THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EDWARD MORGAN,	)	
Employee	)	OEA Matter No. 1601-0039-13
	)	
v.	)	
	)	
DISTRICT OF COLUMBIA	)	Date of Issuance: September 13, 2016
FIRE AND EMERGENCY	)	
MEDICAL SERVICES DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Edward Morgan ("Employee") worked as an Emergency Medical Technician ("EMT") with the D.C. Fire and Emergency Medical Services Department ("Agency"). On November 26, 2012, Agency issued a notice of final decision removing Employee for "any on duty or employment related act or omission that interferes with the efficiency or integrity of government operations, to wit: [ ] incompetence."[1] Specifically, Agency claimed that Employee failed maintain both his national and District of Columbia certification. The effective date of

[1] According to Agency, it relied on District Personnel Manual ("DPM") § 1603.0(f)(5) to remove Employee. *D.C. Fire and Emergency Medical Services Department's Answer to Employee's Petition for Appeal,* p. 3 (February 7, 2013).

Employee's termination was November 29, 2012. [2]

Employee challenged the termination by filing a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 28, 2012. He argued that he was wrongfully terminated because his federal contract was already in place prior to the implementation of the National Registered Emergency Medical Technician ("NREMT") exam. Employee explained that Agency's request that members take the exam was improper. He alleged that Agency did not consistently enforce its policies. Therefore, Employee requested that his termination be reversed.[3]

On February 7, 2013, Agency filed its answer to Employee's Petition for Appeal. It explained that on April 13, 2009, it issued a directive to Emergency Medical Service ("EMS") providers that said the following:

> "[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 after June 30, 2009. The NREMT certification will be the district standard."

According to Agency, Employee's EMT certification expired on July 30, 2010. It alleged that Employee failed the NREMT exam on four occasions. Additionally, Agency provided that Employee failed a six-week EMT certification course. Agency asserted that Employee's lack of certification rendered him incompetent which interferes with the efficiency and integrity of government operations. Therefore, it requested that its removal action be upheld.[4]

The AJ issued her Initial Decision on May 29, 2015. She explained that Agency's notice contained a provision that specifically stated that the new policy superseded all prior policies and/or issuances regarding EMS certification. She found that Agency has cause to take adverse

[2] *Petition for Appeal,* p. 5-9 (December 28, 2012).
[3] *Id.*, p. 2 and 9-12.
[4] *Agency's Answer to Petition for Appeal,* p. 2-9 (February 7, 2013).

action against Employee because he failed to obtain the NREMT certification which rendered him unable to legally perform the functions of his job**.** However, the AJ found that the penalty of termination was not supported by the record. She reasoned that in accordance with DPM § 1619, removal was not within the range of penalties for a first time offense of incompetence. Therefore, she ordered that Agency's termination be reversed and that he be suspended for fifteen days instead. Additionally, she ordered that Agency reimburse Employee with back pay and benefits.[5]

Subsequently, on July 6, 2015, Agency filed a Petition for Review. It argued that OEA's decision to reinstate Employee was an abuse of discretion and should be reversed. Agency reiterates that it applied the *Douglas* factors[6] and considered the Table of Appropriate Penalties within the DPM before removing Employee. Agency admits that the Table of Penalties does not list removal as a penalty for a first offense of incompetence. However, it contends that Employee's termination was appropriate because he failed to obtain the requisite NREMT certification. It explains that OEA previously held in *Ronnie Williams v. District of Columbia Fire and Emergency Medical Services Department,* OEA Matter No. 1601-0206-11R13 (February 11, 2014), that an employee's failure to obtain the NREMT certification is a basis for termination due to incompetence. Additionally, Agency cites to *Dana Brown v. Department of Youth Rehabilitation Services,* OEA Matter No. 1601-0036-07R12 (April 30, 2015) and *Robin Halprin v. D.C. Department of Mental Health,* OEA Matter No. 1601-0107-08 (February 23, 2015), where both employees were terminated for a first offense of incompetence. It provided

[5] *Initial Decision,* p. 2-11 (May 29, 2015). As it related to Employee's federal contract argument, the AJ held that D.C. Official Code § 7-2341.05 gave the Mayor the authority to adopt national standards for certification for EMS providers. Therefore, Employee's failure to obtain NREMT certification rendered him unable to perform his job. Additionally, she ruled that Employee's argument regarding disparate treatment lacked merit.
[6] The *Douglas* Factors are provided in *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981).

that in both cases, the employees were unable to perform their job functions due to a disability. According to Agency, OEA ruled that once the employees' disability exceeded the statutory time frame, they lost their retention rights, and Agency was permitted to remove them. Therefore, it requests that its Petition for Review be granted and its decision to remove Employee be upheld.[7]

Penalty within the Range Allowed by Law, Regulation, or Applicable Table of Penalties

Because the AJ ruled that Agency had cause to remove Employee, Agency only appeals the penalty imposed. In determining the appropriateness of an agency's penalty, OEA has consistently relied on *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). According to *Stokes*, OEA must decide whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties. The Court in *Stokes* reasoned that when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised."[8]

The AJ determined that Agency exceeded its limit of reasonableness and ruled that Employee's penalty be reduced to a suspension for fifteen days so that it is consistent with the Table of Penalties. As previously provided, Agency claimed that it removed Employee for

[7] *Petition for Review*, p. 7-11 (July 6, 2015).

[8] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). Additionally, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that although selection of a penalty is a management prerogative, the penalty cannot exceed the parameters of reasonableness. Moreover, the Merit Systems Protection Board ("MSPB") in *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981), provided the following:

> [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance; such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, 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.

incompetence in accordance with DPM § 1603.0(f)(5). The Table of Penalties lists suspension for five to fifteen days as the range of penalties for the first offense of incompetence. Agency asserts that it is aware that removal was not within the range of penalty, but it contends that removal was appropriate.[9]

However, this Board, citing *Douglas*, has held that when discussing the imposition of penalties, "any disciplinary action demands the exercise of responsible judgment so that an employee will not be penalized out of proportion to the character of the offense . . . ."[10] Additionally, the D.C. Court of Appeals has consistently relied on the Table of Penalties when determining the appropriateness of an agency's penalty.[11] Furthermore, the OEA Board held in *Richard Hairston v. Department of Corrections,* OEA Matter No. 1601-0307-10, *Opinion and Order on Petition for Review* (September 16, 2014)(citing *Power v. United States*, 531 F.2d 505, 507-508, 209 Ct.Cl. 126 (1976) (citing *Daub v. United States*, 292 F.2d 895, 154 Ct.Cl. 434 (1961) and *Cuiffo v. United States*, 137 F.Supp. 944, 950, 131 Ct.Cl. 60, 68 (1955)), that there are two scenarios in which courts will not uphold the punishment imposed by the agency because of an invalid penalty. The first is where the sanction exceeds the range of permissible punishment specified by statute or regulation. The second scenario is where a court has determined that the discipline is so harsh and unconscionably disproportionate to the offense that it amounts to an abuse of discretion by the agency.[12]

As the AJ held, Agency's penalty of removal exceeds the range of penalty outlined for the first offense of incompetence. The AJ correctly ruled, and Agency concedes, that the range

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[9] *Petition for Review*, p. 7-8 (July 6, 2015).
[10] *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 330 (1981).
[11] *Department of Public Works v. Colbert*, 874 A.2d 353 (D.C. 2005); *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985); *Brown v. Watts*, 993 A.2d 529 (D.C. 2010); *Hutchinson v. D.C. Office of Employee Appeals*, 710 A.2d 227 (D.C. 1998); and *District of Columbia v. Davis*, 685 A.2d 389 (D.C. 1996).
[12] The Board noted that although the decisions issued in federal circuit courts are not binding on the OEA Board, it found that they offered sound guidance regarding Table of Penalties.

is a five to fifteen-day suspension. Therefore, the AJ's decision was based on substantial evidence.[13]

Moreover, the Board also held in *Hairston* that the Table of Penalties is mandatory in nature given the language provided in the DPM. The Board explained that DPM §1619.1 provided that "the Table of Appropriate Penalties . . . *shall* be used as specified in this chapter. . . . (emphasis added)." Thus, the plain language of the regulation and the use of the word "shall" clearly denote that the table is mandatory and not advisory. The Board reasoned in *Hairston* that the only exception to the mandatory nature of the Table of Penalties is if an agency decided to implement its own separate and independent Table of Penalties which clearly indicated that its Table was advisory and not mandatory. Agency did not present any evidence that it created its own Table of Penalties, nor were any separate Agency penalty guidelines found to be published in the District Personnel Manual. It is clear from the record that Agency relied on the Table of Penalties outlined in DPM § 1619, which is mandatory in nature.

Removal exceeds the range of penalties for a first offense of incompetence. The OEA Board and the D.C. Court of Appeals relies on the Table of Penalties to determine the appropriateness of an agency's penalty. The AJ's decision is based on substantial evidence that the maximum penalty that could have been imposed was a fifteen-day suspension.

As for Employee's arguments regarding the rulings in *Brown* and *Halprin*, they were raised for the first time on Petition for Review. This Board has consistently held that, in accordance with OEA Rule 633.4, any objections or legal arguments which could have been

[13] Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion. *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). This Board must note the ruling in *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987) where the Court held 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. There may be a valid argument that there is evidence to support a contrary ruling on the penalty in this matter. However, there is also evidence to support the AJ's findings.

raised before the AJ, but were not, are considered waived by the Board.[14] Moreover, the Superior Court for the District of Columbia held in *Bonita Brown v. Office of the Chief Medical Examiner*, 2012 CA 007394 P(MPA)(D.C. Superior Ct. February 4, 2015)(citing *Brown v. Watts*, 993 A.2d 529, 535 (D.C. 2010)) that "in order for a factual issue to be preserved for appeal, it must be raised before the ALJ and be a part of the evidentiary record." Therefore, we will not consider Agency's new arguments.[15] Accordingly, we must deny Agency's Petition for Review.

[14]*Calvin Braithwaite v. D.C. Public Schools*, OEA Matter No. 2401-0159-04, *Opinion and Order on Petition for Review* (September 3, 2008); *Collins Thompson v. D.C. Fire and EMS*, OEA Matter No. 1601-0219-04, *Opinion and Order on Petition for Review* (November 13, 2008); *Beverly Gurara v. Department of Transportation*, OEA Matter No. 1601-0080-09, *Opinion and Order on Petition for Review* (December 12, 2011); *Dominick Stewart v. D.C. Public Schools*, OEA Matter No. 2401-0214-09, *Opinion and Order on Petition for Review* (June 4, 2012); *Darlene Redding v. Department of Public Works*, OEA Matter No. 1601-0112-08R11, *Opinion and Order on Petition for Review* (April 30, 2013); *Markia Jackson v. D.C. Public Schools*, OEA Matter No. 2401-0138-10, *Opinion and Order on Petition for Review* (August 2, 2013); *Latonya Lewis v. D.C. Public Schools*, OEA Matter No. 1601-0046-08, *Opinion and Order on Petition for Review* (April 15, 2014); *Sharon Jeffries v. D.C. Retirement Board*, OEA Matter No. 2401-0073-11, *Opinion and Order on Petition for Review* (July 24, 2014); and *Pamela Dishman v. D.C. Public Schools*, OEA Matter No. 2401-0028-11, *Opinion and Order on Petition for Review* (July 21, 2015).

[15] Assuming arguendo that we could consider those matters, it is clear that the current case is distinguishable from both *Brown* and *Halprin*. In the current case, Employee was removed for incompetence. However, the cause of action taken in *Halprin* was medical incompetence – inability to satisfactorily perform one or more major duties due to a medical incapacitation. The Employee in *Brown* was terminated for failure to overcome her disability by statutory deadline. Thus, this Board cannot rely on any rulings from those cases with very different causes of action taken.

Employee also claims that the *Williams* case is directly on point because Williams was removed for failure to pass the same exam as Mr. Morgan. However, we similarly find that the current case is distinguishable from *Williams*. In *Williams,* after six attempts, the employee failed the NREMT exam in August of 2009. However, in an attempt to assist him in passing, Agency placed him on administrative leave until August 2011. After Employee was still unable to pass the exam by August of 2011, Agency then issued a final notice of termination. In his Initial Decision on Remand, the AJ did not offer a detailed analysis of the penalty taken in *Williams*. Therefore, in reaching his decision to uphold Agency's removal action, he may have considered that Williams was allowed an additional two years to pass the certification exam after failing to pass it six times prior. In the current matter, Employee was removed after six attempts of the exam. However, he was not allowed an additional two years of paid, administrative leave by Agency to assist him in passing the exam. Therefore, this Board does not believe the *Williams* case is on point.

ORDER

Accordingly, it is hereby ordered that Agency's Petition for Review is denied. Agency shall reinstate Employee to his last position of record or a comparable position and substitute for the removal a fifteen–day suspension. Agency shall reimburse Employee all back-pay and benefits lost as a result of the adverse action, less fifteen days which constitutes a fifteen-day suspension. Agency shall file with this Board within thirty (30) days from the date upon which this decision is final, documents evidencing compliance with the terms of this Order.

FOR THE BOARD:

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Sheree L. Price, Interim Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

This decision of the Office of Employee Appeals shall become the final decision 5 days after the issuance date of this order. 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.