THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	OEA Matter No. 1601-0027-24
	)	
v.	)	Date of Issuance: July 10, 2024
	)	
DISTRICT OF COLUMBIA	)	
FIRE AND EMERGENCY MEDICAL	)	
SERVICES DEPARTMENT,	)	MONICA DOHNJI, ESQ.
Agency	)	Senior Administrative Judge
	)	

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

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On February 9, 2024, 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 January 13, 2024. OEA issued a Request for Agency Answer to Petition for Appeal on February 12, 2024. Agency submitted its Answer to Employee's Petition for Appeal on March 11, 2024. This matter was assigned to the undersigned on March 12, 2024.

On March 18, 2024, the undersigned issued an Order Convening a Status/Prehearing Conference in this matter for April 9, 2024. During the Status/Prehearing Conference, the undersigned was informed that an Adverse Action Panel Hearing was convened in this matter on November 15, 2023. 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 April 10, 2024, requiring the parties to submit briefs addressing the issues raised during the Status/Prehearing Conference. Agency's brief was due on or before May 3, 2024; Employee's brief was due on or before May 31, 2024;

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

and Agency had the option to submit a sur-reply by June 14, 2024. The parties have submitted their respective briefs. 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 Agency utilized the appropriate District of Columbia Municipal Regulation in discipling Employee;

2) Whether the Trial Board's decision was supported by substantial evidence;

3) Whether there was harmful procedural error; and

4) 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 CHARGES

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:

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[2] OEA Rule § 699.1.
[3] Agency Answer at Tab 19 (March 11, 2024).

Case No. U-23-327

Charge 1: Violation of D.C. Fire and Emergency Medical Services Department Order Book Article VI, **General Rules of Conduct,** § 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."

This misconduct is defined as cause in D.C. Fire and Emergency Medical Services Order Book, Article VII, § 2(f)(3), which states: "Any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations to include: Neglect of Duty." *See also* DPM §1603.3(f)(3) (rev. 08/27/2012). *See also* DPM §1605.4(e) (rev. 06/12/2019).

Specification 1: Captain Steven Himes describes your misconduct in his 1st Endorsement (dated 02/15/2023) as follows:

> On February 15, 2023, Members assigned to the Logistics Division were asked to assist in cleaning the parking lot/fence line after a number of PDA apparatus was removed. These members replied stating that it's not in their job description to pick up trash and they are only supposed to make deliveries …. DFC Edwards then instructed me to tell these members they must type a special report in regards to their insubordination to which they refused.

FF [Employee] disciplinary record demonstrates a persistent disregard for the rules of the Department and an unwillingness to adhere to lawful orders. Accordingly, this termination action is proposed.

Charge 2 Violation of D.C. Fire and Emergency Medical Services Department Order Book Article VI, **General Rules of Conduct**, §8, Insubordination, which states: "Insubordination is a failure/and or refusal to comply with lawful orders or instructions, either verbal or written, from a higher ranking member."

This misconduct is defined as cause in D.C. Fire and Emergency Medical Services Order Book, Article VII, § 2(f)(4), which states: "Any on-duty or employment-related act or omission that that interferes with the efficiency

or integrity of government operations, to include: Insubordination." *See also* DPM §1603.3(f)(4). *See also* DPM §1605.4(d) (rev. 06/12/2019).

Specification 1: Captain Steven Himes describes your misconduct in his 1st Endorsement (dated 02/15/2023) as follows:

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On November 15, 2023, Employee appeared before a Fire Trial Board. He was represented by counsel and pled Not Guilty to Charge No. 1 and Specification No.1 and to Charge No. 2, and Specification No.1.[4]

SUMMARY OF THE TESTIMONY[5]

On November 15, 2023, 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) Steve Himes – Tr. pgs. 23-41

Captain Steven Himes ("Cpt. Himes") works at Agency's Adams Place, Logistics building. At the time of the Trial Board Hearing, he had been at the Logistic division since February 5, 2023. He explained that the logistic division is a warehouse building used to store Agency household products such as cleaning supplies, small tools, and appliances for fire trucks. He further noted that the fire departments rely on them for their daily firehouse supplies. Cpt. Himes stated that he was familiar with Employee from his time at the logistics building. He noted that he had supervised Employee for approximately two (2) weeks before the February 15, 2023, incident occurred. Tr. pgs. 23 – 25, 35-36.

Cpt. Himes testified that on February 15, 2023, he was newly appointed at the logistics division, and as he was in the process of doing some cleaning around the building, he asked the

[4] *Id.*
[5] *Id.* at Tab 18.

employees prior to doing their normal routine to start picking up trash outside. Cpt. Himes stated that it would take them 15-30 minutes to finish cleaning up everything. He asserted that the employees informed him that it wasn't in their job description. He noted that they felt that they didn't have to clean up the trash, because the trash had been there for an unknown amount of time, and they thought that it wasn't part of their duties to assist in cleaning up the trash. When asked if Employee was one of the employees that refused to clean, Cpt. Himes responded in the affirmative. Tr. pgs. 25 – 27, 36-37.

Cpt. Himes testified that his original request to employees to clean up was not an order. However, because the employees were not going to comply with his request, he told them it was an order to clean up the trash. He stated that they still refused to comply, and he notified Deputy Chief Edwards, his next in command for that division. Cpt. Himes asserted that although he knew that the employees were responsible for cleaning, he called Deputy Chief Edwards to confirm that. He stated that after he narrated the situation to Deputy Chief Edwards, Deputy Chief Edwards told him that he should have the employees complete a special report since they refused to obey his orders. Cpt. Himes explained that he asked the employees to complete the special report, but all of them, including Employee, refused to do so. He then called Deputy Chief Edwards to inform him of their refusal to complete the special report and Deputy Chief Edwards stated he would come to the logistics division, which he did. Tr. pgs. 28-31, 38-39.

According to Cpt. Himes, when Deputy Chief Edwards arrived at the logistics division, he gathered the employees and informed them that because they refused to comply with the order to help clean up and because they did not want to complete special reports, all the employees were dismissed from all duties and sent home. He noted that not obeying orders brings down the department's morale and sets a bad example to other members. Cpt. Himes testified that he was not aware of Employee's or the other employees' disciplinary history on the date of the incident. Tr. pgs. 32 - 34.

2) Deputy Chief Andre Edwards – Tr. pgs. 42 -57

Deputy Fire Chief Andre Edwards ("Deputy Chief Edwards") currently works at Agency's logistics section at the B Street Warehouse. Deputy Chief Edwards is familiar with Employee. He testified that on the morning of February 15, 2023, he received a call from Cpt. Himes, inquiring about the job responsibilities for the employee assigned to Adams Place because he had asked them to clean up the area next to the warehouse, and they had expressed to him that their job was to make deliveries and not to cleanup. Deputy Chief Edwards stated that he told Cpt. Himes that was incorrect and that the employees were to clean up and do whatever is asked of them. Cpt Himes called him again and mentioned that the employees had refused to clean up as asked. He asked Cpt. Himes to inform the employees that if they do not clean up, they will be charged with insubordination and were required to complete a special report. Deputy Chief Edwards stated that he was again informed by Cpt. Himes that some of the employees had refused to complete the special report, to which he responded that he was on his way and would see them in about 10 minutes. When he got there, he addressed the employees as a group and told them that their job was to do whatever they were asked to do and dismissed them for the day. He also instructed them to report to work the next day at the B Street warehouse, under his

supervision. Deputy Chief Edwards asked Cpt. Himes to complete the special reports for everybody assigned that day. Tr. pgs. 42-45.

Deputy Chief Edwards stated that Employee was trying to explain his side, but he asked everyone to go home, and he informed Employee they will deal with that another day. He testified that Employee tried to explain that he did not necessarily refuse to clean up, and that he wanted better direction, because they had not been asked to do that before. Employee noted that it looked like it was trash that had been there from the railroad tracks, for years and years, so, he really didn't understand why they were being asked to clean up. According to Deputy Chief Edwards, Employee stated that he wasn't trying to not clean up, he just wanted better direction. He asserted that Employee completed the special report soon after the incident. Upon review of Agency's Exhibit 4, Deputy Chief Edwards affirmed that Employee completed the special report on April 28, 2023. Tr. pgs. 44, 49-50, 52-55.

Deputy Chief Edwards affirmed that Employee was one of the members that was involved in the refusal of the cleaning and completing the special report. He averred that 15-20 minutes passed between Cpt. Himes's first call to him and when he arrived at the warehouse to address the employees. Deputy Chief Edwards also asserted that there was one (1) employee in the group who spoke on behalf of the group when he addressed them. He noted that this employee was quite disrespectful and loud at that time. He affirmed that Employee was not the group spokesperson. Deputy Chief Edwards testified that failure to follow directions can have some negative consequences as it will affect the teamwork and the overall mission of whatever they're trying to accomplish. He affirmed that such conduct can be disruptive to the Department's daily operations. He explained that after the February 15, 2023, incident, they had to adjust the delivery schedule. Tr. pgs. 45 – 46, 48-49.

Deputy Chief Edwards acknowledged that he supervised Employee at the logistics division, and he'd done so for about nine (9) months as of the date of the Trial Board Hearing. He asserted that Employee was a dependable and reliable employee. When asked if he's had disciplinary issues with Employee in the logistics division since then, Deputy Chief Edwards said "No." Deputy Chief Edwards stated that Employee approached him a couple of weeks after he was assigned to the B Street warehouse stating that he wasn't trying to be disrespectful and that he did not have a problem doing whatever is asked of him. He also noted that he did not want the incident to interfere with their work relationship and he did not want Deputy Chief Edwards to have any negative thoughts about him. Tr. pgs. 46- 48, 50-51.

Deputy Chief Edwards affirmed that all the other individuals involved in the February 15, 2023, incident were charged with insubordination. However, he was not aware if any of these employees had a Trial Board Hearing for this charge. When asked if he thought Employee should be terminated for this charge, he said "I don't think so." Also, when asked if he thought Employee should remain a member of the Department, Deputy Chief Edwards responded that "[f]rom my interaction with him, over the last nine months, yes." Tr. pgs. 51-52.

Deputy Chief Edwards acknowledged that from his understanding, Cpt. Hime's instruction to the employees on that day of the incident was to clean up the fence area around Adams Place warehouse. When asked if in his opinion those instructions were clear, Deputy

Chief Edwards stated that "… it's hard to answer the question because it was … Captain Himes, I believe it was, might have been his first week there. So, they were used to another Captain who did things differently. And that's why he was replaced by Captain Himes. So, I'm not sure what they were used to, prior to Captain Himes' arrival." He noted that the specific instruction to clean up the fence area around Adams Place was not confusing. Tr. pgs. 53-54.

When asked if he was familiar with Employee prior to the February 15, 2023, incident, Deputy Chief Edwards stated that "not particularly." He testified that Employee worked at the Adams Place warehouse. Deputy Chief Edwards was at the B Street Warehouse. So, for the most part the most interaction he had was approving of their time. He also noted that prior to the February 15, 2023, incident, he was not familiar with any disciplinary history. Tr. pgs. 55-56.

Employee's Case-in-Chief

3) Employee - Tr. pgs. 59-104

Employee has been a Firefighter/EMT with Agency since 2016. He was previously assigned to Engine 18 Number 2, and at the time of the Trial Board Hearing, he was detailed to B Street logistics. Employee averred that he has lived in Washington, D.C. his entire life. Tr. pgs. 59 – 60. Employee stated that on February 15, 2023, he was detailed to Adams Place, under the supervision of Cpt. Himes. Tr. pg. 65.

Employee testified that when he got to the warehouse at Adams Place on February 15, 2023, there were a few employees sitting inside. They stated that Cpt. Himes asked them to pick up some trash. Employee asserted that he waited for Cpt. Himes to return to the room and when he did, he asked them to pick up the trash around the fence. As the other employees refused to pick up the trash, Employee asked Cpt. Himes if there was a reason why they had to clean up the trash, or if there was a company responsible for cleaning up because there was a lot of litter at the time. Cpt. Himes said 'no'. Employee stated that another employee inside the warehouse noted that he did not think that cleaning the trash outside of the warehouse was part of their job description. Employee asserted that Cpt. Himes told them he would go clarify that with Deputy Chief Edwards and he left the warehouse. Employee also stated that Cpt. Himes never stated that it was an order. He simply asked if they could clean the trash, and all Employee did was ask a question. Employee stated that about 30 minutes later, they were called to Cpt. Himes' office where he informed them that Deputy Chief Edwards wanted them to submit a special report on insubordination. Employee cited that they were taken aback on how voicing their opinion was considered insubordination. According to Employee, he spoke with the other employees and advised that they all go pick up the trash, to which they agreed. They informed Cpt. Himes they would go pick up the trash, and as they walked downstairs to go pick up the trash, Cpt. Himes followed them. Employee noted that while they were walking towards the gate to pick up the trash, Deputy Chief Edwards pulled up and informed the group that they were all being charged and that they could go home for the day. Employee testified that he tried explaining to Deputy Chief Edwards that they were going to clean up the trash, but he insisted that they were all being charged and that they should report to B Street the next day, which they did. Employee stated that he completed a special report on the same day of the incident. Tr. pgs. 66 – 69, 76-79, 85-86, 90-91.

Referencing Agency's Exhibit 4, page 21, Employee testified that although the attached Special Report is dated April 28, 2023, he initially completed the special report on February 15, 2023. But, after speaking with Deputy Chief Edwards about the February 15, 2023, incident, he did not believe they would be charged so he did not submit the special report. Employee explained that during their conversation, he apologized to Deputy Chief Edwards about the February 15, 2023, incident, and he informed him that he meant no disrespect. He also stated that he simply wanted clarification on the trash situation because it appeared the trash had been there for years, and other employees assigned there before did not clean it up. Employee noted that Deputy Chief Edwards assured him there were no hard feelings. Employee averred that he only submitted the report after he received notice of the charges. Tr. pgs. 70 - 72.

Employee noted that he has not had any other disciplinary issues at the logistics division since the February 15, 2023, incident. Employee stated that he had another Trial Board Hearing in March 2023, in a different matter regarding a traffic incident. He noted that the March 2023, Trial Board involved a criminal charge that was dismissed by the Court and along with another charge. Employee noted that he was suspended for the charges. Employee testified that he is aware his disciplinary history might look bad, but it is his past and he has learned and has rehabilitated from it. Employee stated that he would like to return to work, help rookies coming through the firehouse and eventually become a sergeant. Tr. pgs. 72 -75, 98.

Employee affirmed that Agency's Exhibit 7, page 25, was a record of his past disciplinary history. Employee agreed that he was charged with seven (7) infractions over the past three (3) years. Employee acknowledged that for case numbers U-22-246 and U-20-299 he was charged with insubordination and conduct unbecoming. He affirmed that this was not his first charge of insubordination. Employee also provided explanations for all the seven (7) infractions he was charged with. Tr. pgs. 80 – 81, 91 - 97.

4) Daniel Loughnane - Tr. pgs. 105 -117

Daniel Loughnane is the Third Battalion Chief ("Battalion Chief Loughnane") Engine Number 3. He has worked for Agency for sixteen (16) years as of the date of the Trial Board hearing. He became a Battalion Chief in November 2022. He affirmed knowing Employee when Employee was assigned under him while he was the captain of Engine 18 in 2018. He stated that Employee was under his direct supervision for four (4) years. When asked what his impression was of Employee when he arrived at Engine 18, Battalion Chief Loughnane stated that he thought Employee was physically capable of doing the job and they worked together to get Employee to where he needed to be with regards to his experience and job-related tasks. He noted that Employee demonstrated growth and improvement and once he had that kind of direction, he really started to bloom. Tr. pgs. 105 – 108, 115.

Battalion Chief Loughnane testified that Employee was incredibly intelligent, had the physical capabilities for the job, is emotionally and passionately suited for this job, and that he does a good job interacting with the public and completing his assigned tasks. Battalion Chief Loughnane affirmed that Employee was dependable, reliable and had potential. He testified that he was aware of Employee's past disciplinary history and that he had to issue discipline against Employee while he was at Engine 18. However, he stated that the disciplinary process is

designed to help improve employees by showing them where they are deficient and providing them a way to move forward. He cited that Employe seemed to have moved forward on the right path. Battalion Chief Loughnane stated that he was not sure if the current charge, standing alone would merit terminating anyone. He testified that considering Employee's past disciplinary history, he thought Employee should remain employed with Agency. Battalion Chief Loughnane asserted that he was familiar with progressive discipline. He explained that charges of a similar, or like nature would build on them, to more severe charges as they go along and could eventually lead to termination. Tr. pgs. 110-116.

5) Thomas Williams - Tr. pgs. 119 -131

Lieutenant Thomas Williams ("Lt. Williams") has been employed with Agency for about 19 years. At the time of the Trial Board Hearing, he was assigned to Squad 1 on the Number two Platoon. He became a lieutenant in August of 2019. He stated that he met Employee through his cadet class, as an instructor for one of Employee's classes. Tr. pg. 119.

When asked what his impression was of Employee as a cadet, Lt. Williams stated that Employee was a leader amongst his peers. He asserted that Employee was one of the individuals who took their job very seriously from the beginning. Lt. Williams affirmed that Employee got along well with other cadets, was resilient, reliable, showed initiative, and did not have any issues with discipline while at the training academy. Lt. Williams asserted that he kept in touch with Employee after he left the cadet program. He explained that while he did not work alongside Employee at one point, he was assigned to the same firehouse as Employee and Employee worked the shift before his. He also noted that when he made sergeant, he was assigned to Truck 7 on Number 3 Platoon and Employee was assigned to Number 2 Platoon and he often saw Employee in the morning when he came in and before he left the firehouse. Tr. pgs. 120 – 123.

Lt. Williams testified that he was aware of the current charges against Employee. He averred that the charges did not impact his view of Employee's character, or work ethics. Tr. pgs. 124. Lt. Williams also stated that he was aware that Employee had been disciplined in the past and considering the past discipline, he thought Employee should remain a member of Agency. He stated that he believed Employee was remorseful of everything that happened in the past and this should not dictate his future on the job. Tr. pgs. 125 -126. Lt. Williams affirmed that discipline was an important part of Agency's operations and that following the chain of command is vital to the daily operations of Agency. He noted that based on the current incident, he does not think that Employee was maliciously insubordinate. Tr. pgs. 126-130.

Panel Findings[6]

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

[6] *Id*. at Tab 19.

1) Based on testimony provided to the panel FF [Employee] was Insubordinate. Captain Himes was very specific in his order for members detailed to Logistics to clean up the grounds. FF [Employee] initially refused and delayed carrying out a lawfully issued order by a superior.

2) No testimony was provided to the panel to refute the fact that FF [Employee] refused an order. FF [Employee's] own testimony was that he failed to carry out an order given to him by Captain Himes.

3) No evidence was provided to the panel to refute the charges against FF [Employee].

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS OF LAW[7]

Pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department*,[8] 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.[9] 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:

> 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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[7] 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").
[7] 801 A.2d 86 (D.C. 2002).
[8] 801 A.2d 86 (D.C. 2002).
[9] *See* D.C. Code §§ 1-606.02(a)(2), 1-606.03(a)(c); 1-606.04 (2001).

> 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); and 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) Agency's Use of District of Columbia Municipal Regulations

Employee asserted that the wrong version of the DPM and Table of Penalties were cited in the charging document.[10] Agency on the other hand argued that because Employee failed to make this argument before the Trial Board, he waived the right to assert it now. Agency further explained that the proposed action cited both the 2012 DPM and the corresponding charges in the 2019 DPM. Citing to case law[11], Agency further asserted that the D.C. Superior Court has ruled that Employee's union and Agency bargained to implement the disciplinary system with the 2012 version of the DPM.[12] Additionally, Agency argued that this Office has previously concluded that an Agency's use of the 2012 version of the DPM constitutes harmless error when the charge for the 2012 version has a corresponding charge in the 2019 version of the DPM.[13]

The District of Columbia Municipal Regulations ("DCMR") and the corresponding District Personnel Manual ("DPM') regulate the way agencies in the District of Columbia administer adverse and corrective actions. The new DCMR and DPM (DCMR 6-B Chapter 16

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[10] Employee's Brief (May 31, 2024).
[11] *D.C. Fire and Emergency Medical Services Department v. D.C. Office of Employee Appeals,* (2023-CAB-1076) (December 29, 2023).
[12] Agency's Answer, *supra.*
[13] *Id*.

and DPM Chapter 16) which regulate how agencies administer adverse actions went into effect in the District on May 12, 2017. 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.*,[14] 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…"[15] 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 submissions, the undersigned did not request additional briefs on this issue. Moreover, the D.C. Superior Court case Agency cited[16] in support of its assertion that Employee's union and Agency bargained to implement the disciplinary system with the 2012 version of the DPM is currently pending before both the D.C. Superior Court and the D.C. Court of Appeals.

In the instant matter, Employee was terminated effective January 13, 2024, and the new version of the DPM was already in effect. However, Agency levied an adverse action against Employee citing both the 2012 and the 2019 DPM versions. Specifically, under Charge 1, Specification 1, Agency charged Employee with violating DPM §1603.3(f)(3) of the 2012 DPM version and DPM §1605.4(e) of the 2019 DPM version. For Charge 2, Specification 1, Agency charged Employee with violating DPM §1603.3(f)(4) of the 2012 DPM, and DPM §1605.4(d) of the 2019 DPM.

Agency relied on the Order Book in its assertion that the 2012 DPM version was the applicable DPM in this matter. 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:

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[14] 2023-CAB-001068 (February 16, 2024).
[15] *Id*.
[16] *D.C. Fire and Emergency Medical Services Department v. D.C. Office of Employee Appeals,* (2023-CAB-1076) (December 29, 2023). In this case, the Court reversed OEA's Initial Decision and upheld the employee's suspension, noting that the AJ should not have relied on the 2017 version of the DPM because the Agency and union bargained to implement a disciplinary system consistent with the 2012 version of the DPM. The employee filed a Motion for Reconsideration which the Court denied on April 17, 2024, noting that it found no basis to alter its conclusion that Agency committed no procedural error in the findings related to the charges brought against the employee. The Court reasoned that the employee had the opportunity to argue his position in front of OEA and the D.C. Superior Court, and that the matter was decided on the merits. The Court concluded that even considering the arguments set forth by employee in his brief, it found no basis to reconsider its ruling on the merits.

> 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).

The above CBA provision does not reference any specific DPM – 2012 or 2017, or 2019. Instead, it provides that "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." (Emphasis added). The above referenced CBA was signed by Agency and Employee's Union on September 5, 2018, after the May 19, 2017, effective date of the 2017 DPM. Further, the September 5, 2018, CBA made no mention of the 2012 DPM. 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 2019 DPM version was the applicable DPM in this matter because Employee was terminated effective January 13, 2024, and the 2019 version of the DPM was already in effect. Further, the incidents for which Employee was disciplined occurred on February 15, 2023, which is 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 version, 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 version.

Here, Agency argued that the proposed action cited the 2012 DPM and the corresponding charge in the 2019 DPM. For Charge No. 1, Specification No. 1, the charge of Neglect of Duty is found in DPM §1603.3(f)(3) of the 2012 DPM version. However, because the 2019 DPM version moved all the adverse action charges to DPM § 1605, the charge of Neglect of Duty can now be found in DPM § 1605.4(e), with its corresponding penalty found in DPM § 1607.2(e). Based on the review of the two (2) DPM versions, I conclude that Neglect of Duty is found in both the 2012 and 2019 DPM versions, and the penalty for the first offense for Neglect of Duty for both the 2012 and 2019 DPM versions range from counseling to removal. Further, both DPM versions provide that the maximum range for penalty for Neglect of Duty may be removal.

For Charge No. 2, Specification No. 1, the charge of Insubordination is found in DPM §1603.3(f)(4) of the 2012 DPM version. Agency cited that the corresponding DPM section for the charge of Insubordination in the 2019 DPM version is DPM §1605.4(d). The undersigned disagrees. The charge of Insubordination is *not* found in the 2019 DPM (emphasis added). Furthermore, the corresponding penalty for DPM §1605.4(d) is found in DPM §1607.2(d) of the Table of Illustrative Actions ("TIA"). DPM §1607.2(d) is broken down into three (3) separate subcategories. Agency did not provide the exact subcategory it relied on in the current matter. Agency simply noted in its specification for the charge of Insubordination that Employee failed

to follow instructions. DPM §1607.2(d)(1)[17] and DPM §1607.2(d)(2)[18] both speak to an employee's failure to comply with supervisory instructions. Moreover, each subcategory has a different standard of proof. One required deliberate/malicious conduct, and the other requires negligent conduct. Further, each subcategory has a different penalty range. The undersigned can only adjudicate the current appeal based on the grounds invoked by Agency in the Final Agency Decision. Therefore, it would be improper for the undersigned to essentially 'guess' or 'speculate' what the appropriate subcategory would have been. Accordingly, the undersigned concludes that this constitutes a harmful error and the charge will not be sustained.

2) 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.[19] 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.[20]

A Trial Board Hearing was convened on November 15, 2023. The Panel found that:

1) Based on testimony provided to the panel FF [Employee] was Insubordinate. Captain Himes was very specific in his order for members detailed to Logistics to clean up the grounds. FF [Employee] initially refused and delayed carrying out a lawfully issued order by a superior.

2) No testimony was provided to the panel to refute the fact that FF [Employee] refused an order FF [Employee's] own testimony was that he failed to carry out an order given to him by Captain Himes.

3) No evidence was provided to the panel to refute the charges against FF [Employee].

It is undisputed that Employee and his coworkers at the Logistic division refused to clean up the grounds after being instructed to do so by Cpt. Himes. It is also undisputed that Cpt. Himes was Employee's superior. Cpt. Himes testified that his original request to employees to clean up was not an order. However, because the employees were not going to comply with his request, he told them it was an order to clean up the trash. He stated that they still refused to comply, and he notified Deputy Chief Edwards, his next in command for that division. Tr. pgs. 28-31. Employee noted that Cpt. Himes did not testify truthfully during the Trial Board Hearing. Unfortunately, the undersigned is unable to assess the credibility of the witnesses in a *Pinkard* matter. Additionally, Employee acknowledged that he delayed picking up the trash. Employee testified that he asked Cpt. Himes if there was a reason why they had to clean up the trash, or if

[17] "Negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions."
[18] "Deliberate or malicious refusal to comply with rules, regulations, written procedures or proper supervisory instructions."
[19] *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).
[20] *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987).

there was a company responsible for cleaning up because there was a lot of litter at the time. Moreover, the OEA Board has held that an employee's admission is sufficient to meet an Agency's burden of proof.[21] Accordingly, I find that the Panel met its burden of substantial evidence to terminate Employee.

3) Whether there was harmful procedural error

Pursuant to OEA Rule 634.6, "[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. Agency argued that there was no harmful procedural error in its administration of the instant action. It explained that the proposed action cited the 2012 DPM and the corresponding charge in the 2019 DPM. Agency further asserted that the D.C. Superior Court has ruled that Employee's union and Agency bargained to implement the disciplinary system with the 2012 version of the DPM. As previously noted, the undersigned finds that the 2019, and not the 2012, DPM is the applicable DPM version. However, because the charge of Neglect of Duty is found in both the 2012 and 2019 DPM version, I conclude that Agency's use of the 2012 DPM version here is harmless error.

Agency also charged Employee with Insubordination pursuant to the 2012 DPM version. As previously noted, I find that this cause of action does not exist in the 2019 DPM version. Moreover, the corresponding charge in the 2019 DPM version as provided by Agency has three (3) subcategories/subsections and Agency failed to specify the exact subcategory/subsection it relied on for this cause of action. Therefore, I find that it would be improper for the undersigned to essentially 'guess' or 'speculate' what the appropriate subcategory would have been had Agency used the appropriate DPM version.

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.""[22] 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."[23] Consequently, I find that the charge of Insubordination does not have

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[21] *Employee v. Agency*, OEA Matter No. 1601-0047-84, 34 D.C. Reg. 804, 806 (1987).
[22] Citing to *Office of the D.C. Controller v. Frost*, 638 A.2d 657, 662 (D.C. 1994), at 662.
[23] *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

a corresponding charge under the 2019 DPM version, and Agency's failure to provide the specific corresponding subcategory under the 2019 DPM amounts to harmful procedural error.

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

Employee was charged with Neglect of Duty under Charges No. 1, Specification No. 1, and Insubordination under Charge 2. Specification 1. Employee argued that there was no direct order from Cpt. Himes for them to pick up the trash. He stated that Cpt. Himes simply asked if they could clean up the trash. Further, Employee stated that he did not refuse to cleanup, but rather, he simply wanted clarification on the trash situation because it appeared the trash had been there for years, and other employees assigned there before did not clean it up. Cpt. Himes testified that his original request to employees to clean up was not an order. However, because the employees were not going to comply with his request, he told them it was an order to clean up the trash, but they still refused to comply. Cpt. Himes also explained that he asked the employees to complete the special report, but they, including Employee, refused to do so. Based on the record, and Employee's own admission that he and his coworkers did not immediately comply with Cpt. Himes' directives to clean up the trash, I find that Agency proved by a preponderance of evidence that it had cause to terminate Employee.

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).[24] According to the Court in *Stokes,* OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Illustrative Actions ("TIA"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency.

In this case, there exists substantial evidence to discipline Employee for both Charge No. 1 and Charge No. 2. However, because Agency used an incorrect DPM, and failed to provide the exact subcategory/subsection of the corresponding cause of action for Charge No. 2 in the charging document, I conclude that Agency can only discipline Employee under Charge No. 1. As previously noted, DPM §1607.2(d) has a subcategory/subsection and Agency failed to include the exact subcategory/subsection applicable to this matter. Thus, it would be improper for the undersigned to essentially 'guess' or 'speculate' what the appropriate subcategory would have been. Accordingly, I find that Agency can only rely on Charge No. 1 – Neglect of Duty to discipline Employee.

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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.

[24] *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* (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).

Disparate Treatment

Employee further argued that Agency engaged in disparate treatment because he was the only employee who was terminated for not cleaning up the trash as requested by Cpt. Himes on February 15, 2023. I find that Employee's argument is in essence a disparate treatment argument.

OEA has held that, to establish disparate treatment, an employee *must* show that he worked in the same organizational unit as the comparison employees (emphasis added). They *must* also show that both the petitioner and the comparison employees were disciplined by the same supervisor for the same offense within the same general time period (emphasis added).[25] Further, "in order to prove disparate treatment, [Employee] *must* show that a similarly situated employee received a different penalty."[26] (Emphasis added). An employee must show that there is "enough similarity between both the nature of the misconduct and the other factors to lead a reasonable person to determine that the agency treated similarly-situated employees differently."[27] If a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue.[28]

Here, the record shows that Employee and his coworkers worked at the same organizational unit - the Logistics division and they were disciplined on the same day, for the same cause of action and by the same supervisor. Therefore, I conclude that Employee and these comparison employees were similarly situated. Agency however stated Employee received a different penalty than the comparison employees received because of Employee's lengthy disciplinary history. Employee acknowledged during the Trial Board Hearing that he was charged with seven (7) infractions over the past three (3) years. Based on the foregoing, I find that although Employee has satisfied the test for a *prima facie* showing of disparate treatment, Agency has established a legitimate reason for imposing a different penalty on the Employee. Therefore, I conclude that Employee's tacit Disparate Treatment argument must fail.

Penalty Based on Consideration of Relevant Factors

Employee also argued that the *Douglas* factors were not properly considered. Agency cited that Employee seeks to override the discretion afforded to Agency by requesting a lower

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[25] *Mills v. D.C. Department of Public Works*, OEA Matter No. 1601-0001-09, Opinion and Order on Petition for Review (December 12, 2011), citing *Manning v. Department of Corrections*, OEA Matter No. 1601-0049-04 (January 7, 2005); *Ira Bell v. Department of Human Services*, OEA Matter No. 1601-0020-03, Opinion and Order on Petition for Review (May 6, 2009); *Frost v. Office of D.C. Controller*, OEA Matter No. 1601-0098-86R94 (May 18, 1995); and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998).
[26] *Metropolitan Police Department v. D.C. Office of Employee Appeals, et al.*, No. 2010 CA 002048 (D.C. Super. Ct July 23, 2012); citing *Social Sec. Admin. V. Mills*, 73 M.S.P.R. 463, 473 (1991).
[27] *Barbusin v. Department of General Services*, OEA Matter No. 1601-0077-15, Opinion and Order on Petition for Review (January 30 ,2018) (citing *Boucher v. U.S. Postal Service*, 118 M.S.R.P. 640 (2012)).
[28] *Id*.

penalty, without proving any evidence or law to support his request. Agency averred that Employee's request for a lower penalty can only be granted if Agency failed to weigh the relevant factors or the penalty imposed was not reasonable, neither of which is present here. Agency explained that it weighed the relevant *Douglas* factors in determining which penalty to impose. Specifically, the Fire Trial Board noted that, "[b]ased on the members past disciplinary history it appears that alternative sanctions will not deter the members conduct in the future."

An Agency's decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion.[29] The relevant factors are generally outlined in *Douglas v. Veterans Administration*.[30] The evidence does not establish that the penalty of termination for Neglect of Duty constituted an abuse of discretion. The penalty for a first offense of Neglect of Duty under the 2019 DPM versions ranges from counseling to removal. In *Douglas*, the court held that "certain misconduct may warrant removal in the first instance." Here, Agency has presented evidence that it considered relevant factors as outlined in *Douglas,* in reaching its decision to terminate Employee.[31] The penalty of termination was within the range allowed for a first offense. Therefore, I further conclude that Agency's action should be upheld.

ORDER

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

FOR THE OFFICE:

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

[29] *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).
[30] 5 M.S.P.R. 313 (1981).
[31] Agency's Brief, *supra*, at Tab 17.