THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE,	)	OEA Matter No. 1601-0091-13R20R23
	)	
	)	Date of Issuance: November 29, 2023
v.	)	
	)	JOSEPH E. LIM, ESQ.
D.C. FIRE AND EMERGENCY MEDICAL SERVICES,	)	SENIOR ADMINISTRATIVE JUDGE
Agency	)	
	)	

Frederic Schwartz, Esq., Employee Representative
Milena Mikailova, Esq., Agency Representative

SECOND INITIAL DECISION ON REMAND

PROCEDURAL HISTORY

Employee was an Emergency Medical Technician ("EMT") – Intermediate for the D.C. Fire & Emergency Medical Services ("FEMS" or "Agency"). He was removed from Agency on May 3, 2013, for failing to maintain his D.C. Department of Health ("DOH") certification. Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "the Office") on May 13, 2013. Following OEA's May 15, 2013, request, Agency filed its Answer to Employee's Petition for Appeal on June 13, 2013. On February 25, 2014, this matter was assigned to the undersigned Senior Administrative Judge ("AJ"). After several conferences with the parties from May 21, 2014, to February 11, 2015, I issued an Initial Decision ("ID") on October 20, 2015, whereby I upheld Agency's adverse action. The ID found that: (1) Agency timely initiated the adverse action against Employee in accordance with the 90-day rule as set forth in D.C. Code § 5-1031; (2) Agency's action of removing Employee from service was done in accordance with applicable laws, rules or regulations (specifically, Bulletin No. 83); and (3) termination was an appropriate penalty under the circumstances and was mandated by statute.

On November 16, 2015, Employee appealed the Initial Decision with the Superior Court of the District of Columbia ("D.C. Super. Ct.") On February 7, 2017, the D.C. Super. Ct. issued Order (Case No. 2015 CA 008873 P(MPA)) affirming Agency's decision to terminate Employee. The D.C. Super. Ct. determined that: (1) the OEA's finding that Agency timely initiated the

adverse action against Employee was supported by substantial evidence in the record; (2) the OEA properly found that Agency's action of removing Employee from service was done in accordance with applicable law, rule, or regulation (specifically, Bulletin No. 83); and (3) the OEA's findings that there was no clear error in judgment by Agency and that termination was a valid penalty under the circumstances, mandated under medical regulations, were proper. Employee appealed the D.C. Superior Court's February 7, 2017, Order to the District of Columbia Court of Appeals ("DCCA").

On December 20, 2019, the DCCA issued a Memorandum Opinion and Judgment (Case No. 17-CV-253) vacating D.C. Superior Court's February 17, 2017, Order and remanding the case to the D.C. Superior Court with directions to remand it to the OEA for further proceedings. The DCCA concluded that "remand is required to determine:" (1) "what procedures, if any, should have been followed to deny [Employee] DOH certification before terminating [Employee] for not having a current DOH certification;" (2) "whether these procedures were followed in [Employee's] case;" and (3) "whether [Employee] was given proper notice of an adverse action under D.C. Code § 5-1031, i.e., whether [Agency] denied him notice of a decision not to recertify him, if he was entitled to such separate notice."

On January 16, 2020, the D.C. Super. Ct. issued an Order (Case No. 2015 CA 008873 P(MPA)) remanding the case to the OEA for further proceedings consistent with the DCCA's December 20, 2019, Memorandum Opinion and Judgment. I scheduled a Status Conference for February 3, 2020, but Employee failed to appear. After issuing an order requiring Employee to show cause for his absence, Employee provided cause and I held a Telephonic Status Conference on March 19, 2020. During that conference, I determined that an Evidentiary Hearing was warranted on the issues identified by the DCCA. Following other status conferences and a May 2020 postponement requested by the parties, I scheduled an Evidentiary Hearing for October 13, 2020.

On September 5, 2020, Employee filed a Motion to Disqualify the undersigned. After considering the parties' arguments, I denied Employee's Motion and certified my denial to the OEA Board on October 22, 2020.[1] In the interim, the October 13, 2020, Evidentiary Hearing was postponed at the request of the parties. On March 25, 2021, the OEA Board issued an Order and Opinion on Employee's Interlocutory Appeal denying Employee's Motion.

Based on the parties' request, I held the Evidentiary Hearing on August 4, 2021. At the parties' request, the parties submitted their written closing arguments on November 19, 2021. On March 4, 2022, I issued an Initial Decision on Remand ("IDR") whereby I upheld Agency's action of terminating Employee from service after finding that Agency followed procedures under Bulletin No. 83 in denying Employee's DOH recertification.[2]

On March 8, 2022, Employee appealed the IDR to the D.C. Super. Ct. On December 21, 2022, the D.C. Super. Ct. remanded this matter to OEA to explain why Bulletin 83's requirements regarding National Registry of EMTs ("NREMT") certification apply to DOH recertification, as previously directed by DCCA.[3] On January 18, 2023, Employee appealed the D.C. Super. Ct.'s

[1] *See* OEA Rule 616.3.
[2] *Harold Dargan v. OEA*, Matter No. 1601-0091-13R20 (March 4, 2022).
[3] *Harold Dargan v. OEA*, Case No. 2022 CA 001072 (D.C. Super. Ct. December 21, 2022).

remand order. On February 7, 2023, DCCA ordered Employee to show cause why his appeal should not be dismissed for being taken from a non-final order.[4] On May 18, 2023, I held a Status Conference wherein I ordered the parties to submit briefs on the issue identified by DCCA by subdividing the general issue into its component parts. The parties have complied. 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. Does the National Registry of EMTs ("NREMT") certification apply to the D.C. Department of Health's ("DOH") recertification?
2. Does Bulletin 83's requirements regarding NREMT certification apply to DOH recertification?
3. What is the DOH recertification process for an EMT I/99 who no longer has a current DOH certificate?
4. Were the DOH's recertification processes followed before terminating Employee's employment?
5. If so, should Agency's termination of Employee's employment be upheld?

FINDINGS OF FACT[5]

In 2008, Agency instituted a policy to align its emergency medical services training and certification with the industry accepted standard as provided through the National Registry of EMTs ("NREMT").[6] Effective July 1, 2009, the District of Columbia Department of Health ("DOH") instituted a requirement that all emergency medical services ("EMS") providers would need to present a valid NREMT card in order to receive a District of Columbia EMS certification card.[7]

Prior to his termination, Employee was employed by Agency as a Basic Paramedic, Series DS699, Grade 8.[8] Bulletin No. 83 applied to *all* of Agency's members, including Employee.[9] Thus, Employee was governed by Agency's February 3, 2010, Bulletin No. 83, the purpose of which was to provide guidance for compliance with the District of Columbia certification requirements.[10]

Pursuant to Agency's February 3, 2010, Bulletin No. 83, all Agency employees were required to complete the National Registry process at their respective certification level and

[4] *Harold Dargan v. OEA*, Case No. 2022 CA 001072 (D.C. Super. Ct. February 7, 2023).
[5] The undersigned lists here the parties' joint stipulations of facts, uncontested documents and exhibits of record, and my findings of facts in previous Initial Decisions, including those made at the August 4, 2021, Evidentiary Hearing.
[6] Agency Bates #3.
[7] *Id.*
[8] Agency Exhibit 1.
[9] Agency Exhibit 2 at 3.
[10] *Id.*

maintain both National Registry certification *and* DOH certification.[11] The Bulletin stated that Agency employees who failed the National Registry EMT-Intermediate/99 psychomotor examination would be subject to adverse action.

During the relevant time-period, the District recognized four (4) levels of EMT certification: (1) EMT-Basic; (2) EMT-Advanced; (3) EMT-Intermediate (or EMT-I/99); and (4) EMT-Paramedic. EMT-Basic and EMT-Advanced were classified within the Basic Life Support ("BLS") level of care while EMT-Intermediate and EMT-Paramedic were classified within Advanced Life Support ("ALS") level of care.[12]

Prior to his termination, Employee possessed an NREMT certification card that designated him as an EMT-Intermediate which expired on March 31, 2014.[13] Prior to his termination, Employee possessed a DOH certification card that designated him as an EMT-Intermediate that was issued on June 18, 2010, and expired on June 30, 2012.[14] Employee's certification as an EMT-Intermediate was equivalent to Employee's job title as a Basic Paramedic.[15]

D.C. Official Code §7-2341.15(b)(2) gives the Mayor or his/her designee the power to deny issuance of, deny renewal of, suspend, or revoke a certification to perform the duties of emergency medical services personnel or of an emergency medical services instructor to an individual who is found to have failed to comply with any other federal or District law applicable to the duties of emergency medical services personnel. Under D.C. Official Code § 5-404.01(e)(1), the "provision of pre-hospital medical care by [Agency's] certified emergency medical technicians and paramedics shall be under the license of the Medical Director." "The clinical aspects of techniques, procedures, skills, competency, or efficiency, and adherence to medical protocol fall under the investigative and corrective purview of Office of Continuing Quality Improvement within the Office of the Medical Director. The component which the Operations Division has responsibility is in enforcing adherence to standard operating procedure and operational policies."[16]

While assigned to Medic No. 27 on June 14, 2011, Employee and his unit responded to a call for an unconscious 32-year-old female. The patient died.[17] The Medical Director concluded there were errors in the performance of the responding Emergency Medical Services ("EMS") team and that Employee failed in his paramedic duties. On June 14, 2011, the Office of the Medical Director removed Employee from his EMT job duties and reassigned him to Agency's Training Academy.[18] Employee was placed into a Critical Remediation Action Plan until further notice.[19] Employee underwent an extensive six (6) month remediation process involving classroom education, laboratory education, and numerous field evaluations.[20]

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[11] *Id.*
[12] Transcript ("Tr") pgs. 22-23.
[13] Agency Exhibit 3.
[14] Agency Exhibit 3, Transcript 22, L. 2-13.
[15] Agency Exhibit 1, Tr. at 22.
[16] Agency Bates #7, Transcript p. 84, L. 2-85.
[17] Agency Exhibit 4. Agency Exhibit 15 at 35-36.
[18] Agency Bates # 7. Agency Exhibit 15 at 36.
[19] Agency Exhibit 5; Transcript 24, L. 14-18.
[20] Agency Exhibit 5, Agency Exhibit 21, Tr. at 27-28.

On February 2, 2012, Agency's then-Medical Director, Dr. David Miramontes, tested Employee's skills as an EMT-Intermediate through a practical skills exam scenario. Dr. Miramontes determined that Employee's performance was inadequate and informed Employee that he would not sponsor him under his license as an EMT-Intermediate but *would* sponsor him as an EMT-Advanced.[21] Following his February 2, 2012, examination with Dr. Miramontes, Employee received twelve (12) additional days of extensive training at the Training Academy.[22]

On February 14, 2012, Dr. Miramontes once more tested Employee's skills as an EMT-Intermediate through a practical skills exam scenario and again found Employee's performance to be inadequate. Dr. Miramontes did not have "confidence" in Employee's skills as an ALS provider but still offered to sponsor Employee as an EMT-Advanced at the BLS level of care.[23] Dr. Miramontes wrote a letter to Dr. Brian Amy, Medical Director of the Health Emergency Preparedness and Response Administration at DOH, regarding Employee with the subject: "Request downgrade of Certification after Quality Review." In this letter dated February 14, 2012, Mr. Miramontes detailed Agency's remediation efforts and opined that Employee did not demonstrate the necessary skills required for him to function safely as an independent EMT-I/99 ALS provider. Accordingly, Dr. Miramontes requested that Employee's DOH certification be "dropped" from EMT-I/99 to EMT-Advanced.[24]

DOH did not take any official action regarding Employee's DOH certification in response to Dr. Miramontes' February 14, 2012, letter.[25] Employee completed an EMT-Intermediate Application dated May 30, 2012. Dr. Miramontes did not sign this application and it was not submitted to DOH.[26]

Dr. Miramontes wrote a follow-up letter to Dr. Amy dated June 25, 2012 with the subject: "Request revocation of Certification after provider Clinical Review [Employee] EMT I-99." In this letter, Dr. Miramontes stated that he personally tested Employee and found him to be incompetent despite retraining. Dr. Miramontes also stated that he could not allow Employee to practice under his license and that he would not sponsor him at the ALS scope of practice. Dr. Miramontes requested that DOH "decertify" Employee as an ALS EMS provider.[27] Miramontes wrote the June 25, 2012, follow up letter because while there had been previous discussion with the DOH, there had been no action taken on his previous letter and Employee's "certification was going to lapse on June 30th." This letter was "basically almost identical to the previous one" except that it requested decertification.[28]

Employee's EMT-Intermediate DOH certification expired at midnight on June 30, 2012.[29] By a Memorandum dated July 3, 2012, District EMS Training Coordinator Robert W. Austin noted receipt of Dr. Miramontes' June 25, 2012, letter and informed Dr. Miramontes that Employee's

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[21] Agency Exhibit 6, Transcript pgs. 29-32, 117, 216-217.
[22] Agency Exhibit 7, Tr. at 32-33, 208.
[23] Agency Exhibit 7, Transcript 33-34, 117.
[24] Agency Exhibit 8.
[25] Transcript p. 41.
[26] Agency Exhibit 9, Tr. at 213-214.
[27] Agency Exhibit 10.
[28] Transcript p. 41-42; Transcript p. 91, L. 17 Transcript p. 93, L.12.
[29] Agency Exhibit 3, 11.

DOH EMT-Intermediate certification expired at midnight on June 30, 2012. Mr. Austin also noted that DOH had not received an application of renewal and that therefore no action by DOH was necessary at that time.[30] Employee was no longer eligible to continue in his duties with Agency under Bulletin No. 83. Employee was offered the opportunity to apply for EMT-Advanced level certification. In an October 1, 2012, e-mail to Agency, Miramontes reported that Employee declined. [31] Employee was then referred to the Office of Compliance for termination.

On October 31, 2012, Agency issued an Advance Written Notice/Removal ("Advance Notice") to Employee proposing to terminate him from his position as a Basic Paramedic DS699, Grade 8 based on the following Charge and Specification: [32]

> **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-I[/99], 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 part: "Any on duty or employment related act or omission that interferes with the efficiency or integrity of government operations, to wit Incompetence and in 16 D.P.M. 1603.3(f)(5) (March 4, 2008)."
>
> **Specification No. 1:** In order to practice as a Paramedic or EMT, an employee must maintain D.C. Department of Health (DOH) certification. Your DOH certification expired on June 30, 2012.

The Advance Notice informed Employee of his right to review the material upon which the proposed action was based, to respond in writing within six (6) days of receipt of the Advance Notice, and to an administrative review by a Hearing Officer.[33] Prior to issuing the Advance Notice, Agency repeatedly offered Employee the opportunity to submit an application to DOH for certification as an EMT-Advanced but Employee did not do so.[34]

Employee timely submitted a written response to the Hearing Officer for consideration.[35] On March 28, 2013, the Hearing Officer issued a written decision finding that Agency's proposal to remove Employee from his position was supported by a preponderance of the evidence in the record and that the penalty of termination was reasonable. The Hearing Officer recommended that Employee be removed from his position. [36]

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[30] Agency Exhibit 11.
[31] Agency Exhibit 6 and 7, Agency Exhibit 21 at 62 and 74, Transcript at pgs. 31, 35-36, 44-45, 216-217.
[32] Agency Exhibit 15.
[33] Agency Exhibit 15 at 37.
[34] Agency Exhibit 6 and 7, Agency Exhibit 21 at 62 and 74, Tr. at 31, 35-36, 44-45, 216-217.
[35] Agency Exhibit 18 at 43.
[36] Agency Exhibit 18 at 50.

On April 25, 2013, Agency sent a Notice of Final Decision/Removal ("Final Decision") to Employee notifying him that he would be removed from his position effective May 3, 2013.[37] The Chief expressly noted his consideration of D.C. Official Code § 7-2341.15 (d), which prohibits the Agency from employing persons who no longer possess the requisite certifications. Employee's ACLS certification expired in May 2013. Employee's Cardio-Pulmonary Resuscitation (course C) certification expired in July 2013. Employee's EMT I/99 certification from the National Registry of Emergency Medical Technicians expired on March 31, 2014.

ANALYSIS AND CONCLUSIONS OF LAW

1. Does the National Registry of EMTs ("NREMT") certification apply to the Department of Health ("DOH") recertification?

Pursuant to the Emergency Medical Services Act of 2008, which became effective on March 25, 2009, DOH instituted a requirement that all District EMS providers must obtain NREMT certification.[38] From July 1, 2009, all EMS providers had to present a valid NREMT certification card in order to receive a District of Columbia EMS certification card from DOH.[39] This requirement applies to all new certification requests as well as to renewals of existing DOH certifications.[40] Thus, an EMS provider must have a valid NREMT certification card by the time their DOH certification is ready for renewal.[41] An application that does not have a copy of a valid NREMT certification card will not be accepted by DOH.[42]

In their briefs, both parties agree that NREMT certification applies to DOH certification insofar as all District EMS providers must obtain NREMT certification to receive a District of Columbia EMS certification card from DOH. It is undisputed that prior to his termination, Employee possessed a valid NREMT certification card that designated him as an EMT-Intermediate and did not expire until March 31, 2014.[43] Therefore, Employee's NREMT certification was not at issue on his May 3, 2013 termination date because those NREMT credentials were valid for 10 months beyond his termination.

2. Does Bulletin 83's requirements regarding NREMT certification apply to DOH recertification?

In their briefs, both parties agree that Bulletin No. 83's requirements regarding NREMT certification do not apply to DOH recertification. On February 3, 2010, Agency issued Bulletin No. 83 ("National Registry of EMTs (NREMT) Certification Policy."[44] Bulletin No. 83 was issued to "provide guidance for compliance with the District of Columbia certification requirements" after DOH instituted its requirement that, as of July 1, 2009, all District EMS providers must obtain

[37] Agency Exhibit 20.
[38] *See* DOH Policy Number 2010-0001 at 1.
[39] *Id.*
[40] *Id.*
[41] *Id.*
[42] *Id.* at 2.
[43] Agency Exhibit 3.
[44] Agency Exhibit 2.

NREMT certification.[45] Under the "General Policy" subheading, Bulletin No. 83 indicates that all Agency employees are "required to complete the national Registry certification process at their respective certification level . . . and maintain both National Registry certification and District of Columbia (Department of Health) certification."[46] Bulletin No. 83 then outlines the two NREMT examination components (cognitive and psychomotor) and details the testing procedures as to each.[47]

By their plain language, the testing procedures in Bulletin No. 83 apply solely to NREMT certification; there is absolutely no indication that they are at all applicable to DOH certifications or recertifications. All the testing procedures set forth in Bulletin No. 83 are discussed within the context of "the National Registry." Bulletin No. 83 references only "the National Registry" under its "Implementation Procedures," "Cognitive (Written) Examination Policies," and "Psychomotor (Practical Skills) Examination Policies" subheadings.[48] The only reference to DOH certification in Bulletin No. 83 is on the first page, which states that all Agency employees are required to maintain both NREMT certification *and* DOH certification. The relevance of Bulletin No. 83 to the instant case, where Employee was terminated for failing to maintain his DOH certification, is therefore extremely limited. Bulletin No. 83 is only relevant because it requires all Agency employees to maintain DOH certification. Here, Employee violated the mandate of Bulletin No. 83 because he failed to maintain his DOH certification, which expired on June 30, 2012.[49]

3. What is the DOH recertification process for an EMT I/99 who no longer has a current DOH certificate?

In their briefs, both parties agree that the DOH recertification process for an EMT I/99 required the completion of the DOH "EMT-Intermediate Application" (DC-DOH EMS Form 2010-0004D). To renew his EMT-Intermediate DOH certification, Employee was required to complete the DOH "EMT-Intermediate Application" (DC-DOH EMS Form 2010-0004D) ("Application").[50] The Application instructed Employee to provide basic personal information as well as information about work experience, professional history, and other mandatory certifications.[51] Under the "Certification Renewal Documentation" subheading, the Application indicated that an applicant who was renewing their EMT-Intermediate DOH certification had to include copies of their current NREMT certification as well as their Advanced Cardiovascular Life Support and CPR certification cards with their Application.[52]

Additionally, both the applicant and Agency's Medical Director had to sign and date the Application.[53] As Dr. Miramontes explained during the Evidentiary Hearing, the applicant first filled out the application, which was subsequently validated and double-checked by Agency's

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[45] Agency Exhibit 2 at 1.
[46] *Id.*
[47] *Id.* at 2-3.
[48] *Id.*
[49] Agency Exhibit 3.
[50] *See* DOH Policy Number 2010-0004 Revision 2 at 1 and 11; Agency Exhibit 9.
[51] Agency Exhibit 9.
[52] DOH Policy Number 2010-0004 Revision 2 at 11.
[53] DOH Policy Number 2010-0004 Revision 2 at 13; Agency Exhibit 9.

Training Academy.[54] Afterwards, the application was routed to Dr. Miramontes, who reviewed and signed it.[55] An employee of Agency's Training Academy then typically hand-carried the completed applications to DOH along with the payment vouchers.[56]

4. Was the DOH recertification process followed before terminating Employee's employment?

While Agency argues that the DOH recertification process was followed to the extent possible, Employee argues that the DOH recertification process was not followed solely on the ground that Dr. Miramontes refused to sign Employee's DOH application. However, I find that Employee's argument fails. Pursuant to the applicable statute, Agency's Medical Director has the discretion whether or not to sign Employee's DOH application based on his/her evaluation of Employee's EMT skills. Dr. Miramontes evaluated Employee's skills as an EMT-Intermediate through *two* practical skills exam scenarios on February 2, 2012, and February 14, 2012. (Emphasis added.) By signing Employee's Application, Dr. Miramontes would have been attesting to Employee's competence in all the skills of an EMT-Intermediate.[57] Thus, the evidence shows that his decision to not sign Employee's DOH certification application is supported by his real-time observation of Employee during the practice skills exams and his impressions of Employee's performance and is not arbitrary.

Employee also argues that Dr. Miramontes refused to submit Employee's DOH application to DOH. This argument also fails as it was Employee's obligation to submit said application as there is no law, regulation, or rule obligating the Medical Director to do so. In this case, Employee filled out the Application with the required information, signed it, and dated it May 30, 2012.[58] However, the Application was incomplete because Dr. Miramontes did not sign it. Dr. Miramontes did not sign Employee's Application for DOH recertification as an EMT-Intermediate because he decided not to sponsor Employee as an EMT-Intermediate based on Employee's "lack of performance during the remediation process."[59] Dr. Miramonte's decision not to sponsor Employee as an EMT-Intermediate was entirely within his discretion and supported by the relevant law.

Under D.C. Code § 5-404.01(e)(1), the "provision of pre-hospital medical care by [Agency's] certified emergency medical technicians and paramedics shall be under the license of the Medical Director." Pursuant to this provision, Agency's Medical Director has the discretion to withdraw his sponsorship so that a member can no longer practice under the Medical Director's license.[60] Importantly, the Medical Director *does not* have authority to deny issuance of, deny renewal of, suspend, or revoke a certification to perform the duties of emergency medical service personnel. Under the Emergency Medical Services Act of 2008, D.C. Code § 7-2341.15(b), "[t]he Mayor, subject to the right to a hearing as provided in § 7-2341.17, may deny issuance of, deny

[54] Tr. At 104.
[55] *Id.*
[56] *Id.*
[57] Agency Exhibit 9 at 28.
[58] Agency Exhibit 9.
[59] Tr. at 79, 87-88.
[60] Tr. at 18-20, 35, 42.

renewal of, suspend, or revoke a certification to perform the duties of emergency medical services personnel or of an emergency medical services instructor." Pursuant to Mayor's Order 2009-89 (June 1, 2009) Mayor Adrian M. Fenty delegated the authority vested in him by D.C. Code § 7-2341.15(b) to the Director of DOH, *not* Agency's Medical Director. (Emphasis added)

Indeed, Dr. Miramontes *did not* deny Employee's renewal of his EMT-Intermediate DOH certification; he only withdrew his sponsorship of Employee practicing under his license as an EMT-Intermediate. (Emphasis added) No legal authority required that any specific action be taken before Dr. Miramontes could decide to withdraw his sponsorship for Employee's DOH recertification as an EMT-Intermediate. Moreover, Agency did not forward incomplete or unsigned applications to DOH and there was no authority under which it would have been required to do so.[61]

Dr. Miramontes' decision to withdraw his sponsorship in this case was not made arbitrarily as evidenced by the efforts undertaken by Dr. Miramontes and Agency to remediate and retain Employee. Dr. Miramontes also repeatedly put Employee on notice months before the expiration of his EMT-Intermediate DOH certification that he was not going to sponsor him as an EMT-Intermediate but that he would sponsor him at a lower level of care, as an EMT-Advanced.[62] Agency emphasizes that it offered Employee the opportunity to apply for EMT-Advanced DOH certification even after his EMT-Intermediate DOH certification expired on June 30, 2012 and several months before Agency proposed taking adverse action against Employee.[63] Employee, however, did not apply for EMT-Advanced DOH certification despite having ample opportunity to do so and Agency had no choice but to propose Employee's termination for failure to maintain a DOH certification.[64]

5. If so, should Agency's termination of Employee's employment be upheld?

While Agency argues that its termination of Employee must be upheld, Employee argues the opposite on the ground that Agency's Medical Director should have signed Employee's DOH certification application. While conceding that the Medical Director had discretion, Employee made two contradictory arguments when he pointed out that he had either received or not received adequate retraining.[65] Despite Employee's protestation, the undersigned finds that the evidence shows that Employee had months of remedial training. According to the timeline of Employee's remediation created by Captain James Follin, who oversaw remediation for Dr. Miramontes at the Training Academy, Employee was in remediation from June 2011 to January 2012.[66] Employee also argues that he had demonstrated proficiency in patient care skills and ALS protocols, and that the Medical Director failed to follow protocols.

In essence, Employee disagrees with the Medical Director's medical evaluation decision

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[61] *Id.* at 120-121.
[62] Tr. at 117, 216-217.
[63] Tr. at 48, 91, 217.
[64] Tr. at 217.
[65] Employee's Brief on Second Remand (June 16, 2023).
[66] Agency Exhibit 21 at 58; Tr. at 124-125.

to not sponsor his DOH certification application. Under D.C. Code § 5-404.01(e)(1), the "provision of pre-hospital medical care by [Agency's] certified emergency medical technicians and paramedics shall be under the license of the Medical Director." As the Medical Director, Dr. Miramontes had the discretion to withdraw his sponsorship so that a member could no longer practice under his license. In this case, Dr. Miramontes withdrew his sponsorship for Employee to practice as an EMT-Intermediate under his license based on Employee's poor performance during remediation and, consequently, did not sign Employee's Application. There was no legal authority that: (1) required that any specific action be taken before Dr. Miramontes could decide to withdraw his sponsorship for Employee's DOH recertification as an EMT-Intermediate and/or (2) required Agency to forward incomplete or unsigned applications to DOH.

In this matter, Employee has not challenged the basis for his termination—his failure to maintain DOH certification. It is undisputed that Employee's EMT-Intermediate DOH certification expired on June 30, 2012, and that he did not possess a current DOH certification (at any level) prior to his termination. Employee's failure to maintain a current DOH certification constituted cause for disciplinary action given Bulletin No. 83's mandate that *all* EMS employees are required to maintain both NREMT *and* DOH certification. Employee was charged with violating this requirement in both the Advance Written Notice/Removal ("Advance Notice") and the Notice of Final Decision/Removal ("Final Decision").[67] As Chief Kenneth Ellerbe noted in the Final Decision, D.C. Code § 7-2341.15(d) also prohibits Agency from employing individuals who no longer possess the requisite certification.[68]

In his brief, Employee again attempts to relitigate his timeliness argument by asserting that Agency violated the ninety (90) day rule of D.C. Code § 5-1031(a), in issuing his adverse action notice. However, this issue was resolved in Agency's favor in the October 20, 2015, ID and the Sup. Ct. has affirmed this holding.[69] In addition, Employee's repeated use of this argument is not within the scope of the D.C. Court of Appeals' remand and will thus not be reconsidered.

CONCLUSION

Since July 1, 2009, DOH required all EMS providers to present a valid NREMT certification card to receive a District of Columbia EMS certification card from DOH. Employee's NREMT certification is not an issue in this case because he possessed a valid NREMT certification card at the time of his May 3, 2013, termination. By their plain language, the testing procedures in Agency's Bulletin No. 83, apply to NREMT certification, *not* DOH certifications or recertifications. The *only* reason that Bulletin No. 83 is relevant to this case is because it requires all Agency employees to maintain DOH certification. Employee failed to maintain his DOH certification, which is why Agency charged Employee with violating Bulletin No. 83.

When Employee refused Agency's offer to apply for EMT-Advanced DOH certification even a*fter* his EMT-Intermediate DOH certification expired, Agency had cause to take adverse action against Employee for failing to maintain a current DOH certification and effectuated his termination consistent with District of Columbia law. Therefore, in effectuating Employee's removal, I find that Agency followed the relevant notice requirements, and that Employee was

[67] Agency Exhibit 15; Agency Exhibit 20.
[68] Agency Exhibit 20.
[69] *Harold Dargan v. OEA*, Case No. 2015 CA 008873 (D.C. Super. Ct. February 7, 2017).

given proper due process. I further find that Agency properly removed Employee for cause. Employee's failure to maintain his DOH certification precluded him from providing services as a Basic Paramedic.

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."[70] OEA has previously held that the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.[71] 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.[72] 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.[73]

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[74] The evidence did not establish that the penalty of termination for failure to maintain the statutorily required medical certification constituted an abuse of discretion. Indeed, once Employee fails to hold the required medical certifications for his position, Agency is statutorily bound under D.C. Code § 7-2341.15(d) to terminate Employee's employment.

Based on the aforementioned, I find that there is no clear error in judgment by Agency. Termination was a valid penalty under the circumstances and is mandated under the medical statute. Based on a preponderance of the evidence and upon consideration of the findings of fact

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[70] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

[71] *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles,* OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections,* OEA Matter No. 1601-0062-08 (April 25, 2011).

[72] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Holland v. D.C. Department of Corrections,* OEA Matter No. 1601-0062-08 (April 25, 2011); *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (February 1, 1996); and *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995).

[73] *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,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).

[74] *Butler v. Department of Motor Vehicles,* OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).

and conclusions of law, I find that Agency's action of terminating Employee from service should be upheld.

ORDER

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

FOR THE OFFICE:

s/Joseph Lim
Joseph E. Lim, Esq.
Senior Administrative Judge