THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	OEA Matter No.: 1601-0039-13
EDWARD MORGAN,	)	
Employee	)	
	)	Date of Issuance: May 29, 2015
v.	)	
	)	
DISTRICT OF COLUMBIA FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT,	)	
Agency	)	Sommer J. Murphy, Esq.
	)	Administrative Judge

Edward Morgan, Employee, *Pro Se*
Corey Argust, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 28, 2012, Edward Morgan ("Employee") filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or the "Office") contesting the D.C. Fire & Emergency Medical Services' ("DC FEMS" or "Agency") action of terminating his employment. Employee, who worked as an Emergency Medical Technician ("EMT"), was charged with violating Agency Bulletin No. 83, which requires all DC FEMS employees to complete the National Registry certification and D.C. Department of Health ("DOH") certification at their respective certification level. Specifically, Agency stated that Employee's DOH card expired on June 30, 2012, in violation of Bulletin No. 83. The effective date of Employee's termination was November 29, 2012.

This matter was assigned to me in February of 2014. On May 5, 2014, a Prehearing Conference was held for the purpose of assessing the parties' arguments. During the Prehearing Conference, it was determined that there were no material facts at issue that would warrant an Evidentiary Hearing. Thus, the parties were ordered to submit written briefs. Both parties complied with the Order. 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's action was taken for cause.

2. If so, whether the penalty imposed was appropriate under the circumstances.

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > 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 628.2 *id.* states:

> 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.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Whether Agency's adverse action was taken for cause.

Title 1, Chapter 6, Subchapter VI of the D.C. Official Code (2001), a portion of the Comprehensive Merit Personnel Act, sets forth the law governing this Office. D.C. Official Code § 1-606.03 reads in pertinent part as follows:

> (a) An employee may appeal a final agency decision affecting a performance rating which results in removal of the employee (pursuant to subchapter XIII-A of this chapter), an adverse action for cause that results in removal, reduction in force (pursuant to subchapter XXIV of this chapter), reduction in grade, placement on enforced leave, or suspension for 10 days or more (pursuant to subchapter XVI-A of this chapter) to the Office upon the record and pursuant to other rules and regulations which the Office may issue.

In accordance with Section 1651 (1) of the CMPA (D.C. Official Code §1-616.51 (2001)), disciplinary actions may only be taken for cause. Specially, Employee's termination was based on the following charge and specifications:

Charge No. 1: Violation of the D.C. Fire and EMS Bulletin No. 83, which reads in relevant part: General Policy "All D.C. Fire and EMS Department employees will be required to complete the National Registry certification process at their respective certification level (EMT-B, EMT-IP, or EMT-P) and maintain both National Registry certification and District of Columbia (D.C. Department of Health) certification." This misconduct is defined as cause in Article VII, Section 2(f)(5) of the D.C. Fire and EMS Department Order Book, which states in pertinent part: "Any other on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations, to wit: in Incompetence." *See also* 16 D.P.M. § 1603.3 (f)(5) (March 4, 2008).

Specification No. 1: On April 13, 2009, the Health Emergency Preparedness and Response Administration (HEPRA), D.C. Department of Health (DOH), issued a directive to Emergency Medical Services (EMS) providers in the District of Columbia which reads in relevant part: "[B]eginning on July 1, 2009, the District Department of Health, HEPRA, will no longer be administering a District certification or recertification exam. EMS providers will not have the option of taking the District exam or the NREMT exam after June 30, 2009. The NREMT certification will be the District standard."

Your position of record is Emergency Medical Technician (EMT). Accordingly, you are required to maintain all certification requirements associated with your position. Your EMT certification expired on July 30, 2010, and you have failed to renew your certification. Your inability to meet the requirements of this position renders you incompetent to render services as an EMT. Your lack of certification further places you and the citizens of the District of Columbia in danger and, therefore, interferes with the efficiency and integrity of government operations.

Specification No. 2: You have serially failed the National Registry EMT (NREMT) examinations on four separate occasions—the test dates were December 20, 2010, February 7, 2011, March 11, 2011, and April 21, 2011. Then, on June 12, 2012, you failed the 6-week EMT Class given at the Training Academy…."[1]

[1] Agency's Advance Written Notice of Removal (September 24, 2012).

In this case, I find that Agency had cause to take adverse action against Employee. At the time of his termination, Employee worked as an EMT, DS699, Grade 7, with D.C. FEMS. On January 16, 2009, the D.C. Council passed the Emergency Medical Services Act of 2008 ("EMS Act.")[2] The EMS Act applies to all persons performing the duties of emergency personnel, both compensated and uncompensated, within the District. In response to the newly enacted legislation, the District issued a memorandum on April 13, 2009, providing for the adoption of national training standards and evaluation requirements for the certification and recertification of all emergency medical services providers.[3] Thus, effective July 1, 2009, all emergency medical providers were required to obtain a valid National Registry of Emergency Medical Technicians ("NREMT") certification.

Agency subsequently published Bulletin No. 83 on February 3, 2010. The purpose of the bulletin was to align its emergency medical services training and certification with the industry accepted standards as provided through the NREMT.[4] Bulletin 83 applies to all Members of the DC & FEMS Department, including those who provide medical assistance, medical treatment, first aid, and lifesaving interventions, to a person who is ill, wounded or otherwise incapacitated.[5] The General Policy of Bulletin No. 83 states that:

> All DC Fire & EMS Department employees will be required to complete the National Certification process at their respective certification level (EMT-B, EMT-P) and maintain both National Registry certification and District of Columbia (D.C. Department of Health) certification.
>
> Employees will be given a total of six opportunities to pass the National Registry cognitive (written) examination. Employees who fail to obtain National Registry certification after six cognitive examination attempts will be subject to adverse action by the Department.
>
> This policy shall take effect immediately. This policy supersedes all prior policies and/or issuances regarding EMT certification.

Employee's EMT certification expired on July 30, 2010.[6] However, Employee failed the NREMT examination on four occasions: 1) December 20, 2010; 2) February 7, 2011; 3) March 11, 2011; and 4) April 21, 2011. Employee was ineligible to sit for another NREMT examination because he did not successfully complete the District's EMT Certification Course.[7] In an attempt to assist with passing the exam, Agency enrolled Employee in a six (6)-week EMT class given at

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[2] D.C. Official Code § 7-2341.01 *et seq*.
[3] *See* Charge No. 1, Specification No. 1, *supra*.
[4] Agency Answer to Petition for Appeal, Tab 4 (February 7, 2013). This publication was published as Agency GO-2010-08.
[5] *Id*.
[6] Agency Answer to Petition for Appeal, Tab 2 (February 7, 2013).
[7] *Id*. at Tab 4.

the Training Academy. Employee failed to pass the course.[8] According to Agency, Employee's failure to obtain NREMT certification rendered him incompetent to perform the duties of his job as an EMT, thus an Advance Written Notice of Removal was issued to Employee on September 24, 2012.

Employee argues that his termination was wrongful because of a federal contract which was enacted prior to the implementation of the NREMT exam. In support thereof, Employee cites to Article XXIV of the EMS Administrative and Operational Rules, published as Agency's General Order 2006-14.[9] According to Employee, the rules governing EMT's under Section 3 of Article XXIV applied to him, and not the subsequent legislation as provided for in D.C. Official Code § 7-2341.01 *et seq*. I disagree. Section 7-2341.05 states in pertinent part:

> (a) Except as otherwise provided in this chapter, no person shall perform the duties of emergency medical services personnel in the District, whether for compensation or not for compensation, without first having obtained a certification from the Mayor to do so.
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> (b) Except as otherwise provided in this chapter, no person possessing a certification to perform the duties of emergency medical services personnel shall perform the duties of emergency medical services personnel in the District, whether for compensation or not for compensation, at a higher classification level than that at which he or she has been certified.
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> (c) An applicant for certification as emergency medical services personnel shall establish to the satisfaction of the Mayor that he or she meets all applicable requirements set forth in this chapter and in rules promulgated pursuant to this chapter.
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> (g) The Mayor shall adopt classifications of emergency medical services personnel, including permissible scopes of performance and certification requirements for each such classification. The Mayor may adopt nationally recognized standards or develop standards specific to the emergency medical services needs of the District of Columbia.
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> (h) The Mayor shall require each applicant for emergency medical services personnel certification to successfully complete one or more competency evaluations, demonstrating both theoretical and practical knowledge of the skills required for acceptable performance of the duties of that classification of personnel. The Mayor may adopt nationally recognized evaluations or develop

[8] *Id*.
[9] Employee Brief (April 18, 2014).

> evaluations specific to the emergency medical services needs of the District of Columbia.

Thus, § 7-2341.05 authorized the Mayor to adopt national standards for the certification and recertification of medical services providers. Moreover, the new law requiring NREMT certification applied to Employee, as his position required the rendering of emergency medical services in the District. It should be noted that Agency's Bulletin No. 83 contained a provision, specifically stating that the new policy superseded all prior policies and/or issuances regarding EMT certification.[10] Accordingly, Employee's failure to obtain NREMT certification rendered him unable to lawfully perform the functions of his job. As such, I find that Agency had cause to take adverse action against Employee.[11]

Employee also argues Agency engaged in disparate treatment by retaining EMTs who did not pass the NREMT. In *O'Donnell v. Associated General Contractors of America*, The Court of Appeals held that to show disparate treatment, an employee must show that he or she worked in the same organizational unit as the comparison employees and that both the petitioner and the comparison employees were disciplined by the same supervisor within the same general time period.[12] Here, Employee has not provided any credible evidence to support his position that he was disciplined differently than other EMTs who were similarly situated. Accordingly, Employee's argument lacks substantive merit, and fails under the general standards as provided in *O'Donnell*.

Whether the penalty was appropriate under the circumstances.

With respect to Agency's decision to terminate Employee, any review by this Office of the agency decision 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.[13] 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.[14] 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."[15]

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[10] *Supra*.

[11] Employee has also submitted that Agency engaged in discrimination, retaliation, and violated the Whistle Blower's Act. However, Employee has failed to provide any substantive evidence to support his claims. Thus, the Undersigned will not address the merits of such arguments. In addition, Employee's claims regarding a breach of the Collective Bargaining Agreement between his Union and Agency are outside the purview of this Office's jurisdiction.

[12] 645 A.2d 1084 (D.C. 1994).

[13] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March18, 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).

[14] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).1601-0417-10

[15] *Employee v. Agency*, OEA Matter No. 1601-0158-81, Opinion and Order on Petition for Review, 32 D.C. Reg. 2915, 2916 (1985).

In *Douglas v. Veterans Administration*[16], 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;

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 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;

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

[16] 5 M.S.P.R. 280, 305-306 (1981).

> 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.

In analyzing the *Douglas* factors, Hearing Officer Kim McDaniel opined that while Agency established cause to take adverse action against Employee, the proposed penalty of termination was not consistent with The Table of Appropriate Penalties. After reviewing the Hearing Officer's report and recommendation, Fire & EMS Chief Kenneth Ellerbe disagreed with her finding, stating that:

> I do not concur with the Hearing Officer'[s] recommendation that the penalty of removal is not consistent with the table of penalties as set forth in 1603.3(f). In determining that appropriate penalty, I considered the serious[ness] of the offense and its relations to your position, duties, and responsibilities…[y]our inability to meet the requirements of this position renders you incompetent to render services as an EMT.[17]

In this case, I find that Chief Ellerbe's final decision to terminate Employee was not only inconsistent with Hearing Officer Kim McDaniel's findings, but was also inconsistent with Agency's own Fire & EMS Chief's Decision Form. The form lists the name of the employee, the case number, and the name of the Hearing Officer. Next, there is a section wherein the Fire & EMS Chief can denote whether he: 1) approves the Hearing Officer's decision; or 2) disapproves the Hearing Officer's decision. On November 27, 2012, Chief Ellerbe signed and dated a Fire & EMS Chief's Decision Form, indicating that he ***approved*** the Hearing Officer's decision. (emphasis added).[18]

The Table of Appropriate Penalties, found in Section 1619 of the DPM, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. A charge of Incompetence includes careless work performance; serious or repeated mistakes after given appropriate counseling or training; and failing to complete assignments in a timely manner.[19] The penalty for a first offense of Incompetence is suspension from five (5) to fifteen (15) days.[20]

While Agency has established cause to take adverse action against Employee, I find that the penalty of termination is not supported by the record. While the Undersigned agrees that Employee's failure to obtain NREMT certification renders him incapable of performing the functions of an EMT, employees can only be expected to defend against the charges *actually* levied against them. Thus, a first time offense of Incompetence does not allow for the penalty of

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[17] *Id.*
[18] Agency Answer to Petition for Appeal, Tab 9, pg. 8. (February 7, 2013).
[19] DPM § 1603.3(f)(5).
[20] DPM § 1619(6)(e).

termination under section 1603.3(f)(5). Moreover, Agency has not provided any credible evidence to support a finding that Employee was previously charged, and disciplined for incompetence in the last three years.[21]

Based on the foregoing, I find that Agency has met its burden of proof with respect to establishing cause under D.C. Code §1-616.51 and § 1603.3 of the DPM. However, Agency has failed to prove by a preponderance of the evidence that the penalty of termination was within the range allowed by law, regulation, or guidelines as enumerated in DPM § 1603.3(f)(5). Agency's action of terminating Employee exceeded the limits as provided in the Table of Appropriate Penalties. As such, Employee's termination, albeit reluctantly, must be modified.

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency's termination of Employee is **REVERSED**; and
2. Agency shall reinstate Employee and reimburse him all back-pay and benefits lost as a result of his removal; and
3. Employee is suspended for fifteen (15) days for a first offense of Incompetence; and
4. Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

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SOMMER J. MURPHY, ESQ.
ADMINISTRATIVE JUDGE

[21] Section 1601.6 of the DPM provides that: "Except as provided in § 1601.7, the final decision notice on a corrective or adverse action shall remain in the employee's Official Personnel Folder (OPF) for not more than three (3) years from the effective date of the action. The official personnel action document effecting the corrective or adverse action is a permanent record and shall remain in the employee's OPF."