

¹¹ Agency Exhibit 3, Transcript 22, L. 2-13.

¹² Agency Exhibit 3.

¹³ Agency Exhibit 4.

¹⁴ Agency Bates # 7.

¹⁵ Agency Bates # 716.

- (“TA”) for remedial training until further notice. The Plan was a “logical and standardized approach to assessing...[the] Employee who is brought into remediation for any reason.”¹⁶
21. Employee “went through the continuing education of every advanced life support provider the District does yearly.”¹⁷
 22. On June 20, 2011, Employee had completed the ALS Refresher class held at the Training Academy.¹⁸
 23. On June 24, 2011, Employee completed a Field Internship Student Data Acquisition Project (“FISDAP”) exam.¹⁹
 24. On June 27, 2011, June 28, 2011, and July 7, 2011, Employee reviewed/studied various topics with Instructor Jura.²⁰
 25. As of July 14, 2011, Employee had “completed his classroom training” and was to be scheduled for Advanced Life Support (“ALS”) field evaluations with another EMT-Paramedic, beginning on July 17, 2011, to be completed on July 27, 2011.²¹
 26. On July 15, 2011, Employee’s field evaluation was rescinded by Agency’s former Medical Director, Dr. Mountvarner.²²
 27. On July 19, 2011 Employee met with Dr. Mountvarner, was issued the 6th edition of Nancy Caroline’s “Emergency Care in the Streets,” and returned to the Training Academy.²³
 28. Employee took FISDAP exams on four different topics on August 10, 2011, August 11, 2011, August 15, 2011, and August 16, 2011.²⁴
 29. In August 2011, Dr. Miramontes was appointed as Agency’s Assistant Fire Chief and new Medical Director.²⁵
 30. On September 27, 2011, Employee took a full FISDAP exam and scored 61%.²⁶

¹⁶ Agency Exhibit 5; Transcript 24, L. 14-18.

¹⁷ Transcript 25, L. 7–16.

¹⁸ Agency Bates # 58.

¹⁹ Agency Bates # 58; Transcript 25, L. 12-16.

²⁰ Agency Bates # 58.

²¹ Agency Bates # 69.

²² Agency Bates # 58, 69.

²³ Agency Bates # 58.

²⁴ *Id.*

²⁵ Transcript p. 17-18.

²⁶ Agency Bates # 58.

31. On September 28, 2011, Employee took Dr. Miramontes' examination for field evaluation purposes, and the Medical Director evaluated Employee. The Medical Director checked the box "Return to Mentor," noting "Close eval[uation] of ability to function in field. Need Fisdap²⁷ for full release. Re-assessment. (sic) Will always be ACA²⁸ only under new paramedic partner."²⁹
32. On October 6, 2011, Employee was assigned to obtain ALS field evaluations under mentor Paramedic Preceptor Sgt. Bachelder.³⁰
33. On October 7, 2011, Ms. Massengale e-mailed Employee: "I wanted to reach out and let you know that the CQI³¹ department wants to assist you in maintaining the level of excellence you have demonstrated during the past few weeks at TA."
34. Employee received a field evaluation from October 12, 2011, to January 3, 2012. Agency Bates # 58. At the conclusion of the field evaluation – which consisted of "ten #503's containing ninety-one incident numbers and nine #508s" – Mentor Paramedic Sergeant Bachelder reported to Dr. Miramontes that Employee was "proficient in patient skills and ALS protocols, and should be released to Ops."³²
35. On January 2, 2012, Sgt. Bachelder wrote the Medical Director, noting: [Employee] has improved and progressed from needing an occasional prompting to needing very few prompts during patient care. He has become a better provider for his patients and the agency. [Employee] has easily accepted the roll (sic) of a team member and works well with other unit members providing care. [Employee] is very knowledgeable in patient care and protocols. In my opinion [Employee] is ready to resume his role as an ACA.
36. On February 2, 2012, Medical Director Miramontes tested Employee's skills as an EMT-Intermediate or Advanced Life Support ("ALS") provider through a practical skills (psychomotor) exam scenario. Dr. Miramontes concluded that Employee's performance was inadequate and informed Employee that he would not sponsor him under his license as an EMT-Intermediate but would sponsor him as an EMT-Advanced.³³
37. Dr. Miramontes told Employee that he lacked "maturity" and did not have the "cognitive and psycho-motor skills to practice as [a paramedic]," that he would not sponsor his recertification, and that he would so advise the Department of Health.
38. Thus, the Medical Director rescinded Employee's I/99 certification, but allowed Employee to continue as an EMT-Advanced.

²⁷ "Field Internship Student Data Acquisition Project, also name of EMS test"

²⁸ "Ambulance Crew Assistant"

²⁹ Employee Supplement 10; Agency Bates # 58.

³⁰ Employee Supplement # 9; Transcript 26, L. 15-27, L. 1.

³¹ "Continuous Quality Improvement"

³² Agency Bates # 58.

³³ Agency Exhibit 6, Transcript pgs. 29-32, 117, 216-217.

39. On February 3, 2012 at 3:55 p.m. Captain James Follin, Dr. Miramontes' liaison at the Training Academy, sent an email to Dr. Miramontes following up on Employee. He inquired, "[Employee] is due to report to M-30-2³⁴ on Wednesday per his tele staff. Due to current circumstances do you want him removed from operations? He can report to the TA on a 40-hour work week until the administrative actions are completed."
40. On February 3, 2012 at 4:20 p.m. in response, Dr. Miramontes sent an email stating: He [Employee] is officially removed from operations. He needs a new certification card. I offered him an option. He chose another path. He can go into light duty/no patient care process on day work or as assigned until he has a certification. His EMT-I-99 will be pulled. He has no training requirements so assigning him to training makes no sense. Writing the letter to DOH now.³⁵
41. On February 3, 2012 at 4:58 p.m., Deputy Fire Chief Gerald Coles sent an e-mail to Dr. Miramontes and Captain Follin stating that Employee would be detailed to the Training Academy "until he has been afforded an opportunity to obtain certification."³⁶
42. Employee was assigned to twelve (12) additional days of training at the Training Academy.
43. Dr. Miramontes believes "the Training Academy was using [Employee] for community education for community CPR."³⁷ Dr. Miramontes described Captain Follin as "the overseer of remediation for me at the Training Academy."³⁸
44. Dr. Miramontes referred to Employee having received "extensive" and "intensive" training at the Training Academy.³⁹
45. Employee testified that this training consisted of (1) one additional "swipe" at the interactive simulation mannequin, (2) "some FISDAP paperwork," and (3) some self-directed information gathering.⁴⁰
46. On February 14, 2012, Medical Director Dr. Miramontes again tested Employee's skills as an EMT-Intermediate ALS provider through a practical skills exam scenario. Miramontes again concluded Employee's performance was inadequate, noting that Employee received twelve days of extensive training at the Training Academy. Dr. Miramontes did not have "confidence" in Employee's skills as an ALS provider, but still offered to sponsor Employee as an EMT-Advanced at the BLS level of care. Consequently, Dr. Miramontes did not reinstate Employee's I/99 status.⁴¹

³⁴ M-30-2 or Medic-30-2 is an ambulance unit.

³⁵ Agency Exhibit 21, Bates # 62-63.

³⁶ Agency Bates # 62.

³⁷ Transcript p. 82, L. 5-8.

³⁸ Transcript p. 124, L. 22-125, L. 2.

³⁹ Agency Exhibit 7, Transcript p. 34, L. 16-21.

⁴⁰ Transcript p. 202, L. 13- 22; Transcript p. 203, L. 1-14.

⁴¹ Agency Exhibit 7, Transcript 33-34, 117.

47. On February 14, 2012, Dr. Miramontes wrote a letter to Dr. Brian Amy, Medical Director of the Health Emergency Preparedness and Response Administration at the DOH. The subject was “Request downgrade of [Employee’s] Certification after Quality Review.” He noted:

My assessment reveals that he does not demonstrate the cognitive nor psycho-motor skills that are required for him to function safely as an independent EMT-I-99 advanced life support provider. His technical skills were poor on my last assessment using a patient simulator with mega code session held on 2 February 2012 and again on 14 February 2012.

Basic Paramedic skills such as medication administration, EKG rhythm recognition, and ACLS⁴² protocol compliance were not to an acceptable standard.

I have offered him a BLS⁴³ level of certification as an EMT-Advanced but cannot support him functioning as an EMT I-99 “paramedic” until such time as he completes a fully accredited Paramedic Course, gains NREMT-Paramedic certification, and completes an assessment by this agency.

Summary of past interventions listed below when taken in context to my recent assessment supports such a decision. He also has been in training since removal from operations on 6/14/2011 after a very concerning complaint of poor performance during Cardiac Arrest run.

In this letter dated February 14, 2012, Dr. Miramontes detailed Agency’s remediation efforts and opined that Employee did not demonstrate the necessary skills required for him to function safely as an independent EMT-I/-99 ALS provider. Accordingly, Dr. Miramontes requested that Employee’s DOH certification be “dropped” from EMT-I/99 to EMT-Advanced.⁴⁴

48. The February 14, 2012 letter noted that he could not authorize re-certification of Employee’s NREMT I-99 certification at that time.
49. Dr. Miramontes terminated Employee’s remedial training necessary to satisfy his Critical Remedial Action Plan in February 2012.
50. The DOH did not take any official action regarding Employee’s DOH certification in response to Dr. Miramontes’ February 14, 2012, letter.⁴⁵

⁴² Advanced Cardiac Life Support

⁴³ Basic Life Support

⁴⁴ Agency Exhibit 8.

⁴⁵ Transcript p. 41.

51. Dr. Miramontes declined to sign Employee's May 30, 2012 DOH certification application to be an EMT I/99 under his supervision.
52. Dr. Miramontes wrote a follow-up letter to Dr. Amy dated June 25, 2012 with the subject: "Request revocation of Certification after provider Clinical Review Harold Dargan EMT I-99." In this letter, Dr. Miramontes stated that he personally tested Employee and found him to be incompetent despite retraining. Dr. Miramontes also stated that he could not allow Employee to practice under his license and that he would not "sponsor him at the ALS scope of practice." Dr. Miramontes requested that the DOH "decertify" Employee as an ALS EMS provider. The June 25, 2012, letter noted:
- I have completed a CQI⁴⁶ review for [Employee] EMT I-99 (Basic Paramedic) and have noted he has had a serious CQI interaction regarding poor performance during a cardiac arrest. [Employee] has been detailed to DCFEMS' Training Academy and was re-trained by a field mentorship provider. Shortly thereafter, I personally tested [Employee] on two occasions with a patient simulator and found him to be incompetent despite retraining. I believe [Employee] lacks the maturity, cognitive knowledge and skills to perform as an ALS provider.⁴⁷
53. The June 25, 2012 letter stated that there were past CQI concerns with Employee, stating that Employee received extensive retraining and extended field mentoring. The letter noted "On two separate occasions EMT I-99 [Employee] failed to perform at an acceptable level in patient simulation and multiple cognitive, medication administration and protocol errors were noted despite re-training."
54. The June 25, 2012 letter concluded that: "In light of the documented adverse events and previous remediation attempts, I cannot allow this provider to practice under my license and am hereby requesting that DOH decertify EMT [Employee] as an ALS EMS provider. I cannot authorize re-certification of his NREMT EMT I-99 certification at this time and will not sponsor him at the ALS scope of practice."
55. Miramontes wrote the June 25, 2012, follow up letter because while there had been previous discussion with the DOH, there had been no action taken on his previous letter and Employee's "certification was going to lapse on June 30th." This letter was "basically almost identical to the previous one" except that it requested decertification.⁴⁸
56. Employee's EMT-Intermediate DOH certification expired at midnight on June 30, 2012.⁴⁹
57. By a Memorandum dated July 3, 2012, DOH District EMS Training Coordinator Robert W. Austin noted receipt of Dr. Miramontes' June 25, 2012 letter and informed Dr.

⁴⁶ "Continuous Quality Improvement"

⁴⁷ Agency Exhibit 10.

⁴⁸ Transcript p. 41-42; Transcript p. 91, L. 17 Transcript p. 93, L.12.

⁴⁹ Agency Exhibit 3, 11.

Miramontes that Employee's DOH EMT-Intermediate certification expired at midnight on June 30, 2012. Mr. Austin also noted that the DOH had not received an application of renewal and that therefore no action by the DOH was necessary at that time.⁵⁰

58. As a result, Employee was no longer eligible to continue in his duties with Agency under Bulletin No. 83. Employee was then referred to the Office of Compliance for termination.
59. Employee was offered the opportunity to apply for EMT-Advanced level certification. In an October 1, 2012, e-mail to Agency, Miramontes reported that Employee declined.
60. Based on this, by letter dated October 31, 2012, the Agency issued to Employee an advance written notice proposing removal of Employee from his position as Basic Paramedic, DS-699, Grade 8. The notice⁵¹ charged Employee with:

Charge No. 1: Violation of the D.C. Fire and EMS Bulletin No. 83 which reads in relevant part: General Policy "All D.C. Fire and EMS Department employees will be required to complete the National Registry certification process at their respective certification level (EMT-B, EMT-I[99], or EMT-P) and maintain both National Registry certification and District of Columbia (D.C. Department of Health) certification."

This misconduct is defined as case in Article VII, Section 2 (f) (5) of the D.C. Fire and EMS Department Order Book, which states in part: "Any on duty or employment related act or omission that interferes with the efficiency or integrity of government operations, to with Incompetence and in 16 D.P.M. § 1603.3 (f)(5) (March 4, 2008).

Specification No. 1: In order to practice as a Paramedic or EMT, an employee must maintain D.C. Department of Health (DOH) certification. Your DOH certification expired on June 30, 2012.

On June 14, 2011, while assigned to Medic No. 27, with your partner Paramedic Channel Jones, your unit responded for an unconscious 32-year-old female. You failed to adequately prepare all necessary equipment before initiating a critical skill. You deviated from standard practice by placing an endotracheal tube into the patient's airway and placing a non-re-breather mask over the tube. You failed to oxygenate the patient before intubation and suctioning. You further failed to initiate ventilations for one minute with the proper use of a bag-valve mask device, and you left the patient's airway unattended while you left to retrieve additional equipment. As it turns out, the bag-valve device was inside the bag adjacent to the patient. The patient did not survive.

⁵⁰ Agency Exhibit 11.

⁵¹ Agency Exhibit 15.

On June 14, 2011, at 1530 hours, the Office of the Medical Director immediately removed you from your assigned Medic Unit No. 27 and reassigned you to the Department's Training Academy. You were placed in a critical remediation action plan until further notice.

On February 2, 2012, Medical Director David A. Miramontes, M.D. interviewed your skills as an Advance Life Support (ALS) provider. You were given a medical scenario of a 64-year-old patient with a history of chest pain that became unresponsive with a heart rhythm of ventricular fibrillation. You neither recognized the rhythm, nor did you recognize the asystole rhythm placing the patient in cardiac arrest. In light of your inadequate performance, Dr. Miramontes informed you that he would no longer sponsor you to practice as a Basic Paramedic under his medical license but would allow you to practice as an Advance Level EMT.

On February 14, 2012, Medical Director Miramontes again interviewed your skills as an Advance Life Support provider. You were given another medical scenario of a patient having chest pain with a blood pressure of 204/106, and a pulse rate of 120. You stumbled with your medications and dosages. Dr. Miramontes informed you that he lacked confidence in your skills as an ALS provider, but suggested that you could work as a basic life support provider.

Thus, after having lengthy remediation and numerous evaluations, you continued to demonstrate a lack of maturity, and a deficiency in cognitive psycho-motor skills to practice as a Basic Paramedic. Accordingly, Dr. Miramontes submitted documentation to DOH communicating his decision to withdraw his sponsorship of you to practice as an ALS provider with the Department.

Your position of record is a Basic Paramedic. Accordingly, you are required to maintain all certification requirements associated with your position. Your DOH certification expired on June 30, 2012. Your inability to meet the requirements of this position renders you incompetent to render services as a Basic Paramedic.

Your lack of certification further places both you and the citizens of the District of Columbia in danger and, therefore, interferes with the efficiency and integrity of government operations.

Because you have failed to maintain your DOH certification, you are precluded from performing the duties of Basic Paramedic in the District of Columbia, as outlined in Bulletin No. 83 "National Registry of EMT's (NREMT) Certification Policy EMT." Accordingly, this action is proposed.

61. The Advance Notice informed Employee of his right to review the material upon which the proposed action was based, to respond in writing within six (6) days of receipt of the Advance Notice, and to an administrative review by a Hearing Officer.⁵²
62. Prior to Agency issuing the Advance Notice, Miramontes offered to sponsor the Employee as an EMT-Advanced but not as an EMT-Intermediate (his certification level at the time) on numerous occasions. Employee did not accept the offer.⁵³
63. Employee submitted an undated response through counsel.⁵⁴
64. On March 28, 2013, the Hearing Officer issued a written decision finding that Agency's proposal to remove Employee from his position was supported by a preponderance of the evidence in the record and that the penalty of termination was reasonable. The Hearing Officer recommended that Employee be removed from his position.⁵⁵
65. On April 24, 2013⁵⁶, Agency's Chief Kenneth B. Ellerbe issued the final decision sustaining the removal. The Chief expressly noted his consideration of D.C. Official Code § 7-2341.15 (d), which prohibits the Agency from employing persons who no longer possess the requisite certifications.
66. On April 25, 2013, Agency sent a Notice of Final Decision/Removal ("Final Decision") to Employee notifying him that he would be removed from his position effective May 3, 2013.⁵⁷
67. Employee's ACLS certification expired in May 2013.
68. Employee's employment with Agency was terminated effective May 3, 2013.
69. Employee's Cardio-Pulmonary Resuscitation (course C) certification expired in July 2013.
70. Employee's EMT I/99 certification from the National Registry of Emergency Medical Technicians expired on March 31, 2014.

SUMMARY OF MATERIAL TESTIMONY

Dr. David Miramontes ("Miramontes") August 4, 2021, Transcript pgs. 16-125.

Miramontes is an Associate Clinical Professor of Medicine at the University of Texas Health Science Center, San Antonio. He also serves as the Medical Director for the San Antonio

⁵² Agency Exhibit 15 at 37.

⁵³ Agency Exhibit 6 and 7, Agency Exhibit 21 at 62 and 74, Transcript at pgs. 31, 35-36, 44-45, 216-217.

⁵⁴ Agency Exhibit 18 at 43.

⁵⁵ Agency Exhibit 18 at 50.

⁵⁶ The Final Decision letter was misdated March 24, 2013.

⁵⁷ Agency Exhibit 20.

Fire Department and numerous departments in the San Antonio area. Prior to his work in San Antonio, Miramontes was appointed to Assistant Fire Chief for the District government in August 2011, and he resigned on October 29, 2014. He served as the Emergency Medical Services (“EMS”) Medical Director for the District of Columbia Fire and Emergency Medical Services (“Agency”). Miramontes further explained that he was the Chief of EMS. As a physician, he provided medical direction to Emergency Medical Technicians (“EMT”) and provided sponsorship to paramedics through the Department of Health (“DOH”).

Miramontes stated that it was important that an employee receive sponsorship so that the employee was able to practice medicine, paramedicine or EMT services. He explained that he had discretion to suspend his sponsorship to any given member, as suspension was codified in District law. He further explained the differences between a suspension of sponsorship for a given member and a revocation of a DOH certification. In order to become certified, an individual was required to pass the National Registry of Emergency Medical Technicians (“National Registry”) exam. This exam affirmed one’s knowledge of the core content to determine the level of certification for the EMT-Advanced or paramedic. The employer or provider of the EMS services would have to sponsor the individual on their application to the DOH. In turn, the DOH would review the application, conduct a background check, validate the registry states, and then offer a certification in the District of Columbia.

Miramontes testified that Employee worked as a paramedic basic, and his certification level was I/99, a certification between the level of the EMT-Advanced and paramedic. Miramontes noted that this I/99 certification no longer existed. Upon Miramontes’s arrival, Employee was already reassigned to the training academy. He explained that Employee required an Advanced Life Support Protocol Update (“ALS”) refresher course. Employee also completed the Field Internship Student Data Acquisition Project (“FISDAP”) exam, which is a standardized test that assesses global knowledge of deficits. For instance, if Employee had a deficit in pediatrics or obstetrics, the results would show up on the assessment exam and his superiors would be able to address his remediation plan. Miramontes stated that it took Employee six months to complete the remediation process which was an unusually long time since remediations were typically conducted within four weeks out of twelve weeks.

On September 28, 2011, Miramontes conducted an evaluation on Employee at the training academy in the simulation lab. He recalled Employee having good function and subsequently determined that Employee had enough classroom and lab time to continue his remediation education in the field with a field preceptor.

On February 14, 2012, Miramontes evaluated Employee for a second time. In his report, marked as Agency Exhibit 7, Miramontes noted that he and Captain Follin offered Employee another opportunity to demonstrate that Employee had knowledge, skills, and the ability to perform as an EMT I/99 or EMT Intermediate in a clinical scenario. Initially, Employee did well in the simulation lab; however, he subsequently failed to perform and became hesitant in the simulation exercise. Miramontes emphasized that in a health crisis, an EMT has to perform the correct medical procedures efficiently and quickly. He described in detail Employee’s performance deficits and said Employee failed multiple skills evaluations. Because of Employee’s low performance, Miramontes was not confident that Employee would be able to

perform effectively as an EMT I/99 Advanced. Employee's DOH certification lapsed on June 30, 2012. It was Employee's responsibility to apply for recertification. Until Employee received certification, he would not be permitted to provide patient care.

On February 14, 2012, Miramontes drafted a letter to Dr. Amy requesting that Employee receive a reduction in grade from I/99 to EMT-Advanced. In the letter, Miramontes outlined several reasons and the process conducted to try and remediate Employee. Miramontes did not recall Employee requesting training between February 2, 2012, and June 2012. However, he recalled the discussions that occurred between himself and the DOH.

Miramontes asserted that Employee received regular training at the training academy as part of the normal recertification. Additionally, Employee received in-service training throughout the year and other training required by the District of Columbia. He said that only once in all his 22 years of experience, has anyone such as Employee received so much extensive remediation. Miramontes explained that Employee's National Registry certification had an expiration date of March 21, 2014, which meant he applied to the National Registry before March of 2012.

Miramontes testified that the EMT, EMT-Advanced, and the I/99 could recertify their National Registry based on demonstrating they attended and received continuing education credits that were validated by the registry. Sponsorship was not required by the medical director before. However, this process changed. Now, at the paramedic level, a medical director would have to attest that the employee met the criteria for the National Registry core curriculum in order to be recertified.

Miramontes explained that an EMT-basic is at the level of a half semester, which consisted of a three or four credit course. The EMT-basic provided basic life support skills, CPR, and bandaging. Additionally, they were able to conduct assessments and blood glucose monitoring. The EMT-Advanced provided additional skills, such as administering subcutaneous epinephrine, using a supraglottic airway, and starting an Intravenous ("IV"). The I/99 served as a bridge between EMT-Advanced and the paramedic's scope of practice. It was a transitional certification process that was intended for rural providers that could not go to a complete paramedic class, which consists of 1,200 hours of training, almost thirty-two college credit hours. However, the District used this method to have employees bridge between the two on the way to being a paramedic. They could provide advanced level skills that would not typically be in a paramedic's scope of practice. He explained that the I/99 has since been removed from the National Registry nomenclature. The term basic paramedic in the District job classification refers to the I/99 individual. The ALS EMS is in reference to employees that had skill sets at the I/99 or paramedic level that could perform advanced life support procedures. Additionally, they could assist with distributing medications, administering EKGs and IVs with or without medication, and providing cardioversion.

Miramontes stated that over the span of six months, Employee was evaluated by personnel at the training academy, paramedics, captains, and field training officers. Employee was also evaluated by field training officers in the civilian ambulance division. In order for Miramontes to sponsor an employee, the employee must meet the requirements and apply for recertification. The employee Miramontes sponsored would have to demonstrate that they had

an active National Registry card in addition to other credentialing cards that were required. After submission for processing, the employee was required to attend recertification and Miramontes would sign the forms that were validated by his staff at the training academy. The forms would be processed by the DOH's rules and regulations. Finally, a certificate would be issued from the DOH as an EMT-basic, EMT-intermediate, or EMT-paramedic.

Captain James Follin ("Follin") Transcript pages 156-184.

Follin, an EMS Captain with the DC Fire Department, stated that he facilitated Employee's remediation. He further explained that if a member had an issue while in the field, the member was sent to Continuing Quality Improvement ("CQI"). CQI would then develop a plan of remediation for the member and he would ensure that the plan was completed. Follin witnessed Miramontes evaluate approximately fifteen other members in the remediation program and conduct interviews with new paramedics that were preparing to go into the field. According to Follin, Employee did not perform adequately for his EMT intermediate level of certification. While Follin could not recall specifics, he explained that Employee missed key steps that were necessary in order to treat a specific patient complaint.

Employee Transcript pages 197-231.

Employee acknowledged that this position was the lowest grade of an EMT. He became an I/99 in May of 2005, and that he held certifications in cardiac life support, pediatric advanced life support, advanced medical life support. Employee's medical services training did not require remediation until June of 2011.

Employee testified that Miramontes did not feel comfortable with the skills or the abilities that he demonstrated. Employee also did not feel comfortable performing in front of him. He explained that he was not familiar with the simulation mannequin that he had practiced with. Additionally, not only was he required to perform physical skills, but he also had to observe monitors and other pieces of equipment around. After Employee's performance, he was informed that he was to be remanded to the training department. At the training department, he made another training attempt on the simulation mannequin. While at the facility, Employee completed the Fisdap application, which was a professional examination program that assists an individual in the particular specialty to understand and further develop the skill levels that they may be deficient in.

During Employee's second examination in February, Miramontes informed Employee that he did not possess the skills, knowledge, and abilities to perform roles and responsibilities as an EMT paramedic. Therefore, Employee would not be sponsored by him to receive his I/99 certification. Moreover, Employee was informed that because he was not receiving the certification, he would be demoted to an EMT basic or advanced.

After the two remediations at the training academy, Employee did not receive any additional remediation. Towards the end of 2012, Employee requested to receive outside training and subsequently attended a paramedic course at Prince Georges Community College. There he successfully completed and received certifications as well as the National Registry's

paperwork and documentation. He explained that he submitted the application to be recertified because all personnel were required to submit certification and documentation to be recertified in order to not be classified as insubordinate. Employee claimed that he unintentionally omitted filing out the portion of sponsorship on the form. He stated that he could not recall why he did not provide an answer for the sponsor because the certification occurred approximately ten years ago.

Employee testified that he did not apply for certification as an EMT or EMT-Advanced to the DOH. He stated that although his June 30, 2012, DOH certification was expired, Agency permitted him to remain employed as an EMT-Advanced. However, Employee failed to respond to Agency's offer.

ANALYSIS AND CONCLUSIONS OF LAW

1. What are all the requirements (National Registry of EMTs ("NREMT"), Department of Health certification, etc.) that Employee must meet in order to be recertified as an EMT I/99?

D.C. Official Code §7-2341.15(b)(2) gives the Mayor or her designee the power to deny issuance of, deny renewal of, suspend, or revoke a certification to perform the duties of emergency medical services personnel or of an emergency medical services instructor to an individual who is found to have failed to comply with any other federal or District law applicable to the duties of emergency medical services personnel. The Mayor has designated this power to the Medical Director under D.C. Official Code § 5-404.01. This statute also governs the role and powers of the Agency's Medical Director. D.C. Official Code § 5-404.01(d)(1) (a) to (c) states: "The Medical Director shall provide medical oversight for all aspects of pre-hospital medical care; medical training; and quality assurance of medical services: and D.C. Official Code § 5-404.01(e)(2) states: "The Medical Director shall supervise the administration of pre-hospital medical care...

D.C. Official Code § 5-404.01(e)(1) further provides that "The provision of pre-hospital medical care by the Department's certified emergency medical technicians and paramedics shall be under the license of the Medical Director. There are 4 EMT levels: EMT-Basic and EMT Advanced comprise the BLS level, while EMT Intermediate or EMT -I/99 and EMT Paramedic comprise the higher ALS level.

The February 3, 2010, Agency Bulletin No. 83 entitled National Registry of EMTs ("NREMT") Certification Policy outlined Agency's policy for required certification of EMTs by the NREMT. This bulletin is the sole written policy outlined by Agency regarding the certification and credentialing of its EMT personnel. This policy applies to all those, like the Employee, who provided medical assistance, medical treatment, first aid, or lifesaving interventions, on the scene of an emergency or in transit from the scene of an emergency to a health care facility or other treatment facility, to a person who is ill, injured, wounded, or otherwise incapacitated. This policy states that, "[a]ll DC Fire & EMS Department employees will be required to complete the National Registry certification process at their respective certification level (EMT-B, EMT-I/99, or EMT-P) and maintain both National Registry

certification and District of Columbia (D.C. Department of Health) certification.”⁵⁸

Based on Bulletin No. 83’s General Policy, it is evident that an employee must first complete the NREMT certification process at their respective certification level (EMT-B, EMT-I/99, or EMT-P) and then present a valid NREMT card to receive a District of Columbia EMS certification card from the D.C. Department of Health. As Bulletin 83 is the sole document governing EMT certifications, it also the sole document governing EMT recertifications.

2. What procedures, if any, should have been followed to deny Employee DOH recertification before terminating Employee for not having a current DOH certification?

D.C. Official Code §7-2341.15(b)(2) gives the Mayor or her designee the Medical Director, Dr. Miramontes, the power to deny issuance of, deny renewal of, suspend, or revoke a certification to perform the duties of emergency medical services personnel or of an emergency medical services instructor to an individual who is found to have failed to comply with any other federal or District law applicable to the duties of emergency medical services personnel. Thus, after the June 14, 2011, incident where a patient died due to lapses in the medical care provided by an EMT, Dr. Miramontes exercised his duty to remove Employee from his detail and reassign him for further retraining as an EMT I/99.

To be recertified, Employee must pass both the cognitive and psychomotor sections of the NREMT certification process at his certification level of EMT-I/99 before he can obtain a NREMT certification card. Only then can he present a valid NREMT card in order to receive a District of Columbia EMS certification card from DOH. Employee has six attempts to pass the cognitive portion and three full attempts to pass the psychomotor portion before being subjected to adverse action.

Failing the cognitive portion for the third time will require the employee to obtain at least 36 hours of remedial training. After this, they have three more chances to pass the cognitive portion. For the psychomotor portion, employees are allowed three attempts to pass all eleven skills before being subjected to adverse action. A failure to pass either the cognitive or the psychomotor portions of the NREMT certification process will subject Employee to being decertified by the Medical Director as an EMT-I/99.

According to Bulletin 83’s Implementation Procedures, Agency will make reasonable efforts to ensure that each employee will complete the National Registry certification process within six months of the first examination attempt.

Bulletin No. 83 states that the certification exam consists of two parts: the cognitive (written) examination and the psychomotor (practical skills) examination. Employees are given a total of six opportunities to pass the National Registry cognitive (written) examination. Employees who fail to obtain National Registry certification after six cognitive examination

⁵⁸ All succeeding discussions on Agency’s Bulletin 83 refer to Agency Exhibit 2, which contains the full text of Bulletin 83.

attempts will be subject to adverse action by the Department.

Employees who fail the first attempt at the National Registry cognitive (written) examination must immediately notify their supervisor and contact the Training Division to schedule a second attempt. Employees who fail the second attempt at the National Registry cognitive examination shall be removed from their assignment or detail and be detailed to the Training Division for a program of remediation. They will remain in this remediation program until they have either completed National Registry certification or they have failed six cumulative National Registry cognitive examination attempts.

Employees who fail the third attempt at the National Registry cognitive examination must complete a minimum number of hours of remedial training before making their fourth attempt, as follows: EMT-Basic: 24hours; EMT-Intermediate/99: 36 hours; EMT-Paramedic:48 hours.

Regarding the Psychomotor (Practical Skills) Examination, Bulletin No. 83 established the following policy for those at the EMT-Intermediate/99 level: EMT-Intermediate/99 candidates are allowed three (3) full attempts to pass the psychomotor examination (one “full attempt” is defined as completing all eleven (11) skills and two retesting opportunities if so entitled).

Candidates who fail a full attempt or any portion of a second retest must submit official documentation of remedial training over all skills before starting the next full attempt of the psychomotor examination and re-examining over all eleven (11) skills, provided all other requirements for National Certification are fulfilled. This official documentation must be signed by the EMT Training Program Director or Physician Medical Director of training/operations that verifies remedial training over all skills has occurred since the last unsuccessful attempt and the candidate has demonstrated competence in all skills.

The Medical Director can deny renewal of, suspend, or revoke a certification of an EMT-Intermediate/99 employee who fails the third full attempt of the National Registry EMT-Intermediate/99 psychomotor examination. Such an employee whose certification is either revoked, suspended, or denied renewal of, will then be subject to adverse action or termination of his employment.

Chapter 16 of the District Personnel Manual governs the notice requirements for adverse action. Section 1618.1 (c) states that “Except in the case of a summary actions, described in § 1616, an agency contemplating a corrective, adverse, or enforced leave action shall provide the employee a notice of proposed action. Such notices shall be delivered to the employee...No less than fifteen (15) days prior to implementing an adverse action.

3. Did Agency follow all the required procedures (decertification, proper notice, etc.) before terminating Employee’s employment?

As outlined in Agency Bulletin 83 above, an employee performing EMT services must pass both the cognitive and psychomotor portions of NREMT certification examinations before a

Medical Director can sponsor him or her for either certification or recertification. The NREMT certification process must be completed before an employee can apply for an NREMT certification card. Once the employee has a valid NREMT card, the employee can then apply for a District of Columbia EMS certification card from the District of Columbia Department of Health. These cards expire after a certain time period and the whole process must start over again for new recertification cards to be reissued. This ensures that EMT personnel keep up to date with their medical skills and knowledge to insure the best possible care for their patients.

Bulletin 83 also states that an employee has up to six attempts to pass the cognitive or written portion of the NREMT exam. Once the employee passes the cognitive exam, the Medical Director can then give the employee the psychomotor or practical skills exam portion of the NREMT exam. A full psychomotor exam consists of eleven skills. An EMT-Intermediate/99 candidate who fails any portion of the psychomotor exam must undergo retraining of all eleven skills, even the skills that he or she had already passed. An employee is allowed three chances to pass the psychomotor exam. Bulletin 83 states that a third failure will subject an employee to adverse action.

On June 14, 2011, a patient died while under the care of Employee and his Medic No. 27 unit. The Medical Director concluded there were errors in the performance of the responding Emergency Medical Services (“EMS”) team and that Employee failed in his paramedic duties. That same day, the Medical Director assigned Employee to the FEMS Training Academy (“TA”) for remedial training under a Critical Remediation Action Plan.

On June 20, 2011, Employee finished the ALS Refresher Class. On June 24, 2011, Employee performed the Fisdap exam. From June 27, 2011, to July 7, 2011, Employee studied all relevant topics again under Instructor Jura. By July 14, 2011, Employee finished his retraining and was scheduled for his field (psychomotor) evaluation under then Medical Director Mountvarner. However, Mountvarner rescinded Employee’s field evaluation on July 15, 2011, and returned Employee for further retraining on July 19, 2011. Employee obtained ALS training with another EMT-Paramedic ending on July 27, 2011.

From August 10, 2011, to September 27, 2011, Employee took the Fisdap exams and scored 61% overall. From October 12, 2011, to January 3, 2012, Employee underwent extensive field testing by Paramedic Preceptor Sgt. Bachelder (“Bechelder”). Bechelder then proclaimed Employee as proficient enough for the Medical Director to field test him.

On September 28, 2011, Medical Director Dr. Miramontes (“Miramontes”) evaluated Employee. He concluded that Employee flunked his needed skills and needed retraining. On October 6, 2011, Employee was assigned to obtain ALS field evaluations under Bachelder. On January 2, 2012, Bachelder wrote the Medical Director, noting that Employee has improved after months of training and is now ready to resume his EMT role.

On February 2, 2012, Miramontes tested Employee’s psychomotor skills as an Advanced Life Support (“ALS”) provider and again found Employee’s performance inadequate. Miramontes rescinded Employee’s I/99 certification but allowed Employee to continue at the

lower EMT-Advanced level. Miramontes told Employee that he could not sponsor his recertification, and that he would so advise the Department of Health.

On February 3, 2012, Miramontes informed Captain Follin that Employee's certification as an EMT-I/99 would be pulled and that Employee was officially removed from operations after refusing the EMT Basic option. Chief Coles detailed Employee back to the Training Academy for twelve (12) additional days of training.

On February 14, 2012, Miramontes again tested Employee's skills as an ALS provider for the third time, noting that Employee had received twelve (12) days of extensive training at the Training Academy. Employee's performance in response to a practical skills (psychomotor) scenario was again deemed inadequate by Dr. Miramontes. Consequently, Dr. Miramontes did not reinstate Employee's I/99 status noting that his lack of confidence in Employee's skills as an ALS provider.

On February 14, 2012, Miramontes wrote a letter to the DOH requesting a downgrade of Employee's Certification from an EMT I-99 to EMT-Advanced. He summarized his reasons why he believed Employee's basic paramedic ACLS⁵⁹ performance was poor despite being in training since June 2011. He also wrote that he offered Employee a BLS⁶⁰ level of certification but was refused. The letter stated that he could not authorize re-certification of Employee's NREMT I-99 certification.

Miramontes terminated Employee's remedial training and declined to sign Employee's May 30, 2012, DOH certification application to be an EMT I/99 under his supervision. He informed Employee verbally and in writing, that he could not sponsor his DOH application as a EMT I/99 with his signature on more than one occasion.⁶¹ On June 25, 2012, Miramontes again wrote the DOH requesting revocation of Employee's certification after clinical review. He noted Employee's poor performance at the EMT I-99 level, especially under a cardiac arrest scenario. Miramontes wrote that he personally tested Employee on two (2) occasions with a patient simulator and found him to be incompetent despite retraining. The letter stated that despite extensive retraining and extended field mentoring, Employee failed to perform at an acceptable level and multiple cognitive, medication administration and protocol errors were noted. Thus, Employee's DOH certification expired on June 30, 2012.

On July 3, 2012, the DOH noted its receipt of Miramontes' letter, memorializing that Employee's District EMT-Intermediate certification (Cert # I-132) expired at midnight on June 30, 2012, with no application of renewal pending at DOH. Under Bulletin No. 83, Employee was no longer eligible to continue in his duties with Agency and was then referred to the Office of Compliance for termination. Employee was again offered the opportunity to apply for the lower ranked EMT-Advance level certification. In his October 1, 2012, e-mail to Agency, Dr. Miramontes reported that Employee declined.

⁵⁹ Advanced Cardiac Life Support

⁶⁰ Basic Life Support

⁶¹ Transcript pgs. 29-32, 117, 216-217.

I find that Agency gave Employee extensive retraining as an EMT-I/99. Although Employee testified that some of his training was not adequate, I did not find him credible, especially when it is undisputed that his retraining took almost eight (8) months, considerably longer than the two to four weeks of training that EMTs usually receive.⁶² Instead, Employee attempts to shift the blame for his failures to Agency. Employee even attempts to blame his failure on the use of a new mannequin, even though this mannequin is used by all EMTs in their field tests.

Although Employee passed the cognitive portion of the required NREMT I-99 certification test, he could not pass the psychomotor portion. Employee failed the psychomotor exam on three separate occasions: September 28, 2011; February 2, 2012; and February 14, 2012. With regards to the results of the psychomotor tests, I find Miramontes to be extremely credible in his assessment of Employee's skills. Based on the detailed enumeration of Employee's skill deficits by Miramontes, I find by a preponderance of the evidence that there is substantial evidence to support his assessment that Employee's skills as an EMT-I/99 are subpar. I note that even the prior Medical Director, Mountvarner, found Employee's psychomotor skills to be inadequate.

Bulletin 83 states that employees who failed at their third full attempt will be subject to adverse action. Because Employee could not pass the NREMT I-99 certification test, he could not be sponsored by Agency's Medical Director for a NREMT I-99 certification card and thus could not be recertified by the Department of Health. Thus, his prior certifications expired at their due dates.

In the instant matter, Miramontes did not exercise his power under D.C. Official Code §7-2341.15(b)(2) and D.C. Official Code § 5-404.01 to suspend or revoke Employee's EMT-I/99 certification. Instead, he chose the less drastic option of refusing to renew Employee's EMT-I/99 certification. Thus, Employee was able to continue his employment and be paid his salary as an EMT-I/99 until his certifications lapsed. Agency then gave Employee the required fifteen (15) day notice required under 6 DPM 16 § 1618.1(c). Agency also gave Employee his Advance Notice of Adverse Action on October 21, 2012, which is well within the ninety (90) day advance notice required under D.C. Official Code § 5-1031(a). Employee was removed from his position on May 3, 2013, long after his DOH certification had expired on June 30, 2012.

Based on these undisputed facts, I find that Agency complied with all the required procedures (decertification, proper notice, etc.) under Bulletin 83 before terminating Employee's employment. Indeed, I find that Agency went above and beyond in its efforts to retrain Employee in its effort to keep him as an EMT-I/99. Employee received extensive and prolonged retraining and still could not pass the required psychomotor field tests. Agency could have terminated Employee once his DOH certification expired. Instead, it gave Employee several opportunities for almost a year to retain his employment. Agency's Medical Director offered several times to retain him at the lower EMT-Basic level. Employee never explained why he kept refusing this offer and thus lost his employment.

⁶² Transcript pg. 27, line 12-21.

4. If so, should Agency's termination of Employee's employment be upheld?

Agency Bulletin No. 83 cited in the above findings of facts outlined the Agency's requirement that all its EMTs maintain their certification by the National Registry of EMTs. The certification exam required passing both the psychomotor (practical skills) examination and the cognitive or written examination. EMT-Intermediate/99 candidates are allowed three full attempts to pass the psychomotor examination. Employee had trouble passing the psychomotor (practical skills) examination and indeed, failed it three times: September 28, 2011; February 2, 2012; February 14, 2012.

In his closing argument, Employee challenges the Medical Director's decision to flunk him in his psychomotor field exams on three separate occasions. His argument is that because he had been tested and successfully certified as an EMT-I/99 in the past, his failure must lie with the Medical Director. To buttress his argument, Employee asserts that he has maintained a number of prior certifications and had completed the courses necessary for certification. Employee concludes that, "[t]hus, the failure was not [Employee's], but rather that of the Medical Director."⁶³

This reasoning is faulty. A person who got a medical skills certification years before can, and do, fail to recertify by failing to maintain the standards required for recertification. A prior certification does not preclude a subsequent failure at re-certification.

Finally, Employee argues that Medical Director Miramontes violated his due process right by denying him more opportunities to attempt to pass his psychomotor examination. Employee asserts that he "was not even permitted [to] complete one full attempt to pass his psychomotor examination, much less the three full attempts required under [Agency] Bulletin No. 83."⁶⁴ I do not find Employee credible as the undisputed facts belie this argument. It is uncontroverted that as a result of Employee's failure to follow established medical protocol in dealing with a patient on June 14, 2011, a patient died. Acting within his authority, Medical Director Miramontes removed Employee from further contact with future patients and placed Employee in a critical remediation action plan. This consisted of Employee being placed at the Training Academy for intensive retraining. Employee completed his classroom training in mid-July 2011. For the remainder of the month, Employee was then assigned to another EMT-Paramedic for Advanced Life Support ("ALS") field evaluations.

On September 28, 2011, the Medical Director evaluated Employee and found Employee still lacking in the skills required to re-assign him back to full duty. Thus, on October 6, 2011, Employee was assigned to Paramedic Preceptor Sgt. Bachelder for further ALS field evaluation training. Based on Sgt. Bachelder's January 2, 2012, letter stating that Employee had improved, Medical Director Miramontes tested Employee's skills as an ALS provider on February 2, 2012, and again found his performance inadequate. The next day, Captain Follin asked Miramontes for an update on Employee's status and was informed that Employee could not work as an ALS provider. Although Miramontes opined that it made no sense, Captain Follin nonetheless put Employee back to the Training Academy for twelve (12) days of extensive training.

⁶³ Employee's Motion for Summary Disposition at 17-18.

⁶⁴ Employee's Motion for Summary Disposition at 21.

On February 14, 2012, Medical Director Miramontes again tested Employee's skills as an ALS provider and again found Employee's performance inadequate. At this point, Dr. Miramontes asked DOH to downgrade Employee's certification from ALS to EMT-Advanced, explaining his basis in a detailed letter on February 14, 2012. On June 25, 2012, Miramontes wrote a letter to DOH requesting revocation of Employee's certification after clinical review, and again detailed his rationale for the request. Medical Director Miramontes stated that he would not sign Employee's May 30, 2012, DOH certification application to be an EMT I/99 under his supervision. Miramontes offered Employee the opportunity to apply for EMT-Advanced level certification instead, but Employee declined.

Thus, the facts belied Employee's claim of not being allowed to complete one full attempt to pass his psychomotor examination. Bulletin No. 83's established policy for those at the EMT-Intermediate/99 level states that "EMT-Intermediate/99 candidates are allowed (3) full attempts to pass the psychomotor examination (one "full attempt" is defined as completing all eleven (11) skills and two retesting opportunities *if so entitled*). Emphasis supplied. While Bulletin No. 83 allows for three testing opportunities, the clause "if so entitled" clearly reflects that a total of three tests is not *mandatory*, just that three testing opportunities is the *maximum* number of tests that can be taken before adverse action is required. Thus, the three full attempts to pass is not mandated. It is given only if the candidate is entitled to another attempt. It is clear from Bulletin No. 83 that the Medical Director must verify that the candidate "has demonstrated competence in all skills" in order to sign off on official documentation before retesting can occur.

Here, the Medical Director allowed for a full attempt, and then for a second attempt once Employee had undergone retraining. After the second failed attempt, the Medical Director, within his discretion, lawfully declined to find that Employee had demonstrated "competence in all skills." He was not required, under Bulletin No. 83, to allow the Employee another retest. Indeed, the record shows that Employee got the maximum three attempts that Bulletin No. 83 provides for. I find that all the procedures in Bulletin No. 83 were followed.

In essence, Employee disagrees with the Medical Director's assessment of his psychomotor skills. However, I note that the lives of the patients that Employee encounters in his work as an EMT is literally in his hands. The Medical Director not only has a legal duty but also a moral imperative to use his medical expertise and judgment to ascertain that EMT-Intermediate/99 candidates are qualified to perform their medical duties.

Finally, Employee again attempts to re-argue that Agency violated the ninety-day rule 90-day rule as set forth in D.C. Code § 5-1031 in its removal of Employee. However, this issue has been resolved in Agency's favor in my October 20, 2015 ID and the Sup. Ct. has affirmed this holding. In addition, Employee's repeated use of this argument is not within the scope of the D.C. Court of Appeals' remand and will thus not be reconsidered.

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."⁶⁵ OEA has previously held that the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.⁶⁶ When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment.⁶⁷ As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.⁶⁸

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.⁶⁹ The evidence did not establish that the penalty of termination for failure to maintain the statutorily required medical certification constituted an abuse of discretion. Indeed, once Employee fails to hold the required medical certifications for his position, Agency is statutorily bound under D.C. Code § 7-2341.15(d) to terminate Employee's employment.

Based on the aforementioned, there is no clear error in judgment by Agency. Termination was a valid penalty under the circumstances, and indeed, is mandated under medical regulations. Based on a preponderance of the evidence, I conclude that given the findings of facts and conclusions of law, Agency's action of terminating Employee from service should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of terminating

⁶⁵ *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

⁶⁶ *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

⁶⁷ *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011); *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (February 1, 1996); and *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995).

⁶⁸ *Love* also provided that

[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 [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).

⁶⁹ *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).

Employee from service is **UPHELD**.

FOR THE OFFICE:

s/ Joseph Lim

Joseph E. Lim, Esq.

Senior Administrative Judge