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

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
EMPLOYEE[1],	)	
Employee	)	OEA Matter No. 1601-0010-24
	)	OEA Matter No. 1601-0026-24
v.	)	Date of Issuance: August 19, 2025
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT,	)	Michelle R. Harris, Esq.
Agency	)	Senior Administrative Judge

Employee, *Pro Se*
Lawerence Corbeille, Esq., Agency Representative[2]

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On November 21, 2023, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Fire and Emergency Medical Services Department's ("Agency" or "FEMS") decision to terminate him from service effective November 4, 2023. OEA issued a letter on November 22, 2023, requiring Agency to file an Answer to Employee's Petition for Appeal. This matter was assigned to the undersigned Senior Administrative Judge ("AJ") on December 12, 2023. On December 12, 2023, Agency filed a Motion to Stay Proceedings. Agency cited therein that it was requesting to stay proceeding because even though Employee was terminated effective November 4, 2023, he still worked through November 16, 2023. Agency asserted that it had to reinstate Employee in order to compensate him for the time he worked from November 4, 2023, through November 16, 2023.[3] Agency further cited that it expected to reinstate Employee by December 15, 2023, or the following pay period. As such, Agency proposed that this matter be stayed pending an issuance of a new Final Agency Decision. On December 19, 2023, I issued an Order scheduling a Status/Prehearing Conference for January 10,

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Agency was previously represented by Millicent Jones, Esq.
[3] OEA Matter No. 1601-0026-24.

2024. Both parties appeared for the conference as required.[4] Agency addressed its Motion to Stay Proceedings and asserted during the Conference that it was its position that the Final Notice was sufficient as it was sent to Employee's address on record. The undersigned noted that Agency's final notice was dated October 17, 2023, but the FedEx mailing label provided in Agency's Motion to Stay Proceedings cited that it was not mailed until October 23, 2023, and that the delivery confirmation noted a date of October 24, 2023. That notwithstanding, Employee avers that he didn't receive the notice, and both parties agreed that Employee continued to work past the termination date. Agency's representative (and Employee affirmed) that Employee was reinstated on December 27, 2023, and he was subsequently terminated on January 10, 2024. Agency issued another Final notice on January 8, 2024. The undersigned advised the parties during the Conference that Agency's January 8, 2024, Final Notice could not be attached to the instant Petition for Appeal given that it was a "new" Final Notice and this appeal had already been filed based upon the October 17, 2023, notice.

I issued a Post Status Conference Order on January 12, 2024, requiring the parties to submit briefs based upon what was raised during the Status Conference. Agency was required to submit a brief, along with the entire record in this matter, addressing all issues discussed during the Conference regarding the instant adverse action. Specifically, Agency was required to provide all relevant information regarding the Notice of Termination, Employee's Second Chance/Remand to Alcohol & Substance Abuse Program etc.; and Agency was to provide the entire record, to include the Fire Trial Board Panel Hearing transcript. The undersigned noted during the Conference and in the Order that since a Trial Board Hearing was conducted in this matter, the *Pinkard*[5] standard of review would be invoked in this matter. Agency's brief and required documentation was due on February 16, 2024. Employee's response was due by March 13, 2024. Further a Status Conference was scheduled for March 21, 2024.

On February 7, 2024, Employee filed a new Petition for Appeal which was assigned OEA Matter No. 1601-0026-24. OEA issued a letter dated February 7, 2024, requiring Agency to submit an Answer by or before March 8, 2024. On February 16, 2024, Agency filed a Motion to Extend the time to file briefs as required by the undersigned's[January 12, 2024, Order in the previous matter. Agency cited that it needed a two-week extension due to Employee's new Petition for Appeal, Agency noted therein that Employee had not consented to this request. On February 20, 2024, I issued an Order granting Agency's Motion. Agency's brief was now due by February 29, 2024. Employee's brief was now due by March 27, 2024, and a Status Conference was scheduled for April 4, 2024. On February 28, 2024. Agency filed its Answer in OEA Matter No.1601-0026-24. Further, Agency filed its brief in OEA Matter No.1601-0010-24, on February 29, 2024. On February 27, 2024, the undersigned issued an Order scheduling a Status Conference for March 13, 2024. Agency appeared as required, however Employee failed to appear. An Order for Statement of Good Cause was issued to Employee on March 13, 2024, for his failure to appear. On March 25, 2024, Employee submitted his Statement and cited that he was confused with the dates. On March 27, 2024, Employee filed a request for more time to submit his brief related to OEA Matter No. 1601-0010-24.

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[4]Employee appeared with Mr. Joshua Taborn of the Progressive Firefighters Association. Mr. Taborn conveyed that he would possibly be representing Employee in this matter. The undersigned advised that a Designation of Representation was needed for the record. Mr. Taborn never entered an appearance for representation of Employee in this matter.

[5] *Elton Pinkard v. D.C. Metropolitan Police Department,* 801 A.2d 86 (D.C. 2002). According to the *Pinkard* decision, OEA has a limited role where a departmental hearing has been held. When the prongs of *Pinkard* are present, OEA may not substitute its judgment for that of the Agency, and the undersigned's review of Agency's decision is limited to the determination of whether the Adverse Action Panel's findings were supported by substantial evidence, whether there was harmful error, and whether the action taken was done in accordance with applicable laws or regulations. As a result, the parties were ordered to submit briefs addressing: (1) whether the Trial Board's decision was supported by substantial evidence; (2) whether there was a harmful procedural error; and (3) whether Agency's action was done in accordance with all laws and/or regulations.

On March 28, 2024, I issued an Order granting Employee's request. Employee's brief was now due by April 19, 2024. Additionally, a Status Conference was scheduled for April 10, 2024. This Status Conference was joined with the Prehearing Conference scheduled in Employee's associated matter – OEA Matter No. 1601-0026-24.[6] Both parties filed their Prehearing Statements as required for OEA Matter No. 1601-0026-24. Both parties were also present for the April 10, 2024, Prehearing Conference wherein, it was determined that Employee's Prehearing Statement (entitled Opening Statement) was intended to be representative of his responsive brief for matter number OEA Matter No. 1601-0010-24. As such, the undersigned required Employee to provide a written statement of his intention for consideration. On May 31, 2024, Employee filed a statement regarding his brief.

Following the April 10, 2024, Prehearing Conference, I issued orders in both matters. For OEA Matter No. 1601-0010-24, I issued a Post Conference Order which required Agency to submit its sur-reply by May 15, 2024, and also required Agency to submit a supplemental brief regarding its use/propriety of the 2012 District Personnel Manual (DPM) in this matter. Further, Employee was required to submit his response to Agency's supplemental brief by June 3, 2024. In OEA Matter No. 1601-026-24, the parties were required to submit briefs addressing the Petition for Appeal and the cause of action. Agency's brief was due by May 29, 2024, Employee's brief was due by June 28, 2024, and Agency had the option to submit a sur-reply by July 10, 2024. Agency filed its supplemental briefs for OEA Matter No. 1601-0010-24 on May 15, 2024. On May 21, 2024, Agency filed an Amended Supplemental brief citing that it had left off Exhibit 1 in its initial submission. On May 31, 2024, Employee submitted his "Opening Statement" brief. Agency filed its brief on May 29, 2024, for OEA Matter No. 1601-0026-24. On July 8, 2024, Employee sent correspondence to the undersigned citing that he wanted to utilize the same brief he submitted in OEA Matter No. 1601-0010-24, for OEA Matter No. 1601-0026-24 as well. The undersigned accepted Employee's request. On July 10, 2024, Agency filed a Consent Motion for time to file its Sur-Reply brief. An Order was issued on July 11, 2024, granting Agency's request. Agency filed its sur-reply as required. All deadlines set forth in the orders were complied with. For the purposes of the record in this matter, and for reasons that will be explained later in this matter, the undersigned has determined that consolation of both matters was warranted.[7] The record is now closed.

JURISDICTION

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.

[6] In the interest of ease and accessibility for Employee and for the purpose of clarity within the matters, the undersigned moved forward with addressing both matters jointly.

[7] The substantive cause of action for both Petitions was the same and based upon the same Fire Trial Board Panel hearing and findings. The second Petition was filed as a result of Agency's reinstatement of Employee following the original notice because Employee continued to work past the effective termination date due to Agency's failure to serve the final notice on Employee. This latter Petition will be discussed in the analysis portion of this decision.

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.[8]

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 CHARGES[9]

According to Agency's Supplemental Record filed on February 28, 2024, at Tab 14, Employee's adverse action was predicated on the following charges and specifications, which are reprinted in pertinent part below:

Charge 1: Violation of D.C. Official Code §1-620.35(a) which states "[A]ny confirmed positive drug test results, positive breathalyzer test, or a refusal to submit to a drug test or breathalyzer shall be grounds for termination of employment in accordance with this chapter."

Further violation of DPM §428.1, which states: "An employee shall be deemed unsuitable and immediately subject to separation from a covered position as described in Subsections 439.3 and 439.4 for: (a) A positive drug test result; [or] (b) a refusal to submit to a drug or alcohol test."

Further violation of D.C. Fire and Emergency Medical Services Department Bulletin 5 §7.2 which states: In accordance with Chapter 39 of the District Personnel Manual (DPM), 6 D.C.M.R. 3900 *et. seq*., the following conduct shall subject covered employees to disciplinary action:

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[8] OEA Rule § 699.1.

[9] Agency utilized the same charges in both OEA Matter Nos.1601-0010-24 and 1601-0026-24. These charges were based upon the findings made by the Trial Board (case U-23-370) following the hearing held on July 17, 2023. The final notice in OEA Matter No. 1601-0026-24, reiterated the charges and terminated Employee following a reinstatement January 10, 2024. This Final Notice was dated January 8, 2024.

d. Refusing an order to submit to testing required under this policy.

Further violation of D.C. Fire and Emergency Medical Services Department Bulletin 5 §13.1 which states: Refusal to Submit, Adulteration, and Substitution. An employee who refuses to submit to test required under this Bulletin, or who willfully substitutes or adulterates a sample required to be provided for testing under this Bulletin, shall be recommended termination.

This misconduct is defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(g), which states: "Any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary or capricious." *See also* DPM §1603.3(g).

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

Specification 1: In his Special Report (dated 3/24/2023), Battalion Fire Chief Derek J. Hopkins describes FF/EMT [Employee's] misconduct as follows:

On February 9, 2023, Firefighter [Employee] (E-26-4) reported to the Police and Fire Clinic (PFC) for a Random Drug Screening. [Employee] failed to remain at the testing site until the testing process was complete.

According to Bulletin 5, it is the mission of the Fire and Emergency Medical Services Department to fully protect the safety of the public and its employees, and to provide the residents of (and visitors to) the District of Columbia with the best possible services available. FF/EMT [Employee's] refusal to submit to testing interferes with the Department's efforts to achieve this mission and constitutes both a failure to submit to test and a neglect of duty. Accordingly, this termination action is proposed.

SUMMARY OF THE TESTIMONY

On July 17, 2023, Agency held a Fire Trial Board Hearing. During the hearing, 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

Kevin Gay ("Gay") Tr. Pages 18 – 32

Gay is a Lieutenant with DC FEMS. At the time of the hearing, he had been in this position for one (1) day, prior to that he was a Sergeant assigned to Truck 15's quarters, Engine 26, Platoon Number 4. Tr. 20. He testified that he was working on February 9, 2023, when he came into contact with Employee at approximately 7am. Tr. 21. He noted that Employee seemed "normal" and ready for duty. Tr. 22. Gay explained that it was a relatively normal day, they ran a few calls on the dispatch and a few medical calls. Tr. 22. He testified that they also had to report to the Police Fire Clinic ("PFC") for random drug test that day and that Employee's name had been pulled from the list. Tr. 23. Gay took Employee to the clinic. He provided Employee with the paperwork and said Employee proceeded inside. Gay did not initially go inside. Tr. 23.

Gay further testified that he, the member that was the driver and the member on the back stayed outside while they waited for Employee to complete his test. Tr. 24. He said they waited for about an hour and a half and realized that a run had come out for a sick male at the PFC clinic. Gay said he checked the notes and that it was for a male who ultimately turned out to be Employee. Tr. 25. Gay said he walked into the clinic and spoke to the front desk and explained why he had come in. They confirmed it was Employee, and he went in the back and Employee was in the room. Gay stated that Employee told him that he was sick and nauseous and feeling unwell. Tr. 25. Gay cited that he could not tell whether Employee was sick but took what Employee said at face value and went to discuss with one of the providers. Tr. 26. He talked with a provider who said they were trying to get a sample from Employee but that he told them he felt sick and requested to be transported to the hospital. Tr. 26. Gay explained that the person also told him that Employee had consumed several glasses of water and said he had "brain freeze" and that he didn't feel well. Tr 27. Gay stated that this person told him that she didn't think Employee was sick. Tr. 27.

Gay contacted the 1st Battalion management team and made them aware of the incident and that Employee was being transported by Ambulance 25 to Washington Hospital Center. Tr. 28. Gay also went to Washington Hospital Center and explained to Employee that the 1st Battalion Chief was reporting to the hospital and that once done, they would go back to the PFC to complete his submission of the sample. Tr. 29. Gay recalled that this occurred around midday that same day. Gay also noted that Employee contacted him once he was done at the hospital. Gay explained that he reached out to Employee later that night around 9pm because he hadn't heard from Employee and he needed to enter Employee's pay/status for the day. He said that he and Employee exchanged text messages for about 10 minutes so he could get an idea of the times. Tr. 30. Gay identified Agency's Exhibit 1 as the text message correspondence between him and Employee. Gay stated that Employee told him that the hospital didn't give him "anything", so he questioned Employee about whether he had been seen and evaluated etc. Tr. 31-32.

Michele Johnson ("Johnson") Tr. Pages 34-46

Johnson is a clinic physician at the PFC and has held that position for approximately seven (7) years. Tr. 34-35. Her responsibilities include evaluating members for sick leave and whether

they're able to work at full capacity etc. Tr. 36. Johnson affirmed that she was working as a physician on February 9, 2023, and interacted with Employee that day. Johnson testified that Employee was there for a random urine – evaluation for any illegal substances. Tr. 37. Johnson explained that one of the medical assistants came to her and stated that Employee came for a random test but said he wasn't feeling well. Tr. 37. Johnson evaluated Employee and noted that he seemed to be a bit sweaty and felt clammy. He was talking well and able to sit up. Tr. 38. She stated that Employee told her that he wasn't feeling well and that he had a headache, felt dizzy and was nauseated. Tr. 38. He told her that he had taken six (6) cups of water right before. Tr. 38. Johnson stated that consuming water does not typically lead up to the symptoms that Employee was claiming to have. Tr. 38.

Johnson testified that she didn't find anything abnormal from Employee's history or physical. His vitals were all normal, except that his heart rate was elevated. Tr. 39. She didn't think he needed anything at that time but told him she would check a little later to make sure things weren't changing. Tr. 39. She explained that she returned approximately 10 minutes later, and he said he wasn't feeling better. She told him that they could give him a note to take sick leave for the day since he wasn't feeling well and they could do that after he provided his urine. Tr. 40. About five (5) minutes later she came back, and Employee told her his symptoms were worse and that he wanted to go to the hospital. Tr. 40. She notified the PFC staff to activate EMS and contacted Washington Hospital Center. Tr. 40. Johnson identified Agency's Exhibit 2 as a transfer sheet. She explained that on the sheet she checked that Employee had been stabilized because his vitals had not changed and there wasn't anything to make her think he was decompensating before he was transferred to the hospital. Tr. 42. Johnson explained that after Employee left, she sent an email to Dr. Malomo and Chief Hopkins to inform them of what had happened with Employee at PFC. Tr. 43. Johnson identified Agency's Exhibit 3 as her email to Dr. Malomo and Chief Hopkins about what occurred on February 9, 2023. Johnson explained that her email conveyed what happened and why Employee went to the hospital. Tr. 44. Johnson confirmed that she was present when Employe returned to the PFC after going to the hospital. Tr. 44.

The Panel asked Johnson whether the Washington Hospital center called her back to tell her the outcome of Employee's situation, and she indicated that they did not call her back. Tr. 45. The Panel also asked if she recalled what time Employee returned to the PFC and she indicated that she thought it was around maybe 5:45pm or 6pm. Tr. 46.

Derek Hopkins ("Hopkins") Tr. Pages 47 – 70

Hopkins is the Battalion Fire Chief Medical Services Officer at the PFC. Tr. 48. He had been in that position since November 2022. His duties include ensuring that members are complying with the substance abuse policies and notifying the Department of any positive tests or violations of the policies. Tr. 48. Hopkins testified that he worked half a day on February 9, 2023. Tr. 48. He explained that his office is located at the PFC. He recalled that on February 9, 2023, Battalion Fire Chief William Simister called him and communicated with him about Employee. Tr. 49. He said Simister explained that Employee had been called to the PFC for a random and left the PFC via transport to the hospital prior to completing the random test. Tr. 50. Hopkins cited that Employee was not at PFC when he received this call. Tr. 50. Hopkins further noted that he received this call at 15:02/3:02pm. Simister did not describe Employee's behavior. After he received the call from Simister, Hopkins explained that he started to do research on Bulletin 5 to see what a refusal was. Tr 51. He also called the PFC to get more details but could not recall who he spoke with. Tr. 51. He

testified that they spoke about Employee coming for the random test. That person believed he had completed the breathalyzer portion but was unable to produce enough urine for the urinalysis. Tr. 51.

Hopkins further explained that this person said Employee was given water and that sometime after that, Employee said he felt ill. Tr. 52. He was checked on and his vitals were taken. Hopkins testified that after his research, he assumed that since Employee left PFC prior to completing the entire test, that it would be considered a refusal and that he would cite and charge him as appropriate. Tr. 52. He also determined Employee's behavior of leaving PFC and going to the hospital seemed suspicious and asked Simister to bring him back to PFC for a reasonable suspicion test. Tr. 52. Hopkins testified that he found this suspicious because after speaking with the nurses, there was no medical reason that Employee would have to leave PFC since he was being cared for there. Tr. 53. He stated that the reasonable suspicion meant he displayed some type of behavior that led him to believe that he may have been under the influence of another substance that may have shown positive on the test. Tr. 53.

Hopkins said that Simister brought Employee back to PFC and the test was performed under reasonable suspicion. Tr. 54. Hopkins explained that members are required to complete a custody control form and also provide a fingerprint. He identified Agency's Exhibit 4 as the custody form and noted that there were questions regarding whether there was any medication taken in the last 30 days. Tr. 55-56. He further identified that this custody form in Agency's Exhibit 4 was Employee's. Tr. 57. He cited that Employee completed the form and cited that they had not taken any medications within the past 30 days. Tr. 57. He also identified that the test started at 18:30/6:30pm. Hopkins affirmed that the reasonable suspicion test was completed and that the results came back positive for oxycodone and oxymorphone. Tr. 58-59. Hopkins also identified Agency's Exhibit 5 as the memorandum given to the Medical Services Officer ("MSO") for a positive test from the PFC Medical Director. Tr. 60. Hopkins cited that Dr. Malomo is the Clinical Director. Tr. 60. Hopkins further noted that this memorandum indicated that on "February 14th there was a positive confirmation test for the illicit substance that the member's urine drug test was verified as positive for oxycodone and oxymorphone." Tr. 51. Hopkins also noted that the memorandum cited that the member had declined to have it retested because the "member indicated use and admitted that use." Tr. 61.

Hopkins testified that following this, Employee would have had a review with the Medical Review Officer to determine whether there was any legitimate medical reason for the positive test results. Tr. 61. Employee would also have a consultation with the Medical Services officer to review next steps within Bulletin 5. Tr. 61. Hopkins identified Agency's Exhibit 6 as a documentation of the consultation Employee had with Battalion Chief Jonathan Johnson of the review the substance abuse policy and procedures and Bulletin 5. Tr. 62. Hopkins affirmed that he had seen this document before and was confident it was served to Employee because it was signed by Employee, and he had a conversation with the Chief who conducted the consultation. Tr. 63. Hopkins further explained that this document required the member to complete 52 weeks of screening? as part of the substance abused rehabilitation program. Tr. 64. Hopkins cited that there was an initial delay with Employee becoming compliant, but following further instructions, Employee had been compliant. Tr. 64. Hopkins affirmed that he drafted a special report regarding Employee's refusal to submit to a drug test on February 9th. Tr. 64. Hopkins identified Agency's Exhibit 8 as his report. Tr. 65.

On cross-examination, Hopkins affirmed that his position was the Medical Services Officer. Tr. 66. He also affirmed that Employee provided a urine on February 9th and that he wrote a memorandum about that day and the subject was based on a refusal to submit. Tr. 67. Hopkins also

affirmed that he wrote in his memorandum that Employee had left the ER that day because he had symptoms that had been resolved. Tr. 67-68. Hopkins stated that he did not speak with Employee directly that day and did not witness him in person either. Tr. 68. On redirect, Hopkins explained that he determined that Employee had refused to test that day because he left the PFC without completing the test and that is a refusal. He cited that any portion of the test that isn't complete prior to leaving is considered a refusal. Tr. 69-70.

Olusola Malomo ("Malomo") Tr. Pages 71 – 94

Malomo is a physician and is the Medical Review Officer ("MRO") at the PFC clinic and has been in this role since 2010. Her duties include supervision and oversight of the clinical activities and receiving drug test results. She also reports the drug test results to either MPD or FEMS. Tr. 73. Malomo affirmed that she was familiar with Employee as she received the drug test for him at PFC. Tr. 74. Malomo testified that Employee had come into the clinic for a random drug test but left without doing a test. She believed he had tried to reach her, but later someone – Charles, a lab technician - told her he had left in ambulance. Tr. 74. She also spoke with Dr. Johnson who was in the clinic and saw Employee. Tr. 75. She said Johnson provided verbal and written communication after Malomo asked her to do so. Tr. 75. Malomo testified that she did not believe that Employee was experiencing a medical crisis that morning. Tr. 75. Malomo also explained that PFC staff did not recommend Employee be transferred, but that he requested to be transferred based on her understanding of the situation. Tr. 76.

Malomo further explained that after she received the information about Employee, she contacted Chief Hopkins. Tr. 76. She stated that Hopkins did a drug test and also served as what they call a designated employer representative ("DER"). Tr. 76. She stated that the DER is the person that they communicate with if there are any concerns with the drug test, report a drug test etc. She ended up reaching Hopkins on his cell phone and explained to him what had happened at the clinic. She also told Hopkins that this appeared to be a refusal to test and was not a medical emergency in her opinion. Tr. 77. Malomo affirmed that she was present when Employee returned to the PFC. Malomo could not recall without her notes as to what time Employee returned. Tr. 78. Malomo indicated that she was not present when Employee completed the custody control form but affirmed that she had seen the document. Tr. 79-80. Malomo identified Agency's Exhibit 4 and cited that the 18:30 time stamp indicated when Employee returned to PFC and gave a sample. Tr. 80. Malomo testified that Employee appeared/looked well upon his return to PFC. Tr. 81. He did not have any discharge documentation from the hospital. Tr. 81.

Malomo testified that when she saw Employee, she asked him what had happened earlier, to which he said he had a headache and nausea. He also told her that he left the hospital without being seen by the doctor because he felt better and came to the PFC with Chief Simister. Tr. 81. Malomo confirmed that Employee's reasonable suspicion test was conducted without incident. Tr. 82. Malomo cited that Employee's tests came back positive for oxycodone, and another substance that she could not remember. Tr. 83. On review of Agency's Exhibit 5, Malomo cited that the two substances Employee tested positive for were oxycodone and oxymorphone. Tr. 84. She said that she reviewed the result and custody control form and called Employee. She inquired as to whether there was a legitimate medical reason for the substance being present in the urine. Tr. 84. She did not recall the conversation but noted that Employee did not have a prescription or any other documentation that would explain the substances. Tr. 85. Malomo identified Agency's Exhibit 7 as the memo she used to document her conversation with Employee about the drug test results. Tr. 86.

Malomo did not have any other duties at the MRO with this matter. Tr. 87. Malomo testified that after a positive drug test and the MRO interview, employees are referred to "URI health and the focus is that the DHS are specialist who will take them through substance abuse protocols." Tr. 88. Malomo said that at the time of her conversations with Employee, she made him an appointment with these specialists. She also said that she asked Employee if he wanted another sample tested, but Employee did not dispute the results and admitted the use. Tr. 88. Malomo described the potential impact of taking medications not prescribed, which could include side effects like drowsiness etc. Tr. 90-91.

On cross-examination, Malomo affirmed that she completed a medical review for Employee on February 14, 2023. She also affirmed that during that review, Employee talked about his mother having passed away. Tr. 92. She also noted that Employee voluntarily admitted using the substance and requested help and to be placed in a program. Tr. 93-94.

Employee's Case In Chief

Employee – Tr. Pages 96 – 126

Employee testified that he has worked with Agency for five (5) years. He said that he became a firefighter to help his community. He has been assigned to Engine 26 for his entire tenure at Agency. On February 9, 2023, Employee explained that he assumed normal duty on Engine 26. He said a couple of hours passed and Sergeant Gay told him that he had a random drug test, and they drove to the PFC. Tr. 97. He said he completed a breathalyzer and provided urine but was told it wasn't enough. Tr. 98. He drank about five or six cups of water when he started to feel sick, dizzy and nauseous. Tr. 98. His breathalyzer test result was "zero" which meant it was negative for alcohol. Tr. 98. Employee explained that the first time he was asked to give a urine sample, it wasn't enough to fill up both, as there were two containers to fill up. That's when he was asked to drink water and he felt sick. Tr. 98. Employee cited that he drank all the water in less than a minute. Tr. 99. He also noted that he felt lightheaded and was stressed. He indicated that he had not felt this way before after drinking several cups of water. Tr. 99.

Employee further testified that the physician asked him to sit in a room and that she took his vitals. Tr. 99. He stated that she took his vitals and left, and thereafter he vomited in the trash can. She came back and he asked to be transported to the hospital because he didn't feel well. Tr. 99. Employee said the physician presented him with some papers and asked him to sign but didn't explain what the papers were. He said that after he signed the papers, Engine 26 arrived and took him to the hospital. Tr. 100. Employee explained that he understood that Bulletin 5 was the rules, regulations, policies and procedures of the drug abuse program. He stated he had read Bulletin 5 his first year on the job. Tr. 100. He noted that Bulletin 5 says that if you refuse to test you could be terminated. Tr. 100. Employee explained that he thought refusal meant that if someone had asked him to urinate and he said no, or that if he walked out or left and said he would not do a test.. Tr. 100-101. Employee stated that he didn't know that needing medical attention would be a refusal. Tr. 101. Employee asserted that he did not know that his leaving would be considered a refusal. Tr. 101.

Employee said he was taken to Washington Hospital Center and was not there long, maybe an hour or less. Tr. 102. He said that shortly after he arrived, Sergeant Gay approached him and told him that if he didn't come back to PFC to finish his random test, that he would be "deemed for termination." Tr. 102. Employee asserts that he never had the chance to be evaluated at the hospital, and he did not receive discharged documents. Tr. 102-103. Employee testified that he never told

anyone he wanted to return to PFC because his symptoms were improving. He said his decision to leave and report back to PFC was because he thought his job was on the line because of what Sergeant Gay had conveyed. Tr. 103. Battalion Chief Simister[10] brought him back to the PFC. Tr. 103. He was escorted in and was told to sign paperwork. He cited that Simister began to yell at him and said just sign the paper. Tr. 104. Employee testified that he did not understand what he was signing because he has ADHD and has had it since he was in elementary school. Tr. 104. He explained that this causes him difficulty at times in understanding a document and requires help and/or a longer time to read it. Tr. 104. He asserted that no one ever explained to him what he was signing. Tr. 105. He also cited that he made the Agency aware of his disability and that it's in the National Registry. Tr. 105.

Employee noted that back at PFC, he went into the bathroom and someone watched him urinate. Tr. 106. About a week later, he received the results of the test which were positive for oxycodone and oxymorphone. Tr. 106. Employee testified that he had these substances in his system because his mother passed on December 26 and he was having trouble sleeping so he took pills out of his mother's medicine cabinet. Tr. 106. He affirmed that he was aware that this may violate the drug policy. Tr. 106. He also cited that he thought that if he violated the drug policy that pursuant to Bulletin 5, given it was a first time, that he would be put in a program and given help. Tr. 107. Employee explained that his mother passed because she was "septic" and had been sick for about two (2) months. Tr. 108-109. Employee explained that he was working overtime on Christmas and received a phone call that things were not going well for his mom while he was at work. Tr. 110. Once he was relieved, he went to the hospital and his mother passed in his presence. Tr. 110. His father also passed away while he was at work and his grandmother passed while he was at the training academy Tr. 111. Employee explained that he had talked to the PFC support team a couple of times, but it didn't work for him. Tr. 112.

Employee cited that he had received his own counseling from Dr. Hubert and also spoke with BHS Counseling which works upstairs at the PFC. He received some coping mechanisms and ways to deal with stress. Tr. 112. Employee testified that his weekly testing was delayed because Captain Johnson told him that the department was not going to waste any of their time and money on him until after the trial board hearing. Tr. 113. Employee stated that he wanted to continue to work with the Department and become a part of the peer support team. Tr. 113.

On cross-examination, Employee affirmed that he knew he had taken the oxycodone and oxymorphone when he reported to PFC on February 9th. Tr. 113. He cited that he had taken the medication two weeks after his mother had passed, so he took the medication sometime in January prior to the test. Employee asserted that he provided a sample before going to the hospital but was told it wasn't enough. Tr. 116. He did not provide enough urine prior to leaving the PFC. Employee cited that this was the first time he had ever been called for a random drug test in his whole career. Tr. 116. He affirmed that he knew he was subject to random drug testing. He was not sure what time exactly he reported to work on February 9th. Tr. 117. He noted that when he is not working overtime, he usually reports before 7am. Tr. 118. Employee was not sure how long he stayed at the Washington Hospital Center. He cited he received a wristband and waited for his name to be called when Sergeant Gay told him that if he didn't go back to PFC he could be terminated. Tr. 119. Employee did not tell anyone at the PFC that he had ADHD. Tr. 120. On redirect, Employee affirmed that he provided a urine sample on February 9th. Tr. 120.

[10] Employee referred to him as Battalion Chief Huan.

The Panel asked Employee what time he received the random, but Employee could not recall. Tr. 120-121. He thought they may have been doing a Sunday drill at the time. He also explained that he took two pills one time. Tr. 121. Employee was not sure how long it took him to get transported from the PFC to Washington Hospital Center. Tr. 122. He believed that he sat at the PFC for about an hour before he was transported. Tr. 122. The Panel asked Employee if he remembered what time prior to the random call that he had last used the bathroom, to which Employee responded that he hadn't. Tr. 123. The Panel asked Employee how many times he had asked for support. Employee explained that every time someone passed away in his family he asked for help. On redirect, Employee identified Defense Exhibit 1 as the document he signed when he took the random and breathalyzer. Tr. 126.

Maurice Bolding ("Bolding") Tr. Pages 128 – 133

Bolding is a Sergeant and has been with Agency for 19 years. He currently is assigned with fire prevention but initially was assigned to the truck unit. He is a technical sergeant, and his position entails special events and codes for propane and hazardous materials. He also ensures that fire lanes are appropriately maintained. Tr. 129. Bolding explained that he knows Employee because he had been detailed to fire prevention for a position. Tr. 130. He had been detailed to fire prevention for several months. Bolding testified that Employee comes off as a decent human being intrigued by the job. Tr. 130. He is passionate and they developed a mentor-mentee relationship. Tr.130. Bolding also explained that he has seen growth in Employee and that he has become more focused. Tr. 131. Bolding further explained that Employee had recently opened up to him about how he recently lost both his parents. Tr. 132. Bolding cited that he advised Employee to go to therapy. Tr. 132. Bolding also noted that he doesn't have any concerns with Employee as a firefighter and believed that Employee could be successful in the Department. Tr. 133.

Agency Rebuttal Witness Malomo Tr. 135

Malomo was asked if a person took two pills containing oxycodone and oxymorphone how long those substances would remain in the individual's system. Malomo cited that the substances would typically remain for three (3) to five (5) days.

Panel Findings

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

1. All evidence and testimony presented led the panel to conclude that the member is guilty. The member was not fully upfront and honest with his testimony and events.
2. The member testified that he had started to feel ill. Although he was at a facility that was more than capable of rendering care, he persisted in requesting to be transported to another medical facility, to avoid full urinalysis.
3. Dr. Malomo gave testimony that Firefighter [Employee] was evaluated by PFC staff and that no medical emergency was present or could not be dealt with by the PFC. She further testified that transportation to another facility was not necessary in her medical opinion.
4. Dr. Malomo also gave testimony that during her medical review with [Employee] he never requested to have bottle B tested as one would logically do if they suspected error.

Upon consideration and evaluation of all the testimony and factors, the Trial Board Panel unanimously found Employee guilty of the charges. In addition to making the findings of fact, the Panel also weighed the offense against the relevant *Douglas* factors[11] and concluded that termination was an appropriate penalty.

ANALYSIS AND CONCLUSION[12]

Pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department*,[13] 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.[14] 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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[11] *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:

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.

[12] 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").

[13] 801 A.2d 86 (D.C. 2002).

[14] *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;
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> 4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard*, *i.e.*: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, 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 a Trial Board Panel on July 17, 2023, for a hearing. This Panel made findings of fact, conclusions of law and recommended that Employee be terminated from his position as Firefighter. As a result, I find that *Pinkard* applies in this matter. Accordingly, pursuant to *Pinkard*, this Office 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 Trial Board 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.

Brief Summary of the Parties' Positions

Agency's Position

It should be noted that Agency presents the same arguments regarding the *Pinkard* prongs for both OEA matters (1601-0010-24 and 1601-0026-24) as related to the charges for which Employee was disciplined. As such, this summary of position is representative of all filings submitted in these matters. The issue regarding the issuance of another final decision following reinstatement is what will be distinguished for OEA Matter No.1601-0026-24.

Agency asserts that it had cause to terminate Employee from service. Agency avers that as a Firefighter/Emergency Medical Technician (FF/EMT), Employee occupied a "safety-sensitive" position. Because of this position, Agency maintains that Employee was subject to enhanced suitability screenings to include drug and alcohol tests. On the morning of February 9, 2023,

Employee was selected for a random drug screening and was transported to the PFC by his Sergeant.[15] While there, Agency asserts that Employee completed his breathalyzer examination but failed to produce enough urine for the drug screening. Agency further notes that the PFC staff provided Employee with water and soon after, Employee "complained that he was experience headache, nausea and dizziness-allegedly due to the amount of water and the speed at which he drank it."[16] Agency cites that Employee was evaluated at the PFC by Dr. Michele Johnson and she determined that Employee's vitals were normal, except for an increased heart rate. Agency further notes that Johnson told Employee that she would monitor him and if he still felt unwell, she would provide a note for him to have sick leave following his completion of the urinalysis.[17] Agency avers that when Johnson returned to check on Employee, he told her his symptoms were worse and that he wanted to go to a hospital. "Despite finding that Employee's condition was stable and seeing no clinical reason for Employee to be transported to the hospital, Dr. Johnson arranged for Employee's transfer to the Washington Hospital Center (WHC)."[18]

Following his transportation to the WHC, Agency asserts that FEMS Sergeant Kevin Gay was "advised by Chief Derek Hopkins that Employee's departure from the PFC without providing a urine sample would be considered a refusal, which could be ground [sic] for termination…[f]urther Sergeant Gay was instructed to tell Employee that after he was finished at WHC, he would be transported back to PFC to provide a sample for drug testing."[19] Agency asserts that after Employee received this information, he left the WHC without receiving treatment and went to PFC. Agency avers that upon his return to PFC, following an initial refusal, "Employee provided a sample - this time, pursuant [sic] FEMS' Reasonable Suspicion protocols."[20] Agency asserts that "[p]ursuant to FEMS' Substance Abuse Policy, FEMS supervisors can refer employees for Reasonable Suspicion Testing when there is a reasonable basis to suspect that a test would show the employee is under the influence of alcohol, controlled substances or drugs in violation of the policy."[21] Agency also provides that "the term Reasonable Suspicion means specific contemporaneous observations that can be articulated concerning the appearance, behavior, speech or body odors of the employee." Agency asserts that in this matter, "after conferring, Chief Hopkins and Chief Wiliam Simister determined Reasonable Suspicion testing was justified where it was apparent that despite being in stable condition, Employee was determined to leave PFC to go to a different medical facility before producing a full urine sample."[22] Following the reasonable suspicion tests, Agency asserts that Employee's tests were positive for oxycodone and oxymorphone and that Employee admitted to Dr. Maloomo "that he had taken his late mother's pills."[23]

Agency also cites that Employee was enrolled in a mandatory substance abuse program "as required for all non-probationary employees who test positive for alcohol or drugs for the first time." Agency notes that on March 29, 2023, Employee was served with an Initial Written Notification ("IWN") which proposed termination for refusal to submit to drug testing and neglect of duty.[24] Agency cites that following a Fire Trial Panel ("FTB") hearing on July 17, 2023, Employee was

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[15] *Id.*
[16] *Id.*
[17] *Id*. at 3.
[18] *Id.*
[19] *Id*.
[20] *Id*. at Page 3-4.
[21] *Id.* at Page 4.
[22] *Id.*
[23] *Id.*
[24] *Id*. at Page 5.

unanimously found guilty and was subject to termination. Agency cites that "the Fire Chief adopted the FTB's recommendation on October 17, 2023."

Agency asserts that "on October 17, 2023, FEMS' Final Agency Decision (FAD) was sent to Human Resources Manager Deborah Bonsack for service on Employee." Agency cites that usually Final Agency Decisions are "served by FEMS during in-person exit meetings…. Ms. Bonsack was unable to arrange a meeting with Employee after making multiple unsuccessful attempts at reaching him by phone."[25] Agency contends that on October 23, 2023, "Ms. Bonsack mailed the FAD for Employee."[26] Agency further provides that " [u]nfortunately Ms. Bonsack used an outdated mailing address for Employee," so the notice was not delivered to the correct address. Agency asserts that this notice "would have informed Employee that he would be terminated from his position effective November 3, 2023…[h]owerver, Employee did not receive the FAD and continued to report to work in the Fire Prevention Division on November 7-9, 2023, and November 14-17, 2023."[27] Agency cites that "FEMS did not learn that Employee was not properly served with the October 17, 2023, FAD until November 16, 2023, when Employee's counsel informed FEMS that Employee was still reporting to work."[28] Agency avers that the "D.C. Office of Pay and Retirement Services informed FEMS that they would have to reinstate Employee in order to pay him for the dates he worked after November 4, 2023." To this end, Agency cites that "on December 27, 2023, Employee was reinstated for the sole purpose of paying him his salary for the days he worked beyond November 4, 2023." Additionally, Agency cites that it "prepared a second FAD notice informing Employee that he would be terminated effective January 10, 2024, based on the cause established in Case Number U-23-370."[29] Agency avers that this second notice was "properly served upon Employee and Employee was effectively terminated January 10, 2024."[30]

Agency contends that "FEMS final agency decision to remove Employee was not properly served which nullified the attempted termination, making the instant appeal moot (1601-0010-24)." Agency cites that "it is clear that FEMS experienced various administrative difficulties with its initial attempt to remove Employee from his position."[31] Agency avers that "these administrative challenges thwarted the adverse action process until the second FAD was served on Employee at his proper address." Agency further argues that "Employee's instant appeal should be denied because Agency's error had the effect of invalidating Employee's removal." Agency asserts that because Employee was "not properly served with the October 17, 2023, FAD, the attempted adverse action did not result in Employee's removal or have any other adverse impact on Employee." As such, Agency asserts that OEA does not have jurisdiction over the instant appeal (1601-0010-24). Agency contends "that it is indisputable that Agency's October 2023 attempted removal was ineffective…Employee continued to work and when Agency became aware of this, Employee was administratively reinstated to his position and paid his salary." Thus, Agency avers that the appeal in OEA Matter No. 1601-0010-24, must be denied as moot.[32]

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[25] *Id*. at Page 6.
[26] I*d*.
[27] *Id*. at Pages 6-7.
[28] *Id*. at Page 7.
[29] *Id*. Agency also noted that Employee received his final check January 5, 2024. It should be noted that the Case U-23-370 is the case wherein a FTB Panel held a hearing and determined Employee was guilty of refusing to test and recommended termination. Agency did not incorporate any new charges for this January (incomplete statement)
[30] *Id.*
[31] *Id. at* Pages 7-8.
[32] *Id*. at Pages 8-9.

Agency avers that there was no harmful procedural error. Agency states that "Employee's reinstatement and subsequent removal was an extension of the initial removal."[33] Agency argues that "although FEMS experienced administrative difficulties removing Employee from the Agency due to failed service of the October 17, 2023, FAD, these administrative challenges did not amount to a procedural error."[34] Agency contends that "the only change to the adverse action process was that a second FAD was sent to Employee after he was retroactively reinstated and paid for the time he worked beyond his initial intended termination date."[35] Agency maintains that "whether Employee was terminated on the initial proposed date of November 4, 2023, or the ultimate removal date of January 10, 2024, he received timely initial notice of the adverse action being taken against him, a full and timely evidentiary hearing, and effective notice of his ultimate termination."[36] Agency further argues that in the "December 8, 2023, letter informing Employee that he was being administratively reinstated, FEMS informed Employee that his position was a 'Probational Reinstatement Career Appointment'."[37] Agency cites that it also told Employee that "the required probationary period would be eighteen-months and would end on May 5, 2025." Agency asserts that Employee accepted the terms of reinstatement.[38] Agency contends that even if OEA finds that it made a procedural error that it is harmless.[39] Agency asserts that pursuant to OEA rules regarding harmless error, that OEA cannot reverse an Agency action if the Agency can demonstrate it was harmless.[40] Agency further cites that this rule includes procedures found in CBAs. To this extent, Agency asserts that its notice errors "did not violate the parties' CBA and ultimately amounted to a technical error."[41] Agency also asserts that pursuant to the reinstatement, Employee was in probational status at the time of rehire, such that his subsequent appeal should be dismissed, as Employee has no claim before this Office given his probationary status.

Agency also maintains that its actions were in accordance with all applicable laws, rules and regulations. Agency further contends that with regard to the use of the 2012 DPM in the administration of this matter, that OEA should apply the "waiver doctrine."[42] Agency asserts that because Employee did not raise this issue before the FTB, that this matter should be waived before OEA. Agency further claims that a failure to apply the waiver doctrine would cause the *Pinkard* review to "break down."[43] Further, Agency avers that because Impacts and Effects Bargaining had not occurred, that it was appropriate for them to utilize the 2012 DPM in the administration of the current adverse action. Agency avers that "because bargaining hadn't occurred between Local 36 and FEMS with respect to the 2019 DPM, FEMS was precluded from doing anything different."[44]Agency also states that the Collective Bargaining Agreement ("CBA") "was executed in 2018, and thus the parties were aware that Article VII defined the causes for disciplinary action, not the 2019 version of the DPM." Wherefore, Agency maintains that "it correctly and intentionally charged Employee based on Article VII and the 2012 DPM because it bargained with Local 36 to do so."[45] Agency also asserts that the Superior Court for the District of Columbia has said that FEMS "reliance on the 2012

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[33] Agency Brief (for Matter No. 1601-0026-24) at Page 9 May 29, 2024.
[34] *Id.*
[35] *Id.*
[36] I*d*. at Page 10.
[37] *Id*.
[38] *Id*. at Page 10-11.
[39] *Id.*
[40] *Id*. at 10.
[41] *Id.*
[42] I*d*. at Page 12.
[43] *Id*. at Pages 13-14.
[44] *Id*. at Page 16.
[45] *Id.* at Page 17.

DPM was wholly proper…[and] OEA should not disregard the Superior Court's clear holding and find error where none exists."[46]

Agency maintains that Employee's actions constituted a refusal to test.[47] Further, Agency asserts that "when confronted with the results of his reasonable suspicion test, Employee readily admitted consuming his mother's medication."[48] Agency also argues that with regard to the use of the 2012 DPM, that Employee has "not countered nor contested Agency's arguments in this regard, thereby conceding Agency's position…[i]t appears that Employee's only argument is that he shouldn't have been terminated for testing positive on the reasonable suspicion test."[49] Agency asserts that Employee was not terminated for testing positive, but was "properly terminated for refusing to submit to/complete the random testing procedure."[50] Agency contends that termination was proper and that even if there was procedural error that it was harmless in nature because Employee would have been terminated through the October 2023 or the January 2024 Final Agency Decision based on his refusal to test. Further, Agency avers that "Employee was a probationary employee on January 10, 2024, and could therefore be terminated without cause." Agency maintains that because its actions were "based on substantial evidence, that there was no harmful procedural error and was rendered in accordance with all applicable laws and regulations, Employee's termination should be upheld."[51]

Employee's Position

Employee cites that he was selected for a random drug test while on duty at Engine 26.[52] Employee avers that after he completed his breathalyzer portion, he went to a bathroom to urinate in a cup. He cites that the physician at the PFC told him that his sample was insufficient. He further cites that the PFC physician told him to "sit down and drink some water to help with the urge to urinate." Employee asserts that after drinking water, even after 15 minutes he still did not have an urge to use the bathroom, so he started to "consume water very quickly."[53] Employee contends that he started to feel nauseous, dizzy and notified a nurse. Employee says the nurse took his vitals and asked him if he was still feeling unwell. He told her he was and that the nurse asked if he wanted to be transported to a hospital to which he again answered in the affirmative. Employee cites that he was transported via Ambulance 26 to the Washington Hospital Center. Employee avers that "once [he] arrived and registered, Sgt. Kevin Gay walked to [him] and stated, 'Hey [Employee] if you do not report back to the Police and Fire Clinic before the end of the day and finish your random drug screening you will be deemed for termination."[54] Employee avers that he returned to the PFC and was "prompted to sign more paperwork…[and he] asked the Battalion Fire Chief to explain to [him] the details of the paperwork [he] was being asked to sign…[Battalion Fire Chief] replied to just sign the paperwork."[55]

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[46] *Id.*
[47] Agency's Sur-Reply Brief for 1601-0026-24 (July 19, 2024).
[48] I*d*. at Page 3.
[49] I*d*. at Page 4.
[50] *Id.*
[51] I*d.*
[52] Employee's Brief (submitted for both matters) April 2, 2024 & May 31, 2024).
[53] *Id.*
[54] *Id.*
[55] *Id.*

Employee explains that he went back and started to complete the random drug screening. He cites that he was only asked to fill one cup with urine and to complete one breathalyzer. Employee asserts that his "random drug screening tested positive and was report[ed] to [him] via cellphone call from the police and fire clinic." Employee further explains that he was told to complete the steps in Bulletin 5 and that he was placed in a rehabilitation program. Employee avers that he never missed an appointment for his weekly drug screenings and did not produce any positive tests. Employee also asserts that it took a long time for the weekly screenings to begin and when he inquired, he was told that "the fire department wasn't going to waste money on me taking my weekly drug screening until after they've made a decision about the severity of the offenses I would be charged with."[56] Employee further asserts that he spoke with Jonathan Johnson who asked about his weekly screenings and that he wasn't aware of previous conversations with Mr. Hopkins. Employee cites that almost a month lapsed.

Employee contends that he "was placed on day work and reported to the office of fire prevention Monday through Friday from 7am to 3pm, signing [his] name into a journal with [his] name and initials."[57] Employee asserts that on November 16, 2023, he became aware of the Agency's decision to terminate his employment effective November 4, 2023. Employee avers that this was the first notice he received, and he was not aware of the termination date. Further, Employee asserts that none of the supervisors or his superiors at the Fire Prevention Office informed him, despite them having access to personnel action lists that come out on a weekly basis.[58] Employee notes that all of these persons "encountered him daily, Monday through Friday; due to me sitting at the front desk of the building all while never notifying me." Employee asserts that he was notified by Caitlin Keckacs, his union lawyer at the time, who told him what happened. Employee also cites that his last paycheck from Agency was "prolonged for 2 months."

ANALYSIS

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

Pursuant to *Pinkard*, the undersigned must determine whether the Trial Board 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.[59] 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.[60] In the instant matter, I find that the Trial Board's findings were supported by substantial evidence. Specifically, the Panel listened to the testimony of the witnesses involved in the incident involving Employee and the random drug screening he was assigned to complete on February 9, 2023. Specifically, the Panel noted that Dr. Malomo's testimony regarding Employee's persistence to leave the PFC despite not having a medical reason to do so weighed in the Panel's findings regarding the charges. As such the Panel found that Employee left the PFC without providing an adequate sample for the random drug screening. Because of this the Panel found that Employee refused to submit to the random drug test as required by Bulletin 5.

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[56] I*d*. at Page 2.
[57] *Id.*
[58] *Id.*
[59] *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).
[60] *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987).

Based upon the review of the Trial Board transcript, the Panel remained engaged and listened to all witnesses. After consideration of the testimonial and documentary evidence, along with the *Douglas* factor considerations, the Panel determined that the charge against Employee should be sustained. As a result, I find that the Board's findings to sustain the charges were supported by substantial evidence and in accordance with the standards of *Pinkard*, I find that those findings can be sustained.

Whether there was harmful procedural error

Failed Notice Service & Reinstatement

In the instant matter, Employee was subject to an FTB hearing and a subsequent decision to terminate him from service. As previously highlighted, the FTB Panel determined that Employee was guilty of refusing to complete a drug screening based on his departure from the PFC. As a result of this finding, the Panel recommended termination to which the Fire Chief adopted and terminated Employee from service. Agency concedes that its October 17, 2023, Final Decision that made Employee's termination effective November 4, 2023, failed to be properly served on Employee. As a result, Employee continued to work at Agency until November 16, 2023, when he (and apparently Agency) determined that this error had been made. Employee filed his Petition for Appeal in OEA Matter No. 1601-0010-24 on November 21, 2023. In the meantime, Agency cited that the DC Office of Pay and Retirement ("OPRM") advised them that they would have to reinstate Employee in order to pay him for the days he worked beyond November 4, 2023. Thus, Agency filed a Motion to Stay Employee's initial appeal pending its attempts to "remedy" its notice failure. Ultimately, Agency reinstated Employee and had him complete forms which it cited reinstated Employee to a probational status. Employee was reinstated as of December 2023 and received his retroactive pay from the days worked after the initial November 4, 2023, effective date. Agency then issues a Final Notice dated January 8, 2024, terminating Employee based upon the same charges and causes of action (case no. 7-23-370) and made his termination effective January 10, 2024. Employee filed a subsequent appeal (OEA Matter No.1601-0026-24) on February 7, 2024.

Agency makes several arguments regarding its action in the administration of this process. As it relates to the initial appeal, Agency contends on the one hand that because of its notice failure it reinstated Employee, the initial action was invalidated and therefore made Employee's petition "moot". Specifically, Agency proffered that "FEMS' final agency decision to remove Employee was not properly served which nullified the attempted termination, making the instant appeal moot (OEA Matter No. 1601-0010-24)." Agency also noted that "it is clear that FEMS experienced various administrative difficulties with its initial attempt to remove Employee from his position."[61] Agency averred that "these administrative challenges thwarted the adverse action process until the second FAD was served on Employee at his proper address." Agency further argues that "Employee's instant appeal [OEA Matter No. 1601-0010-24] should be denied because Agency's error had the effect of invalidating Employee's removal."

Regarding the subsequent notice, Agency further proffered that "Employee's reinstatement and subsequent removal was an extension of the initial removal."[62] Agency argues that "although FEMS experienced administrative difficulties removing Employee from the Agency due to failed service of the October 17, 2023, FAD, these administrative challenges did not amount to a procedural

[61] *Id.* at Pages 7-8.
[62] Agency Brief (for Matter No. 1601-0026-24) at Page 9 May 29, 2024.

error."[63] Agency contends that "the only change to the adverse action process was that a second FAD was sent to Employee after he was retroactively reinstated and paid for the time he worked beyond his initial intended termination date."[64] Agency maintains that "whether Employee was terminated on the initial proposed date of November 4, 2023, or the ultimate removal date of January 10, 2024, he received timely initial notice of the adverse action being taken against him, a full and timely evidentiary hearing, and effective notice of his ultimate termination."[65] Agency also contends that its second notice also reinstated Employee to a probational status to which Employee agreed to, thus arguing that ultimately OEA has no jurisdiction over Employee's second appeal because he was in probationary status at the time of filing. To this end, Agency contends that while its administrative procedures regarding the notice were insufficient, that these insufficiencies would amount to "harmless error" and that its termination action should be upheld. Agency avers that Employee would have been terminated either way, and because Employee had agreed to the reinstatement terms and otherwise, its actions would continue to be harmless error as noted in the OEA Rules.[66] Agency cited that OEA rules provide that OEA "shall not reverse an agency's action for error in the application of its rules, regulations or procedures." Agency further asserts that these procedures include procedures required by CBAs. Agency contends its failed notice attempt of the initial FAD did not violate the parties' CBA and was essentially a "technical error." To this end, Agency asserts that it has shown that these actions amount to harmless error and that OEA should uphold the termination.

In the instant matter, Agency concedes to its service errors for the initial Final Notice in OEA Matter No. 1601-0010-24. As a result, Employee continued to work past the initial November 4, 2023, effective termination date. Agency asserts that OPRM required it to reinstate Employee in order to pay him for those days. In review of Agency's arguments regarding both Petitions, the undersigned finds the arguments to be both contradictory and confusing. On the one hand, Agency essentially avers that OEA has no jurisdiction over either Petition. The first being because Agency had to reinstate Employee following its failed notice attempt and the second Petition because when it reinstated Employee, albeit for the same cause of action, it reinstated Employee as a probationary employee, thus precluding his ability to file before this Office. Regarding these arguments, the undersigned finds that Agency's arguments are convenient as a remedy to their admitted insufficiencies but are overall contradictory. Regarding the first Petition filed on November 21, 2023, the undersigned would note that at the time of filing, Employee had not yet been reinstated, thus I find that he was still terminated, despite the failed notice. Employee asserts that he was given notice on November 16, 2023. Employee was not reinstated until December 2023, and during this time lapse, he filed his appeal with a copy of the October 17, 2023, Final Notice. While the notice was not from Agency, Employee still filed a Petition at OEA. Further, in review of the record, Employee's status based upon the timeline presented by both parties evince he was not employed by Agency at the time of filing at OEA (November 21, 2023). As such, I find that Agency's arguments regarding the invalidation of Employee's initial Petition to be wholly without merit.

The process that followed involving the reinstatement of Employee was convoluted and confusing, even in review of the record. Again, Agency proffers contradictory arguments regarding the validity of the Petition. Agency asserts that the cause of action for the January 8, 2024, final

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[63] *Id*.
[64] *Id*.
[65] *Id*. at Page 10.
[66] Agency cited on Page 10 of its May 29, 2024, Brief that this rule was 631.3 (2013). However, OEA rules were updated and adopted in 2021, so the harmless error rule citation is OEA Rule 634.6.

notice was based on the same causes as the initial action and that this action was an "extension of the initial removal."[67] In that same argument, Agency avers that Employee was reinstated to a probational status, thus OEA lacks jurisdiction over his second Petition (OEA Matter No. 1601-0026-24). The undersigned finds this argument to be wholly unpersuasive. While it may have been convenient for Agency to attach this status to Employee, because Agency concedes that the cause of action for the termination was the same, the undersigned finds that the Petition can be reviewed by this Office, given the circumstances. Additionally, the undersigned finds that Agency again made a procedural error in its reinstatement, as it is well established before this tribunal that reinstated employees are not subject to a probationary period. Further, while it is not necessarily within the undersigned's review to question the procedures of reinstatement, the undersigned finds that the record is void of how Agency determined to reinstate Employee as a probational employee but paid him at his same rate (grade/scale) as he was previously categorized. Again, this clearly exhibits Agency's procedural shortcomings in the administration of this action, particularly given the fact that Agency relied upon the same cause of action from the initial final notice in the second final notice. The undersigned finds it puzzling as to why Agency would have elected to reinstate Employee and change his job position when it claims the purpose of reinstatement was only to follow OPRM's guidance such that Employee could receive the pay for the days worked past the initial November 4, 2023, termination date. The undersigned would note that a possible exploration of a different remedy to pay Employee for the days worked past the initial date may have prevented the confusion in this matter. This stated, Agency avers that given the circumstances the undersigned must consider its actions "harmless error."

Based upon precedent set forth by the D.C. Court of Appeals and the OEA Board in this matter before the Office I must apply a balancing test and review this matter under the harmless error test. OEA has defined harmless error as "an error in the application of a District agency's procedures, which did not cause substantial harm or prejudice to the employee's rights, or significantly affect the agency's final decision to take the action."[68] Agency asserts that Employee had initial notice regarding the adverse action, had a full FTB hearing and was otherwise apprised of his rights. As such, Agency avers that pursuant to OEA rules, this would constitute harmless error, and its action should be upheld.

The OEA Board has addressed this issue of harmless error. The OEA Board has held in that matter that "… *an agency's violation of a statutory procedural requirement does not necessarily invalidate the agency's adverse action. Thus, the facts in this matter warrant the invocation of a harmless error review. In determining whether Agency has committed a procedural offense as to warrant the reversal of its adverse action, this Board will apply a two-prong analysis: whether Agency's error caused substantial harm or prejudice to Employee's rights and whether such error significantly affected Agency's final decision to [discipline] Employee*."[69] Here, the undersigned finds that Agency's actions were representative of procedural inefficiencies and insufficiency from nearly every angle. From the initial failed notice to its reinstatement, Agency's procedural actions failed to meet the expectations of the administration of this action. This stated the undersigned would agree that Employee was provided with a full FTB hearing and had notice of his initial adverse action. While he did not receive the initial Final notice from Agency as required, he was able to file a timely Petition for Appeal (in both matters) and included the copies of the Final Notices

[67] Agency Brief at Page 9 (May 29, 2024).
[68] OEA Rules §699.1.
[69] OEA Matter No. 1601-0093-10, *Opinion and Order on Petition for Review* (January 25, 2010).

along with his appeal as required. Thus, Employee was afforded the opportunity to present his case before this tribunal as he would have had if Agency had not failed in its service of its initial notice. Further, Employee was paid, albeit it was some time after, for the days he worked past the November 4, 2023, date. Thus, I find that under the harmless error test, Employee was not prejudiced by Agency's failures in this matter.

2012 DPM

In the instant matter, Agency utilized the 2012 DPM in its administration of the instant action. Agency avers that Employee did not raise this as an issue during the FTB hearing, thus waiving his rights to present this before this tribunal. Additionally, Agency asserts that because Agency and Local 36 had not yet completed impact and effects bargaining regarding the 2019 DPM that its use of the 2012 DPM was appropriate and proper in these circumstances. The OEA Board also issued an Opinion and Order which upheld this ruling. This noted, the D.C. Superior Court for the District of Columbia issued a ruling in *D.C. Fire and Emergency Medical Servs. Department v. D.C. Office of Employee Appeals*,[70] wherein, the Court agreed with Agency and found that Local 36 bargained to implement a disciplinary system consistent with the 2012 version of the DPM. It held that the action was brought in accordance with the charges and penalties outlined in the bargained-for version of the DPM, and "not the revisions which brought about "substantial changes…with regard to charges and penalties." "Additionally, the OEA Board noted in *Employee v. D.C. Fire and Emergency Medical Servs. Department v. D.C. Office of Employee Appeals*[71], that "… current case law dictates that Agency's use of the 2012 DPM in this matter was proper."[72] While the undersigned would note that matters regarding the use of the 2012 DPM are still pending before both D.C. Superior Court and the D.C. Court of Appeals; I find that I must hold consistent with the OEA Board's ruling that the "current case law dictates that Agency's use of the 2012 DPM in this matter was proper."

Whether Agency's action was in accordance with applicable laws, rules and/or regulations

For the same reasons outlined above, I find that Agency's actions, despite having failed in its initial service of the October 17, 2023 Final Notice, were otherwise in accordance with applicable laws, rules and regulations. The undersigned would again note that Agency's procedural shortcomings in this matter (particularly as it relates to the reinstatement, reclassification of Employee upon reinstatement and its subsequent second final notice citing to the same initial causes of action) were inefficient and fell well short of the expectations of the administration of such actions. However, as was previously cited, pursuant to applicable precedent, the undersigned had to make determinations in consideration of the 'harmless error' balancing test.

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).[73] Therefore when assessing the

[70] 2023-CAB1076 (D.C. Super Ct. December 29, 2023). See also. *D.C. Fire and Emergency Medical Servs. Department v. D.C. Office of Employee Appeals*, 2023-CAB 003933 (D.C. Super Ct. January 15, 2025).
[71] OEA Matter No. 1601-0050-23 (January 16, 2025).
[72] *Employee v. DCFEMS*, 1601-0040-21R 24 (*citing* to OEA Board decision in *Employee v. DCFEMS, Opinion and Order on Petition for Review*, OEA Matter No. 1601-0050-23 (January 15, 2025)).
[73] *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,

appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercise." Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.[74] Accordingly, when an Agency charge is upheld, this Office will "leave Agency's penalty undisturbed when the penalty is within the range allowed by law regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgement."[75] Based on the aforementioned, the undersigned finds that Agency acted in accordance with all applicable laws, rules and regulations, that its charges were based on substantial evidence and that there was no harmful procedural error. Consequently, the undersigned concludes that the Agency's action should be upheld.

ORDER

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

FOR THE OFFICE: **/s/ Michelle R. Harris**
Michelle R. Harris, Esq.
Senior Administrative Judge

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* (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).

[74] *Love* also provided the following:

> [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, it is appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. (Citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981)).

[75] *Id. See also. Sarah Guarin v Metropolitan Police Department*, 1601-0299-13 (May 24, 2013) citing *Stokes supra*.