THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	
v.	)	OEA Matter No.: 1601-0040-21
	)	
	)	Date of Issuance: January 19, 2023
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT, Agency	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Firefighter/Emergency Medical Technician ("FF/EMT") with the Department of Fire and Emergency Services ("Agency"). On August 7, 2020, Agency issued a Proposed Notice of Adverse Action, charging Employee with violation of the D.C. Fire & Emergency Services Order Book, Article XXIV, Section 10, Section 11 of the Patient Bill of Rights, and Special Order No. 54, Series 2012.[2] The first charge alleged that Employee neglected her duties as a FF/EMT and unreasonably failed to aid a member of the public during an emergency

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Charge No. 1, Specification No. 1 contained two causes of action as a basis for misconduct: neglect of duty and unreasonable failure to give assistance to the public.

call.[3] The second charge asserted that she violated the Pre-Hospital Treatment Protocols by failing to properly document the Electronic Patient Care Report ("ePCR") for the incident.

On June 7, 2021, Agency's Fire Trial Board held an administrative hearing. She pleaded not guilty as to Charge No. 1, Specification No. 1 and guilty as to Charge No. 2, Specification No. 1. After eliciting the documentary and testimonial evidence, the Trial Board found Employee guilty of both charges and recommended the penalty of termination for Charge No. 1 and a seventy-two-hour suspension for Charge No. 2. On July 28, 2021, Agency's Chief issued a Final Agency Decision accepting the Trial Board's recommendations. Her termination became effective on July 31, 2021.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on August 9, 2021. In her appeal, Employee argued that Agency's decision to terminate her was an error because more egregious incidents have occurred with other employees which did not result in termination. As a result, she requested that Agency reverse her termination and reinstate her with back pay and benefits.[4]

Agency filed an answer to the petition on October 27, 2021. It argued that Employee's appeal should be rejected because there is substantial evidence supporting each of the Trial Board's findings. Specifically, it alleged that Employee called the patient's mother on the cell phone, rather than making face to face contact with the patient during the May 22, 2021, emergency call, which violated the Patient Bill of Rights. It also contended that Employee failed to contact an EMS supervisor to assist in advocating for the patient; failed to obtain a proper refusal, which violated Patient Care Protocols; and failed to appropriately document the corresponding ePCR. Agency determined that Employee deviated from the appropriate standard of care and abandoned her

[4] *Petition for Appeal* (August 9, 2021).

patient, such that disciplinary action was warranted. Lastly, Agency submitted that it considered the *Douglas* factors and concluded that the termination was the appropriate penalty.[5]

On May 19, 2022, the Administrative Judge ("AJ") held a status conference to determine the outstanding issues in this matter.[6] During the conference, it was determined that the Collective Bargaining Agreement ("CBA") between Agency and Employee's union, as well as the holding in *Pinkard v. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2006), precluded a *de novo* hearing.[7] Thereafter, the parties were ordered to submit written briefs addressing whether Agency's termination action was supported by substantial evidence; whether Agency committed a harmful procedural error; and whether Employee's termination was taken in accordance with all applicable laws, rules, and regulations.[8]

In its brief, Agency argued that both charges levied against Employee were based on substantial evidence. As it related to Charge No. 1, Specification No. 1 (neglect of

---

[5] *Agency Answer to Petition for Appeal* (October 27, 2021). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters: 1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated; 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position; 3) the employee's past disciplinary record; 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability; 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties; 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses; 7) consistency of the penalty with any applicable agency table of penalties; 8) the notoriety of the offense or its impact upon the reputation of the agency; 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question; 10) potential for the employee's rehabilitation; 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[6] *Order Convening a Prehearing/Status Conference* (April 18, 2022).

[7] Under the holding in *Pinkard*, 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: the appellant is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department; the employee has been subjected to an adverse action; the employee is a member of a bargaining unit covered by a collective bargaining agreement; the collective bargaining agreement contains language essentially the same as that found in *Pinkard*; and at the agency level, the employee appeared before a Trial Board 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.

[8] *Post-Status Conference Order* (May 20, 2022).

duty/unreasonable failure to give assistance to the public), Agency submitted that during a dispatch call, Employee failed to make face-to-face contact with the patient; failed to do a proper assessment of the patient; and informed the patient's caregiver (mother) that it was fine to give the patient Tylenol and call 911, if needed. Additionally, it asserted that Employee's ambulance ("Ambulance 32") violated protocol when it returned to service without obtaining a proper refusal from the patient. According to Agency, Employee's conduct placed the patient in danger because she failed to perform a visual assessment and because the child was at risk of developing serious complications from a high fever, including seizures. It also noted that the COVID-19 Public Health Emergency did not serve as an excuse for ignoring established practices.[9]

As it related to Charge No. 2, Specification No. 1, Agency opined that it met its burden of proof because Employee pleaded guilty to this charge and noted that she acknowledged that she would be precluded from challenging the imposed suspension on this basis. Finally, it reasoned that the imposed penalty was an appropriate exercise of managerial discretion based on a reasonable consideration of the relevant *Douglas* factors. Consequently, Agency requested that Employee's suspension be sustained.[10]

In response, Employee argued that Agency violated Article 31, Section B(5) of the CBA because the Trial Board hearing was held 180 days after the date of the initial written notification. She also highlighted other instances where in Agency employees committed similar acts of misconduct but did not receive the same penalty as her. Employee further averred that her termination was retaliatory, gender-based, and racist.[11]

[9] *Agency Brief* (June 17, 2022).
[10] *Id*.
[11] *Employee Brief* (July 21, 2022).

Agency's Reply Brief reiterated its position that the charges were supported by substantial evidence. It asserted that Employee's timeliness argument is waived and meritless. It explained that Employee did not raise any argument about the timeliness of her hearing and that the hearing was timely scheduled for May 26, 2021, consistent with memoranda of understandings tolling Trial Boards in response to the COVID-19 Public Health Emergency. However, Agency noted that Employee, through counsel, requested that the Trial Board be continued; therefore, she waived any argument as to timeliness for the period of the delay.[12]

An Initial Decision was issued on September 7, 2022. Concerning Charge No 1., Specification No. 1, the AJ held that the Trial Board met its burden of proof in establishing that the charge was supported by substantial evidence. According to the AJ, Employee did not dispute that she failed to follow the proper patient care protocol in her interaction with the 6-year-old patient and his mother, in violation of the Patient Bill of Rights. Employee admitted during the Trial Board Hearing to not having any contact with the patient prior to leaving the scene. As it related to Charge No. 2, Specification No. 1, the AJ acknowledged that Employee pleaded guilty to this charge and specification during the Trial Board Hearing. As a result, she held that Charge No. 2 was supported by substantial evidence.[13]

However, the AJ concluded that Agency utilized the incorrect version of the District Personnel Manual ("DPM") in instituting its adverse action. Concerning the neglect of duty cause of action, she explained that the applicable DPM version went into effect in the District on May 12, 2017. Therefore, Agency's adverse action, which commenced after the effective date, was subject to the new version of the DPM. The AJ went on to provide that a specification of neglect of duty under the 2012 version and the 2017 version of the DPM, while encapsulated in different

[12] *Agency Sur-Reply Brief* (July 29, 2022).
[13] *Id*.

subsections, did not substantively differ because the specification was captured in both versions of the DPM. Since both versions provide for a maximum penalty of termination, the AJ held that Agency's error was harmless.

Unlike neglect of duty, the AJ determined that a cause of unreasonable failure to give assistance to the public under the 2012 version of the DPM did not have a corresponding provision in the May 12, 2017, or subsequent versions of the DPM. Thus, she held that Agency's failure to follow the appropriate laws, rules, and regulations constituted a harmful procedural error because Agency did not provide a breakdown of the penalty with respect to each cause of action or specification under Charge 1 No. 1. Accordingly, the AJ concluded that it would be improper to essentially 'guess' or 'estimate' what the appropriate charge and/or penalty would have been had Agency used the appropriate DPM version. As a result, the AJ dismissed Charge No. 1 because Agency committed a harmful procedural error.[14]

Next, the AJ assessed whether Agency violated Article 31, Section B (5) of the CBA, which states that "…[t]he hearing shall begin within 180 days of the employee's receipt of the Initial Written Notification. When the employee requests a postponement or continuance of a scheduled hearing, the 180-day time limit shall automatically be extended by the length of the postponement or continuance granted by the Department." AJ identified that Employee received an initial notification of the charges on May 22, 2020, and the Trial Board Hearing began on June 7, 2021, after Employee, who was represented by counsel at the time, requested that the date be extended to June 7, 2021. According to the AJ, even if Agency violated the CBA, both the OEA Board and Courts have held that, where there is no specific consequence to an agency's violation of a time limit, the time limit is construed to be directory in nature. Although Article 31, Section B(5)

[14] *Id.*

provides a clear time limit for when to begin a Trial Board Hearing, it does not provide a consequence for failing to strictly adhere to this provision. Consequently, the AJ determined that the language of the CBA should be construed as directory, rather than mandatory in nature. She further determined that any violation of this section did not constitute a harmful procedural error.[15]

Concerning whether Agency's adverse action was conducted in accordance with all applicable laws or regulations, the AJ provided that the neglect of duty specification includes failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties; failure to assist the public; undue delay in completing assigned tasks or duties; careless work habits; conducting personal business while on duty; abandoning an assigned post; and sleeping or dozing on-duty or loafing while on duty. She noted that Employee admitted that her conduct on May 22, 2020, did not conform with the Patient Bill of Rights and proper patient care protocol. Employee also admitted that Ambulance 32 did not have a face-to-face contact with the patient, and they did not perform an assessment of the patient as required. Based on the record, the AJ held that Agency's decision to levy a charge of neglect of duty against Employee was done in accordance with applicable laws and regulations.[16]

For the unreasonable failure to give assistance to the public charge, she held that Employee's failure to have face-to-face contact or evaluate the child/patient was not unreasonable given the COVID-19 Public Health Emergency. In further support of her conclusion, the AJ noted that the lack of proper guidance due to the novelty of the disease; the mother's concern for potential COVID exposure; and her refusal to have her son transported to the hospital with the ambulance,

[15] *Id.*
[16] *Id.*

were factors which supported the conclusion that Agency lacked cause to charge Employee with this cause of action.[17]

Finally, the AJ relied on the holding in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), in assessing whether the imposed penalty was appropriate.[18] Regarding Charge No. 2, Specification No. 1, Employee's guilty plea, in addition to a review of the record, led the AJ to conclude that the charge was supported by substantial evidence. Therefore, Agency's imposition of a seventy-two-hour suspension for neglect of duty was sustained. However, for Charge No. 1, Specification No. 1, the AJ concluded that Agency failed to utilize the appropriate version of the DPM in its administration of this action, and that Agency failed to provide a breakdown of the penalty with respect to each cause of action listed in the charge. Consequently, she held that the penalty of termination for Charge No. 1, Specification No.1 was inappropriate under the circumstances. Therefore, Agency's action of terminating Employee was reversed; Agency's action of suspending Employee for seventy-two hours was upheld; and Agency was ordered to reimburse Employee all pay and benefits lost as a result of the termination.[19]

Agency disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on October 12, 2022. It asserts that the Initial Decision should be reversed because it was inappropriate to decide the case based on an issue that was not addressed by the parties; the issue on which relief was granted was waived by Employee; and Agency properly charged Employee using the applicable procedures. It contends that Agency was required to rely upon the Order Book and the 2012 DPM because the 2017 amendments would modify bargained-for procedures and

[17] *Id*.
[18] In *Stokes*, the Court of Appeals held that 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. The Court further provide that an agency's decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion.
[19] *Initial Decision* at p. 29.

notes that Impacts & Effects bargaining has not occurred between Agency and Employee's Union. Further, Agency opines that even if its reliance on the 2012 DPM constituted an error, it was harmless. Thus, it requests that the Petition for Review be granted.[20]

Substantial Evidence

The Board may grant a Petition for Review when the AJ's decision is not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[21] After reviewing the record, this Board believes that the AJ's rulings were based on substantial evidence.

Discussion

As previously stated, the holding in *Pinkard* applies to this matter; therefore, OEA's review of Agency's adverse action is limited to the determination of 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. While Agency's termination action was based on two charges, Employee pleaded guilty to Charge No. 2, Specification No. 1. Therefore, this Board will only determine whether the AJ's conclusions of law with respect to the remaining charge and specification are based on substantial evidence in the record.

[20] *Petition for Review* (September 28, 2022).
[21] Black's Law Dictionary, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002

Charge No. 1, Specification No. 1 against Employee, as provided in its Answer to Employee's Petition for Appeal, states the following in pertinent part:

> Violation of D.C. Fire and Emergency Medical Department Order Book Article XXIV, § 10 Position Responsibilities, which states:
>
> C. Position Responsibilities Continued – Medical Duties: …
> Driver (Position No. 1): …
> 2. Duties at the Incident Scene:
>
> - Status DEK Button # 2 when arriving on scene.
> - Applies Oxygen and AED, when applicable.
> - Obtains Vital Signs.
> - Establishes IV line, when applicable.
> - Checks the scene for equipment prior to leaving the scene.
> - Checks the scene for equipment and any discarded material that would be classified as medical waste prior to leaving the scene.
> - Status DEK Button #6 when transporting to hospital.
>
> Further violation of D.C. Fire and Emergency Medical Services Department Bulletin No. 13, § 11, which states: As our patient, you have the right to expect competent and compassionate service from us….
>
> *This misconduct is defined as cause in D.C. Fire and Emergency Medical Department Order Book Article VII, § 2(f)(3), which states: "Any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations to include: Neglect of Duty." See also 16 DPM § 1603.3(f)(3) (August 27, 2012).* (Emphasis added).
>
> *This misconduct is defined further as cause in D.C. Fire and Emergency Medical Department Order Book Article VII, § 2(f)(9) which states: "Any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations to include: unreasonable failure to give assistance to the public." See also 16 DPM § 1603.3(f)(9).* (Emphasis added).

DPM Version

In her analysis, the AJ provided a thorough assessment of why Agency utilized the incorrect version of the DPM in initiating its adverse action against Employee. The AJ correctly

concluded that the applicable DPM version went into effect in the District on May 12, 2017. Thus, all adverse actions commenced after this date were subject to the new regulations. Since the alleged misconduct giving rise to this appeal occurred after the implementation of the new DPM, Employee's appeal must be scrutinized using the correct iteration of the regulations.

Agency does not dispute that it charged Employee with misconduct under the 2012 version of the DPM. Specifically, Agency charged Employee with violating DPM §1603.3(f)(3) (March 4, 2012). Under the 2012 version, a charge of neglect of duty included but was not limited to failure to follow instructions or observe precautions regarding safety; failure by a supervisor to investigate a complaint; failure to carry out assigned tasks; or careless or negligent work habits. The penalty for the first offense for neglect of duty under the 2012 DPM ranged from reprimand to removal.

Under the 2017 version of the DPM, a charge of neglect of duty includes, but is not limited to, failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties; failure to assist the public; undue delay in completing assigned tasks or duties; careless work habits; conducting personal business while on duty; abandoning an assigned post; or sleeping or dozing on duty, or loafing while on duty."[22] The penalty for the first offense is counseling to removal.

Here, Employee was suspended based on her alleged failure to carry out the essential functions of her position during an emergency call. As the AJ held, this specification is captured in both the older and the new version of the DPM. Therefore, we believe that the AJ provided a rational basis for concluding that find that a charge of neglect of duty did not substantively different

[22] The current version of the DPM moved all the adverse action charges to DPM § 1605. Thus, 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).

from the older version utilized by Agency. Accordingly, we will leave her ruling on this issue undisturbed.

In Charge No. 1 of the proposed adverse action, Agency alleged that Employee violated 16 DPM § 1603.3(f)(9) for "unreasonable failure to give assistance to the public." As the AJ noted, this cause of action does not have a corresponding provision in the newer version of the DPM. Further, we agree with the AJ's finding that there are substantive changes in the 2012 DPM with regard to the charges and penalties, such that an affected employee would be unable to determine which charges should have been levied had Agency utilized the appropriate version of the DPM. In support of her conclusion, the AJ cites to the holdings in *George v. D.C. Office of the Attorney General*, OEA Matter No. 1601-0050-16, *Opinion and Order* (July 16, 2019); *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 662 (D.C. 1994); *Johnston v. Government Printing Office*, 5 M.S.P.R. 354, 357 (1981); and *Sefton v. D.C. Fire and Emergency Services*, OEA Matter No. 1601-0109-13 (August 18, 2014), in which it was held that an employee must be aware of the charges for which they are penalized in order to appropriately address those charges. Further, she noted that Agency did not provide a breakdown of the proposed penalty of with respect to each cause of action as encapsulated in Charge No. 1. Accordingly, the AJ deemed it improper to 'guess' or 'estimate' what the appropriate charge and penalty would have been had Agency used the appropriate DPM version. This Board believes that the AJ provided a thorough assessment of this issue and finds that her conclusions are supported by substantial evidence.

In *Fulford-Cutberson v. Department of Corrections*, OEA Matter No. 1601-0010-13 (December 19, 2014), OEA held that it is required to adjudicate an appeal on the "grounds invoked by agency and may not substitute what it considers to be a more appropriate charge." This requirement was also highlighted in the holdings in *Francois v. Office of the State Superintendent*

of Education, OEA Matter No. 1601-0007-18, *Opinion and Order* (July 16, 2019) and *Linnen v. Office of the State Superintendent of Education*, OEA Matter No. (February 13, 2019). In *Francois,* the OEA Board concluded that Agency's reliance on the incorrect version of the DPM in the charging documents constituted a harmful error because Employee could not adequately defend herself against the charges levied against her. The AJ in *Francois* noted that penalties in the 2012 and 2017 DPM versions were vastly different and could have resulted in a different outcome and significantly affected Agency's final decision. Likewise, in *Linnen,* the OEA AJ held that Agency erred in relying on the 2012 version of the DPM and reversed the agency's adverse action because she could not determine what the corresponding charges in the 2017 DPM would have been to those cited by Agency from the 2012 DPM version.

Since Agency utilized an out-of-date version of the DPM, we agree with the AJ's conclusion that it is impossible to bifurcate or parse each specification of misconduct as provided in Charge No. 1. based on "neglect of duty" and "unreasonable failure to give assistance to the public." Consequently, we will leave the AJ's ruling undisturbed.

Harmless Error

In its Petition for Review, Agency argues that its use of the 2012 version of Chapter 16 of the DPM was harmless error. OEA Rule 631.3 provides the following:

> Notwithstanding 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 harmless. Harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to make the action.

Because the wrong version of the regulation was used, Employee could not adequately defend herself against the charges levied by Agency. The penalties in the 2012 and 2017 versions

are vastly different and could very well have resulted in a different outcome and significantly affected Agency's final decision. This created substantial harm and severely prejudiced Employee's rights. Consequently, this Board agrees with the AJ's ruling that Agency's utilization of the wrong version of the DPM does not amount to harmless error. Employee should not have been placed in a position where he had to speculate as to which penalty would have been used had Agency utilized the proper version of the DPM; therefore, it is difficult to uphold Agency's action.

Conclusion

Under the holding in *Pinkard*, the AJ was limited to determining, based on the record, whether Agency's adverse action was supported by substantial evidence; whether there was harmful procedural error; or whether it was in accordance with law or applicable regulations. Agency provides no persuasive basis to support its position that she was not permitted to address *sua sponte* that it utilized the incorrect version of the DPM. This issue is germane to the disposition of this appeal. Further, Agency's reliance on the 2012 version of the DPM was not a harmless error, as it caused substantial harm to Employee. While a charge of "neglect of duty" has corresponding causes and penalties under both the 2012 version and the 2017 version of the DPM, a charge of "failure to provide assistance to the public" does not. Thus, the AJ properly concluded that she could not 'recreate' the adverse action for Agency and assign a proper penalty for each basis of cause. Consequently, this Board cannot uphold Agency's termination action for Charge No. 1. Based on the forgoing, we find that the AJ's conclusions of law are supported by substantial evidence in the record.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED**. Agency's action of terminating Employee is **REVERSED**. Agency is, therefore, **ORDERED** to reimburse Employee for all pay and benefits lost as a result of the termination action.

FOR THE BOARD:

_____
Clarence Labor, Jr., Chair

_____
Jelani Freeman

_____
Peter Rosenstein

_____
Dionna Maria Lewis

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.