THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	OEA Matter No. 1601-0040-21R24
	)	
v.	)	Date of Issuance: February 28, 2025
	)	
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT, Agency	)	MONICA DOHNJI, Esq. Senior Administrative Judge

Pamela M. Keith, Esq., Employee Representative
Connor Finch, Esq., Agency Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL HISTORY

On August 9, 2021, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Fire and Emergency Medical Services Department's ("Agency" or "FEMS") decision to terminate her from her position as a Firefighter/EMT effective July 31, 2021. OEA issued a Request for Agency Answer to Petition for Appeal on September 28, 2021. Agency submitted its Answer to Employee's Petition for Appeal on October 27, 2021. This matter was initially assigned to Administrative Judge ("AJ") Cannon.[2] Thereafter, this matter was reassigned to the undersigned on April 5, 2022. The undersigned Senior Administrative Judge ("SAJ") issued an Initial Decision ("ID") reversing Agency's decision to terminate Employee on September 7, 2022. Agency filed a Petition for Review with the OEA Board on October 12, 2022. The OEA Board issued an Opinion and Order ("O&O") on January 19, 2023, denying Agency's Petition for Review.

Agency appealed the ID to the Superior Court of the District of Columbia ("Superior Court") and on February 16, 2024, the Superior Court issued an Order Vacating the Initial Decision of the

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

[2] AJ Cannon issued an Order scheduling a Prehearing Conference in this matter for March 24, 2022, and the parties were required to submit Prehearing Statements on March 17, 2022. Agency submitted its Prehearing Statement as requested.

Office of Employee Appeals and Remanding the Case.[3] The D.C. Superior Court Judge remanded the matter to OEA for reconsideration by the undersigned "of at least two issues following briefing and argument – and, if necessary, the presentation of evidence – by the parties: (1) the proprietary of FEMS's application of the 2012 DPM – rather than the 2017 DPM – to its determination whether [Employee]'s conduct was subject to discipline; and (2) whether [Employee] waived her right to challenge her discipline on the ground that her conduct was not subject to discipline by failing to raise the issue before the FEMS Trial Board."[4]

Thereafter, the undersigned issued an Order on February 26, 2024, and February 29, 2024, requiring the parties to submit written briefs addressing the issues on remand. On March 5, 2024, Employee filed her Motion for Leave to Conduct Limited Discovery and Stay the Briefing Schedule Until Such Discovery Can Be Completed. On March 11, 2024, Agency filed its Opposition to Request for Discovery and to Stay Briefing. On March 14, 2024, Employee filed her Reply in Support of her Motion for Leave to Conduct Discovery and to Stay the Scheduling Order. On March 18, 2024, Agency filed a Consent Motion to Vacate Scheduling Order. On March 20, 2024, the undersigned issued an Order granting Employee's Motion for Leave to Conduct Limited Discovery and Stay the Briefing Schedule Until Such Discovery Can Be Completed and Agency's Consent Motion to Vacate Scheduling Order. This Order also scheduled a Status Conference for March 26, 2024. Following the Status Conference, the undersigned issued an Order requiring Agency to submit the applicable Collective Bargaining Agreement ("CBA") between Employee's Union and Agency. This Order also clarified that the March 20, 2024, Order only applied to Employee's Motion to Stay Briefing Schedule.

On April 12, 2024, Agency filed Agency's Notice Responsive to March 26, 2024, Order, wherein, it included the applicable CBA with its submission.[5] On April 18, 2024, the undersigned issued an Order requiring the parties to submit written briefs addressing five (5) issues.[6] On April 30, 2024, Agency filed its Motion for Certification of Interlocutory Appeal to the OEA Board and Request for Stay of Proceedings. On May 2, 2024, the undersigned issued an Order on Motion for Certification of Interlocutory Appeal to the OEA Board and Request for Stay of Proceedings, referring the matter to the OEA Board. On May 30, 2024, the OEA Board issued an Opinion and Order on the Motion for Interlocutory Appeal remanding this matter to the undersigned noting that "… the AJ's order exceeds the scope of the directives on remand since OEA is limited to reviewing the record established at the Trial Board level." Thereafter, the undersigned issued a Second Order for Briefs on June 12, 2024. While Agency timely submitted its brief, on July 28, 2024, Employee

---

[3] *D.C. Fire and Emergency Medical Services Department v. D.C. Office of Employee Appeals, et. al.*, No. 2023-CAB-001068 (February 16, 2024).
[4] *Id*.
[5] It should be noted that the applicable CBA went into effect in 2018, approximately one (1) year after the effective date of the 2017 DPM.
[6] (1) Whether Article 31, Section A of the September 5, 2018, CBA between Employee's Union and Agency specifically referenced Chapter 16 of the 2012 DPM and/or Chapter 16 of the 2017 DPM. (2) Whether there is a conflict between the 2018 CBA and the 2017 DPM version which was in effect at the time of the current adverse action. (3) Whether the parties were engaged in impacts and effects bargaining regarding Chapter 16 of the 2017 DPM at the time the current adverse action occurred. **The parties must provide documentary evidence in support of their position.** (4) The proprietary of Agency's application of the 2012 DPM – rather than the 2017 DPM to its determination whether [Employee]'s conduct was subject to discipline even though the governing and applicable CBA was executed in 2018, about a year after the 2017 DPM version and approximately six (6) years after the 2012 DPM version. (Emphasis added). (5) Whether Employee waived her right to challenge her discipline on the ground that her conduct was not subject to discipline by failing to raise the issue before the Trial Board.

filed her Consent Motion for Enlargement of Time to File her Response to Agency's Brief on Petition for Review. Employee filed her Brief on Remand on July 25, 2024. On August 7, 2024, Agency submitted its Reply Brief on Remand. Thereafter, according to the directives from the OEA Board, this matter was held in abeyance.[7] The record is now closed.

JURISDICTION

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

ISSUES

1) The proprietary of FEMS's application of the 2012 District Personnel Manual ("DPM") – rather than the 2017 DPM – to its determination whether [Employee]'s conduct was subject to discipline; and

2) Whether [Employee] waived her right to challenge her discipline on the ground that her conduct was not subject to discipline by failing to raise the issue before the FEMS Trial Board.

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[8]

Pursuant to OEA Rule § 628.1, Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. On February 16, 2024, the D.C. Superior Court Judge remanded the matter to OEA for reconsideration by the undersigned "of at least two issues following briefing and argument – and, if necessary, the presentation of evidence – by the

[7] Additionally, due to personal extenuating circumstances requiring the undersigned's absence, on December 12, 2024, AJ Harris issued a Notice Regarding Temporary Abeyance of Proceedings to the parties until my return.

[8] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. See *Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

parties: (1) the proprietary of FEMS's application of the 2012 DPM – rather than the 2017 DPM – to its determination whether [Employee]'s conduct was subject to discipline; and (2) whether [Employee] waived her right to challenge her discipline on the ground that her conduct was not subject to discipline by failing to raise the issue before the FEMS Trial Board."

1) **The proprietary of FEMS's application of the 2012 DPM – rather than the 2017 DPM – to its determination whether [Employee]'s conduct was subject to discipline.**

In the September 7, 2022, ID, the undersigned found that the 2017 and not the 2012 DPM was applicable in the instant matter. However, D.C. Superior Court Judge Kravitz remanded this matter to OEA for reconsideration by the undersigned "… the proprietary of FEMS's application of the 2012 DPM – rather than the 2017 DPM – to its determination whether [Employee]'s conduct was subject to discipline." D.C. Superior Court Judge Matini issued a ruling in *D.C. Fire and Emergency Medical Servs. Department v. D.C. Office of Employee Appeals*,[9] wherein, the Court agreed with Agency and found that Local 36 bargained to implement a disciplinary system consistent with the 2012 version of the DPM. It reasoned that the charges levied against the employee were brought in accordance with the charges and penalties outlined in the bargained-for version of the DPM, and not the revisions which brought about "substantial changes…with regard to charges and penalties." Additionally, the OEA Board noted in *Employee v. D.C. Fire and Emergency Medical Servs. Department v. D.C. Office of Employee Appeals*[10], that "… current case law dictates that Agency's use of the 2012 DPM in this matter was proper." Consistent with the aforementioned rulings of both the Superior Court for the District of Columbia and the OEA Board, I conclude that the 2012 DPM is the applicable DPM in this matter.

2) **Whether Employee waived her right to challenge her discipline on the ground that her conduct was not subject to discipline by failing to raise the issue before the FEMS Trial Board.**

Agency argued that because Employee failed to raise the issue of the appropriate regulation before the FEMS Trial Board, she waived her rights to do so. Because the Superior Court for the District of Columbia's and the OEA Board found that the 2012 DPM is the applicable regulation, I find that the issue of whether Employee waived her rights when she failed to challenge this issue before the FEMS Trial Board is MOOT.

Whether the Penalty was Appropriate

The undersigned found in the September 7, 2022, ID that there was substantial evidence in the record to support Agency's findings in both Charge No. 1, Specification No. 1; and Charge No. 2, Specification No. 1. The undersigned also noted that Agency's action was taken for cause with regard to Charge No. 2, Specification No. 1. Employee received a 72 duty hours suspension for Charge No. 2, Specification No. 1 (Neglect of Duty). Agency did a thorough *Douglas* factors analysis in this matter. Therefore, I conclude that Agency had sufficient cause to suspend Employee for 72 duty hours for Charge No. 2., Specification No. 1.

---

[9] 2023-CAB1076 (D.C. Super Ct. December 29, 2023). See also. *D.C. Fire and Emergency Medical Servs. Department v. D.C. Office of Employee Appeals*, 2023-CAB 003933 (D.C. Super Ct. January 15, 2025).
[10] OEA Matter No. 1601-0050-23 (January 16, 2025).

Charge No. 1, Specification No. 1, had two (2) separate causes of actions (1) Neglect of Duty and (2) unreasonable failure to give assistance to the public. The undersigned previously held that Agency did not utilize the appropriate version of the District Personnel Manual in its administration of this action and therefore found that Agency could not terminate Employee pursuant to Charge No. 1, Specification No. 1. However, again, consistent with the aforementioned D.C. Superior Court and OEA Board rulings, I find that Agency's use of the 2012 DPM in this matter was proper. Accordingly, I find that Agency was within its managerial discretion to terminate Employee pursuant to Charge No. 1, Specification No. 1.

As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[11] When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors, and is clearly not an error of judgment. I find that Agency has properly exercised its managerial discretion and its chosen penalty of termination for Charge No. 1, Specification No. 1, and 72 hours suspension Charge No. 2, Specification No. 1 is reasonable and not an error of judgment.

ORDER

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

FOR THE OFFICE:

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

[11] *Love* also provided that "[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." *Citing Douglas v. Veterans Administration.*