THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,[1]	)	OEA Matter No. 1601-0050-23
	)	
v.	)	Date of Issuance: March 15, 2024
	)	
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT,	)	MONICA DOHNJI, Esq.
Agency	)	Senior Administrative Judge
	)	

Employee, *Pro Se*
Jeremy Greenberg, Esq., Agency's Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On July 13, 2023, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Fire and Emergency Medical Services Department's ("Agency" or "FEMS") decision to terminate him from his position as a Firefighter/EMT effective June 24, 2023. OEA issued a Request for Agency Answer to Petition for Appeal on July 13, 2023. Agency submitted its Answer to Employee's Petition for Appeal on August 11, 2023. This matter was assigned to the undersigned on August 14, 2023.

On August 22, 2023, the undersigned issued an Order Convening a Status/Prehearing Conference in this matter for September 12, 2023. During the Status/Prehearing Conference, the undersigned was informed that an Adverse Action Panel Hearing was convened in this matter on December 1, 2022. As such, OEA's review of this appeal was subject to the standard of review outlined in *Elton Pinkard v. D.C. Metropolitan Police Department,* 801 A.2d 86 (D.C. 2002). Thereafter, I issued a Post Status Conference Order on September 25, 2023, requiring the parties to submit briefs addressing the issues raised during the Status/Prehearing Conference. Agency's brief was due on or before October 20, 2023; Employee's brief was due on or before November 10, 2023; and Agency had the option to submit a sur-reply by November 27, 2023. The parties have submitted their respective briefs. Subsequently, on January 4, 2024, Agency filed a Notice of Authority. The record is now closed.

JURISDICTION

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.

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

ISSUES

1) Whether the Trial Board's decision was supported by substantial evidence;
2) Whether there was harmful procedural error;
3) Whether Agency's action was done in accordance with applicable laws or regulations.

BURDEN OF PROOF

OEA Rule § 631.1, 6-B District of Columbia Municipal Regulations ("DCMR") Ch. 600, et seq (December 27, 2021) states:

> The burden of proof for material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > the degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.[2]

OEA Rule § 631.2 *id.* states:

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

STATEMENT OF THE CHARGE(S)

According to Agency's Answer to Employee's Petition for Appeal[3], Employee's adverse action was predicated on the following charges and specifications, which are reprinted in pertinent part below:[4]

Case No. U-21-154

Charge 1: Violation of D.C. Fire and Emergency Medical Services Department Order Book Article VI, § 6 (**Conduct Unbecoming an Employee)** which states:

> Conduct unbecoming an employee includes conduct detrimental to good discipline, conduct that would adversely affect the employee 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.

[2] OEA Rule § 699.1.
[3] Agency Answer at Tabs 25 & 27 (August 11, 2023).
[4] Employee was terminated based on two (2) separate cases: - Case Nos.: (1) U-21-154 and (2) U-21-087.

Further violation of D.C. Fire and Emergency Medical Services Department Rules and Regulations Article VI, § 8, which states:

> Members shall refrain from immoral conduct, deception; violation or invasion of law or official rule, regulation, or order; and from false statements.

This misconduct is defined as cause in D.C. Fire and Emergency Medical Services Order Book, Article VII, § 2(e), which states: "Any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law." See also16 DPM §1603.3(e).

This misconduct is further defined as cause in D.C. Fire and Emergency Medical Services 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 also16 D.P.M. §1603.3(h).

This misconduct is further defined as cause in D.C. Fire and Emergency Medical Services Order Book, Article VII, § 2(f)(3), which states: "Any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations to include: Neglect of Duty." See also 16 DPM §1603.3(f)(3).

Specification 1: In his Special Report (dated 03/16/2021), FF/EMT[Employee] describes his misconduct as follows:

> I, [Employee] was arrested on 03/14/2021 in Capital Heights, MD. I have multiple charges pending against me:
>
> - Second degree assault on my fiancé
> - Second degree assault on an officer
> - Disturbing the peace
> - Resisting arrest
> - Obstructing a police officer investigation

Further, in his final Investigative Report (dated 08/24/2022), Seargeant Bryant E Edgerton describes FF/EMT[Employee's] misconduct as follows:

CHRONOLOGICAL NARRATIVE SECTION

> On March 16th, 2021, the Office of Internal Affairs received notification that [FF/EMT Employee] was

> arrested in Capital Heights, MD by the Prince George's County Sheriff on March 14th, 2021, and was charged with multiple violations; second degree assault; second degree assault on an officer; disturbing the peace; resisting arrest; and obstructing a police investigation.
> ***

COMPLAINANT(S) STATEMENT(S)

> [FF/EMT Employee] went to court on August 9, 2022, in the District Court of Maryland, Prince George's County. [FF/EMT Employee's] charges of; second degree assault; second degree assault of an officer; disorderly conduct; resisting/interference with arrest; and obstructing and hindering were given NOLLE PROSEQUI, due to the police officer not showing up to court.

FF/EMT[Employee's] admitted failure to observe precautions regarding safety constitutes neglect of duty, and his probable cause arrest confirms that he committed a criminal offense whether or not the act results in a conviction. Accordingly, this termination action is proposed.

Case No. U-21-087

Charge 1 Violation of D.C. Fire and Emergency Medical Services Department Order Book Article VI, §6 (**Conduct Unbecoming an Employee)**, which states:

> Conduct unbecoming an employee includes conduct detrimental to good discipline, conduct that would adversely affect the employee 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.

Further violation of D.C. Fire and Emergency Medical Services Department Rules and Regulations Article VI, § 8, which states:

> Members shall refrain from immoral conduct, deception; violation or invasion of law or official rule, regulation, or order; and from false statements.

This misconduct is defined as cause in D.C. Fire and Emergency Medical Services Order Book, Article VII, § 2(e),

which states: "Any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law." See also16 DPM §1603.3(e).

This misconduct is further defined as cause in D.C. Fire and Emergency Medical Services 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 also16 D.P.M. §1603.3(h).

This misconduct is further defined as cause in D.C. Fire and Emergency Medical Services Order Book, Article VII, § 2(f)(3), which states: "Any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations to include: Neglect of Duty." See also16 DPM §1603.3(f)(3).

Specification 1: In his Special Report (dates 12/31/2020), his misconduct as follows:

> I, [Employee] was charged by [Police Officer] Washington #4195 of the District IV squad 26 patrol with the following offenses:
>
> - Possession stolen regulated firearm
> - Loaded handgun on person
> - Loaded handgun on person in vehicle

Further, in his final Investigative Report (dated 08/24/2022), Sergeant Bryant E. Edgerton describes FF/EMT[Employee's] misconduct as follows:

CHRONOLOGICAL NARRATIVE SECTION

> On December 31st, 2020, the Office of Internal Affairs received notification that [FF/EMT Employee] was arrested in Suitland, Maryland by Prince George's County Police and was charged with possession of a handgun.

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> [FF/EMT Employee] went to court on July 20th, 2022, in the District Court of Maryland for Prince George's County. [FF/EMT Employee's] charges of; [registered] firearm: stolen/sell etc. and loaded handgun in vehicle were given NOLLE PROSEQUI. [FF/EMT Employee] was found guilty of the charge; loaded handgun on person. [FF/EMT Employee] was [sentenced] to 3-years [with] 3 years suspended; supervised probation for 2 years.

> FF/EMT[Employee's] admitted failure to observe precautions regarding safety constitutes neglect of duty, and his probable cause arrest confirms that he committed a criminal offense whether or not the act results in a conviction. Moreover, FF/EMT [Employee's] LOADED HANDGUN ON PERSON conviction establishes beyond a reasonable doubt that he violated the law. Accordingly, this termination action is proposed.

On December 1, 2022, Employee appeared before a Fire Trial Board. He was represented by counsel and pled Not Guilty to Charge No. 1 and Specification No.1 for Case Nos.: (1) U-21-154 and (2) U-21-087.[5]

SUMMARY OF THE TESTIMONY[6]

On December 1, 2022, Agency held a Trial Board Hearing in this matter. During the hearings, testimony and evidence were presented for consideration and adjudication relative to the instant matter. The following represents what the undersigned has determined to be the most relevant facts adduced from the findings of fact, as well as the transcript (hereinafter denoted as "Tr."), generated and reproduced as part of the Trial Board Hearing.

Agency's Case-in-Chief

1) Bryant Edgerton – Tr. pgs. 28-66; 263-268

Sergeant Bryant Edgerton ("Sgt. Edgerton") is assigned to the Agency's Office of Internal Affairs. He affirms that he is familiar with Employee, and he was assigned to investigate the current matter. He further affirmed that he completed an investigative report. Tr. pg. 28. Sgt. Edgerton identified Agency's Exhibits A and B as the investigative report and attachments he completed in this matter. Tr. pg. 29.

Sgt. Edgerton testified that Employee was charged with misconduct unbecoming an office due to an alleged possession of illegal/stolen and loaded firearm on December 30, 2020. Sgt. Edgerton explained that the department got a call from Employee stating that arrest he had been arrested for an alleged domestic dispute and the police found a loaded gun in Employee's possession during the arrest. Tr. pgs. 30-31.

Sgt. Edgerton asserted that Employee submitted a special report recounting what happened. He explained that Employee was placed on administrative enforced leave after the incident. Sgt. Edgerton attended Employee's criminal trial where Employee was found guilty of possessing a handgun and he was given three (3) years suspended sentence, two (2) years of which included supervised probation, community service and a gun safety class. He noted that Employee was found guilty on two (2) of the three (3) gun charges. Sgt. Edgerton stated that Employee provided Agency with the criminal case disposition papers. Sgt. Edgerton noted that he collected the police report prior to receiving disposition papers from Employee. Tr. pgs. 32-33, 36-37.

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[5] Agency Answer, *supra*, at Tab 19.
[6] *Id*. at Tab 19.

Sgt. Edgerton described the statement of charges in the criminal matter against Employee to include possession of an unregulated firearm; possession of a stolen firearm; possession of a loaded handgun on his person; and carrying a loaded handgun in a vehicle on public roads, and highways. Sgt. Edgerton recounted that Employee had gone to visit one of his children's mother and an argument ensued. He was not sure if the children's mother or grandmother called the police. Employee was about to leave the scene when the police arrived. He identified himself as the person they were calling for, and as the police attempted to search him, he resisted. As they tried to get Employee to remove his hands from his pocket, they uncovered a loaded handgun. Employee was then arrested and charged. He noted that Employee did not inform the police officers upon their arrival and prior to being searched that he possessed a loaded handgun on his person. Tr. pgs. 34-37.

Sgt. Edgerton identified Agency's Exhibit A, page 57, as Employee's disposition papers. He affirmed that Employee entered a guilty plea for the loaded handgun on person charge and the other two (2) charges were dropped for lack of sufficient evidence. He clarified during cross-examination that Employee pleaded guilty to only one (1) charge from the December 30, 2020, arrest. Tr. pgs. 37-38. Sgt. Edgerton identified Agency's Exhibit A, page 55, as a picture of the handgun Employee had on his person on the left and a picture of Employee on the right that he obtained from the police report. Tr. pgs. 39, 57-58.

Sgt. Edgerton affirmed that he interviewed Employee after he was sentenced as part of his investigation and Employee provided him an explanation for why he had the loaded gun on December 30, 2020. Sgt. Edgerton testified that Employee explained that the day before his arrest, he found the loaded handgun in a paper bag in front of a grocery store while helping his fiancée. He took the handgun with plans of turning it to the police the next day on his way to work. Sgt. Edgerton highlighted that Employee was arrested by the Prince George's law enforcement around 7:30 a.m. on December 30, 2020. He asserted that if Employee had planned on going to work on December 30, 2020, he was already at least 30 minutes late because report time was at 7:00a.m. Sgt. Edgerton testified that the record showed that Employee called his lieutenant, Lieutenant Erik Wiklund ("Lt. Wiklund or Captain Wiklund") at around 6:39 a.m. informing them that he would be reporting to the clinic to call out sick. But he was unsure if Employee followed through. Stg. Edgerton cited that he inherited Employee's case from Lieutenant Weldon Genies ("Lt. Genies"). Tr. pgs. 39-43.

Sgt. Edgerton testified that Employee was charged with Second degree assault in relation to IA-F-21-03-0009. He noted that his investigation showed that on March 14, 2021, Employee and his fiancée were engaged in a verbal dispute and things were thrown around the house. The noise was so loud that it disturbed the neighbors, who knocked on Employee's door to inform him they were calling the police because of the disturbance. A neighbor then called 9-1-1 and reported a domestic disturbance. When the Sherriff responded to the location, Employee answered the door. Upon looking inside, they saw signs of a struggle. A struggle ensued between Employee and law enforcement as Employee attempted to leave. Things became physical and Employee was tased about two (2) to three (3) times and he was subsequently arrested and taken into custody. Sgt. Edgerton testified that they were notified by the Prince George's County Sherriff department that Employee had been arrested and charged with second degree assault on an officer, disturbing the peace, resisting arrest, and obstructing a police investigation. Employee also submitted a special report. Employee was also taken to the hospital to ensure he was not injured and was eventually released. Sgt. Edgerton acknowledged that that was the first time the officer went to Employee's home. He clarified that the police noted that there were broken things and signs of a struggle in the house. Sgt. Edgerton admitted that the Statement of Probable Cause in this matter did not state that

the officers observed anything broken inside the house upon their arrival. Tr. pgs. 44-46, 50-51, 58-60.

Stg. Edgerton asserted that he followed the criminal case by attending court on multiple occasions. Because the officer did not show up and Employee's child's mother/fiancée stated that she did not wish to press charges against Employee, the case was thrown out. He affirmed that the charges were all nolle prosequi. Sgt Edgerton explained that he understood this to mean that the case was dismissed because the prosecutor did not wish to proceed with the case at that time, but the case could be brought back later if the prosecutor chose to do so. Sgt. Edgerton acknowledged that he obtained the police record and the court documents for this case. He noted that pursuant to the police record, Employee was charged with "assault in the second degree of a police officer; assault in the second degree, willfully act in a disorderly manner to the disturbance of the public peace; intentionally resisted arrest; did intentionally annoy, obstruct and hinder a police officer in the performance of his lawful duties in violation of common law." Tr. pgs. 47-53, 265-267.

Sgt. Edgerton noted that despite the case being dismissed, either the Sherriff or police officers determined that there was probable cause to arrest Employee. Sgt. Edgerton explained that when the officers arrived, Employee was uncooperative and tried to forcefully get out of the house, and he and the officer got into a physical altercation. Sgt. Edgerton expressed that this resulted in an arrest as Employee was combative and the officer used non-lethal force to calm him down. He affirmed that the commissioner or the judicial officers confirmed that there was probable cause for the charges levied against Employee. Tr. pgs. 53-57.

When asked if he was familiar with the Maryland statute on warrantless arrest, Sgt. Edgerton said 'no'. He noted that the Statement of Charges for the March 14, 2021, case does not specifically state that Employee's arrest was lawful or not. Sgt. Edgerton upon review of the Statement of Charges document for the December 30, 2020, case stated that the record provided there was no probable cause for Charge 1 – possession of a regulated firearm. Sgt. Edgerton interpreted that to mean that Employee did not possess a stolen regulated firearm. Tr. pgs. 60-64.

Sgt. Edgerton testified that he inherited both of Employee's cases from a previous investigation, and there was no indication that Body Worn Cameras ("BWC") were available for both incidents because Agency was not aware that the Prince George's County police department used BWCs at the time. He stated that PG county police department had in-vehicle cameras and they did not request those because Employee had already admitted to possession of a gun. He also cited that they had footage of the loaded handgun and Employee in the police report, thus, they did not need the video footage. Tr. pgs. 263 – 265, 267-268.

2) Akil Washington – Tr. pgs. 66-82

Akil Washington ("Ofc. Washington") has been employed by Prince George's County Police Department ("PG County PD") as a Police Officer for approximately five (5) years. He recalled responding to a 'domestic disturbance with weapon' call on December 30, 2020, at a senior citizen assisted living building. Ofc. Washington explained that when he arrived at the address, the grandmother informed him that her daughter was being threatened at the door by her boyfriend. He explained that the comments on the call provided a description of what the suspect was wearing, that he was armed, and banging and yelling at the door. Tr. pgs. 66-68.

Ofc. Washington testified that when they arrived at the scene, they saw someone who matched the description walking away and entering a car. This person was Employee. Ofc. Washington stated that they approached Employee, who got out of the car and informed Ofc. Washington that they were at the scene for him and that he was about to leave. Employee was ordered to remove his hands from his pockets, but he did not comply, so Ofc. Washington had to physically remove Employee's hands from his pocket. A struggle ensued and Employee was placed in handcuffs, and a handgun was discovered inside his jacket pocket, inside a Shopper's grocery bag. The gun was removed and kept safe. A serial number check was conducted on the handgun, and it was determined that the handgun had been stolen from North Carolina about ten (10) years prior. Employee was then transported to the police station to be interviewed by a detective. Ofc. Washington averred that Employee waived his rights to a statement and he was later taken to jail to be processed. Ofc. Washington stated that Employee was initially cooperative, but panic and fight or flight set in when Employee realized that he could not leave the scene and go about his day. Tr. pgs. 68 – 69, 76-77.

Ofc. Washington confirmed that Agency's Exhibit A, pages 44-45, was the Statement of Charges he completed against Employee. The Statement of Charges was reviewed at some point by the state attorney. He also affirmed that the document had the Court Commissioner's initials. He explained that the Court Commissioner is a judicial officer and their role include reviewing statements of charges and probable cause statements to determine whether a person should be released from jail on their own recognizance, and the bail amount if any. Ofc. Washington confirmed that Agency's Exhibit A, pages 54-55, was the Statement of Probable Cause he completed and signed. Ofc. Washington noted that probable cause statement is not used to determine guilt or the absence thereof. Rather, it is reviewed against the Statement of Charges to ensure they align, and it has no effect on the judicial decision of whether or not a charge will stick. Tr. pgs. 69 -72, 74-74.

Ofc. Washington affirmed that there was a finding of probable cause for Charge 2 – wearing a loaded handgun. He also affirmed that there was a finding of probable cause for Charge 3 – possession of loaded handgun on public roads, highways, waterways, airways, or parking lots. Ofc. Washington explained that in the state of Maryland, until recently, carrying a handgun anywhere other than in your residence was considered a violation of the code described as 'possession of loaded handgun on public roads, highways, waterways, airways, or parking lots'. He explained that this charge is separate from the charge of possession of a loaded handgun. Ofc. Washington affirmed that the Court Commissioner did not find probable cause for Charge 1 – possession of a stolen firearm even though the firearm was in fact stolen and the charge was recommended by a superior. When asked if Employee's demeanor showed that he knew that the gun was stolen, Ofc. Washington stated that 'no'. Tr. pgs. 72 – 74.

Ofc. Washington identified Agency's Exhibit A, pages 35-42, as the incident report he completed for Employee's arrest. He affirmed that the incident report was a true and accurate statement of what happened on December 30, 2020. Tr. pgs. 74 – 75. Ofc. Washington testified that Employee told him that he found the gun in or behind a trash can at a grocery store the day before. He did not recall what Employee gave as the reason he had the gun on him when they responded to the scene on December 30, 2020. He noted that Employee did not advise them that he had a gun in his possession when they approached him or that he wanted to turn in the gun. Tr. pgs. 77-78.

Ofc. Washington stated that he only became aware that Employee was a D.C. firefighter at the police station when he was getting information from Employee to complete his paperwork. Tr.

pgs. 78-79. Ofc. Washington testified that he had BWC footage, but he was not sure why the BWC was not presented during the Trial Board. He also stated that he had no knowledge if fingerprint was gotten out of the gun. Tr. pgs. 80-81.

3) Keith Wooten - Tr. pgs. 83-140

Corporal Keith Wooten ("Corporal Wooten") has been employed by the Prince George's County Sherriff Department ("PG County Sherrif Department") for approximately seven (7) years. He is a member of the Viper Unit, an executive protection unit that runs the inner perimeters for SWAT when they get call outs for barricades and hostage situations, etc. Prior to this, Corporal Wooten testified that he was in the domestic violence unit for about six (6) years. He explained that the domestic violence unit specialized in domestic violence calls for Districts 8 and 3 (Henry and George sector). That unit is also responsible for any protective orders, child custody orders, and any other orders by the court on domestic and family related matters. Corporal Wooten testified that as a member of the domestic violence unit, they received annual training on things like how to deal with domestic violence victims, de-escalation, providing help to the victims and how to get them additional resources. Tr. pgs. 83-85.

Corporal Wooten recalled responding to a 'check on welfare' on March 14, 2021. After refreshing his recollection with the Probable Cause Statement, Corporal Wooten asserted that the March 14, 2021, call initially came in as a 'check on welfare' call, but was later reclassified as a domestic matter as they received more information about the call. He testified that three (3) third parties called in with different versions of what was going on that ranged from 'a male beating up a female', 'female was screaming for help', 'a male threw female down the stairs', and 'the people inside were having a physical altercation and needed help immediately'. Corporal Wooten and his partner responded priority, with lights and siren to the scene. They parked six (6) to seven (7) houses from the scene. As they were walking to the scene, they heard male and female voices screaming and cussing from the house. Corporal Wooten testified that as they got closer, he heard a female screaming for help from inside the house. When they approached the house, they knocked on the door multiple times with no answer. Corporal Wooten asserted that while they could still hear some banging, shuffling, and throwing, the female's voice went quiet, which was concerning to him. He stated that they kept on knocking and announcing themselves until the male (who was later identified as Employee) came to the door covered in sweat and with a cut on his forehead that was bleeding. Tr. pgs. 85, 87-88.

According to Corporal Wooten, when Employee opened the door, he could see inside the residence. He stated that it looked like there had been a physical altercation as furniture had moved with a lamp on the floor and items that were broken. Corporal Wooten stated that he was concerned for the wellbeing of the female, so he asked Employee to move out of the way so he could get inside the house. Employee attempted to shut the door and Corporal Wooten put his foot in the door to keep it from shutting. Employee then reached out with his hands through the door and touched Corporal Wooten's gun belt, which was considered an assault. Corporal Wooten testified that he had to take control of the situation and verify that everyone inside the house was safe. He placed Employee in an arm bar against the wall of the house. Employee was yelling as he was not happy that Corporal Wooten touched him. Corporal Wooten noted that to de-escalate the situation, he instructed Employee to calm down, not to touch him and that they had to figure out what was going on. He stated that he tried to talk to Employee, but Employee kept trying to talk over him. He repeatedly asked Employee to calm down. He stated that Employee noted that he would calm down if Corporal Wooten let go of him. Corporal Wooten stated that he let Employee go while trying to figure out

what was going on. He asserted that he kept a loose grip of Employee because he was still investigating. Employee took a few steps, pushed Corporal Wooten out of the way, and tried to bolt out of the front door to flee the scene. Corporal Wooten stated that he and his partner grabbed Employee and a struggle ensued on the stairs outside the house. Corporal Wooten testified that Employee was pushing and shoving, while he and his partner were trying to restrain Employee with the least amount of force possible. Corporal Wooten stated that he got pushed by Employee at one point and he stumbled down four (4) steps of the stairs, while his partner and Employee continued tussling. He asserted that Employee ended up going over the railings and he stated 'taser, taser, taser' before using the taser on Employee a few times. They handcuffed Employee while he was still on the ground, and then sat him up to ensure his airway was clear. Corporal Wooten also stated that they made the proper notifications, and the EMS Fire came out to check on Employee. Corporal Wooten added that because Employee was uncooperative and caused a scene, the entire neighborhood came out to see what was happening, which led to Employee being charged with disorderly conduct. Tr. pgs. 88 – 93, 117-123.

Corporal Wooten identified the Statement of Charges he authored and signed under penalty of perjury. He affirmed that the Statement of Charges and the Probable Cause Statement were reviewed by a judicial officer or Commissioner. Corporal Wooten testified that he emailed the statements to the on-call assistant state attorney to review for inconsistencies in the facts, evidence, and charges. He explained that if they did not align, the assistant state attorney would inform them that it does not meet the criteria for the charges. He averred that no errors were pointed out to him in this case, and they found that probable cause existed. Tr. pgs. 93 – 95.

Corporal Wooten confirmed that all the charges against Employee were misdemeanors. He testified that he charged Employee with assault of his girlfriend because there were lots of indications that domestic violence had happened such as witness testimony on what was heard through the door – that the argument turned physical in the house; and the scratch mark on Employee's face was consistent with a self-defense mark of someone trying to get away. He also noted that Employee was covered in sweat. Corporal Wooten stated that although Employee's girlfriend refused to provide any statement, he went ahead and charged Employee because based on his experience and training, domestic violence victims are often scared to press charges against their aggressors, especially when they are still in proximity. He confirmed that none of the charges levied against Employee were felonies. Tr. pgs. 95 – 96, 123-124.

According to Corporal Wooten, he charged Employee with second degree assault, which can be defined as the unwanted touching of one person of another, because Employee touched him multiple times without permission. Corporal Wooten testified that he charged Employee with disturbing the peace because prior to him and his partner getting to the house, the situation with Employee was so loud and violent that three (3) different neighbors who were not inside the apartment called the police. Corporal Wooten also asserted that Employee's behavior attracted a crowd as additional people came out of their houses to see what was happening. He concluded that Employee's action was disturbing the public peace. Corporal Wooten further testified that he charged Employee with intentionally resisting arrest because Employee tried to flee and escape the scene while they were trying to put handcuffs on him. He explained that Employee was actively resisting and aggressive towards them to avoid being placed in handcuffs. Corporal Wooten asserted that he charged Employee with obstructing and hindering a police officer because he had the legal right to enter the house due to exigent circumstances, and Employee denied him entry into the house as he was trying to conduct an investigation to ensure everyone was safe. Tr. pg. 97 – 101.

Corporal Wooten identified Agency's Exhibit B, page 119 as the Probable Cause Statement he authored and initialed under penalty of perjury for the March 14, 2021, incident. He confirmed that he was summoned to attend a trial against Employee. He explained that he was in court for the initial trial, however, the case was continued. He also explained that he did not receive the summons for the second trial date, so he did not attend the trial. He stated that if he had received it, he would have appeared on the second trial date. Tr. pgs. 101 – 103.

Corporal Wooten affirmed that as a law enforcement officer, he regularly interacted with firefighters and firefighter/EMTs. He asserted that he was not aware that Employee was a firefighter when they arrived at the scene. He explained that it was only after Employee had been handcuffed that someone in the house yelled that Employee was a firefighter, to which Employee asked the individual to keep quiet, which led him to believe that Employee did not want them to know his profession. Corporal Wooten testified that his interaction with Employee was an anomaly to his experience of dealing with first responders on calls for service. He later found out that Employee was a D.C. firefighter. He also cited that he was shocked and disappointed at the unprofessionalism. Corporal Wooten testified that after Employee's arrest, he had a conversation with his co-worker who stated that "D.C. Fire will hire anyone". Tr. pgs. 103 – 107. Corporal Wooten confirmed that there was Body Worn Camera footage of the arrest. Tr. pgs. 107.

Corporal Wooten testified that he has completed between 50-100 Probable Cause Statements throughout his career at the PG County Sherrif's Department. He affirmed that he included all important details relevant to offenses he charged on the probable cause statement as best as he could recall. He confirmed that he signed the probable cause statement in Employee's case on the day the incident occurred. Corporal Wooten affirmed that he heard a female screaming for help when they got to the house. He explained that he did not specifically include that in his probable cause statement; however, he did note in the statement that he heard "sounds of distress coming from inside the house." Corporal Wooten also noted that although he testified that the female's voice went quiet when they knocked on the door, he did not include that in his probable cause statement. He also affirmed that while he earlier testified that Employee was covered in sweat when he opened the door, he did not include this in the probable cause statement. He explained that this was listed in his use of force report. Corporal Wooten confirmed that although he testified that he saw scratch marks on Employee's forehead, he did not include that in the probable cause statement. He again explained that this was in his use of force report. Tr. pgs. 108 -112.

Corporal Wooten confirmed that although he did not have a search or arrest warrant when he got to Employee's house on March 14, 2021, there were exigent circumstances to enter the house. He noted that he did not personally hear the 9-1-1 calls about the incident, but rather, the incident was communicated to them via radio and their car computer display system ("CAD"). Corporal Wooten did not remember stating in his Probable Cause Statement that Employee pushed him down the stairs. He also affirmed that he warned Employee that he was going to tase him, and he did use his taser on Employee. Tr. pgs. 113-115, 118-119, 129. According to Corporal Wooten, not all the details of an incident are included in the Probable Cause Statement. Tr. pgs.124-126.

When asked by the Trial Board member if Employee's girlfriend had notable injuries, Corporal Wooten stated that he did not speak with her. He explained that his partner interviewed the girlfriend, and she refused service. Corporal Wooten said 'no' when he was asked if he witnessed the physical altercation. He noted that while there were witness statements taken from what people heard coming from inside the house, no one saw anything. When asked if he thought the female –

Employee's girlfriend could be the aggressor, Corporal Wooten stated that "anything is possible". Tr. pgs. 127 – 128. Corporal Wooten explained that he does not know if his failure to attend the second hearing was the reason Employee's case was dismissed as '*nolle prosequi*'. He reiterated that he did not attend the trial because he did not receive the second summons. Tr. pgs. 129-130.

Corporal Wooten stated that there was BWC that captured the incident. However, it took a lot of time for the video to be downloaded and for him to have access to the footage. So, he was not able to review the BWC footage prior to completing the Probable Cause Statement, which is the reason why it does not include all the details. Corporal Wooten also stated that his BWC footage was reviewed by internal affairs as part of use of force investigation. He testified that he received discipline for the accidental tasing of Employee. He noted that he was not disciplined for the initial tasing of Employee. Tr. pgs. 131 -134. Corporal Wooten acknowledged that they are able to make an arrest once a defendant steps outside of the house, and that his arrest of Employee was according to protocol, and state laws and regulations. Tr. pgs. 139-140.

Employee's Case-in-Chief

4) Erik Wiklund - Tr. pgs. 142-152

Erik Wiklund ("Captain Wiklund") is employed as a Captain at Agency. He testified that Employee was one of his members when he was a Lieutenant at Engine 27. He stated that he worked with Employee at Engine 27 for about three (3) years. He affirmed that Employee was an asset to the Department. He explained that Employee was a strong, motivated worker who was interested in moving forward and he always wanted to learn more. Captain Wiklund stated that he went on a few rounds with Employee and Employee did well. He said that Employee never needed to be prompted to do anything, he did a good job on his runs, and he was self-motivated. Captain Wiklund stated that if Employee was terminated, Agency would lose a strong worker. Tr. pgs. 142-144.

Captain Wiklund affirmed that he was Employee's supervisor on December 30, 2020. He could not recall an incident involving Employee that occurred on December 30, 2020, but he recalled Employee calling in sick on that day. He testified that Employee texted him to inform him that he would be on sick leave. He provided that Employee also followed up stating that he was having a tough day, and he responded by telling Employee not to do anything stupid. Captain Wiklund later stated that Employee might have called and not texted to request to be placed on sick leave. He noted that since Employee placed himself on sick leave, he was not expecting Employee to report to work on that day. Captain Wiklund affirmed that later that day, he was informed that Employee had been arrested. Captain Wiklund stated that he contacted internal affairs via telephone and explained that he had received a memo from PG County Police that they had arrested one of their members. He stated that he provided the officer's contact information to internal affairs, and he documented the conversation via email to internal affairs. He identified Agency's Exhibit C, page 135, as the email he sent to internal affairs about the arrest. When asked if he had any previous problems with Employee while he was under his command, Captain Wiklund said 'no'. Tr. pgs. 145-151.

5) Keith Eastman - Tr. pgs. 153 -165

Keith Eastman ("Investigator Eastman") is a Fire Inspector at the Fire Marshall Division at Agency. He testified that Employee was a backstep member when he, Inspector Eastman, was a Technician at Engine 27. He stated that Employee was his 'go-to' guy. Investigator Eastman asserted

that Employee was a hard worker, he kept them together, and as the backstep on the ambulance, he was eager, ready to listen and learn, and if he could not reach someone at the fire house, he would go to Employee. He stated that Employee had good interaction with the people in the community. He agreed that he went on several runs with Employee while they were at Engine 27. Investigator Eastman averred that despite the call volume and pressure at Engine 27, Employee never folded. He noted that Employee learned and got better at his job. Tr. pgs. 154-158, 161.

Investigator Eastman affirmed that at some point in 2020, Employee was not present as a firefighter at Engine 27, and he was missed. He noted that Employee's absence was noted as runs were not the same without Employee. He highlighted that Employee could move up the ranks at Agency, especially with his work ethics. He asserted that Employee would be missed if Agency were to terminate his employment. Tr. pgs. 158 – 160.

Investigator Eastman averred that in his role as Fire Inspector, he sometimes works with law enforcement and other first responders. He affirmed that firefighters are expected to interact with law enforcement and other first responders in a respectful and cordial manner. He agreed that they work with first responders and law enforcement from other jurisdictions such as Prince George's County and Virginia, and they are expected to show respect and kindness to everyone. Investigator Eastman affirmed that that respect should continue while they are off duty. He noted that Employee always acted cordially and respectfully towards law enforcement and others. He explained that he had never seen Employee disrespect other officers. Tr. pgs. 161 – 165.

6) Employee - Tr. pgs. 165-263

Employee has been a Firefighter/EMT with Agency since December 2, 2013. Tr. pgs. 166 – 167, 169-170. Employee stated that he grew up in the District of Columbia, graduated from Perry Street Prep, as valedictorian, and then he joined the Fire Department's Cadet program. He explained that prior to his current assignment in logistics, he was assigned to Engine 27, Platoon 1. He noted that his first day on the field was September 2, 2014, at Engine 27. Employee testified that he requested this assignment while he was at the academy because Engine 27 got a lot of work, he loved the challenge, and Engine 27 got things done. He averred that he got three (3) medals for his outstanding work. Tr. pgs. 170 -172.

Employee testified that in the fall of 2020, he had a lot of financial responsibilities in his family. Employee narrated that the night before his arrest in December 2020, he went to Shoppers (a grocery store) to do grocery shopping with one of his children's mother ("Ms. Parker"). He stated that they arrived at the Shopper's grocery store right before the store closed. Employee asserted that when he got out of the grocery store after shopping, a shiny object in a grey Shopper's bag in the grass in front of his car caught his eyes. He took two (2) steps closer and noticed it was a handheld gun. He stated that he grew up in a violent neighborhood with gun violence and he had seen similar handguns, which they referred to as 'throwaways'. He picked up the gun with the bag, placed it in his glove box console and locked it up with the valet key. Employee testified that because he was too tired to call and wait for the police, he immediately went home with Ms. Parker, and he intended to drop off the gun at the police station on his way to work the next day. Employee stated that Ms. Parker later left his house for her grandmother's house, while he went to bed, with the intention of going to work the next day. Tr. pgs. 172-179, 213-214.

Employee testified that when he got up the next morning, he received a text from Ms. Parker that they needed to talk. He and his sister drove to Ms. Parker's grandmother's house. He explained that his sister was going to drop him at work and take the car. Employee asserted that when they got to Ms. Parker's grandmother's house, he knocked on the door, Ms. Parker opened the door, and while they were talking, Ms. Parker's grandmother came over and stated that she did not like how the conversation between Employee and Ms. Parker was going, so Employee left. Employee affirmed that Ms. Parker saw and was aware the handgun was in the car. Employee stated he did not hear Ms. Parker tell her grandmother about the handgun in the car. He highlighted that the handgun was not mentioned during his disagreement with Ms. Parker and her grandmother. When asked if Ms. Parker or her grandmother damaged his car, Employee said 'no'. Tr. pgs. 179 – 180, 182, 215-216, 235-237.

Employee stated that when he went into Ms. Parker's grandmother's house, the gun was still in a Shopper's bag locked in the glove box console of his car. He stated that when he was walking to his car from Ms. Parker's grandmother's house, he saw two (2) police cars coming in his direction. He testified that when he noticed the police cars were coming towards him, he went into his car and grabbed the gun and put it on his person, inside his left jacket pocket because his sister was in the car, and he did not want her to get involved in case something bad happened. Tr. pgs. 181 – 183, 216-218.

According to Employee, he tried to smooth things out with the police, and he told them that there was no violence and that he was leaving the premises, but they did not allow him to leave. He states that he was told to sit and put his hands up. He asserted that he tried telling the police officer that he had a firearm on him, but he does not know if the police officer who was about 20 yards away from him responded. He cited that the police officer asked him to lie down, which he did before the police officer got to him because he did not want anyone to think he was aggressive or doing anything harmful. He explained that two (2) seconds later, the officers walked up to him, restrained him and then found the gun after he directed them on where it was located. Tr. pgs. 183-184.

Employee testified that he told the officers that he had found the gun the day before in a Shopper's bag next to the Shopper's grocery store, and he was planning on turning it in that morning on his way to work. He stated that he relayed this to them multiple times, starting from when he was in handcuffs on the ground, when he was in handcuffs in the backseat of the police car, and again while he was being processed. Employee cited that he was detained from about 7:00 o'clock to 11:00pm. Tr. pgs. 185 – 186.

Employee testified that he initially contacted Captain Wiklund prior to the police arriving at the scene to notify him that he was going to be late and would not make it for roll call. He also stated that prior to the incident with the police, he informed Captain Wiklund to place him on sick leave and that he would be absent from work. When asked if he knew there was a possibility of him going to jail on that day when he first contacted Captain Wiklund, Employee said 'no'. Employee explained that he realized he was not going to make it to work by 7:00 a.m. when he got handcuffed. He stated that he was later released on his own recognizance after he spoke to the commissioner. Employee acknowledged that he was charged with three (3) offenses: (1) possession of a stolen handgun; (2) possession of a handgun; and (3) possession of a handgun in a vehicle. He noted that these charges were misdemeanors. Tr. pgs. 186 -187, 219-230.

Employee asserted that he went to Agency's Internal Affairs the day after he was released to inform them of the incident. He affirmed writing a Special Report. He noted that the Special Report

contained a narrative of the incident and the three (3) charges pending against him. Employee testified that the three (3) charges against him were 'thrown out'. He stated that he pled guilty for the 'loaded gun on person' charge because he failed to follow the proper procedures to dispose of a gun. He cited that he received three (3) years reduced sentence, one (1) day in jail, twenty (20) hours of community service, and registration into a firearms information program. Tr. pgs. 188 – 190, 210.

Regarding the March 14, 2021, incident, Employee testified that while he was cleaning the house, he was also having a conversation with his brother and another child's mother ("Ms. Lowe"). Employee noted that he and Ms. Lowe were in a peaceful, happy, normal mood. He explained that while he could be considered loud by others, his conversation with Ms. Lowe that morning was not loud and there was no yelling. When asked if he hit Ms. Lowe at any point during the conversation, Employee said 'no'. He was also asked if he threw Ms. Lowe down the stairs or if Ms. Lowe was screaming at any time, and Employee responded 'no' to both questions. Tr. pgs. 194 – 196.

Employe asserted that he lived in a townhouse, and any one of his neighbors could hear any noise coming from his house. He cited that one of his neighbors knocked on his door and asked him to keep it down, stating that they just started a new job and they needed to get some sleep. Employee noted that to be considerate, he shut the door, and the neighbor was good with that when they left. Employee testified that a couple of minutes later, two (2) PG County Sheriff knocked on his door and he answered. Employee cited that he did not know why the Sheriff was at his house. When asked if he recalled seeing Corporal Wooten take witness statements from three (3) of his neighbors, Employee said 'no'. Tr. pgs. 196 – 198, 235.

According to Employee, Corporal Wooten informed him that they had received a phone call of a possible domestic situation at Employee's address. Employee testified that he told Corporal Wooten that there was nothing going on, and he invited him to check inside the house if he had doubts. Employee also stated that he requested permission from Corporal Wooten to leave the premises, while they investigated because he did not want to be accused of impeding or stopping the investigation. He left the house to the sidewalk once he was given the okay to do so. Employee stated that the conversation with the police officers occurred downstairs, at the front of his house. He stated that he was grabbed as he was about to take his second step. Employee averred that he did not intentionally make physical contact with the police officers while he was having a conversation with them. When asked if he grabbed Corporal Wooten's taser on his belt, Employee said 'no'. He explained that he had no reason to fight Corporal Wooten. Employee reiterated that he had no reason to leave his home or run away from the police officers. Tr. pgs. 198 -200, 255-256.

Employee asserted that after he was grabbed, he had one hand put behind him in an aggressive manner and thrown over the banister. The other officer grabbed and restrained his hands, telling him to stop resisting. Employee stated that he told the officer he did not know what was going on. He explained that Corporal Wooten came around, shouted "taser, taser, taser" and shot him. Employee said he was surprised and shocked, but fully alert when the first tase hit him. He averred that Corporal Wooten then discharged a second shot, which Employee noted was the most excruciating pain he had ever felt, and he fell to the ground. According to Employee, the officers placed a knee on his back and neck, handcuffed him, placed him on the steps on his property. Employee stated that he was shot a third time with the taser, he screamed, and the officer told him to be quiet and that it was an accident. Employee averred that he had no knowledge of touching anyone and he denied pushing Corporal Wooten down the stairs. Employee stated that he was later transported to the hospital where he was examined and treated for injuries caused by the taser.

Employee noted that he was discharged from the hospital, and he was transported to the Maryland precinct where he was processed. Tr. pgs. 201 – 206.

Employee affirmed that he was charged with five (5) misdemeanor offenses stemming from the March 14, 2021, incident. Employee asserted that he reported the charges to Agency and Internal Affairs the day after he was released. Employee testified that he appeared in court twice for these charges. Employee stated that the first court date in March 2021 was pushed to August 2021. He explained that during the August 2021 trial, he was told all the charges against him were dropped because the officers involved did not show up for court. Tr. pgs. 206 – 208.

Employee averred that as soon as he got out of the Maryland precinct, he got a call from the PG County Sheriff department internal affairs and he spoke with Seargeant Hackett ("Sgt. Hackett"), who wanted to get his side of the story. According to Employee, Sgt. Hackett noted that there were discrepancies in the police report. Tr. pg. 209.

Employee stated that he had not been trained on the use of a handgun, and he did not check if the handgun he found near the Shopper's grocery store on December 30, 2020, was loaded. He noted that he just wanted to get the handgun off the streets before someone got hurt. Employee explained that he did not notify anyone at Shoppers because it was his understanding that Shoppers cleaned up every day and he assumed that since the handgun was still there, it meant the people at Shoppers did not want to get it. He also noted that he did not notify Shoppers because he did not want to get more people involved. Employee stated that he made an error in judgement by keeping the gun and his reason for doing so was to not allow the gun to fall in the wrong hands. Thus, he wanted to personally take it to the police station. Tr. pgs. 213-215.

Employee testified that on December 30, 2020, he left the house for work at 6:00am, which was late by his standard, but not by Agency's standard. He then left for Ms. Parker's grandmother's house to talk to her as she requested around 6:15am, but before 7:30 am when he was arrested. His sister stayed in the car while he went in to talk to Ms. Parker. Employee stated that his sister drove away with the car when he was arrested. He stated that he informed his job around 6:39am that he might be out on sick leave. He explained that although he was not sick, he did not have any annual leave hours and he did not want to be charged with Absent without Leave ("AWOL"). Employee stated that he sent Captain Wiklund a picture of his car that morning, with his headlights smashed out and joking that he would end up in jail. Employee maintained that he considered Captain Wiklund as family, and he was joking about ending up in jail. Tr. pgs. 239 – 243.

Employee said he talked to Captain Wiklund around 6:54am, before he went to talk to Ms. Parker. Employee testified that he did not have an argument with Ms. Parker when he got to her grandmother's house, but rather, they had a quick conversation before the grandmother came out, and he left and went to his car. He averred that he saw the police officers while he was sitting in his car. He told his sister to relax, and he removed the handgun from the car and put it inside the left pocket of the jacket he was wearing. According to Employee, he removed the gun from the car because he did not want his sister involved in the event the car was searched. Employee stated that he immediately got out of the car, and he tried telling the police officers he was leaving the scene. Employee stated that he followed the police officers' instructions. He stated that he was asked to put his hands up. With one hand up, he used his other hand to point at the inside of his jacket to notify the police officers that he had a gun on him, but he was unsure if the police officers heard him. After he was restrained on the ground, he told the officers he had a gun inside his jacket pocket, which they

reached inside and grabbed. Employee asserted that he did not resist arrest. He stated that he did not hear the police officers tell him to take his hands out of his pockets. He reiterated that he complied with all the instructions from the police officers on the scene. Tr. pgs. 243 – 255, 256-257.

Panel Findings[7]

The Trial Board Panel made the following findings of fact based on their review of the evidence presented at the hearing:

Findings of Fact - Case No.: U-21-154

1) Body Worn Camera (BWC) footage confirmed that FF/EMT[Employee] assaulted a police officer and resisted arrest. He was charged with second degree assault; second degree assault of an officer; disorderly conduct; resisting/interference with arrest; and obstructing and hindering a police investigation.

2) The Department has established cause by a preponderance of the evidence on Charge 1.

Findings of Fact - Case No. U-21-087

1) Body Worn Camera (BWC) footage confirmed that Firefighter [Employee] was in possession of a stolen, loaded handgun on his person and in a vehicle on a public parking lot.

2) Firefighter [Employee] plead [sic] guilty of the charge "loaded handgun on person" in the District Court of Maryland for Prince George's County.

3) Firefighter [Employee's] conduct and resistance as captured on the BWC footage directly contradicts his representation at the Trial Board hearing that he immediately disclosed his possession of the loaded firearm.

4) BWC footage demonstrates that Firefighter [Employee] knowingly possessed and transported the loaded handgun to the senior citizen community and that he used the handgun to threaten Ms. Parker.

5) The Department has established cause by a preponderance of the evidence on Charge 1.

Upon consideration and evaluation of all the testimony, The Trial Board Panel found that there was a preponderance of evidence to sustain the charges against Employee in both cases. For Case No. **U-21-154**, the Panel found Employee guilty of Charge No. 1, Specification No. 1. For Case No. **U-21-087**, the Panel found Employee guilty of Charge No. 1, Specification No. 1. In addition to making the findings of fact, the Panel also weighed the offenses against the relevant *Douglas* factors[8]

[7] *Id*. at Tabs 25 & 27.
[8] *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

and concluded that termination for **U-21-154**- Charge No. 1, and **U-21-087** - Charge No. 1, was the appropriate penalty for these offenses.[9]

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW[10]

Pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department*,[11] OEA has a limited role where a departmental hearing has been held. According to *Pinkard*, the D. C. Court of Appeals found that OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings.[12] The Court of Appeals held that:

> "OEA may not substitute its judgment for that of an agency. Its review of the agency decision…is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. The OEA, as a reviewing authority, must generally defer to the agency's credibility determinations."

Additionally, the Court of Appeals found that OEA's broad power to establish its own appellate procedures is limited by Agency's Collective Bargaining Agreement. Thus, pursuant to *Pinkard*, an Administrative Judge of this Office may not conduct a *de novo* hearing in an appeal before him/her, but must rather base his/her decision solely on the record below, when all of the following conditions are met:

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1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3) the employee's past disciplinary record;
4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[9] Agency Answer, *supra*, at Tab 25 & 27.

[10] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

[11] 801 A.2d 86 (D.C. 2002).

[12] *See* D.C. Code §§ 1-606.02(a)(2), 1-606.03(a)(c); 1-606.04 (2001).

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
>
> 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;
>
> 4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard*, *i.e.*: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, Adverse Action Panel] has been held, any further appeal shall be based solely on the record established in the Departmental hearing"; *and*
>
> 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 (emphasis added).

There is no dispute that the current matter falls under the purview of *Pinkard*. Employee is a member of the D.C. Fire and Emergency Medical Services Department and was the subject of an adverse action (termination); Employee is a member of the International Fire Fighters Local 36, AFL-CIO MWC Union ("Union") which has a Collective Bargaining Agreement ("CBA") with Agency. The CBA contains language similar to that found in *Pinkard* and Employee appeared before an Adverse Action Panel on December 1, 2022, for an evidentiary hearing. This Panel made findings of fact, conclusions of law and recommended that Employee be terminated for the current charges. Consequently, I find that *Pinkard* applies in this matter. Accordingly, pursuant to *Pinkard*, OEA may not substitute its judgement for that of the Agency, and the undersigned's review of Agency's decision in this matter is limited to the determination of (1) whether the Adverse Action Panel'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.

1) Whether the Adverse Action Panel's decision was supported by substantial evidence

Pursuant to *Pinkard*, I must determine whether the Adverse Action Panel's ("Panel") decision was supported by substantial evidence. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[13] If the Panel's findings are supported by substantial evidence, then the undersigned must accept them even if there is substantial evidence in the record to support findings to the contrary.[14]

After reviewing the record, as well as the arguments presented by the parties in their respective briefs to this Office, I find that the Panel met its burden of substantial evidence for Case

[13] *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).
[14] *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987).

No. **U-21-154**. Employee affirmed that he was charged with five (5) misdemeanor offenses stemming from the March 14, 2021, incident. Tr. pgs. 206 – 208. Further, Sgt. Edgerton acknowledged that he received the police record and court documents from the Maryland District Court for FEMS Case No. **U-21-154,** which highlighted that Employee was charged with "assault in the second degree of a police officer; assault in the second degree in such case made and provided against the peace, government, and dignity of the state; did willfully act in a disorderly manner to the disturbance of the public peace; intentionally resisted arrest; did intentionally annoy, obstruct and hinder a police officer in the performance of his lawful duties in violation of common law" for the March 14, 2021, incident. Tr. pgs. 47-53, 265-267.

In addition, Corporal Wooten of the PG County Sheriff Department, testified that while they were responding to a call at Employee's residence on March 14, 2021, Employee pushed Corporal Wooten out of the way, and tried to bolt out of the front door to flee the scene of the domestic. Corporal Wooten stated that he and his partner grabbed Employee who did not want to be restrained and a struggle ensued on the stairs outside the house. According to Corporal Wooten, Employee was pushing and shoving, while he and his partner were trying to restrain Employee with the least amount of force possible. Corporal Wooten stated that he got pushed by Employee at one point and he stumbled down four (4) stairs, while his partner and Employee continued tussling. Corporal Wooten also added that because Employee was uncooperative, and caused a scene, the entire neighborhood came out to see what was happening, which let to Employee being charged with disorderly. Tr. pgs. 88 – 93, 117-123. The Trial Board found that Body Worn Camera (BWC) footage confirmed that FF/EMT[Employee] assaulted a police officer and resisted arrest.[15] The Trial Board noted that Employee was charged with second degree assault; second degree assault of an officer; disorderly conduct; resisting/interference with arrest; and obstructing and hindering a police investigation.

Upon review of the BWC footage submitted to this Office by Agency, the undersigned cannot confirm with certainty that Employee assaulted Ms. Lowes or any other individual since the BWC does not contain any direct evidence to that effect and Ms. Lowes stated that she was not assaulted.[16] Additionally, from reviewing the BWC, the undersigned cannot confirm that Employee assaulted a police officer or that he prevented the police officers from investigating.[17] Employee did ask Corporal Wooten if he had a warrant when Corporal Wooten attempted to get into the house after Employee answered the doorbell. However, the BWC footage shows Employee resisting arrest, struggling with the officers, and falling off the stair rails. It also showed that Employee acted in a disorderly manner. Based on the aforementioned, I find that there was substantial evidence in the record to support the Panel's findings for FEMS Case No. **U-21-154.**

Also, after reviewing the record, as well as the arguments presented by the parties in their respective briefs to this Office, I find that the Panel met its burden of substantial evidence for Case No. **U-21-087**, Employee testified that he was charged, and he pled guilty for the 'loaded gun on person' charge because he failed to follow the proper procedures to dispose of a gun. Tr. pgs. 186-189. Sgt. Edgerton identified Agency's Exhibit A, page 57, as Employee's disposition papers. He affirmed that Employee entered a guilty plea for the loaded handgun on person charge. Tr. pgs. 37-

[15] It should be noted that Agency did not present the BWC to the Trial Board on the date of the Trial Board hearing. Agency explained to the Board members that it was not aware that PG County Police officers wore BWC. However, it appears Agency was able to later obtain the BWC for both cases, which it submitted to this Office.
[16] While the BWC does not show Employee assaulting his fiancé, the neighbors stated on camera that Employee beats his fiancé all the time and there's always commotion from Employee's house. *See* Agency's Answer, *supra*, at Tab 1 - Deputy R. Williams' March 14, 2021, BWC at 24mins, 20seconds – 27mins.
[17] *See* Agency's Answer, *supra*, at Tab 1 – Deputy K. Wooten's March 14, 2021, BWC at 1.37sec – 2mins.

38. The BWC provided by Agency further shows that Employee was in possession of a loaded handgun on his person, while he was in the public parking lot of a senior citizen community. The police officers upon retrieving the handgun, verified and later confirmed that the handgun was stolen. The BWC footage also shows that Employee did not immediately inform the officers that he was in possession of a handgun.[18] Employee testified during the Trial Board hearing that he tried to inform the officers that he had a loaded handgun in his possession, but he was unsure if they heard him. Tr. pgs. 243 – 255, 256-257. Ms. Parker stated that she had an altercation with Employee a week prior and she was surprised to see Employee at her grandmother's house. She explained that Employee had his hands in his jacket pocket when he came to her grandmother's house. She however noted that she was not aware that Employee had a gun on him. She also highlighted that Employee was probably just trying to scare her. Ms. Parker averred that when she closed the door, Employee began kicking the door.[19] Based on the aforementioned, I find that there was substantial evidence in the record to support the Panel's findings for Case No. **U-21-087**.

2) Whether there was harmful procedural error

In its submissions to this Office, Agency also noted that there was no harmful procedural error in its administration of the instant action. It stated that its action was not discriminatory in nature. It further asserted that even if its actions were discriminatory in nature as Employee stated in his Petition for Appeal, OEA does not have jurisdiction to hear discrimination claims, as such claims are reserved for the Office of Human Rights, pursuant to D.C. Code 2.1411.02 and DPM 1631.1(q). In his July 13, 2022, Petition for Appeal, Employee stated that his termination was discriminatory. However, he did not provide any evidence in support of that allegation. Moreover, as Agency noted, D.C. Code § 2-1411.02, specifically reserves complaints of unlawful discrimination to the Office of Human Rights ("OHR"). Per this statute, the purpose of the OHR is to "secure an end to unlawful discrimination in employment…for any reason other than that of individual merit." Complaints classified as unlawful discrimination are described in the District of Columbia Human Rights Act.[20] Additionally, District Personnel Manual ("DPM") § 1631.1(q) reserves allegations of unlawful discrimination to Office of Human Rights. Accordingly, I find that Employee's discrimination claims fall outside the scope of OEA's jurisdiction.

In addition, Employee averred that Agency used an obsolete version of the DPM in the current matter. Employee stated that Agency used the 2012 version of the DPM despite the presence of an updated version.[21] Agency acknowledged that it disciplined Employee pursuant to the 2012 version of the DPM. It stated that it charged Employee based on Order Book Article VII because that was the procedure for which Agency and Employee's Union bargained for until impacts and effects bargaining regarding the current version of the DPM was completed. Agency contended that *assuming arguendo* that its application of the 2012 version of the DPM was in error, it constitutes harmless error as the charges from the 2012 DPM version have a corresponding charge in the current and applicable DPM version.[22] Agency reiterated that each of the causes of action levied against

[18] *See* Agency's Answer, *supra*, at Tab 4 – Ellis BWC1; Al-Hassani BWC1; Nick BWC1; Washington BWC1; and Montgomery BWC1.
[19] *See* Agency's Answer at Tab 4 – Nick BWC2 and Al-Hassani BWC2.
[20] D.C. Code §§ 1-2501 *et seq.*
[21] Employee's Brief (November 17, 2023).
[22] OEA Rule 634.6 provides that, "[n]otwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was a harmless error."

Employee are found in both the 2012 and current DPM version.[23] Agency further noted in its Notice of Authority dated January 4, 2024, that pursuant to the D.C. Superior Court's ruling in *Fire and Emergency Medical Services Department v. D.C. Office of Employee Appeals*, *et. al*.[24] its use of the 2012 DPM is "a proper application of the regulations at issue and thus cannot be the basis of procedural error by FEMS."[25]

It is undisputed that Agency used the 2012 version of the DPM in its administration of the instant adverse action. The District of Columbia Municipal Regulations ("DCMR") and the corresponding District Personnel Manual ("DPM') regulate the manner in which agencies in the District of Columbia administer adverse and corrective actions. The current and applicable DCMR and DPM versions (DCMR 6-B Chapter 16 and DPM Chapter 16) regulating the manner in which agencies administer adverse action went into effect in the District on June 12, 2019. Consequently, all adverse actions commenced after this date were subject to the new regulation. Moreover, the D.C. Superior Court's Order in *Fire and Emergency Medical Services Department v. D.C. Office of Employee Appeals*, *et. al*.,[26] remanded this matter to OEA. Judge Kravitz remanded this matter to the undersigned to reconsider "(1) the propriety of FEMS's application of the 2012 DPM – rather than the 2017 DPM- to its determination whether [the employee] was subject to discipline…"[27] Thereby, providing the undersigned with the discretion to decide the applicable DPM, based on the evidence presented by the parties. Because the parties in the instant matter have already addressed this issue in their previous submissions, the undersigned did not request additional briefs on this issue.

Here, the Order Book Article VII, Section 1, provides that:

> *Disciplinary actions against firefighters at the rank of captain and below shall be governed by the collective bargaining agreement between the Department and D.C. Fire Fighters' Association Local 36 and Chapter 16 of the D.C. Personnel Manual (DPM).* In the event of a conflict between the collective bargaining agreement and Chapter 16, the collective bargaining agreement shall prevail. (Emphasis added).

Furthermore, Article 31, Section A of the CBA between Employee's Union and Agency provides:

> Disciplinary procedures are governed by *applicable provisions of Chapter 16 of the District Personnel Manual, and the Department's Rules and Regulations and Order Book*, except as amended/abridged by this Article. Disciplinary procedures are also governed by applicable sections of the District of Columbia Official Code, of which such sections shall supersede the provisions of this Article. (Emphasis added).[28]

The above CBA provision does not reference any specific DPM – 2012 or 2017, or 2019. Instead, it provides that "Disciplinary procedures are governed by <u>*applicable* *provisions of Chapter 16 of the District Personnel Manual, and the Department's Rules and Regulations and Order Book*</u>, except as amended/abridged by this Article." (Emphasis added). The above referenced CBA was signed by

[23] Petition for Appeal (July 13, 2022). *See also* Agency's Answer, *supra*, at Tab 29 and Agency's Legal Brief, *supra*.
[24] 2023-CAB-1076 (December 29, 2024).
[25] *Id*.
[26] 2023-CAB-001068 (February 16, 2024).
[27] *Id*.
[28] *See*. Agency's Legal Brief, *supra*, at Exhibit C.

Agency and Employee's Union on September 5, 2018, after the May 19, 2017, effective date of the 2017 DPM. Agency presented a December 23, 2015, letter from the Union in support of its assertion that it was still engaged in 'impacts and effects bargaining' with Employee's Union on the issue of the applicability of the 2017 DPM, therefore the 2012 DPM was the applicable DPM when the current adverse action commenced.[29] I find Agency's assertion in this regard to be illogical given that both Agency and Employee's Union signed the current and applicable CBA on September 5, 2018, almost three (3) years after the December 23, 2015, letter from the Union. Further, the September 5, 2018, CBA made no mention of the 2012 DPM. Even assuming that the December 23, 2015, letter from Employee's Union was a request to bargain the applicability of Chapter 16 of the 2017 DPM, I conclude that this issue was resolved on September 5, 2018, when Agency and the Union signed the current and applicable CBA.[30] Pursuant to Article 31, Section A of the 2018 CBA, "Disciplinary procedures are governed by ***applicable*** provisions of Chapter 16 of the District Personnel Manual, and the Department's Rules and Regulations and Order Book, except as amended/abridged by this Article." Accordingly, I conclude that the parties were not engaged in impacts and effects bargaining when the current cause of action was levied against Employee. I further find that the December 23, 2015, letter from Employee's Union to Agency's representative, Office of Labor Relations and Collective Bargaining ("OLRCB") is immaterial to the current matter.

Additionally, here, Employee was terminated effective June 24, 2022, and the 2019 version of the DPM was already in effect. Further, the incidents for which Employee was disciplined occurred on December 30, 2020, and March 14, 2021, of which both dates were after the 2019 DPM version became effective. Chapter 16 of the DPM was substantively changed in 2017, and again revised in 2019, however, the 2019 revision did not affect the adverse action/disciplinary section. While the applicable Chapter 16 DPM provision at the time of the signing of the current CBA was the 2017, the current incident occurred after the 2019 DPM became effective. Further, because the revision to the 2019 DPM did not substantively affect the Chapter 16 DPM provision, I conclude that the applicable DPM at the time of the current disciplinary action was the 2019 DPM.

In this matter, under both Case Nos. **U-21-087**, Charge No. 1, Specification No. 1, and **U-21-154**. Charge No. 1, Specification No. 1, Employee was charged with: "(1) Any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law; (2) Any act which constitutes a criminal offense whether or not the act results in a conviction; and (3) Neglect of Duty", pursuant to the Order Book and the 2012 version of the DPM. Since the undersigned has concluded that the applicable DPM at the time of the current action was the 2019 DPM version, I find that Agency used the incorrect DPM version. All three (3) charges cited above do not exist in the current DPM, as the 2017 and subsequent versions of the DPM moved all the adverse action charges with the corresponding penalty from DPM §1603 to DPM §§ 1605 and 1607 respectively. These causes of actions do not have a corresponding provision in the 2019 version of Chapter 16 of the DPM. Further, there are substantive changes in the 2019 version of the DPM with regard to the charges and penalties such that the undersigned would be unable to ascertain which charges should have been levied against Employee had Agency utilized the appropriate version.[31] OEA has held that it is required to adjudicate an appeal on the "grounds invoked by agency

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[29] *Id*. at Exhibit D.

[30] Agency has provided no evidence whatsoever to suggest that the Impact and Effects bargaining between Agency and the Union has been ongoing for the last nine (9) years or that the CBA provision would warrant the use of the 2012 DPM.

[31] *Madeleine Francois v. Office of the State Superintendent of Education*, OEA Matter No. 1601-0007-18, Opinion and Order (July 16, 2019); *See also Stephanie Linnen v. Office of the State Superintendent of Education*, OEA Matter No. (February 13, 2019).

and may not substitute what it considers to be a more appropriate charge."[32] Additionally, this Office has held that an employee must be aware of the charges for which they are penalized in order to appropriately address/appeal those charges.[33]

The undersigned can only adjudicate the current appeal based on the grounds invoked by Agency in the Final Agency Decision. Agency disciplined Employee under an incorrect DPM version. I find that Agency's error is not harmless error because Agency did not provide a breakdown of the penalty with respect to each cause of action or specification under any of the charges. Therefore, it would be improper for the undersigned to essentially 'guess' or 'speculate' what the appropriate charge and/or penalty would have been had Agency used the appropriate DPM version.[34]

Moreover, the D.C. Superior Court in *D.C. Office of the Attorney General v. Office of Employee Appeals,* 2019 CA 5286 P(MPA) (July 2, 2020), found that the Advance Notice and Final Decision issued by OAG failed to adequately identify the charges underlying [employee's] proposed removal. It concluded that "… OAG's failure to provide [employee] with adequate notice of the charges underlying her proposed termination prevented her from knowing "the allegations . . . she w[ould] be required to refute or the acts . . . she w[ould] have to justify, thereby [depriving her of] a fair opportunity to oppose the proposed removal.""[35] The D.C. Superior Court agreed with the OEA Board and AJ Harris's decision in *Rachel George v. D.C. Office of the Attorney General, supra,* that OAG's failure "to identify the charges underlying [employee's] proposed termination in the Final Agency Notice deprived [employee] of the notice to which she is entitled, as well as an opportunity to adequately defend herself." Citing to case law, the D.C. Superior Court further opined that "[A]n employer is required to provide an employee, against whom an adverse action is recommended, with advance written notice stating any and all causes for which the employee is charged and the reasons, specifically and in detail, for the proposed action."[36]

Similarly, here, I find that Agency's failure to provide Employee with the specific charges underlying the proposed termination under the appropriate DPM provision deprived Employee of a fair opportunity to oppose the proposed removal. Because the wrong version of the regulation was used, Employee could not adequately defend himself against the charges levied against him. Accordingly, I find that Agency's failure to follow the appropriate laws, rules and regulation amount to harmful procedural error.

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[32] *Kenya Fulford-Cutberson v. Department of Corrections*, OEA Matter No. 1601-0010-13 (December 19, 2014). Citing to *Gottlieb v. Veteran Administration*, 39 M.S.P.R. 606, 609 (1989) and *Johnston v. Government Printing Office*, 5 M.S.P.R. 354, 357 (1981).

[33] *Rachel George v. D.C. Office of the Attorney General,* OEA Matter No. 1601-0050-16, Opinion and Order (July 16, 2019); *See also Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 662 (D.C. 1994); *Johnston v. Government Printing Office*, 5 M.S.P.R. 354, 357 (1981); and *Sefton v. D.C. Fire and Emergency Svcs*., OEA Matter No. 1601-0109-13 (August 18, 2014).

[34] Assuming *arguendo* that these causes of action were based solely on the Order Book Article VII, Agency will not meet its burden of proof here because the Order Book does not provide a table of penalty or list of potential penalties associated to the different causes of actions outline in section 2, on which the undersigned can rely on in determining the appropriateness of the penalty. Hence, the reason both the Order Book Article VII and the CBA provide that disciplinary action shall be based on **both** the Order Book and Chapter 16 of the DPM, as the DPM provides a Table of Illustrative Actions for the various causes of actions (emphasis added).

[35] Citing to *Office of the D.C. Controller v. Frost*, 638 A.2d 657, 662 (D.C. 1994), at 662.

[36] *Id.* (internal quotations and citations omitted); see also 6B DCMR § 1618(c)-(d) (requiring an employer to provide the employee with written notice of "[t]he specific performance or conduct at issue;" and "[h]ow the employee's performance or conduct fails to meet appropriate standards."). "The purpose of requiring a specification of the details is to apprise the employee of the allegations he or she will be required to refute or the acts he or she will have to justify, thereby affording the employee a fair opportunity to oppose the proposed removal." Frost, 638 A.2d at 662.

3) Whether Agency's action was in accordance with law or applicable regulation

Under Charges No. 1, Specification No. 1, for both Case Nos. **U-21-087** and **U-21-154**, Employee was charged with: (1) Any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law; (2) Any act which constitutes a criminal offense whether or not the act results in a conviction; and (3) Neglect of Duty.[37]

Any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law:

Under **U-21-154**, Agency argued that Body Worn Camera (BWC) footage confirmed that FF/EMT[Employee] assaulted a police officer and resisted arrest. He was charged with second degree assault; second degree assault of an officer; disorderly conduct; resisting/interference with arrest; and obstructing and hindering a police investigation. While there is substantial evidence in the record to support this assertion, Employee's actions on March 14, 2021, were *not related to his employment* with Agency as a Firefighter/EMT. Moreover, this incident occurred while Employee was ***off-duty***. (Emphasis added). Therefore, I find that Agency cannot charge Employee with "[a]ny ***on-duty or employment-related act or omission*** that the employee knew or should reasonably have known is a violation of the law. Emphasis added.

Similarly, Agency also charged Employee with Any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law for **U-21-087**. Agency averred that: (1) BWC) footage confirmed that Employee was in possession of a stolen, loaded handgun on his person and in a vehicle on a public parking lot; (2) Employee pled guilty for the charge of "loaded handgun on person" in the District Court of Maryland for Prince George's County; (3) Employee's conduct and resistance as captured on the BWC footage directly

[37] Assuming *arguendo* that the 2012 DPM was applicable in this matter, the undersigned finds that Agency would still not have cause to discipline Employee for "[a]ny *on-duty or employment-related act or omission* that the employee knew or should reasonably have known is a violation of the law" and "[a]ny *on-duty or employment-related act or omission* that interferes with the efficiency or integrity of government operations to include: Neglect of Duty." The specifications as listed do not support these charges. First, Under Charges No. 1, Specification No. 1, for both Case Nos. **U-21-087** and **U-21-154**, Employee was charged with "[a]ny *on-duty or employment-related act or omission* that the employee knew or should reasonably have known is a violation of the law." (Emphasis added). Employee's actions on March 14, 2021, were ***not related to his employment*** with Agency as a Firefighter/EMT. Moreover, this incident occurred while Employee was ***off-duty***. (Emphasis added). In addition, Employee's actions on December 30, 2021, were ***not related to his employment*** with Agency as a Firefighter/EMT. Moreover, this incident occurred while Employee was ***off-duty***. (Emphasis added). Employee had requested sick leave prior to being arrested, thus, he was 'off the clock'. Next, Agency charged Employee with "[a]ny *on-duty or employment-related act or omission* that interferes with the efficiency or integrity of government operations to include: Neglect of Duty." Similar to the previous charge, Employee's conduct under both Case Nos. **U-21-154** and **U-21-087**, which formed the basis for the charge of Neglect of Duty occurred while Employee was off-duty and the conduct at issue is not related to his employment as a Firefighter/EMT at Agency. It should also be noted that although there is sufficient evidence in the record to support a charge for "[a]ny act which constitutes a criminal offense whether or not the act results in a conviction" in this matter, the record shows that this was Employee's first offense and the penalty for a first offense ranges from a ten (10) days suspension to removal. I find that Agency charged Employee with three (3) different specifications under both Case Nos. **U-21-154** and **U-21-087**, but only had cause to discipline Employee for "[a]ny act which constitutes a criminal offense whether or not the act results in a conviction". Agency also failed to provide a breakdown of the penalty with respect to each of the three (3) causes of action for Case No. **U-21-154** Charge No. 1, and case No. **U-21-087** Charge No. 1. Based on the foregoing, I conclude that the penalty of termination levied against Employee for Charge No. 1, Specification 1, under both Agency Case Nos. **U-21-154** and **U-21-087**, was inappropriate under the circumstances.

contradicts his representation at the Trial Board hearing that he immediately disclosed his possession of the loaded firearm; and (4) BWC footage demonstrates that Employee knowingly possessed and transported the loaded handgun to the senior citizen community and that he used the handgun to threaten Ms. Parker. While there is substantial evidence in the record to support these assertions, Employee's actions on December 30, 2021, were ***not related to his employment*** with Agency as a Firefighter/EMT. Moreover, this incident occurred while Employee was ***off-duty***. (Emphasis added). Employee had requested sick leave prior to being arrested, thus, he was 'off the clock'. Accordingly, I further find that Agency cannot charge Employee with "[a]ny ***on-duty or employment-related act or omission*** that the employee knew or should reasonably have known is a violation of the law. (Emphasis added).

Any act which constitutes a criminal offense whether or not the act results in a conviction

Agency also charged Employee with "[a]ny act which constitutes a criminal offense whether or not the act results in a conviction" under both Case Nos. **U-21-154** and **U-21-087**. Agency highlighted in its Statement of Charges that Employee's probable cause arrest confirms that he committed a criminal offense whether or not the act results in a conviction. I find that because this cause of action does not exist in the current and applicable version of Chapter 16 of the DPM (2019 version), the undersigned cannot adjudicate this issue. OEA may not substitute the current cause of action as presented by Agency for what it considers to be a more appropriate charge. Therefore, the undesigned finds that Agency cannot discipline Employee pursuant to this cause of action.

Neglect of Duty

Agency charged Employee with "Any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations to include: Neglect of Duty" under the 2012 DPM version - 16 DPM §1603.3(f)(3). The corresponding DPM section under the current and applicable DPM provision found in DPM §§ 1605.4(e) and 1607.2(e) defines Neglect of duty as "[c]areless or negligent work, general negligence, loafing, sleeping or dozing on-duty, wasting time, and conducting personal business ***while on duty***." (Emphasis added). Agency stated in the Statement of Charges that Employee's admitted failure to observe precautions regarding safety constitutes neglect of duty. However, it should be noted that Employee's conduct under both Case Nos. **U-21-154** and **U-21-087**, which form the basis for this adverse action **occurred while Employee was off-duty and the conduct at issue is not related to his employment as a Firefighter/EMT at Agency**. (Emphasis added). Consequently, I find that Agency has not met its burden in this instance, and therefore, it cannot discipline Employee for Neglect of Duty.

Whether the Penalty was Appropriate

In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of* Columbia, 502 A.2d 1006 (D.C. 1985).[38] According to the Court in *Stokes,* OEA

[38] *See also Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review*

must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Illustrative Actions ("TIA"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. An Agency's decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion.[39] In this case, although there exists substantial evidence to discipline Employee, I find that the specifications as listed in Agency's Statement of Charges and the Trial Board's Findings of Fact and Recommendation do not support the charges therein. Thus, because I have concluded that Agency has not met its burden to establish cause for the adverse action, I also find that Agency cannot rely on these causes of action to discipline Employee. Accordingly, I further find that Agency's penalty of termination must be reversed.

Additionally, because Agency brought charges against Employee under an incorrect version of the DPM, I found that Agency engaged in harmful procedural error. This action created substantial harm and severely prejudiced Employee's rights. As previously noted, the 2017, and subsequent versions of the DPM, including the 2019 version applicable in the instant matter, eliminated DPM section 1603 and moved all adverse actions to DPM section 1605. Moreover, Agency failed to provide a breakdown of the penalty with respect to the three (3) charges levied against Employee for both Case Nos. **U-21-154** and **U-21-087**. It would be improper for the undersigned to essentially 'guess' what the appropriate charge and/or penalty would have been had Agency used the appropriate DPM version. Consequently, I conclude that the penalty of termination was inappropriate under the circumstances.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's action of separating Employee from service is **REVERSED**; and
2. Agency shall reinstate Employee to his last position of record; or a comparable position; and
3. Agency shall reimburse Employee all back-pay and benefits lost as a result of the separation; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

/s/ *Monica N. Dohnji*
MONICA DOHNJI, Esq.
Senior Administrative Judge

(April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[39] *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).