THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	
EMPLOYEE,)	OEA Matter No. 1601-0001-24
)	
)	Date of Issuance: June 26, 2024
v.)	
)	JOSEPH E. LIM, ESQ.
D.C. FIRE & EMERGENCY MEDICAL)	SENIOR ADMINISTRATIVE JUDGE
SERVICES DEPARTMENT,)	
Agency)	

Donna Rucker, Esq., Employee Representative
Felix I. Nnumolu, Esq. Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Employee, a Firefighter/Emergency Medical Technician, filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") on October 2, 2023, challenging the D.C. Fire & Emergency Medical Services Department's ("Agency" or "DCFEMS") decision to terminate him effective September 2, 2023, based on Cases Nos. U-22-645, U-22-690, U-22-698, U-22-802, U-22-844, U-22-850, and # U-22-851.[1] In response to OEA's October 2, 2023, letter, Agency filed its Answer on November 22, 2023,[2] after OEA granted its November 1, 2023, Request for an Extension. This matter was assigned to me on November 27, 2023.

Pursuant to the December 7, 2023, OEA Order Convening a Telephone Prehearing Conference to be held on January 18, 2024, the parties were required to submit Prehearing Statements by January 12, 2024. Due to the busy holiday schedule and with permission, Agency submitted its Prehearing Statement on January 23, 2024. At the January 18, 2024, Prehearing Conference, I directed both parties to address the following issue: whether the Fire Trial Board ("FTB")'s decision was supported by substantial evidence, whether there was harmful procedural error, or whether Agency's decision was done in accordance with applicable laws and regulations.

[1] The Agency Record, filed with OEA on November 22, 2023, is cited herein as "AR at Tab __". AR at Tab 19.
[2] AR at Tab 21.

On February 21, 2024, Employee submitted a Consent Motion to modify the submission deadline to February 23, 2024, and keep the reply deadline to March 20, 2024. In response to a subsequent order for the parties to address the applicable District Personnel Manual ("DPM") regulation utilized in this matter and another request by Agency to extend the deadline, both parties submitted their briefs on or before May 6, 2024. Because this matter is being reviewed under the analysis set forth in *Pinkard v. D.C. Metropolitan Police Department*[3], an Evidentiary Hearing was not convened. The record is now closed.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 631.1, 6-B DCMR Ch. 600 (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:
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> That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

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.

ISSUES

Whether the Trial Board's decision was supported by substantial evidence, whether there was harmful procedural error, and whether Agency's action was done in accordance with applicable laws or regulations.

ANALYSIS AND CONCLUSIONS

This Office's review of this matter is limited pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). In that case, the D.C. Court of Appeals overturned a decision of the D.C. Superior Court that held, *inter alia*, that this Office had the authority to conduct *de novo* evidentiary hearings in all matters before it. According to the D.C. Court of Appeals: "The OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives

[3] 801 A.2d 86 (D.C. 2002).

the OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings."[4]

In *Pinkard,* the Court held that this seemingly broad power of the OEA to establish its own appellate procedures is limited by the collective bargaining agreement in effect at the time of Pinkard's appeal. The relevant portion of the collective bargaining agreement reads as follows: [An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing has been held, *any further appeal shall be based solely on the record established in the Departmental hearing.*[5]

The Court noted that the CMPA itself explicitly provides that systems for review of adverse actions set forth in a collective bargaining agreement must take precedence over standard OEA procedures. D.C. Code § 1-606.2 (b) (1999) (now § 1-606.02 (b) (2001)) states that "any performance rating, grievance, adverse action, or reduction-in-force review, which has been included within a collective bargaining agreement . . . *shall not be subject to the provisions of this subchapter*" (emphasis added). The subchapter to which this language refers, subchapter VI, contains the statutory provisions governing appellate proceedings before the OEA. *See* D.C. Code § 1-606.3 (1999) (now § 1-606.03 (2001)). Since section 1-606.2 (b) specifically provides that a collective bargaining agreement must take precedence over the provisions of subchapter VI, the Court held that the procedure outlined in the collective bargaining agreement -- namely, that any appeal to the OEA "shall be based solely on the record established in the [Adverse Action Panel] hearing"—controls in the Pinkard's case.

Not only did *Pinkard* dictate that the OEA's review of the case be constrained to the record produced as a result of the hearing, but it also noted:

> The OEA may not substitute its judgment for that of an agency…. Its review of an agency decision—in this case, the decision of the [Adverse Action Panel] in the MPD's favor—*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, also must generally defer to the agency's credibility determinations….Mindful of these principles, we remand this case to the OEA to review once again the MPD's decision to terminate Pinkard, and we instruct the OEA, as the collective bargaining agreement requires, to *limit its review to the record made before the [Adverse Action Panel]*.[6]

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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[4] *See* D.C. Code §§ 1-606.02 (a)(2), 1-606.03 (a), (c); 1-606.04 (1999), recodified as D.C. Code §§ 1-606.02 (a)(2), 1-606.03 (a), (c), 1-606.04 (2001); *see also* 6B DCMR § 625 (1999).
[5] *Pinkard*, 801 A.2d at 91 (emphasis in original).
[6] *Id.* at 90-92. (citations omitted).

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
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> 2. The employee has been subjected to an adverse action;
>
> 3. The employee is a member of a bargaining unit covered by a collective bargaining agreement;
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> 4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard*, *i.e.*: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, 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.

Based on the documents of records and the position of the parties as stated during the conference held in this matter, I find that all of the aforementioned criteria are met in the instant matter. Therefore, my review is limited to the issues as set forth in the Issue section of this Initial Decision *supra*. Further, according to *Pinkard*, I must generally defer to [the Adverse Action Panel's] credibility determinations when making my decision. *Id.*

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

According to *Pinkard*, I must determine whether the Adverse Action Panel's findings were supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." [7] Further, "[i]f the Trial Board's] findings are supported by substantial evidence, [I] must accept them even if there is substantial evidence in the record to support contrary findings." [8]

After Employee challenged his termination, a Fire Trial Board ("FTB") Hearing was held on May 15, 2023. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their position. The FTB assessed witness testimony and other evidence regarding Employee's alleged misconduct and found Employee to be guilty of all charges except for the one associated with July 21, 2022, for which the Agency failed to meet its 75-day deadline for issuing an Initial Written Notification.[9]

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[7] *Davis-Dodson v. D.C. Department of Employment Services*, 697 A.2d 1214, 1218 (D.C. 1997) (citing *Ferreira v. D.C. Department of Employment Services*, 667 A.2d 310, 312 (D.C. 1995).
[8] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).
[9] *See* FTB Findings of Fact and Recommendation ("FTB Findings") at 17.

Following the Hearing, the FTB issued its Findings of Fact and Recommendation on August 16, 2023, unanimously finding Employee guilty and recommending termination for each charge:[10]

1) **Case No. U-22-645: Charge 1, Specification 1:** Violation of D.C. Fire and Emergency Medical Services Department Order Book Article XI, Part II, § 1(1)(b), Reporting Sick: Uniformed Operation All Hazards Employees.

   Employee placed himself on Sick Leave on June 17, 2022, but did not report to the Police and Fire Clinic ("PFC") as required by Order Book Article XI.

2) **Case No. U-22-690: Charge 1, Specification 1:** Violation of D.C. Fire and Emergency Medical Services Department Order Book Article XI, Part II, § 1(1)(b), Reporting Sick: Uniformed Operation All Hazards Employees.

   Employee placed himself on Sick Leave on July 19, 2022, but instead of reporting to the PFC in the morning, he reported in the afternoon without first receiving permission from the MSO as is required by Order Book Article XI.

3) **Case No. U-22-802: Charge 1, Specification 1:** Violation of D.C. Fire and Emergency Medical Services Department Order Book Article XI, Part II, § 1(1)(b), Reporting Sick: Uniformed Operation All Hazards Employees.

   Employee placed himself on Sick leave on September 1, 2022, but did not report to the PFC in the morning as required by Order Book Article XI.

4) **Case No. U-22-844: Charge 1, Specification 1:** Violation of D.C. Fire and Emergency Medical Services Department Order Book Article XI, Part II,
   § 1(1)(b), Reporting Sick: Uniformed Operation All Hazards Employees.

   Employee placed himself on Sick leave on September 21, 2022, but instead of reporting to the PFC in the morning, he reported in the afternoon without first receiving permission from the MSO as is required by Order Book Article XI.

5) **Case No. U-22-850: Charge 1, Specification 1:** Violation of D.C. Fire and Emergency Medical Services Department Order Book Article VI, § 7, Inefficiency.

   Agency charged Employee with inefficiency because he had more than three consecutive infractions in the past twelve months prior to the September 21, 2022, incident. Employee admitted that on several occasions, he failed to adhere to proper procedures for reporting to the PFC as ordered by his supervisor and required by Agency policy.

6) **Case No. U-22-851: Charge 1, Specification 1:** Violation of D.C. Fire and

[10] AR at Tab 17.

> Emergency Medical Services Department Order Book Article VI, § 8 Insubordination.
>
> Employee placed himself on Sick leave on September 21, 2022, but instead of reporting to the PFC in the morning, he reported in the afternoon without first receiving permission from the MSO as is required by Order Book Article XI. Additionally, Employee demonstrated insubordination because of his constant failure to follow orders.

On August 31, 2023, Chief John A. Donnelly, Sr. notified Employee that he had accepted the FTB's Findings of Fact and Recommendation, and that Employee would be removed from employment effective September 2, 2023.[11] The FTB's findings of fact underlying its decision include:

Employee has worked for Agency as a Firefighter/Emergency Medical Technician since August 7, 2016.[12] From their first day, Firefighters are trained on the proper procedure for calling out sick, reporting their status to their supervisor, and reporting to the PFC in the morning ("morning sick call") to determine their work status.[13] The proper sick call procedure is also outlined in Agency's Order Book, specifically, Order Book Article XI, Part II, § 1(1)(b) ("OB Article XI"). If a Firefighter is unable to report to the PFC in the morning, he must receive permission from the Medical Services Officer ("MSO") or MSO Liaison to attend the PFC in the afternoon ("afternoon sick call").[14] Furthermore, when a Firefighter commits an infraction, he is notified on what to do differently so that the misconduct is not repeated.[15]

On January 9, 2021, at approximately 6:10 a.m., Employee called his assigned firehouse to place himself on sick leave.[16] He was directed by his supervisor to report to an urgent care facility because the PFC was closed or, alternatively, to report to the PFC the upcoming Monday.[17] Employee did not follow his supervisor's instructions and failed to report to the PFC or urgent care facility.[18]

On June 17, 2022, Employee was scheduled to report for duty.[19] However, rather than reporting for duty, Employee placed himself on sick leave without reporting to the PFC as required

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[11] AR at Tab 18.
[12] AR at Tab 21.
[13] The May 15, 2023, FTB Hearing Transcript, found in Tab 16 of the Agency Record, is cited herein as "Tr. at __". Tr. at 28-29.
[14] *See* OB Article XI; *see* also Tr. at 28.
[15] Tab 16 of the Agency Record, Tr. at 29-30; *see also* Tr. at 128-32. This portion of the transcript refers to Employee's questioning by Captain Dennis Carmody ("Cpt. Carmody") to demonstrate that Employee understood the proper procedure for reporting to the PFC after calling out sick.
[16] Tr. at 40-41. The FTB held that his incident was no longer part of the causes against Employee.
[17] *Id.*
[18] *Id.*
[19] Tr. at 30.

by OB Article XI.[20] Employee also did not share his status with his supervisors.[21] Furthermore, Employee failed to provide any documentation to prove that he had sought treatment at an urgent care facility.[22]

On July 19, 2022, Employee placed himself on sick leave for a 24-hour tour but failed to report to the PFC at 7:00 a.m., as required by OB Article XI.[23] Later that day, at 1:35 p.m., Employee checked in at the PFC without obtaining permission from the MSO or the MSO Liaison, as required by OB Article XI. Again, on July 21, 2022, Employee placed himself on sick leave while already on Limited Duty status for an 8-hour tour but did not report to PFC for duty.[24] Consequently, he was placed on Absent Without Leave ("AWOL") status when attempts to reach him were unsuccessful.[25] A welfare check was performed at 8:18 a.m. Employee was found at his residence and was directed to report to the PFC that morning.[26] However, Employee failed to report to the PFC that morning and instead reported in the afternoon at 12:30 p.m.[27]

On September 1, 2022, Employee once again placed himself on sick leave for a 24-hour tour but failed to report to the PFC at 7:00 a.m., as required by OB Article XI.[28] Employee contacted the MSO Liaison at 8:03 a.m. and left a voicemail. In that voicemail, Employee stated that he had to take his kids to school and requested permission to report to afternoon sick call.[29] The MSO Liaison emailed Employee at 9:20 a.m., informing Employee that he was in receipt of his voicemail, that it was "incumbent" on Employee to have reported to morning sick call, and that at that point he was considered to be AWOL.[30] The MSO Liaison also stated that Employee had permission to attend afternoon sick call at 1:00 p.m.[31] It was noted by Battalion Fire Chief Jack Spencer ("Chief Spencer") in his Endorsement of the Special Report by MSO Lieutenant Gregory Johnson that Employee had used a total of 686 hours of sick leave since January 1, 2022.[32]

On September 21, 2022, Employee placed himself on sick leave for a 24-hour tour but failed to report to the PFC at 7:00 a.m.[33] Pursuant to OB Article XI, if Employee wanted to attend the afternoon sick call, he was required to seek permission from the MSO.[34] Employee did not do so. Instead, he called the MSO Liaison at 9:09 a.m., and left a voicemail stating that he was taking his children to school and requesting permission to report to the 1:00 p.m. sick call at the PFC.[35]

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[20] Tr. at 21, 34 & AR at Tab 14. AR at Tab 14 are Agency's exhibits presented at the FTB Hearing. These exhibits were Bates stamped. For ease of reference, this brief will indicate the page number of the referenced exhibits in the footnote. The Bates Stamp for the referenced portion is 065.
[21] Tr. at 33-34.
[22] Tr. at 34-35.
[23] Tr. at 59-60 & AR at Tab 14. Bates Stamp No. 024 to 028.
[24] Tr. at 61 & AR at Tab 14. Bates Stamp No. 029 to 039.
[25] *Id.* Tr. at 63 & AR at Tab 14.
[26] *Id.* Tr. at 63-64 & AR at Tab 14.
[27] *Id.* at 65-66 & AR at Tab 14.
[28] Tr. at 42.
[29] AR at Tab 14. Bates Stamp No. 013.
[30] *Id.* Bates Stamp No. 013-014.
[31] *Id.*
[32] AR at Tab 14. Bates Stamp No. 016.
[33] Tr. at 47.
[34] AR at Tab 14, Bates Stamp No. 025.
[35] Tr. at 47. *Also* AR at Tab 14, Bates Stamp No. 021.

The MSO did not respond to Employee's voicemail. Therefore, Employee did not receive permission to report to the afternoon sick call. Nevertheless, Employee reported to the PFC at 2:11 p.m. and was noticed by the MSO, who ordered Employee to report to PFC on September 22, 2022, at 7:00 a.m.[36] Employee reported to PFC on September 22, 2022, at 8:22 a.m.[37]

Consequently, on September 25, 2022, Agency charged him with "serial violations of agency sick call policies and inefficiency during Fiscal year 2022."[38] The Agency charged Employee with seven separate violations of D.C. Fire and Emergency Medical Services Department Order Book ("Order Book"). Five charges were violations of Order Book Article XI, Part II, § 1(1)(b) ("Article XI"). The other two were violations of Order Book Article VI, for Inefficiency and Insubordination.

Specifically, Employee was charged with inefficiency for not following sick leave procedures on June 17, 2022,[39] July 19, 2022,[40] and September 1, 2022.[41] Additionally, on the same day, Employee was charged with insubordination for repeatedly failing to follow sick leave procedures despite receiving numerous corrections from supervisors.[42] Employee states that the seven charges stemmed from five incidents occurring on June 17, 2022, July 19, 2022, July 21, 2022, September 1, 2022, and September 21, 2022. As a result, Employee was recommended for termination.[43]

In arguing that there was substantial evidence found by the FTB, Agency summarizes the FTB's fact findings based on the testimonial and documentary evidence presented at the FTB Hearing as follows:[44]

a. Employee placed himself on Sick Leave on June 17, 2022, but did not report to the PFC as required by Order Book Article XI.

b. Employee placed himself on sick leave on July 19, 2022, but instead of reporting to the PFC in the morning, he reported in the afternoon without first receiving permission from the MSO as is required by Order Book Article XI.

c. Employee placed himself on sick leave on September 1, 2022, but did not report to the PFC in the morning as required by Order Book Article XI.

d. Employee placed himself on sick leave on September 21, 2022, but instead of reporting to the PFC in the morning, he reported in the afternoon without first receiving permission from the MSO as is required by Order Book Article XI.

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[36] *Id.*; *see also* AR at Tab 14. Bates Stamp No. 021-022.
[37] *Id.*
[38] AR at Tab 18. Final Agency Decision.
[39] FEMS Case No. U-22-645
[40] FEMS Case No. U-22-690
[41] FEMS Case No. U-22-802.
[42] AR at Tab 14. Bates Stamp No. 019.
[43] AR at Tab 5.
[44] AR at Tab 17.

e. With regards the charges of inefficiency and insubordination, Employee admitted that he failed to follow sick leave procedures on June 17, 2022,[45] July 19, 2022,[46] and September 1, 2022,[47] and failed to adhere to proper procedures for reporting to the PFC as ordered by his supervisor and required by Agency policy.

June 17, 2022, Allegation

In his brief, Employee does not dispute the facts underlying the charges.[48] Rather, Employee provides reasons why he did not or could not follow Agency's procedures. For instance, Employee states that with regards to June 17, 2022, he was suffering from anxiety due to bullying and mistreatment from coworkers. Employee admitted that he placed himself on sick leave on June 17, 2022, and did not report to the PFC as required.

At the FTB Hearing, Agency presented Employee's July 7, 2022, Special Report, wherein he freely admitted that he placed himself on sick leave because of a "situation with [his] children/wife."[49] Employee reasoned that he could not attend the PFC as required because it would be an "inconvenience" to his family.[50] This is despite Employee understanding that it was improper to use sick leave for this purpose.[51] Employee's Special Report is substantiated by the testimony of Sergeant Joshua Lord and Battalion Fire Chief Jack Spencer ("Chief Spencer"). Furthermore, at the FTB Hearing, Employee offered no evidence contradicting the fact that he placed himself on sick leave on June 17, 2022, and did not report to the PFC as required.

Accordingly, I find that there is substantial evidence in the record to support Agency's "guilty" finding for Charge 1; Specification 1, which states that Employee placed himself on sick leave on June 17, 2022, and did not report to the PFC as required by Order Book Article XI.

July 19, 2022, Allegation.

Regarding the July 19, 2022, incident, the FTB found that Employee called the fire station at 6:59 a.m. and put himself on sick leave.[52] Employee did not report to the PFC and did not contact the MSO or MSO Liaison to request permission to attend afternoon sick call.[53] Nevertheless, the MSO Liaison noticed Employee attempting to attend afternoon sick call at 1:35 p.m.[54] Chief Spencer confirmed during his testimony that Employee did not receive permission to report to the PFC in the afternoon.[55] This is corroborated by Employee's July 19, 2022 Special Report, wherein he admitted reporting to the PFC "when [he] was able to which happened to be in the afternoon."[56]

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[45] FEMS Case No. U-22-645
[46] FEMS Case No. U-22-690
[47] FEMS Case No. U-22-802.
[48] *Employee's Post Conference Brief* (February 23, 2024).
[49] AR at Tab 14. Bates Stamp No. 001.
[50] *Id.*
[51] Tr. at 114, *see also* Tr. at 36.
[52] AR at Tab 14. Bates Stamp No. 027.
[53] *Id.*
[54] *Id.*
[55] *Id.*; *see also* Tr. at 60.
[56] AR at Tab 14. Bates Stamp No. 026.

At the FTB Hearing, Employee did not present any contradictory evidence and only discussed his alleged injury when testifying about reporting to the PFC on July 19, 2022.[57]

In his brief, Employee states that he had called and left a voicemail on the MSO phone asking for permission to come to afternoon sick call as he was unable to drop his children off at childcare prior to the morning sick call and that the MSO never contacted him on July 19, 2022, either by phone or email, regarding his request to attend afternoon sick call. He further avers that any alleged violation was actually due to the MSO Liaison's failure to contact him. Employee also asserts that he called out sick that day due to back pain from a work-related injury suffered on the job in April 2022.[58]

Employee testified to this effect at the FTB Hearing, but the FTB did not find that this excused Employee or found him credible. I defer to the FTB's fact finding and thus I find that there is substantial evidence to support the FTB's finding that Employee did not follow proper sick leave procedures on July 19, 2022.

<u>September 1, 2022, Allegation.</u>

The FTB found that according to his September 1, 2022, Special Report, Employee called the MSO Liaison at 8:03 a.m. that day and left a voicemail stating that he placed himself on sick leave because he had to drop his children off at school.[59] The MSO Liaison emailed Employee at 9:20 a.m. and informed Employee that he did not follow the proper protocol and that he was now AWOL. When a Firefighter is on duty, it is his responsibility to check his email because it is a proper form of notification.[60] The MSO Liaison also instructed him to report to afternoon sick call at 1:00 p.m. which Employee attended.[61] Chief Spencer corroborated this by testifying that Employee did not report to the PFC that morning pursuant to OB Article XI and he was charged accordingly.[62]

In his brief, Employee states that the MSO waited until after morning sick call was over to send an email telling him to report to afternoon sick call and that he was AWOL, despite his already notifying his supervisor that he would be off for the day.[63] Employee states that he tried to get permission to report to afternoon sick call. Employee asserts that the doctor at PFC placed him on sick leave through September 3, 2022.[64]

However, the FTB credited Battalion Fire Chief Jack M. Spencer's belief that Employee was abusing sick leave privileges.[65] Employee complains that abuse of sick leave was not a charge made against him and was meant to prejudice the FTB against him. Employee further complains that the FTB failed to mention that the PFC doctor placed him on leave for two additional days.

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[57] Tr. at 86.
[58] Tr. at 85 and 86; *see also* Firefighter Ex. 1.
[59] AR at Tab 14. Bates Stamp No. 015.
[60] Tr. at 46.
[61] *Id.* Bates Stamp No. 013-14.
[62] Tr. at 67.
[63] Tr. at 42 and 119.
[64] *Id.*
[65] FTB Findings of Fact at 8.

This shows that Employee was justified in taking leave; however, he was not charged AWOL but rather, he was charged with not following procedure. Thus, while Employee disagrees with the FTB's factfinding, I find that substantial evidence exists to show that Employee did not follow proper sick leave procedures on September 1, 2022.

September 21, 2022, Allegation.

The FTB found that after Employee placed himself on sick leave on September 21, 2022, Employee again failed to report to morning sick call at the PFC.[66] Employee contacted the MSO Liaison at 9:09 a.m. and left a voicemail requesting permission to attend afternoon sick call.[67] Because the MSO Liaison did not respond to Employee, Employee did not have permission to attend afternoon sick call. Notwithstanding, Employee attempted to report to the PFC at 2:11 p.m.[68] The MSO at the PFC caught Employee's unauthorized attendance to the afternoon sick call and instructed Employee to attend the following day.[69] Employee admitted to this fact at the FTB Hearing.[70]

Employee did not dispute the FTB's fact findings. Instead, he blamed the MSO for not responding immediately to his voicemail. He also explained that he contracted a hand foot and mouth virus from his children.[71] Because Agency provided ample evidence to support the FTB's fact findings, I find that substantial evidence exists to show that Employee did not follow proper sick leave procedures on September 21, 2022.

Substantial evidence proves that Employee's conduct demonstrated inefficiency and insubordination.

The FTB found that based on Agency rules and regulations, Agency was justified in charging Employee with inefficiency because he had more than three consecutive infractions in the past twelve months prior to the September 21, 2022, incident.[72] The FTB also found that Employee demonstrated insubordination because of his constant failure to follow orders.[73] Specifically, Employee repeatedly failed to properly report to the PFC after calling out sick even though it is undisputed that he was fully aware of the proper sick call procedure. In addition to receiving training on this, the proper sick call procedure is fully detailed in OB Article XI. The FTB also found that June 17, 2022, was not the first time that Employee called out sick and did not report to the PFC as required.[74] It found that when a Firefighter commits an infraction, he is re-educated on the proper procedures so that it does not happen again.[75] The FTB noted that Cpt.

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[66] Tr. at 47.
[67] *Id.*; *see also* AR at Tab 14. Bates Stamp No. 021-22.
[68] *Id.*
[69] *Id.*
[70] Tr. at 117.
[71] Tr. at 101.
[72] Tr. at 69.
[73] Tr. at 70.
[74] Tr. at 39-41.
[75] Tr. at 29-30.

Carmody's questioning of Employee at the FTB Hearing confirms that Employee was very familiar with the sick call procedures.[76]

Contrary to the charges of inefficiency and insubordination, Employee argues that he diligently informed his superior officers that he was sick, sought permission from the MSO to report for afternoon sick call, and reported for afternoon sick call. Employee does not deny that he incurred the charges underlying inefficiency and insubordination; however, he asserts that three adverse actions (U-22-207, U-22-313, U-22-614) were not investigated by the FTB at the Hearing and thus the charge of inefficiency cannot be substantiated if the underlying adverse actions were not warranted. As for the charge of insubordination, Employee argues that he was never given a direct order that leaving a voicemail is not a sufficient way to get permission to go to afternoon sick call.[77]

Nonetheless, because evidence was presented and found credible by the FTB to support the charges of inefficiency and insubordination, Employee's contrary evaluation of the evidence is insufficient for me to discard the fact findings of the FTB. In summary, I find that there is substantial evidence to support all of Agency's charges against Employee.

Whether there was harmful procedural error.

Agency asserts that it effectuated Employee's discipline wholly in adherence with applicable policies and procedures, including the Collective Bargaining Agreement and Agency's Order Book Article VII. Agency adds that its chosen penalty of termination is appropriate on the grounds that it was made after a thorough "*Douglas* factors" analysis[78] and is within the acceptable range of discipline under the District Personnel Regulations.

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[76] Tr. at 128-32.
[77] Tr. at 72.
[78] In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth "a number of factors that are relevant for consideration in determining the appropriateness of a penalty." Although not an exhaustive list, the factors are as follows:

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

It is uncontroverted that Agency considered the *Douglas* factors when determining Employee's penalty.[79] However, Employee counters by saying that Agency committed harmful procedural error when it incorrectly applied the *Douglas* factors analysis by failing to consider mitigating circumstances. Employee argues that what Agency deemed aggravating should have been considered a mitigating factor. He also argues that Agency failed to consider all, instead of just the majority of the *Douglas* factors. Employee states that Agency mischaracterizes his actions when it labeled them as aggravating when they should actually be deemed as mitigating. Employee then provided several reasons for his argument. He indicated that if Agency had not performed such a perfunctory analysis of the *Douglas* factors, it would have realized that a lesser penalty would have been appropriate.

The OEA may overturn the agency decision only if it finds that the agency "failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness."[80] "Not all of [the *Douglas*] factors will be pertinent in every case, and frequently in the individual case some of the pertinent factors will weigh in the [petitioner's] favor while others may not or may even constitute aggravating circumstances."[81] Although the OEA has "'marginally greater latitude of review' than a court, it may not substitute its judgment for that of the agency in deciding whether a particular penalty is appropriate."[82] The "primary discretion" in selecting a penalty has been entrusted to agency management.[83]

> Selection of an appropriate penalty must ... involve a responsible balancing of the relevant factors in the individual case. The OEA's role in this process is not to insist that the balance be struck precisely where the OEA would choose to strike it if the OEA were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the OEA's review

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> 7) consistency of the penalty with any applicable agency table of penalties;
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> 8) the notoriety of the offense or its impact upon the reputation of the agency;
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> 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
>
> 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[79] AR at Tab 17. Fire Trial Board Findings of Fact and Recommendation.
[80] *Stokes v. District of Columbia*, 502 A.2d 1006, 1011 (D.C. 1985).
[81] *Douglas, supra*, 5 M.S.P.R. at 306.
[82] *Stokes*, 502 A.2d at 1011 (citing *Douglas*, 5 M.S.P.R. at 300).
[83] *Id*.

> of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the OEA finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the OEA then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.

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

The D.C. Superior Court noted that *Douglas* outlines the factors that must be considered but it does not require a certain level of consideration be devoted to each factor.[84] I find that Employee's objections to the FTB's *Douglas* factor analysis are simply disagreements with the FTB's evaluation of said factors in his case. There is no requirement that the Agency must conform its *Douglas* factor analysis to Employee's satisfaction.

I note that Employee does not deny that Agency weighed the *Douglas* factors in determining his penalty; rather, Employee disagrees with the way Agency weighed the *Douglas* factors. In Employee's view, Agency should have considered the factors in a way that wholly rebounds to his benefit, without regard to other considerations that reflect upon Agency's ability to achieve its mission. I therefore find that there was no harmful procedural error.

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

Agency reiterates that its disciplinary action against Employee was wholly in accordance with applicable policies and procedures. On the other hand, Employee argues that Agency violated Federal and District of Columbia law by discriminating against Employee based on race and prior protected activity. A review of the FTB transcript shows that Employee never brought up discrimination as a defense and is bringing it up as an issue for the first time at OEA. Because this is a *Pinkard* matter, this Office cannot entertain this argument.

I also note, as Agency argued, this Office does not have jurisdiction to address Employee's employment discrimination complaints. OEA was established pursuant to D.C. Official Code § 1–606.01. OEA has the authority to "[h]ear and adjudicate appeals received from District agencies and from employees as provided in this subchapter."[85] "An employee may appeal … an *adverse action for cause that results in removal* … to the [OEA] upon the record and pursuant to other rules and regulations which the [OEA] may issue."[86] "In any appeal taken pursuant to this section, the [OEA] shall review the record and uphold, reverse, or modify the decision of the agency."[87]

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[84] *Eugene Goforth v. Office of Employee Appeals, et. al.,* Case No. 2020 CA 005084 (D.C. Super. Ct. July 9, 2021).
[85] D.C. Code § 1–606.02(a)(2).
[86] D.C. Code § 1–606.03(a) (emphasis added); *see also* Article 31, Section (F)(7) of the Collective Bargaining Agreement.
[87] D.C. Code § 1–606.03(a)(b).

The Office of Human Rights ("OHR"), having been created to apply human rights laws in the District,[88] is the proper venue for Employee's discrimination allegations, wherein he claims retaliation for engaging in protected activity in violation of D.C. Official Code § 2-1402.61(a).[89] One of OHR's main purposes is to "secure an end to unlawful discrimination in employment."[90] As such, OHR can: (1) "[r]eceive and investigate complaints of unlawful discrimination in employment … and take appropriate enforcement action regarding these complaints"; (2) "[m]ediate complaints of unlawful discrimination in employment … to help parties to a complaint reach a voluntary settlement"; and (3) "[c]onciliate complaints of unlawful discrimination in employment … after the [OHR] has made a finding of probable cause to believe that an act of unlawful discrimination has occurred, to help the parties to a complaint reach a voluntary settlement."[91] Because OEA is not the proper venue for Employee's employment discrimination allegations, I conclude that this argument is not a ground for overturning Employee's penalty.

Any review by this Office of the agency decision of selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[92] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."[93] When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[94]

Agency cites Employee's misconduct 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" and D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(f)(4), which states: "Any on duty or employment-related act or omission that interferes with the efficiency or integrity of government operations, to include: Insubordination." [95] In its Douglas Factor analysis, Agency noted Employee's prior disciplinary infractions within the last three years,

Employee states that he has suffered harmful error because Agency used the 2012 DPM instead of the 2017 DPM version. Employee asserts that because Agency used the incorrect version of the DPM, Employee could not have adequately defended himself as he was not even on notice

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[88] D.C. Code § 2–1411.01. The term "human rights law" includes "District or federal laws related to discrimination by reason of race." § 2–1411.01(c)(2)(A).
[89] *See* D.C. Human Rights Act of 1977, D.C. Code § 2-1401.01 et seq. created OHR.
[90] D.C. Code § 2–1411.02.
[91] D.C. Code § 2–1411.03(4)-(6).
[92] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994).
[93] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).
[94] *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).
[95] DPM § 1603.3(f)(3) & (4) (August 27, 2012).

of the correct charges. Employee believes that had Agency used the more updated version, he would have likely faced a different charge and a different penalty.

Employee's argument fails because he was on notice that his actions were listed as cause under "Neglect of Duty" and "Insubordination or Failure/Refusal to Follow Instructions" regardless of whether the 2012 DPM or the 2017 DPM version was utilized. In the 2012 version, Neglect of Duty and Insubordination falls under the umbrella of "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include..." In the 2017 version, "Neglect of Duty" and "Failure/Refusal to Follow Instructions" stand alone as a cause. The penalty for the first offense for Neglect of Duty under the 2012 DPM ranged from reprimand to removal,[96] whereas the penalty under the 2017 DPM for the first offense for Neglect of Duty ranged from counseling to removal.[97] The penalty for the subsequent offenses for Insubordination under the 2012 DPM ranged from suspension to removal,[98] whereas the penalty under the 2017 DPM for the first offense for Failure/Refusal to Follow Instructions (negligence, including the careless failure to comply with rules, regulations, written procedures, or proper supervisory instructions) ranged from counseling to removal.[99]

Thus, removal is within the range of reasonable penalties regardless of which version of the DPM was used. Employee cannot claim that he was unaware of what charge he faced nor can he claim that removal was not within the range of possible penalties. Thus, Employee was on notice that the penalty for his misconduct included termination under both the 2012 and the 2017 version of the DPM.

In a recent case, the D.C. Superior Court ("DCSC") in *Employee v. DCFEMS*[100] reversed OEA's decision to reverse an employee's removal solely on the ground that DCFEMS used the 2012 DPM version instead of the most recent 2019 DPM version. OEA had held that this was harmful error. The DCSC found that both Agency and the employee's labor union had agreed to continue to use the 2012 DPM version, the charges were clearly specified and defined as cause for adverse action in Agency's Order Book articles, the recommended penalty is consistent with the Table of Penalties recited in Chapter 16 of the DPM, and neither party had objected to Agency's utilization of the 2012 DPM. DCSC concluded that OEA's decision was not supported by substantial evidence in the record and was not in accordance with the law.

In this matter, the record shows that Agency's decision was based on a full and thorough consideration of the nature and seriousness of the offense, as well as any mitigating factors present. I find that Agency exercised its primary responsibility for managing and disciplining its workforce by electing to terminate Employee for his actions which demonstrated several instances of neglect of duty and insubordination. For the foregoing reasons, I conclude that Agency's decision to select removal as the appropriate penalty for Employee's infractions was not an abuse of discretion and should be upheld.

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[96] DPM § 1619.1(6)(c) (2012).
[97] 6-B DCMR 1607.2 (e) Table of Illustrative Actions (2017).
[98] DPM § 1619.1(6)(c) (2012).
[99] 6-B DCMR 1607.2 (d)(1) Table of Illustrative Actions (2017).
[100] Case No. 2023-CAB-3610 (D.C. Super. Ct. May 8, 2024).

ORDER

It is hereby ORDERED that Agency's action of removing Employee is UPHELD.

FOR THE OFFICE:

/*s/Joseph Lim, Esq.*
JOSEPH E. LIM, ESQ.
Senior Administrative Judge