THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
Keith Chung, Employee	OEA Matter No. 1601-0133-15
v.	Date of Issuance: February 14, 2017
DC Fire & Emergency Medical Services, Agency	Joseph E. Lim, Esq. Senior Administrative Judge

Donna Rucker, Esq., Employee Representative
Rahsaan Dickerson, Esq., Agency Representative

INITIAL DECISION[1]

INTRODUCTION AND PROCEDURAL BACKGROUND

Keith Chung ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") on August 28, 2015, challenging the D.C. Fire & Emergency Medical Services Department's ("Agency" or "DCFEMS") decision to terminate him based on Case # U-14-076 and Case # U-15-128. Agency filed its Answer on September 24, 2015. Employee's last position of record was Firefighter. After an attempted mediation, this matter was reassigned to me on November 18, 2015.

A Prehearing Conference was held on January 6, 2016. Subsequently, a Post Prehearing Order was issued on January 8, 2016, requiring the parties to submit legal briefs addressing the issues in this matter. After Employee was granted an extension of time to file his brief, both parties submitted their briefs accordingly. Because this matter is being reviewed under the analysis set forth in *Pinkard v. D.C. Metropolitan Police Department*[2], an Evidentiary Hearing was not convened. The record is now closed.

JURISDICTION

[1] This first page of the ID is mailed solely to correct the date of issuance from Feb. 14, 2016, to the correct Feb. 14, 2017.
[2] 801 A.2d 86 (D.C. 2002).

ISSUES

1. Whether the Fire Trial Board's decision was supported by substantial evidence;

2. Whether there was harmful procedural error; and

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

UNDISPUTED FACTS

On December 30, 2013, Employee notified Agency that he had been arrested in Maryland for having a loaded firearm with obliterated serial numbers in his vehicle. Employee was charged with handgun in vehicle, handgun on person, and two counts of an altered firearm ID number. This was Employee's second arrest in a seven-month period.

Agency also charged Employee with being absent without leave ("AWOL") on February 27, 2015, and failing to provide a valid reason therefore. This was Employee's second AWOL offense within a three-year period.

The following charges were levied against employee:

Case # U-14-076

Charge 1: Violation of D.C. Fire and EMS Department Order Book, Article VI, Section 6, which states, "Conduct unbecoming an employee includes conduct detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or any conduct that violates public trust or law of the United States, any law, municipal ordinance, or regulation of the District of Columbia committed while on-duty or off-duty."

This misconduct is defined as cause in the D.C. Fire and EMS Department Order Book, Article VII, § 2(h), which states: "Any act which constitutes a criminal offense whether or not the act results in a conviction." *See also* 16 D.P.M. § 1603.3(h).

This misconduct is further defined as cause in the D.C. Fire and EMS Department Order Book, Article VII, § 2(f)(3): "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to wit: Neglect of Duty." *See also* 16 D.P.M. § 1603.3(f)(3) (March 4, 2008).

Specification 1: In his Special Report (dated 12/30/2013), FF/EMT[2] Keith Chung confirms that "I Keith Chung was arrested on 12/28/13 in Temple

[2] Firefighter/Emergency Medical Technician.

Hills, Maryland, by Prince George's County police department. I was charged with having a firearm in my vehicle." FF/EMT Chung's arrest constitutes neglect of duty and, otherwise, stems from an act (having a handgun in his vehicle) that constitutes a criminal offense whether or not the act results in a conviction.

Charge 2: Violation of D.C. Fire and EMS Department Order Book, Article VI, Section 6 which states, "Conduct unbecoming an employee includes conduct detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or any conduct that violates public trust or law of the United States, any law, municipal ordinance, or regulation of the District of Columbia committed while on-duty or off-duty."

This misconduct is defined as cause in the D.C. Fire and EMS Department Order Book, Article VII, § 2(f)(3): "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to wit: Neglect of Duty." *See also* 16 D.P.M. § 1603.3(f)(3) (March 4, 2008).

This misconduct is further defined as cause in the D.C. Fire and EMS Department Order Book, Article VII, § 2(f)(7): "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to wit: Malfeasance." *See also* 16 D.P.M. § 1603.3(f)(7) (March 4, 2008).

Specification 1: FF Chung's illegal conduct brought both heightened and unnecessary scrutiny to the Department. F/F Chung's criminal conduct was reported in various media outlets – shedding a negative light on the Department; calling into question the reputation of Department members; and demeaning the ability of each member to effectively carry out the Department's mission. F/F Chung's commission of an illegal act that interfered with the performance of his duties constitutes both neglect of duty and malfeasance.

Case # U-15-128

Charge 1: Violation of D.C. Fire & EMS Department Rules and Regulations, Article VI, § 10, which states, "Members shall report for duty at the proper time and place."

Further violation of D.C. Fire and EMS Department Order Book, Article VII, Section 16, which states, "When members of the Department fail to report for duty at the proper time and place, they will be subject to a charge of AWOL, and in addition, may be subject to disciplinary actions."

This misconduct is defined as cause in the D.C. Fire and EMS Department Order Book, Article VII, § 2(f)(2): which states: "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include: Absence Without Leave." *See also* 16 D.P.M. § 1603.3(f)(2) (March 4, 2008).

Specification 1: In his Special Report (dated 03/17/2015), Captain Michael White describes FF Keith Chung's misconduct as follows: "The Special Report by Firefighter Chung does not contain a valid reason why he was absent from duty on February 27, 2015. I was notified by 3rd Battalion Aide Sergeant Barnes on 2-27-15 at 2000, of FF Chung being AWOL from duty on this day... FF Chung's failure to maintain strict observance of his official duty hours by punctually reporting to his dity station constitutes absence without leave, and this is FF Chung's 2nd AWOL offense (Case Nos. U-14-058) and 9th disciplinary case (U-12-056, U-12-146, U-13-197, U-13-041, U-13-476, U-14-058, U-14-076) within the past three years.

With Employee's consent, Agency consolidated both cases and held an Adverse Action hearing before a Fire Trial Board (FTB) on June 10, 2015. On July 22, 2015, Employee was found "guilty" on all charges.[3] The penalty imposed against Employee was as follows: Case # U-14-076, Charge 1: seven hundred twenty (720) duty-hour suspension; Charge 2: termination. Case # U-15-128, Charge 1: termination. Acting Fire Chief Gregory Dean accepted the FTB's findings and recommendations, and terminated Employee effective August 1, 2015.

SUMMARY OF TESTIMONY

On June 10, 2015, Agency held a FTB Disciplinary Hearing. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of Employee's proceeding.[4] Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their position.

Case # U-14-076, Charge 1, Specification 1

Capt. Hilton Burton ("Burton") Tr. 18-75.

Burton testified that he reviewed Agency's investigative report, the Prince George's County police report, related to Employee's arrest on December 28, 2013. In said incident, Employee was operating a vehicle in Prince George's County, Maryland while travelling with two other friends, when he was pulled over for a speeding violation. During the course of the traffic stop, the Prince George's County Police Officer who pulled Employee over smelled

[3] Employee Exhibit 4, Trial Board Findings and Recommendation.
[4] FTB Hearing Transcript, June 10, 2015.

alcohol and saw what seemed to be an illegal drug. The officer searched Employee's vehicle and found a loaded .40 caliber handgun. Employee and the two passengers in his vehicle were subsequently charged with handgun in vehicle, and two counts of alteration of a firearm serial number.

On February 26, 2014, Employee appeared in the District Court of Maryland, at which time his charges were placed on the "stet" docket. [5] Employee's passenger, Mr. Woodland, was indicted for illegally carrying a firearm.

Agency interviewed Employee on March 5, 2014. Employee confirmed the events as related but denied ownership of the altered handgun. Burton's investigation revealed that gunshots were heard at around 2 o'clock in the morning while Employee sped away from the scene. This led to his stop by the police. The seizure of an altered gun led to Employee's arrest.

Employee was not charged with speeding, illegal drug possession, or reckless driving. After the one year stet period, Employee was not prosecuted.

Paramedic Keith Chung ("Employee") Tr. 45-75

At the time of the Fire Trial Board, Employee had been with Agency nearly eight years as a firefighter/paramedic. Employee confirmed Agency's account of what happened on December 28, 2013. He indicated that his passengers at the time were his friends Kevin Harris and Kevin Woodland. Employee denied owning the contraband handgun, violating any traffic laws, or driving while drunk. He said it was Woodland who was intoxicated. Employee denied any knowledge of the gun, but admitted having prior disciplinary problems with Agency. As for the drugs, Employee testified that he had a bag of unprescribed Adderall that he used to help him study.

Case # U-14-076, Charge 2, Specification 1

Capt. Hilton Burton ("Burton") Tr. 18-75.

Burton testified that the embarrassing arrest of an Agency employee for a weapons crime was prominently featured in the news. He said this reflected poorly on Agency.

As the Fire Trial Board stated in its findings of fact, Employee admitted in a Special Report that he was arrested on December 28, 2013. Moreover, the Board pointed out the fact that Employee's December 28, 2013 arrest, his second in a seven-month period, was publicized by the media, cast Agency in a negative light, called into question the reputation of members of the Agency, and demean the ability of each member of the Agency to effectively carry out the Agency's mission.

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[5] The stet docket is defined as an indefinite postponement whereby no guilty verdict is entered, but the defendant may be asked to accept conditions set down by the court. As a condition of being placed on the stet docket, the defendant must waive his/her right to a speedy trial. A case on the stet docket may be re-opened at any time within one year if the conditions of the stet are violated.

Case # U-15-128, Charge 1, Specification 1

Sergeant John Barnes ("Barnes") Tr. 86-94

Agency Staffing Sergeant Barnes testified that his job was to maintain adequate staffing levels for the No. 4 Platoon. In response to a phone call he received from a Sergeant on Engine 19, Barnes verified that Employee, who was assigned to report for a tour of duty with Medic 19 on February 27, 2015, failed to report as required. He was able to reach Employee by phone, who informed him that because Preceptor[6] Spriggs was off that day, he believed he did not have to show up for work. Although Barnes let Employee know he still had to show up for work, Employee did not. Sergeant Barnes further testified that, based on his experience and Departmental protocol, the manner in which Employee handled his absence on February 27, 2015, was inappropriate.

Captain Michael White ("White") Tr. 95-104

Captain White testified that after he received word of Employee's February 27, 2015 absence from Sergeant Barnes, he began investigating the matter. It was also established that, during his February 27, 2015 tour of duty, Employee was scheduled to continue his preceptor work with fellow Agency employee Kamisha Spriggs. However, Ms. Spriggs was ill, and therefore did not report to work on February 27, 2015.[7] He instructed Employee to submit a Special Report regarding his absence. Captain White further testified that after reviewing Employee's Special Report, it was clear that the Special Report did not contain a valid reason why Employee was absent from duty on February 27, 2015. Captain White went on to testify that the endorsement which he prepared in reference to his investigation cited Employee for AWOL, and listed Employee's five prior violations within the past three years.

Paramedic Keith Chung ("Employee") Tr. 45-75

Employee, who knew that Ms. Spriggs would not be reporting to work prior to beginning his February 27, 2015 tour of duty, testified that he did not believe he could actually work since his preceptor was not at work, therefore he did not report. When Captain White was asked what impact the absence of Employee's preceptor had on Employee's responsibility to report to work as scheduled on February 27, 2015, he responded by indicating that there were no rules or regulations that would justify Employee's failure (without receiving authorized leave) to assume duty simply because another Agency member did not report to work.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Pursuant to the *Pinkard* analysis,[8] an Administrative Judge of this Office may not conduct a *de novo* hearing in an appeal before him/her, but must rather base his/her decision

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[6] Preceptor is a term Agency uses for an experienced instructor who trains another employee.
[7] At the time of his February 27, 2015 tour of duty, Employee was in training to become a paramedic. Part of the training included learning from and working closely with a preceptor, i.e. a seasoned paramedic trainer/instructor.
[8] *Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002).

solely on the record below at the Fire Trial Board ("FTB") Hearing, when all of the following conditions are met:

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
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> 2. The employee has been subjected to an adverse action;
>
> 3. The employee is a member of a bargaining unit covered by a Collective Bargaining Agreement;
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> 4. The Collective Bargaining Agreement contains language essentially the same as that found in *Pinkard*, i.e.: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [i.e., Trial Board Hearing] has been held, any further appeal shall be based solely on the record established in the Departmental hearing"; and
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> 5. At the agency level, Employee appeared before an Adverse Action Panel that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.[9]

Based on the documents of record and the position of the parties as stated during the Prehearing Conference, I find that the aforementioned criterion is met in the instant matter. Therefore, my review is limited to the issues as set forth in the "Issues" section of this Initial Decision. Further, according to *Pinkard*, I must generally defer to the [Trial Board's] credibility determinations when making my decision.[10]

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

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[11] If the [Trial Board's] findings are supported by substantial evidence, I must accept them even if there is substantial evidence in the record to support contrary findings. *See Metropolitan Police Department v. Baker*, 564 A.2d 1155 (D.C. 1989).

Case # U-14-076, Charge 1, Specification 1

Charge one is based on "Conduct unbecoming an employee includes conduct detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or any conduct that violates public trust or law of the United States, any law, municipal ordinance, or regulation of the District of Columbia committed while on-duty or off-

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[9] *See Id.*
[10] *Id.*
[11] *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).

duty;" "Any act which constitutes a criminal offense whether or not the act results in a conviction;" and "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to wit: Neglect of Duty." Agency asserts under Charge 1, Specification 1, that Employee's arrest and subsequent four criminal handgun charges amounts to conduct that adversely affect Employee's ability to perform effectively, as well as acts constituting a criminal offense whether or not the act results in a conviction, and neglecting his duty.

Employee does not dispute the facts underlying the charges and readily admits to them. Accordingly, I find that there is substantial evidence in the record to support Agency's "guilty" finding for charge 1; specification 1.

Case # U-14-076, Charge 2, Specification 1

Charge two is based on "Conduct unbecoming an employee includes conduct detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or any conduct that violates public trust or law of the United States, any law, municipal ordinance, or regulation of the District of Columbia committed while on-duty or off-duty;" "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to wit: Neglect of Duty and Malfeasance." Employee acknowledges that his arrest was publicized by the media, and that the FTB found it brought disrepute to Agency and that Employee's actions constitute neglect of duty and malfeasance.

As this was Employee's *second* arrest within a twelve-month period that reached media proportions wherein Employee's employment with the Department was mentioned, the Board's findings as it relates to the negative publicity and negative public perception of the Agency caused by Employee's arrest is based on substantial evidence, i.e. such relevant evidence as a reasonable mind might accept as adequate to support the Board's conclusion that Employee's arrest impacted the Agency's members' reputation in the community, and negatively impacted the ability of each member of the Agency to carry out the Agency's mission.

Based on the undisputed facts surrounding this specification, I must find that there is substantial evidence in the record to support Agency's "guilty" finding for Charge 2.

Case # U-15-128, Charge 1, Specification 1

This charge is based on Employee's AWOL on February 27, 2015. Employee admits to the charge and concedes he did not have a good excuse for his absence other than ignorance on his part. As evidenced by both his Special Report and his entry of a plea of guilty for the charge of AWOL at the commencement of his June 10, 2015 Fire Trial Board, although he provided an explanation, Employee concedes that his failure to report for his tour of duty as required constituted AWOL. Thus, there can be no question that the Board's decision as it relates to Employee's AWOL charge is supported by substantial evidence. Based on his admission, I must find that there is substantial evidence in the record to support Agency's "guilty" finding for this charge.

In summary, I find that there is substantial evidence to support all of Agency's charges against Employee.

Whether there was harmful procedural error.

Neither party alleged that there was harmful procedural error. Thus, this issue will not be discussed. Employee does, however, dispute the appropriateness of his penalty. This will be discussed in the next section.

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

Agency's arguments[12]

Agency argues that its decision on all charges and specifications is based on substantial evidence, and that its chosen penalty of termination is appropriate on the grounds that it was made after a thorough "Douglas Factors" analysis[13] and is within the acceptable range of discipline under the District Personnel Regulations.

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[12] Agency Brief, April 25, 2016.

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

> 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
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> 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
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> 3) the employee's past disciplinary record;
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> 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
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> 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
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> 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
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> 7) consistency of the penalty with any applicable agency table of penalties;
>
> 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 where violated in committing the offense, or had been warned about the conduct in question;
>
> 10) potential for the employee's rehabilitation;

Employee's arguments[14]

Employee argues that the penalty of a 720 duty-hour suspension as to Charge 1 of Case # U-14-076 is unreasonable because of mitigating circumstances. He argues that Agency penalizes him for conduct over which he has no control. Employee explains that in that instance, although he was driving the car that contained an unlicensed handgun with its serial numbers erased, the gun belonged to his passenger. In any case, Employee asserts, the gun was the product of a warrantless stop and search, and his criminal case was placed on a stet docket. Employee asserts that because his criminal charge was placed on the stet docket, the arrest and charge was baseless.

I note that Case # U-14-076, Charge one is based on "Conduct unbecoming an employee includes conduct detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or any conduct that violates public trust or law of the United States, any law, municipal ordinance, or regulation of the District of Columbia committed while on-duty or off-duty;" "Any act which constitutes a criminal offense whether or not the act results in a conviction;" and "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to wit: Neglect of Duty."

The FTB found that Employee's actions that led to his arrest and subsequent criminal charges to be conduct that were detrimental to good discipline and adversely affected his and Agency's ability to perform effectively. Employee's argument that his actions that led to his arrest were beyond his control is unpersuasive. It was his choice of having intoxicated friends in his vehicle, to be celebrating with alcohol drinks with them, and to drive them around in his car. His argument that because his criminal charge was placed on the stet docket and therefore the criminal charges were baseless is likewise unpersuasive. I note that the prosecutor did not dismiss the charges as unfounded. Rather, the prosecutor merely placed the charges on the stet docket to give Employee a chance at a clean criminal record.

I also note that Agency charged Employee with an act that constitutes a criminal offense regardless of whether it results in conviction. It is already established that Agency had substantial evidence to support its assertion that Employee committed an act that constitutes a criminal handgun offense.

With regards to Charge 2 of Case # U-14-076, Employee complains that the penalty of termination was unreasonable because of mitigating circumstances. He argues that the media report of his arrest did not mention his passengers; that he had no control over the publication,

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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.

[14] Employee's Brief, April 28, 2016.

and that Agency presupposes his guilt for conduct which he had not yet been arraigned for. Employee asserts that his mere connection to this incident does not warrant termination.

Again, I do not find Employee's arguments persuasive. While it is true he had no control over the media, he did have control over his own actions that led the media to cover him.

As for Case # U-15-128, Employee argues that the penalty of termination was unreasonable because of mitigating circumstances. He argues that Agency should not punish him for being forthright in his admission of guilt. Employee emphasizes that his AWOL was not due to a deliberate shirking of his duty but due to a mistaken belief that since his preceptor was absent, he did not have to show up for work. He argues that his error was excusable because he was new to the job and unfamiliar with his practices.

Considering that Employee had worked for Agency for eight years, I do not find credible his argument that he was new to the job and unfamiliar with his practices. The FTB transcript also shows that Employee had no answer when the FTB asked him why he did not ask any of his superiors if he could take the day off when his preceptor did not show up.

Employee also quotes statistics that purport to show that African-Americans like himself[15] are disproportionately targeted by D.C. and Maryland authorities. He accuses Agency of consistently disciplining minorities like himself more rigorously than Caucasian-Americans. Employee cites the case of another employee, a Caucasian named M.R. who he alleges got a mere suspension despite being found guilty of second-degree assault.

Employee is making a disparate treatment argument. In *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, *Opinion and Order on Petition for Review* (September 29, 1995), the Office's Board set forth the law regarding a claim of disparate treatment:

> [An Agency must] apply practical realism to each [disciplinary] situation to ensure that employees receive fair and equitable treatment where genuinely similar cases are presented. It is not sufficient for an employee to simply show that other employees engaged in misconduct and that the agency was aware of it, the employee must also show that the circumstances surrounding the misconduct are substantially similar to his own. Normally, in order to show disparate treatment, the employee must demonstrate that he or she worked in the same organizational unit as the comparison employees and that they were subject to [disparate] discipline by the same supervisor [for the same offense] within the same general time period.

(citations omitted). Additionally, the employee bears the burden of proof in disparate treatment claims. *Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-0119-90, *Opinion and*

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[15] Employee does not specifically identify himself as African-American, but based on his arguments, it is implied. I also note that the FTB documents identify him as African-American.

Order on Petition for Review (July 22, 1994); *Frost v. Office of the D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995).[16]

Here, Employee has failed to make a *prima facie* showing of disparate treatment. He failed to produce the employee whom he claimed were similarly-situated to him, or to introduce any records to show that this employee was in fact similarly-situated. Employee has failed to meet his burden of proof on his claim of disparate treatment. I conclude that his argument is unpersuasive.

Lastly, Employee argues that a rigorous analysis of the Douglas Factors would have resulted in the mitigation of the penalty he received for both cases.[17] In his brief, Employee goes through each factor and states how each of these factors should have influenced Agency to mitigate Employee's penalty to something substantially less than termination.

The OEA may overturn the agency decision only if it finds that the agency "failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness." *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985). "Not all of [the *Douglas*] factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the [petitioner's] favor while others may not or may even constitute aggravating circumstances." *Douglas, supra*, 5 M.S.P.R. at 306. Although the OEA has "'marginally greater latitude of review' than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate." *Stokes*, 502 A.2d at 1011 (citing *Douglas*, 5 M.S.P.R. at 300). The "primary discretion" in selecting a penalty has been entrusted to agency management. *Stokes*, 502 A.2d at 1011.

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

[16] Regarding this Office's well-established law on disparate treatment, *see also Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92, *Opinion and Order on Petition for Review* (September 29, 1995); *Adewetan v. D.C. General Hospital*, OEA Matter No. 1601-0021-93 (July 11, 1995); *Shade v. Department of Administrative Services*, OEA Matter No. 1601-0360-94 (August 3, 1999).
[17] *Douglas v. Veterans Administration, id.*

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

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

I note that Employee does not deny that Agency weighed the *Douglas* factors in determining his penalty; rather, Employee disagrees with the way Agency weighed the *Douglas* factors. In Employee's view, Agency should have considered the factors in a way that wholly rebounds to his benefit, without regard to other considerations that reflect upon Agency's ability to achieve its mission.

I also note that under either the penalty structure set forth in DCMR § 16-1619.1(f)(2) "Absence Without Official Leave," DCMR § 16-1619.1(f)(3) "Neglect of Duty," and DCMR § 16-1619.1(f)(7) "Malfeasance," Agency had acted within its authority to select "any penalty from reprimand to removal as the appropriate penalty for the cause of action of "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations. [18] Therefore, removal was an appropriate penalty.

My reading of Agency's analysis of the *Douglas* factors leads me to find and conclude that Agency properly weighed the relevant *Douglas* factors and that Agency acted reasonably within the parameters established in the Table of Penalties to terminate Employee.

I conclude that Agency exercised its primary responsibility for managing and disciplining its workforce by electing to terminate Employee for his actions which brought discredit not only on Employee, but on the Agency as a whole.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's decision to remove Employee from service is **UPHELD**:

FOR THE OFFICE:

JOSEPH E. LIM, Esq.
Senior Administrative Judge

[18] Table of Appropriate Penalties, District Personnel Manual, DC Personnel Regulations, Chapter 16, §1-1619.1(f).

NOTICE OF APPEALS RIGHTS

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

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

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

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

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

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

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with Administrative Assistant, D.C. Office of Employee Appeals, 1100 4th St., SW., Suite 620E, Washington, D.C. 20024. Four (4) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review may file their response within thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review.

Instead of filing a Petition for Review with the Office, either party may file a Petition for Review in the Superior Court of the District of Columbia. Either party may also appeal a decision on Petition for Review (also known as an Opinion and Order on Petition for Review) to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

CERTIFICATE OF SERVICE

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

Keith Chung
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Katrina Hill
Clerk

February 14, 2017
Date