THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
EMPLOYEE[1],	)	
Employee	)	OEA Matter No. 1601-0018-23
v.	)	Date of Issuance: August 26, 2025
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT,	)	Michelle R. Harris, Esq.
Agency	)	Senior Administrative Judge

Mark Wilhite, Esq., Employee Representative
Connor Finch, Esq., Agency Representative[2]

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

On December 29, 2022, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA" or "Office") contesting the District of Columbia Department of Fire and Emergency Medical Services' ("Agency" or "FEMS") decision to terminate him from service, effective December 3, 2022. OEA issued a letter dated December 28, 2022, requiring Agency to file an Answer to Employee's Petition for Appeal. Agency filed its Answer to Employee's Petition for Appeal on January 27, 2023. This matter was assigned to the undersigned Senior Administrative Judge ("AJ") on January 31, 2023. On February 1, 2023, I issued an Order Convening a Prehearing Conference in this matter for February 28, 2023. Prehearing statements were due by or before February 21, 2023. On February 23, 2023, Employee filed a Motion for an Extension of time and cited therein that Agency had consented to his request. On February 23, 2023, I issued an Order granting Employee's Motion. The Prehearing Conference was now scheduled for April 18, 2023, and Prehearing statements were due by or before March 31, 2023. On March 31, 2023, Employee filed another Motion for an Extension of time, citing that he was finalizing representation and more time was needed for his counsel to prepare. Following email correspondence, it was determined that the April 18th Conference would proceed. On April 18, 2023, Employee, his counsel and Agency's representative all appeared for the conference.

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Agency was previously represented by Rashaan Dickerson, Esq., in this matter.

During the Prehearing Conference, I found that because there was a Fire Trial Board hearing in this matter, OEA's review of this appeal was subject to the standard of review outlined in *Elton Pinkard v. D.C. Metropolitan Police Department,* 801 A.2d 86 (D.C. 2002). As a result, the parties were ordered to submit briefs addressing whether (1) the Fire Trial Board's decision was supported by substantial evidence; (2) whether there was a harmful procedural error; and (3) whether Agency's action was done in accordance with all laws and/or regulations. Both parties complied with the deadlines set forth in that Order. Additionally, Employee raised an issue regarding Agency's use of the 2012 version of the District Personnel Manual (DPM), thus the parties were also required to address that issue. A Post Prehearing Conference Order was issued that same day providing the deadlines for briefs. Agency's brief was due by June 5, 2023, Employee's brief was due by July 10, 2023, and Agency had the option to submit a sur-reply brief by July 26, 2023. Following several motions requesting extensions of time to submit their briefs, the parties completed the initial briefing schedule.

On January 5, 2024, the undersigned issued an Order scheduling a Status Conference for January 16, 2024, to discuss matters pertaining to the instant appeal. Both parties appeared for the Status Conference as required. During the Conference, the undersigned advised the parties, that in light of a recent decision issued by the Superior Court for the District of Columbia in the matter of *Traes Ceasar v. DCFEMS* 2023-CAB-1076 (December 29, 2023), that supplemental briefs were warranted. Specifically, the *Ceasar* decision addressed issues related to the instant matter regarding the use of the 2012 District Personnel Manual ("DPM") version versus the 2017/2019 DPM versions.[3] That same day, I issued a Post Status Conference Order scheduling the due dates for the briefs. Agency's brief was due on or before March 7, 2024, and Employee's brief was due on or before April 16, 2024. On March 7, 2024, Agency filed a Consent Motion for an Enlargement of Time for which to submit its brief. Agency cited therein that the current representative would be leaving the Agency, and more time was needed for the matter to be reassigned. Agency requested an additional 30 days to allow for time to submit its brief. On March 8, 2024, I issued an Order granting Agency's Motion. Agency's brief was due on April 12, 2024, and Employee's brief was due on May 13, 2024. On May 13, 2024, Employee, by and through his counsel, filed a Consent Motion for an Enlargement of Time to File to June 3, 2024. Employee noted therein that Employee's counsel had been out on bereavement leave due to a death in his family. Following additional extensions, all briefs were submitted as required. The record is closed.

JURISDICTION

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

ISSUES

1) Whether the Trial Board's decision was supported by substantial evidence;
2) Whether there was harmful procedural error;
3) Whether Agency's action was done in accordance with applicable laws or regulations.

[3] At the time of the issuance of the January 5th Order, there were also two (2) other related matters pending before Superior Court which also address the DPM version. Those matters: *Danaraye Lewis v DCFEMS.* 2023-CA- 001068 (pending before Judge Kravitz), and *Anthony Thomas v DCFEMS*, 2023 CAB-003933 (pending before Judge Scott). Agency filed a Notice of Authority pursuant to the *Ceasar* decision in the *Danaraye Lewis* matter.

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.

STATEMENT OF THE CHARGES

According to Agency's Departmental Record (inclusive of Agency Answer) at Tab 18[4], Employee's adverse action was predicated on the following charges and specifications, which are reprinted in pertinent part below:

Charge 1: Violation of D.C. Fire and Emergency Medical Department Order Book Article VI § 6 (Conduct Unbecoming), which states:

> **Conduct unbecoming** an employee includes conduct detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or any conduct that violates public trust or law of the United States, any law, municipal ordinance, or regulation of the District of Columbia committed while on-duty or off-duty.
>
> This misconduct is defined as cause in the D.C. Fire and Emergency Medical Services Department Order Book Article VII §2(e), which states: "Any on duty or employment related-act or omission that the employee knew or should reasonably have known is a violation of law." *See also* 16 DPM § 1603.3(e).
>
> This misconduct is further defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII § 2(h), which states: "Any act which constitutes a

[4] On May 5, 2023, Agency filed a supplemental record because the previously filed Answer and record was incomplete.

criminal offense whether or not the act results in a convction." See also 16 DPM §1604.4.(h)

Specification 1: In his email (dated 4/28/2020), Metropolitan Police Department Lieutenant Jaron Hickman describes [Employee's] misconduct as follows:

3rd Degree Sexual Abuse (Known)

Incident Date/Time: 4/25/2020, 0700-0715 hours
Victim #1: [A.B.]
Suspect #1: [Employee]

Summary
V 1 reports while in bunk area of DC FEMS station for Engine 14, S1 engaged in forced sexual contact (touching of the breast) with her which was unwanted. After the incident, S1 called V1 via telephone which was unanswered by V1. V1 then sent S1 a text message advising him that the incident was inappropriate.

Further, in his Special Report dated (06/02/202) [Employee] describes his misconduct as follows:

I [Employee], was charged, arrested, or issued a criminal summons on May 22, 2020 in Washington, DC by [the Metropolitan Police Department]. I was charged with Sexual Abuse ([misdemeanor]).

Further, in the **JUDGEMENT IN CRIMINAL CASE** (dated 06/27/2022), D.C. Superior Court Judge Peter A. Krauthamer describes [Employee's] misconduct as follows:
THE DEFENDANT HAVING BEEN FOUND GUILTY ON THE FOLLOWING COUNT(S)AS INDICATED BELOW:

Count Court Finding
1. Trial By Court – Guilty Sex Abuse – [Misdemeanor]

SENTENCE OF THE COURT

Count 1 Sex Abuse-Misd. Sentenced to 120-day(s) incarceration, execution of sentence suspended as to all, *Supervised Probation for 12 month(s), $50.00 VVCA, VVCA due date 06/27/2023.

Further, in the **STAY AWAY/NO CONTACT ORDER** (dated 06/27/2022), D.C. Superior Court Judge Peter A. Krauthamer describes [Employee's] misconduct as follows:

> You, the Defendant in this case, MUST obey the following conditions, which are being imposed IN ADDITION to any other conditions that the Court may impose as part of your incarceration, as a condition of your probation, or as suggested condition of your supervised release;
>
> X no harassing, abusive, assaultive, threatening or stalking behavior toward **A.B**.
> X You are to stay away from the persons listed below: **A.B.**
>
> **YOU, THE DEFENDANT, ARE TO HAVE NO CONTACT WITH ANY OF THE PERSONS NAMED ABOVE BY ANY MEANS WHATSOEVER. THIS MEANS THAT YOU SHALL REMAIN AT LEAST 100 YARDS AWAY FROM THEM, THEIR HOME, AND/OR THEIR PLACE OF EMPLOYMENT, AND THAT YOU SHALL NOT COMMUNICATE OR EVEN ATTEMPT TO COMMUNICATE WITH ANY OF THESE PERSONS NAMED ABOVE, EITHER DIRECTLY OR THROUGH ANY OTHER PERSON, (EXCEPT THROUGH YOUR LAWYER), BY TELEPHONE, WRITTEN MESSAGE, ELECTRONIC MESSAGE, PAGER, OR ANY FORM OF SOCIAL MEDIA OR OTHERWISE.**
>
> [Employee's] admitted failure to observe precautions regarding safety constitutes neglect of duty, and his probable cause arrest confirms that he committed a criminal offense whether or not the act results in a conviction. Moreover, [Employee's] sex abuse conviction and sentence (including the Stay Away Order) establishes beyond a reasonable doubt that he violated the law. Accordingly, this termination action is proposed.

SUMMARY OF THE TESTIMONY

On October 14, 2022, Agency held a Trial Board Hearing. During the hearing, testimony and evidence were presented for consideration and adjudication relative to the instant matter. The following represents what the undersigned has determined to be the most relevant facts adduced from the findings of fact, as well as the transcript (hereinafter denoted as "Tr."), generated and reproduced as part of the Trial Board Hearing.

Agency's Case in Chief

Detective David Evans ("Evans") Tr. pages 37 – 72.

Evans is a Detective with the Metropolitan Police Department ("MPD"). Evans testified that he is currently assigned to the MPD investigation task force and that he is a task force officer. Evans has been with MPD for 23 ½ years. Evans was assigned to MPDs sexual assault unit. He was with the sexual assault unit from May 2018 until January 6, 2021. During his time in the sexual assault unit, Evans was tasked with investigating an allegation of sexual assault committed by Employee. Evans testified that he received this assignment from an officer in the 6th district that requested a Detective from the sexual assault unit to respond to the 6th district substation. Evans explained that he

contacted the officer at the 6th district substation who at that time was working in the station as station personnel. That officer advised that he had a female in the station who had stated that she was a DC fire fighter and that she was the victim of a sexual assault. Evans recalled that the date of this notification was April 27, 2020. Evans testified that following the receipt of this information he went to the 6th district substation which was located at 2701 Pennsylvania Ave. SE. He met with the station officer who appointed him to Firefighter B, who was seated in the community room. That officer cited that firefighter B stated that she was inside of a bunk room inside the firehouse when Employee grabbed her breasts.

Evans testified that in accordance with the policies of the sexual assault unit, he interviewed her in a safe secure and private location and that 90% of the time they audio recorded their interviews. Evans identified the victim as A.B. Evans testified that A.B. conveyed to him during the interview that she was working at a secondary firehouse on an overtime assignment. She was assigned to drive the ambulance over the weekend, and she recalled that this was a Friday night into a Saturday. This was not her typical assigned house, and she had worked overtime hours. Evans explained that A.B. told him that at about 3:00 AM she was working and she went up to the bunk room to try to get some rest before going onto her normal shift at her other firehouse. While inside the bunk room, she was awoken by a person she knew to be Employee who was standing over her with what she thought was a cell phone flashlight. He woke her up and told her that she had to get up because she was late for duty. Evans said that A.B. said there was interaction between the two (2) of them and at that some point in that time, Employee reached inside A.B.'s shirt and grabbed her breasts. Evans attested that upon review of that information he made the determination that what A.B. described fit the criteria for third degree sexual abuse. Evans also stated that following this interaction with Employee, A.B. explained that she felt something scratching inside her shirt and reached inside her bra and discovered $40 of US currency shoved inside of her bra. A.B. told Evans that she later threw the $40 out of her vehicle window as she was driving to her normal duty station. A.B. also told Evans that she sent a text to the phone number she believed to be Employee's and described how violated and disappointed she was in his behavior. A.B. told Evans that Employee responded back to that text and asked A.B. to call him.

Evans also cited that A.B. told him that she had notified her duty lieutenant about the assault, and that prior to that, she also contacted her mother via telephone and told her what happened. Evans testified that he ensured A.B. had information about the national victims for recovery of DC which assists survivors of sexual assault. Evan testified that when he returned to his office, he contacted the on-duty battalion chief for the fire department. Evans could not recall the name of the person but noted that it was a deputy fire chief in charge of what they would call DE Knight Hall for the Police Department. Evans also noted that he notified the chain of command that there was an allegation of sexual assault and misconduct by a DC firefighter involving another DC firefighter. Evans further testified that he received a call from the now retired deputy fire chief Milton Douglas ("Douglas"). Evans stated that what stood out to him about his conversation with Douglas with that Douglas indicated that he had just gotten a call earlier in the day from Employee making an allegation that he was being extorted by someone for the amount of around $3000, and that if he did not pay that money, then the individual would divulge information about an assault that he allegedly performed on another firefighter. Douglas told Evans that Employee indicated that he could not identify the person he spoke with because they had an accent. Evans also cited that Douglas shared with him that he thought it was odd that a lieutenant would contact the deputy chief in charge of internal affairs directly for this type of matter. Evans also asked Douglas if he would provide Employee's name and biographical information which Douglas sent to Evans via email later.

Evans testified that the next step in this process is an interview called the outcry witness. Evans explained that an outcry witness is the person who the complainant or survivor reports the incident to first. This could be a friend or family member, or clergy and they like to interview that person for the capital investigation. Evans explained that in this case, the outcry witness was A.B.' mother. Evans cited that A.B.'s mother did not live in the area so the only way to contact her was via telephone. When Evans stated that when he spoke with A.B.'s mother, she indicated that her daughter had told her that the firefighter lieutenant who was working outside of her station had grabbed her breast. Evans said that he also asked A.B.'s mother if she or any family members that spoke with an accent contacted this lieutenant, and the mother stated 'no' and that all of their family is from the United States. Evans averred that the mother also stated that they do not know anyone with any kind of accent. He also asked A.B.'s mother if A.B. had a brother too, which she said she did not. Evans testified that minus some specific details the base of the interview with A.B.'s mother was similar to the interview with A.B. Evans testified that his next step was to present his findings to the United States Attorney's office ("USAO"), to. get an affidavit in support of an arrest warrant. Evans explained that the USAO reviews affidavits and decides if more information is needed and if there is further investigation required. Evans testified that Assistant United States Attorney Lindsey Sutterberg requested a copy of Employee's personnel file. Evans cited that he reached back out to Chief Douglas and obtained a copy of Employee's personnel file. Evans further noted that once the United States Attorney's office reviewed the investigation report, the charges, his recommendation citing that this was third degree sexual abuse, the USAO made a final decision that there was probable cause for a misdemeanor sexual abuse. Tr. 54.

Evans explained that once the USAO approved the affidavit, it was sent to a judge at DC Superior Court. Evans testified that the judge reviewed the affidavit for probable cause and signed the affidavit which became a warrant for Employee's arrest for the charge of misdemeanor sexual abuse. Evans identified a citation release form for Employee. Evans also identified a form called a Gerstein which is a charging document. Evans testified that he did reach out to Employee to provide a statement about the allegations against him. He cited that Employee responded directly to his emails and referred him to his attorney and that after that he worked with Employee's attorney. Following this, he also worked with Employee's attorney to make arrangements for Employee to surrender himself to the First District police station. Evans testified that this matter proceeded to a criminal trial and was before a judge in June 2022. Evans testified at this hearing. He cited that Employee was found guilty in the criminal matter by a judge DC Superior Court for the crime of misdemeanor sexual abuse.

On cross-examination, Evans cited that it is his goal to keep good notes of cases that he investigates. Evans explained that when he said in his previous testimony that he later found out about $40 is that while the $40 was brought up in the initial investigation, he did learn what happened to that money until it was requested by Assistant United States Attorney at which time he contacted A.B. and she explained what happened to the $40. Evans cited that this happened after the affidavit for the arrest warrant had been signed. Evans could not recall exactly when the conversation took place but that it was after the affidavit had been signed for a warrant against Employee. Evans did not know whether he wrote that down or not in his notes, but he cited that it might be in his notes. Evans also testified that all of his notes were turned over as part of the criminal trial and should be part of the record. Evans also recalled that he had A.B. report to the 6th District. substation probably in the evening as he recalled it may have been dark outside. Evans also noted that the sexual assault unit headquarters is located at 300 Indiana Ave. NW. Evans also testified that when speaking with Chief Douglas that was the first time he had spoken to him and had never spoken or met chief Milton

Douglas prior to this case. Evans iterated that Chief Douglas assisted with a request for Employee's personnel file which was requested by the Assistant United States Attorney who was reviewing this case. Evans testified that they also requested A.B.'s personnel file and that they received that as well. Tr. 64-65. When asked whether he had any other contact with A.B. following the 6th District affidavit, Evans affirmed that he had. He noted that he did not visit the firehouse where the incident supposedly took place. Tr. 66-67.

The Panel inquired as to how long Evans had been with MPD and been a detective. Evans explained that he had been with MPD for 23 years and he had been a detective for 10 years. Tr. 67. He testified that he did not know A.B., her mother, or Employee prior to this investigation. Tr. 68-60. Evans explained that once he completed his investigation, he submitted it to his Sergeant, and they reviewed the affidavit in support of an arrest warrant. He averred that if changes are needed, those are completed at that time. Tr. 69. Then it is sent for review by a Lieutenant or above. He further noted that at that time, the Lieutenant of the sexual assault unit was Jaron Hickman and he reviewed this arrest warrant before it was sent to the United States Attorney's Office (USAO). Tr. 69-70. Evans cited that neither Employee nor his representative informed him of a call he received. Tr. 70. On redirect, Evans explained that for the investigation regarding the $40, it was not relevant, but he initially learned about it from A.B. in her April 27th report. Tr. 71.

Retired Chief Milton Douglas ("Douglas") Tr. Pp. 74 – 101

Douglas worked for the Agency for 35 years until his retirement. His last duty assignment was as the Assistant Fire Chief of Technical Services, which he led for about six (6) years. Prior to that, he was a Deputy Fire Chief for the oversight of the Office of Internal Affairs. He testified that in April 2020, he was with the Office of Internal Affairs. Tr. 75. His responsibilities in that role included the oversight of employees' conduct and oversight of serious misconduct of members. Tr. 76. He affirmed that he became aware of an alleged sexual assault committed by a member Employee. Tr. 76. He stated that he received a notification of an incident from Deputy Chief Thomas Dean. Tr. 76. Douglas also explained that Deputy Chief Dean indicated that Detective Evans from the MPD would be contacting him about the incident. Tr. 77. Douglas affirmed upon review of documents that he had exchanges with Detective Evans on April 27th. Tr. 77. Douglas explained that he and Evans discussed the incident that had occurred in the quarters of Engine 14. Douglas also noted that he received a call from Employee around 4pm. Tr. 78. He testified that he and Employee discussed that Employee had received a call from the Captain on November 28th regarding A.B. Tr. 78. Douglas said that Employee cited that A.B. had been working overtime, and on November 28th, he went over to tell her that her Officer was requesting her. Tr. 79. He said that he left but went back into the bunk to tell her not to forget her bag and do her temperature check. Tr. 79. Douglas went on to explain that Employee also told him he received another call and that afterward he went ot Engine 14 to see if the temperature check had been done. Tr. 79. He said Employee told him that he noticed A.B. was sitting in her vehicle, so he tried to reach her via her cell but received no answer. Tr. 80. He said Employee also told him that later that day, he received a call from a male saying he needed to bring $3,000 to McDonald's and if not, he would tell everything Employee had done to his sister. Tr. 80.

Douglas testified that it was not typical to receive calls like the one he received from Employee. Tr. 81. Douglas noted that he took notes during the call and then asked Employee questions. He inquired whether Employee had notified his Battalion Commander or MPD, but Employee answered that he had not. Tr. 82. Douglas cited that he completed a special report into his

investigation which was dated April 28, 2020. He identified Agency Exhibit Bates Page 46 as the D.C. Crime Unit's Memorandum Special Report that was generated to document his conversation with Employee. Tr. 83. He iterated that he prepared this memorandum as he was taking notes during his call with Employee. Tr. 84. Douglas also explained that Employee indicated he had received a text from A.B., however Douglas never received that text. Tr. 85. He also noted that Employee seemed to avoid answering his question about what the details of the text were. He further noted that Employee said he couldn't recall it and would have to forward it to him. Douglas noted at the time of the testimony that he had not received the text from Employee. Tr. 85-86.

Douglas further explained that he provided a memorandum to Detective Evans because Evans had inquired about the conversation he had with Employee. Tr. 86. Douglas explained that he had a conversation via telephone with Detective Evans. Tr. 88. Douglas testified that this incident was investigated by the Office of Internal Affairs. Tr. 88-89.

On cross-examination, Douglas explained that he found it "odd" that Employee called him about the matter because there is a process that is followed and that someone from the Office of Internal Affairs would have handled that. Tr. 92. Douglas reiterated that even if Employee had called Captain Melonie Barnes prior, he did not understand why Employee called him. Tr. 92. Chief Douglas further testified that he could not recall whether he or anyone in the Office of Internal Affairs followed up with Employee regarding the $3,000. Tr. 96. He cited that all that information was provided to MPD. Tr. 96. Douglas also affirmed that the report dated April 28th was not recorded via audio or video. Tr. 96. He did not schedule a time for recording with Employee. Tr. 97. He also affirmed that his report stated that Employee called A.B. and there was no answer. Tr. 97. He affirmed that this conversation was not recorded either. He did not confirm with Employee before submitting his report. Tr. 98.

On redirect, Douglas testified that Employee did not provide a phone number, or any documentation or other evidence of a call that he received from someone purportedly to be A.B.'s brother. Tr. 100. The Panel asked if the Agency was considered the lead in a criminal matter like this and Douglas answered "no". Tr. 101. Douglas explained that he collected information and provided it to the MPD. Tr. 101.

Captain Melone Barnes ("Barnes") Tr. 103 – 122

Barnes explained that she has been with Agency for 26 years and is currently a captain with the Office of Internal Affairs ("OIA"). Tr. 103. She noted that she has been with OIA for nine (9) years and serves as an investigator where she investigates any misconduct or criminal activities among members. Tr. 104. She affirmed that there came a time where she investigated a sexual assault allegation between Employee and another member. She testified that the assignment was given to her by her former supervisor Assistant Chief Milton Douglas. Tr. 104-105. Barnes identified Agency's Exhibit 30 as the final investigative report she prepared regarding her investigation of Employee. Tr. 105-106. Barnes further testified that this matter was criminal in nature, so she could not act on it until it was adjudicated in court which is called "tolling." Tr. 106. Barnes affirmed that she stayed apprised of the developments in the criminal proceeding in this matter. Tr. 107. She also affirmed that she learned that Employee went to trial regarding that criminal matter and noted that the disposition of the criminal matter was that Employee was found guilty of misdemeanor sexual assault. Tr. 109. She cited that this was reflected on page 53 of the report. She also noted that the report stated that Employee was sentenced to 120 days of incarceration, all of

which were suspended, and he was on supervised probation for 12 months and ordered to pay a fine. Tr. 109-110. Barnes testified that there was also a stay away/no contact order from the victim. Tr. 110. She identified from the report that the date of this order was June 27, 2022. Tr. 110. Barnes testified that she recommended that the charges against Employee be sustained based on the guilty findings in court. Tr. 111.

On cross examination, Barnes affirmed that the memorandum dated June 29, 2022, was the final investigative report she prepared. Tr. 112. When asked why under Employee's name there was a note that said, "no statement provided", Barnes explained that Employee did not come to OIA for an administrative interview. Tr. 114. Barnes reiterated that her report was based upon the testimony in Court and the judicial proceedings. Barnes also testified that she did not interview anyone from Engine 14. Tr. 117. She cited that she was not provided with any names of members in the bunkroom of Engine 14 present during the alleged incident. Tr. 117. When asked regarding her findings that Employee had fabricated the story regarding the extortion of $3,000, Barnes cited that the report findings spoke for themselves. Tr. 119. Barnes testified that in her nine (9) years of experience, OIA has investigated complaints of sexual misconduct. Tr. 121.

On redirect, Barnes testified that she was not allowed to obtain Employee's statement during the criminal investigation, as they are not allowed to conduct parallel investigations with criminal investigations. Tr. 122.

A.B. Tr. Pages 125 – 142[5]

A.B. testified that she is employed with Agency as a Firefighter/EMT and is currently assigned to Engine 28. She has been with Agency for 10 years. She cited that in April 2020, she was with Engine 14. Tr. 125. She noted that she was also assigned to Engine 28 at that time as well. Tr. 126. A.B. affirmed that she was working on April 24, 2020, at Engine 14 and it was an overtime assignment. Tr. 126. She cited that she was on the ambulance the night before and that her shift started on April 24, 2020, and concluded on April 25, 2020. Tr. 126. She asserted that she was scheduled to work at Engine 28 on April 25, 2025, and her shift ended at Engine 14 at 0700. A.B. testified that she wasn't relieved at the end of her shift, so she was asleep until her relief arrived and then she left in her car to go to the next firehouse. Tr. 127.

A.B. explained that when the ambulance got back to Engine 14 firehouse, she went to settle down and to sleep. Tr. 128. She testified that she felt someone standing over top of her and wasn't aware that it was 7am. She opened her eyes and saw Employee standing over her with a cellphone and flashlight on her. Tr. 128. He told her that the officer from Engine 28 was looking for her and that he told her officer that she hadn't been relieved yet. Tr. 128. She said that she said ok and that Employee then began to crack jokes and leaned in and stated, "with your sexy ass" and then he left the bunkroom. Tr. 128. A.B. explained that she had been laying down in the bunkroom at Engine 14. Tr. 129. A.B. further testified that the jokes did not make her feel awkward at first until he leaned in and said, "with your sexy ass." Tr. 130. She said she felt unsettled after that and felt she needed to get out of there. Once Employee left, she testified that she immediately got up and packed up her linen. Tr. 130.

[5] Given the nature the charges and the testimony elicited, this witness' name has been abbreviated to be represented only by initials for the purposes of this Initial Decision.

A.B. testified that Employee walked back into the bunkroom and asked if she had left something in the ambulance. Tr. 131. She said that she may have left her 'go' bag. She explained that Employee asked her "oh you didn't leave this" and walked up to her and put his hand down her shirt and grabbed her right breast. Tr. 131. A.B. testified that she removed his hand and felt resistance as if he was trying to feel her left breast. Tr. 131. He then took his hand out of her shirt and said, "let me get out of here" and he did not come back into the bunkroom. Tr. 132. She testified that she immediately went to her car. A.B. asserted that she had not asked Employee to touch her in anyway. Tr. 132. She explained that she felt violated because it was supposed to be a safe space and she felt taken advantage of. Tr. 133. She stated that she sat in her car for a few minutes replaying everything and felt something scratching in her bra. She checked her bra and found "40 balled up dollars" that Employee had put in her bra. Tr. 133. She further testified that soon after, Employee came knocking on her driver side window asking her if she was okay. She explained that she told him "I'm good" and pulled off the premises. Tr. 134. While on route to Engine 28, she called her mother because she was the first person she felt she could call to comfort her. Tr. 134.

A.B. explained that there was never a relationship with Employee. She asserted that she had seen Employee a few times at the training academy, and they had never worked together. This was her first time working with him. Tr. 135. A.B. further explained that she was emotional while talking to her mother. Once she arrived at the firehouse, she replayed it all again, while sitting in the locker room. She cited that she wasn't sure if she wanted to tell her officer at the time because being in a predominately male workspace as a female, she didn't want to make other people uncomfortable. Tr. 136. A.B. testified that she disposed of the $40 dollars she found in her bra while on route to Engine 28. She cited that it had two (2) $20 bills. Tr. 136. She didn't know what the $40 was for or why he touched her. She further explained that while in the locker room, she sent Employee a text and elaborated on how it made her feel and that she didn't understand what impression she gave him to think that would be okay or that he could do that. Tr. 137. She also said she cursed him out in the text. A.B. testified that Employee called her phone, but she did not answer because she did not want to talk at that point. Tr. 137. A.B. cited that she probably sent the text approximately 45minutes to an hour after everything had happened. Tr. 138.

A.B. stated that after she didn't answer Employee's call, Employee texted her and asked her to please give him a call, but she did not respond. Tr. 138. She stated that at that time, she had talked to her mother and godmother about the incident. Tr. 139. A.B. testified that after that, she went to the police department and spoke with Detective Evans. Tr. 139. After she left the police, she called her Lieutenant at the time – Lt. McMann. Tr. 139. She cited that Detective Evans took a report as he asked questions, took notes and also recorded her. A.B. also testified that she provided testimony during a criminal proceeding and affirmed that she testified under oath regarding the April 25, 2020, incident. Tr.140. A.B. explained that she believed Employee had a cellphone flashlight on during the April 25th incident because it was very dark in the bunkroom. She also cited that she did not recall what time this had occurred because she woke up after feeling a presence over her. Tr. 141.

A.B. testified that the incident has impacted her, as she is more reserved and doesn't always feel comfortable in the bunkrooms with others, especially at night. Tr. 142. She explained that she works mornings, so she doesn't have to sleep with different crew shifts. Tr. 142.

The Panel noted that Employee was not permitted to cross-examine A.B. due to the standing court order of no contact (physical or verbal). Agency Representative also noted that the order

cited that Employee was to have no contact with A.B. except through an attorney which he did not retain prior to the Trial Board Hearing. Tr. 144-145*

Employee's Case in Chief

Firefighter Laurie Parrish ("Parrish") Tr. 146 – 157

Parrish testified that she is a member with Agency and she is assigned to Engine 8, Platoon 3. She's been with Agency for 15 years and affirmed that she has known Employee that entire time. Tr. 147. She explained that she has not had any difficulty with Employee, and it was her opinion that Employee was a "squared away officer on a professional level." Tr. 147-148. Parrish also testified that she has personally known Employee for 30 years and that he does what he's supposed to do. Tr. 148. Parrish affirmed that she has seen Employee upset and agitated, namely when he was going through challenges with child support and custody issues. Tr.149. She also explained that Employee has health challenges, including obesity, diabetes and also believed he has had a heart attack. Tr. 149. Parrish testified that she heard that Employee was removed from operations due to a sexual harassment issue with a young woman. Tr. 149-150. Parrish explained that it doesn't affect her personally because she had never had an encounter with Employee in that way, and as of today, felt she could still be led by Employee if he were her officer. Tr. 150. Parrish cited that Employee had never sexually abused or attempted to sexually abuse her. Tr. 150-151.

On cross examination, Parrish affirmed that she considered Employee to be a friend outside of work. Parrish testified that she was not familiar with any past incidents Employee has had with disciplinary incidents. Parrish reiterated that she did not know the specifics about the current incident. Tr. 152. She stated that Employee told her that he was in some trouble at work and that a young lady was accusing him of something sexual in nature. Tr. 153. She said Employee told her that he didn't really want to talk about every little thing, so she does not know all the details. Tr. 153. Parrish was aware of the criminal proceedings and knew that Employee had been found guilty but cited that she did not know what the charge was. Tr. 154. The Panel asked Parrish whether she thought it would be difficult for Employee to manage a company given that he now has a criminal history, to which Parrish cited that Employee is still knowledgeable, but that operations wise he might find difficulty with a criminal background. Tr. 156-157.

Lieutenant Kenneth Humphries ("Humphries") Tr. 159 – 171

Humphries testified that he was currently a Lieutenant at Truck 4, but was previously assigned to Engine 14, Platoon 4. Tr. 159. Humphries stated that he was assigned to Engine 14 in August of 2016 and left in November 2019. He affirmed that Employee replaced him as the Lieutenant at Engine 14, and that he had recommended Employee for his replacement. Tr. 160. Humphries explained that he recommended Employee for the position because he felt that Employee would be a good fit; that his leadership style would be good for members at Engine 14, and that Employee could handle a single company house. Tr. 160.

Humphries further testified that on a 24-hour shift at Engine 14, there are usually about eight (8) members, including the officer. Tr. 161. Humphries cited that while he was not 100 percent sure, he was "99.9 percent" sure he was present at Engine 14 on August 24, 2020. Tr. 161. He recalled that he had requested for Engine 14 to come in the field near the Bertie Backus School on South Dakota Avenue for testing that was to begin at 9:00am. Tr. 162. He estimated that it would take

about five (5) minutes to travel from Engine 14 to the school as it was approximately a mile away. Tr. 162. Humphries described the morning duties of an officer for a 24-hour shift to include checking in, making sure all members were present and checking with the Telestaff to ensure everyone was at the right place. Tr. 164.

When asked whether he had heard about Employee being involved in a sexual assault at Engine 14. Tr. 165, Humphries cited that he had not heard anything concrete, so he didn't think it would be difficult to work with Employee since he knows his leadership style. Tr. 166. Humphries also noted that the bunkroom is on the first floor at Engine 14. Tr. 166. On cross-examination, Humphries agreed that members of Agency are duty bound to adhere to the general orders and policies of the Department in conducting their duties. Tr. 168. The Panel asked whether Humphries thought it would be difficult for a captain to manage his company if he had been charged and found guilty of a crime, and Humphries answered that he personally did not. Tr. 170. Humphries stated that it would be based on what they were charged with and who the person was. Tr. 170. Humphries noted that it would be hard for him to say how others may feel and that he had seen it not be difficult and seen it be difficult, so it would be based on the person and what they were charged with. Tr. 171.

***Employee provided a statement and Agency's representative asked questions/cross-examined Employee. The following is a summary of Employee's narrative statement and cross-examination**.*

Employee Tr. Pgs. 175 – end

Employee asserted that the Trial Board has had several setbacks and difficulties. He noted that he was removed from Agency on January 2022, but that removal was dismissed in August 2022. Tr. 176. He cited that usually there is a Trial Board Hearing before a member is dismissed, thus having the obligation to have representation from the Union, have proper notifications, email etc. Tr. 176. Employee averred that for those reasons, he had difficulty preparing for the Trial Board hearing. He also noted that he was not being paid, so he was unable to pay for representation. Employee cited that if things had been in order, he would not have faced all the difficulties and had to ask for continuances for his matter. Tr. 177.

Regarding the related criminal matter, Employee noted that there were misrepresentations, but that nothing could be done about the case at this time. Tr. 177. He asserted that he entered a plea of not guilty for the charges. Tr. 178. Employee maintained that he was not guilty, and he did not assault A.B. and that he had no reason to. Tr. 179. He admitted that he does get upset and that he had been controlling himself for the past two (2) years. Employee cited that he was upset with his attorney for not doing a good job in his court case. Tr. 179.

Employee also asserts that he found the man who made the phone call through voice recognition. He noted that he has a certain skill because he was a dispatcher for six (6) years. Tr. 179. He averred that he could recognize the person's voice and that he was going through channels now to figure out who it was. Tr. 180. Employee also maintained that he was hurt that OIA said he had fabricated that story, as that meant he lied. He maintained that he knew what happened, and that he emailed Internal Affairs and called Captain Barnes, but got no answer. Tr. 180. He also emailed Chief Douglas. Tr. 180. He cited that because of COVID, no one was in the office. He iterated that he emailed them to try to get assistance, but none was provided. Tr. 181. Employee also asserts that no members of Engine 14 in the bunkroom were asked any questions nor were any members of Platoon 4 interviewed. Tr. 182. He asserted that the investigator never asked for witnesses and he

questioned how a detective from MPD did not ask for any witnesses. Tr. 183. Employee asserted that the whole situation made him emotional and that was the reason he did not talk about it. Tr. 183.

On cross-examination, Agency inquired why Employee had not asked or subpoenaed the person who allegedly made the call to extort $3000 to testify. Employee responded that MPD was handling that investigation and he didn't want to pry into that. Tr. 184. Employee asserted that Chief Douglas' report said that he told him the call came from a blocked number, so there was no number to provide to Chief Douglas. Tr. 185. Employee also noted that he never spoke directly with Detective Evans, but that he spoke with his attorney. He stated that he could not say with certainty wheat his attorney shared with Detective Evans about the call. Tr. 185. He cited that information was transmitted via email.

Employee affirmed that he was on duty the morning of April 25, 2020, at Engine 14. He also affirmed that he interacted with A.B. on the morning of April 25, 2020, because he received a call from Engine 28 asking of her whereabouts. Tr. 187. Employee also affirmed that he went to the bunkroom to look for A.B. Tr. 187. He went in initially and didn't see her, but saw her gear so he went back. He affirmed that he interacted with A.B. in the bunkroom. Tr. 188. Employee also affirmed that he attempted to have phone contact with A.B. on the morning of April 25, 2020.

Employee testified that he received a text message from A.B. first and Thereafter, he sent her a text asking her to call him after she did not answer his phone call. Tr. 189. Employee maintained that he only interacted with A.B. once in the bunkroom, not twice. Tr. 190. He reiterated that he sent a text after he received A.B.'s text. Tr. 190. When asked whether the only thing he disagreed about in terms of the interaction and what took place in the bunkroom was that AB said he touched her without her consent, Employee noted that that was not the only thing he disagreed with. Tr. 190. Employee asserted that he had one interaction with A.B. in the bunkroom. Tr. 193. Employee also noted that he spoke about his ineffective counsel at the criminal trial. Tr. 193. He said that he had reported him to the Bar Council. Tr. 194. Employee answered in the affirmative that he had appealed the criminal case. Tr. 194. He did not know what stage it was in. Tr. 194.

When asked by the Panel about going out to the parking lot when A.B. was leaving, Employee asserted that that was one of the discrepancies he referred to. Tr. 195. He cited that the answer was "yes" because Engine 28 had called back an additional time while he was in the office. He asserted that he did go out to see if she had left yet and saw that her gear had been picked up and there was nothing in the ambulance. Tr. 195. He cited that he asked others "where's the girl from the ambulance last night" and they pointed toward a car – a white or silver car in the back parking lot. Tr. 195. He stated that he went out to make sure she had verbal contact to let them know she was on her way. Tr. 196. Employee stated that he told her to make sure she called because someone from Engine 28 called again. Employee averred that A.B. said something to the effect of "ok and they get on my nerves" and picked up the phone like she was calling them, so he walked away. Tr. 196.

Panel Findings

The Trial Board Panel made the following findings of fact based on their review of the evidence presented at the hearing:

1. [Employee] was charged with and convicted of misdemeanor sexual abuse by the D.C. Superior Court.

2. [Employee] did not provide sufficient evidence or belief to refute his misconduct or the court findings.
3. The sexual abuse case centered around on-duty misconduct involving a direct report.
4. The panel finds the misdemeanor conviction establishes that [Employee] did in fact, engage in the on-duty misconduct as charged.
5. As part of [sic] the and EMS/penalty sentence, [Employee] has a "Stay Away Order" which will greatly hinder [Employee] from his duties.
6. [Employee] did not satisfy his claims of impropriety.

Upon consideration and evaluation of all the testimony and factors, the Trial Board Panel found (unanimously) Employee guilty of Charge No.1, Specification No.1. In addition to making the findings of fact, the Panel also weighed the offense against the relevant *Douglas* factors[6] and concluded that termination was an appropriate penalty.

SUMMARY OF THE PARTIES' POSITIONS

I. Agency's Position

Agency asserts that its action of separating Employee was warranted and is supported by the record. Agency cites that the Metropolitan Police Department ("MPD") notified them that Employee had sexually assaulted a subordinate firefighter "A.B." on April 25, 2020, in the bunkroom of Engine 14.[7] Agency further notes that following an investigation, Employee was criminally charged with misdemeanor sexual assault. Further, Agency cites that Employee was found guilty of misdemeanor sexual assault in D.C. Superior Court on July 27, 2022.[8] Agency asserts that because "Employee's administrative disciplinary charges were undergirded by his criminal sex abuse charge, Agency's disciplinary matter was tolled until Employee's criminal case was disposed of on June 27, 2022."[9] Agency asserts that it served Employee with a Proposed Notice on July 1, 2022, which cited that

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[6] *Douglas v. Veterans Administration,* 5 M.S.P.R. 313 (1981). The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

1) the nature and seriousness of the offense, and its relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
3) the employee's past disciplinary record;
4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;
6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
7) consistency of the penalty with any applicable agency table of penalties;
8) the notoriety of the offense or its impact upon the reputation of the agency;
9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
10) potential for the employee's rehabilitation;
11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and

the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

[7] Agency Brief at Page 2. (August 11, 2023).

[8] *Id.* at Page 3.

[9] *Id.* at Page 4-5.

Employee was being charged with conduct unbecoming. Further Agency's Proposed Notice "further informed Employee that his matter would proceed to a pre-termination FTB hearing."[10]

A Fire Trial Board ("FTB") hearing was held on October 14, 2022. Agency avers that it presented live witness testimony from Detective Evans, A.B., and other Agency Internal Affairs investigators. The FTB issued its decision on November 22, 2022, and found Employee guilting of the proposed charges and specifications and recommended his termination. On November 30, 2022, the Chief issued a letter terminating Employee from service effective December 3, 2022. Agency asserts that "as the issues weren't raised before the FTB panel, Employee asserted violations of the "90 Day Rule"….wrong DPM…ineligible trial board member, and "illegitimate trial board member" as challenges to his administrative disciplinary proceeding."[11] Agency maintains that even though Employee's criminal conviction constituted substantial evidence for the charge, the Fire Trial board "independently reviewed the evidence submitted and independently heard witness testimony. Agency avers that following its review, the "FTB Panel reasoned that Employee's "misconduct call[ed] into question [] his ability to serve as a supervisor…[and] [i]t also calls into question whether members of the Department can and will feel safe around him.""[12] Wherefore, Agency asserts that the Panel's findings should remain undisturbed.

1. 90 Day Rule

Agency further avers that there was no harmful procedural error in Employee's disciplinary process. Agency asserts that "notwithstanding Employee's conclusory assertions of procedural irregularities, the record evidence established that no harmful procedural error occurred…" Agency also maintains that Employee "failed to allege any purported errors in Agency's application of its procedures during the FTB hearing…. [r]ather, Employee listed several instances of harmful error that Agency allegedly committed for the first time in his [Petition for Appeal]. Agency avers that Employee's claims lack merit.[13] Specifically, Agency asserts that Employee raised the "90-Day Rule" for the first time at OEA and as such, were not presented to Agency and "were not properly preserved, and were therefore waived." Agency further avers that because of this "OEA, which sits in the posture of a "reviewing court," should not consider contentions that were not raised before the administrative agency as required."[14] Agency notes that even if OEA wee to consider Employee's claims on its merits, they are still unsupported.

Agency cites[15] that it learned about the assault on or about April 27, 2020, and that Employee was arrested on May 22, 2020. Agency maintains that Employee received service of the IWN ("Initial Written Notification") on June 22, 2020. Agency contends that pursuant to the CBA Article 31 Section B, "an employee shall be notified of the alleged infraction or complaint filed against him/her in writing within seventy-five (75) days of the alleged infraction or complaint or such time as the employer becomes aware of the alleged infraction or complaint. This notification shall be referred to as the "Initial Written Notification."[16] Agency avers that "[a]pplying April 27, 2020, as the anchor date, Agency's June 22, 2020 issuance of the IWN satisfies the strictures of CBA Article 31 Section B." Agency further notes that this same section requires that the Fire Trial Board hearing

[10] *Id.*
[11] *Id.* at Page 6.
[12] *Id.* at Page 9.
[13] *Id.* at Page 9-10.
[14] *Id.* at 10.
[15] *Id.* at Page 11.
[16] *Id.*

be held within 180 days of the service of the IWN, however it stayed Employee's administrative proceeding until the disposition of the criminal proceeding. Agency maintains that this action is not an error, much less harmful error, because the CBA provides that "where the alleged infraction or complaint is based on a criminal charge, the 75-day period shall run from the date such charge is issued…[i]n such a case**, all other time limits under this article shall be tolled until disposition of the criminal charge** (emphasis added in filing)."[17] Agency further notes that "assuming arguendo that Agency erroneously applied a procedure or policy during Employee's disciplinary proceeding, the error or errors did not cause substantial harm or prejudice to employee's rights, or significantly affect the agency's final decision to take action." Citing to the Supreme Court decision in *Cleveland Board of Ed. V. Loudermill*, Agency avers that it met the requirements of *Loudermill* and that Employee was not deprived of any due process.[18] Agency also assert that it correctly considered the *Douglas* factors and that its action should be sustained.

Agency maintains that its actions were in accordance with the 90-Day Rule under D.C. Code § 5-1031. Agency explains that the legislative history of this, along with subsequent amendments, indicate that disciplinary proceedings should proceed within 90 days of when Agency knew or should have known of the actions. Further, this 90 Day time period tolls pending the resolution of a criminal investigation.[19] To this end, Agency asserts that consistent with the findings of the DC Court of Appeals, that in this instant matter, the criminal investigation into Employee's matter did not conclude until "the prosecuting entity has brought the criminal case to conclusion, which in Employee's case, occurred on June 27, 2022 when the "entity with prosecutorial authority" tried the case at D.C. Superior Court, resulting in Employee's conviction of misdemeanor sex abuse."[20] Agency contends that Employee's argument that "[n]owhere did the Court of Appeals [in Jordan] rule that the investigation must remain pending until the criminal case is finally brought to trial and resolved as the Agency appears to suggest is a deceptive red herring."[21] Agency avers that it is "equally true that nowhere in the *Jordan* holding did the court find that the issuance of an arrest warrant, or the arrest of the suspect marked the conclusion of the criminal investigation as Employee suggests here; instead, as Employee noted, the *Jordan* court held that the conclusion of the criminal investigation will depend on the circumstances of the individual case."[22] Agency further asserts that "the record contains indisputable proof of an ongoing criminal investigation that wasn't complete until June 27, 2022, when Employee was tried and convicted for misdemeanor sex abuse."[23] Agency argues that "Employee's argument that FEMS is now attempting to circumvent the firm deadline imposed by the 90-Day Rule by arguing that the length of the tolling should be expanded beyond the actual investigation until the end of trial, then to sentencing, then to appeal, and so forth, is flatly wrong because FEMS makes no such argument that the criminal investigation goes on indefinitely as Employee suggests."[24]

Further, Agency avers that Employee's argument that the "criminal investigation of his misconduct concluded prior to the disposition of his criminal charges is plainly wrong." Agency maintains that Employee "attempts to broadly interpret the legislative history of the 90-Day Rule to

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[17] *Id.*
[18] *Id.* at Pages 11-12.
[19] Agency's Sur Reply December 11, 2023. Citing to *Jordan,* 883 A.2d 124 *(D.C. 2005)*
[20] *Id.* at Page 6.
[21] *Id.*
[22] *Id.* at Page 7.
[23] *Id.*
[24] *Id.* at Page 8.

nullify the fatal flaw of his position."[25] Agency argues that "[p]rosecutors and their law enforcement partners have every reason to keep investigating *after* charges are? filed and regularly continue to investigate." Agency asserts that the presumption that prosecutors "do not file charges until an investigation is "full….and complete" – that is, a presumption that prosecutors conduct no further investigation once charges are filed – is not supported by either experience or logic."[26] Agency further notes that prosecutors often take further investigative measures once charges are filed. Agency contends that in this matter, "through June 27, 2022, more than two years after Employee's vile act of touching his colleague's breast without her permission or provocation, the USAO continued its formal inquiry into the crime by trying the case." Additionally, Agency provides that "assuming that criminal charges are not disposed of in some other manner, the criminal investigation continues until conviction and sentencing."[27] In Employee's matter, Agency notes that "his criminal proceeding was disposed of through conviction and sentencing based on Judge Krauthamer's guilty finding."[28] Agency argues that "even assuming a criminal case will *not* ultimately go to trial, the decision to *not* go to trial necessarily entails further investigation by the agency that is contemplating whether to proceed with criminal prosecution…[w]hat's more, in a case that doesn't go to trial but instead involved a plea agree, the prosecution must *still* conduct "investigation" to determine what punishment to recommend at sentencing and the prosecutorial authority must review the pre-sentence investigation."

Agency contends that "Employee's argument that the criminal investigation in his case was presumptively completed once he was arrested rests on a clear misconception of the scope of such investigations."[29] Agency maintains that "Employee's conviction and attendant sentence was indisputably triggered by the prosecution's further "criminal investigation" of Employee's criminal charges at Employee's criminal trial."[30] Agency reiterates that Employee "was arrested and charged with a crime on May 22, 2020"…near the time when Employee's criminal matter was pending in May of 2020, the United States, indeed the entire world, was in the throes of a once in a lifetime pandemic."[31] Agency asserts that this cause the entire workforce to make adjustment including suspending matters held in person. Employee's criminal trial was ultimately held in June 2022, and he was convicted and sentenced. Agency avers that "Employee's argument that Agency somehow needs to prove more of what the USAO's criminal investigation entailed defies logic, the USAO's criminal investigation entailed trying Employee's case in D.C. Superior Court." Wherefore Agency maintains that "the statute starts the clock at the conclusion of the investigation" pursuant to D.C. Code §5-1031 (b) and "for the reasons explained, *especially based on the circumstances of Employee's case* where the prosecutorial authority took the case to? trial, the criminal investigation could not and did not conclude until Employee's criminal charges were resolved."[32]

Agency further contends that the 90 Day Rules as promulgated in 5-1031 (b) "is designed to avoid the serious problem posed by overlapping criminal and disciplinary proceedings." Agency cites that "contrary to Employee's argument, just because Agency arguably could proceed with its administrative disciplinary process while the criminal proceeding was ongoing doesn't mean that Agency should do so because the approach that Employee suggest would most certainly create Fifth

[25] *Id.* at Page 9.
[26] *Id.* at Page 10.
[27] *Id.* at Page 11.
[28] *Id.*
[29] *Id.* at Page 12.
[30] Id. at 13.
[31] *Id.* at Pages 13-14.
[32] *Id.* at Page 14.

Amendment self incrimination problems for employee."[33] Agency also contends that "parallel disciplinary and criminal processes can prejudice the government as well." Agency further cites that "to conduct an adequate disciplinary investigation and prove and disciplinary charges, the employee's agency would want to discover and use information in the prosecutor's possession…[h]owever prosecutors oftentimes decline to provide such information to the agency or authorize its disclosure to the employee for fear of jeopardizing the criminal case."[34] Agency argues that Employee's citation to *Fowler* is unpersuasive and should not be relied upon at OEA.[35] Agency avers that case law favors a decision be made on the merits and that "Section 5-1031 does not become a loophole by which Agency is unwittingly barred from bringing disciplinary charges."[36]

2. Use of 2012 DPM

Agency also maintains that it complied with applicable District laws and regulations. Agency asserts that it fully cooperated and bargained with the Local 36 regarding the CBA in this matter. In this same vein, Agency asserts that "[b]y agreement of Local 36 and FEMS, the parties collective bargaining agreement (CBA) sets forth that [d]isciplinary procedures are governed by applicable provision of Chapter 16 of the District Personnel Manual, and the Department's Rules and Regulations and Order Book, except as amended/abridged by this Article."[37] Agency further notes that within these agreements, "to the extent there is any conflict between bargained-for procedures and other regulatory procedures, bargained-for procedures must take precedence."[38] Agency cites that "in the years after Article VII went into effect, the District of Columbia Department of Human Resources ("DCHR") propose and ultimately finalized multiple changes to the personnel regulations on which FEMS relied…[h]owever Local 36 expressed concerns as to these changes and demanded that they not be implemented without bargaining." Agency maintains that "as required by law and consistent with Local 36's demand, FEMS did not modify Article VII based on DCHR's changes to the DPM."[39] Agency asserts that "Employee's counsel, who is not the legal representative for Local 36, argues that FEMS's disciplinary action in invalid under the current DPM."

Agency contends that because Employee did not argue before the Trial Board Panel that Agency's use of the 2012 DPM was erroneous, that he has now waived his opportunity to do so. Specifically, Agency argues that "Employee's failure to seasonably raise his argument before the FTB Panel precludes him from raising the argument before OEA because Employee's failure to raise the issue at the hearing constituted a waiver of the argument."[40] Agency asserts that because this is a Pinkard matter before OEA, arguments must be presented to the Trial Board Panel to be considered at OEA. Further, Agency maintains that "there was an understanding between FEMS and Local 26 that FEMS' charging procedures relying on Article VII and the 2012 DPM were lawful."[41] Agency also avers that it "relied upon Article VII and the 2012 DPM because the 2016 amendments would modify bargained-for procedures and Impact & Effects bargaining has not occurred between FEMS and Employee's Union."[42] Because bargaining had not occurred regarding the revised 2016 or 2019

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[33] *Id.* at Page 15.
[34] *Id.* at 16
[35] *Id.* at Page 17. Citing to Employee's citation of *Metropolitan Police Department v Fraternal Order of Police*, PERB Case No. 17-A-06, 64 D.C. Reg 10115 (2017) ("Fowler").
[36] *Id.* at 19.
[37] *Id.* at 21.
[38] *Id.*
[39] *Id.*
[40] *Id.* at Page 22.
[41] *Id.* at Page 23.
[42] *Id.* at Page 25.

DPM, "FEMS was precluded from doing anything different."[43] Agency further asserts that while it does not concede that its use of the 2012 DPM was in error, if it were, than that error would be harmless.[44] Agency asserts that OEA's harmless error standard as noted in OEA Rule 634.6 should apply, because the charges and penalties of the 2017 DPM and the 2012 were similar such that the use of that 2012 DPM should be considered harmless in nature. Agency avers that "if there is no substantive difference between the charges with which an employee is charged and the charges with an employee should have been charged, then the charging error is harmless."[45] Agency notes that "not only was the substantive law same as to the cause in, but both the 2012 DPM and present regulations allow a penalty up to termination for Employee's misconduct."[46]

Agency further contends that OEA should follow the ruling in *Ceasar*. Agency asserts that "there is no way to distinguish this matter from *Ceasar* to find that the parties' reliance on Article VII was improper here."[47] Agency avers that the D.C. Superior Court in *Ceasar* reversed the OEA decision and the reliance on *Francois*. Agency argues that "the Superior Court, reviewing FEM's arguments, entirely agreed with FEMS and determined that the FEMS's reliance was wholly proper."[48] Agency further cites that "*Ceasar* cannot be distinguished away; OEA cannot hold that the charges were improper without rejecting the Court's reasoning in *Ceasar*…[r]regardless of whether OEA may reject a clear holding of the Superior Court, a court which exercises appellate authority over OEA, it would be imprudent to reject the Superior Court's legal analysis without very strong reason."[49] Agency notes that should OEA not follow *Ceasar*, that it should still find the issue waived given that Employee did not raise this issue before the Fire Trial Board. Agency iterates that the "waiver doctrine applies in all OEA matters" and is "mandatory in *Pinkard* matter."[50] Agency avers that the "OEA Board may consider an argument not raised at the administrative judge's underlying hearing for good cause, but OEA's consideration in a *Pinkard* matter "shall be based solely on the record established in the [trial board]hearing.""[51] Agency cites that "without waiver, the contractual agreement to limit OEA's consideration to the record developed at the FEMS Trial Board pursuant to *Pinkard* would collapse."[52]

3. Due Process

Agency contends that it did not violate Employee's due process in its administration of the action. Agency asserts that "Employee's argument that FEMS violated his due process of law by summarily terminating him prior to holding the FTB Hearing and then "preventing" him from confronting his accuser both lack merit."[53] Agency avers that the summary removal "was rescinded and [Employee] was made whole for the period during which he was temporarily summarily removed from Agency."[54] Agency also contends that Employee's citation to *Stone v FDIC*, 179. F.3d 1368 is distinguishable from this matter. Agency further avers that Employee's argument that

[43] *Id.* at Page 25.
[44] *Id.* at Page 28.
[45] *Id.* at Page 30.
[46] *Id.*
[47] Agency Supplemental Brief at Page 3 (April 12, 2024). l
[48] I*d.* citing to *Francois v Office of the State Superintendent of Education*, OEA Matter No. 1601-0007-18, *Opinion and Order on Review* (July 16, 2019.
[49] Id at Page 4.
[50] *Id.* at 5.
[51] *Id.* at Pages 5-6.
[52] *Id.* at Page 7
[53] Agency's Sur Reply at Page 31. (December 11, 2023).
[54] *Id.*

his summary removal "irreparably tainted" his disciplinary process is "based on speculation and nothing more." Agency agrees that Employee "possessed a protected property interest in his employment that the government could not deprive him of without due process."[55] Agency notes that it followed the Supreme Court's guidance in *Cleveland Bd. Of Ed v. Loudermill*, 470 U.S. 532 (1985) regarding Employee's due process. Agency maintains that FEMS "afforded Employee a pre-deprivation evidentiary hearing where he had an opportunity to provide a robust defense of his actions toward A.B."[56] Agency rejects Employee's claim that "he was prejudiced by FEMS refusal to honor his *third* continuance request which was made on the day of the FTB hearing." Agency argues that Employee knew since "June 27, 2022, he could have **no contact** with A.B other than through counsel, and yet he failed to secure counsel for the FTB hearing."[57] Agency further notes that Employee's FTB hearing was held on October 14, 2022 and that prior to this date, Employee had previously requested "two last minute continuances of the FTB to obtain counsel, which Agency granted." Agency maintains that "Employee received the full panoply of due process rights that he was entitled to" and as such, Employee's argument regarding due process should fail.

Agency maintains that its actions were based upon substantial evidence, and that there was no harmful procedural error and that termination was an appropriate penalty and its actions should be upheld.

II. Employee's Position

Employee avers that Agency's action was a clear violation of law. Employee asserts that his criminal bench trial was held in the D.C. Superior Court on June 27, 2022 and "[d]epsite the lack of any independent or corroborative evidence, Judge Peter Krauthamer found the Employee guilt of misdemeanor sexual assault."[58] Employee avers that on July 1, 2022, he was served with a Notice of Proposed Removal "predicated on the incorrect version of the District Personnel Manual (DPM)." Employee cites that over his objection, the FTB hearing was held on October 14, 2022, and that due to the stay away order, Employee "was not permitted to ask questions to and/or cross examine AB-the Department's star witness because he did not have an attorney."[59] Employee avers that he was "essentially prevented from mounting a defense, it was no surprised that the Agency sustained the administrative charges and terminated Employee."[60] Employee also cites that on July 1, 2022, Agency "summarily remov[ed] him from the Department." Employee adds that "realizing its grave error, Agency rescinded Employee's summary removal, restored Employee's active-duty status, and restored all pay benefits that Employee lost retroactive to July 1, 2022."[61] Employee asserts that these actions were an "affront to due process."

1. 90 Day Rule

Employe argues that the "90 Day Rule is only tolled for as long as the criminal investigation *actually* occurred, and it is not tolled simply if a criminal investigation could or might have occurred." Employee avers that Agency has "failed to present any evidence to show that the USAO was conducting a criminal investigation beyond May 22, 2020, when Employee was arrested and

[55] *Id.* at 32.
[56] *Id.* at 33.
[57] *Id.*
[58] Employee's Brief at Pages 3-4 (October 17, 2023).
[59] *Id.* at Page 4.
[60] *Id.*
[61] *Id.*

charges were filed."[62] Employee asserts that because he was served with the Notice of Proposed Action on July 1, 2022, Agency's action was "grossly untimely." Employee states that the 90 Day Rule required Agency to issue its proposed action within 90 business days of "the knowledge of the act or occurrence and all evidence of the criminal investigation concluded on May 22, 2020, the Proposed Action was late by **431 business days**."[63] Employee contends that the 90 Day Rule is a "statute of limitations under which the Department is required by D.C. Law to institute an adverse action against [Employee]."[64] Employee further notes that "[u]nder both the applicable 2015 statute and the predecessor 2004 statute, the 90-Day rule is tolled if there is a criminal investigation by MPD or the USAO."[65] Employee argues that "FEMS' argument will be that prosecutors could continue to prepare their cases beyond the filing of charges; however that does not show that there was actually a criminal investigation in [Employee's] case after the charges were filed."[66] Employee further provides that the "D.C. Court of Appeals precedent does not state that the 90-day period is tolled until the conclusion of the criminal case, i.e. the case is dismissed or the conclusion of the trial…[r]ather D.C. Code §5-1031 (b) (2015) provides only that the 90-Day rule 'shall be tolled until the conclusion of the [criminal] *investigation*'. (emphasis added)"[67]

Employee contends that in *Jordan*, 883 A.2d 124 (D.C. 2005), the D.C. Court of Appeals has interpreted the phrase "conclusion of a criminal investigation" to mean that there must be "**action taken by an entity with prosecutorial authority**" – that is, the authority to review the evidence, and to either charge an individual with commission of a criminal offense, or decide that charges not be filed."[68] Employee notes that the D.C. Court of Appeals has "indicated that the event which marks the conclusion of the investigation will depend on the circumstances of the individual case but provided several examples of events which may mark the conclusion of an investigation including, the issuance of an arrest warrant, the actual arrest of an employee, or even a prolonged period of inactivity by the USAO."[69] Employee maintains that "[n]owhere did the Court of Appeals rule that the investigation must remain pending until the criminal case is finally brought to trial and resolves as the Agency appears to suggest."[70] Employee further cites that the legislative history of the 90-Day Rule, particularly its predecessor legislation was "intended to bring "certainty" to employees over whose heads a potential adverse action might otherwise linger indefinitely." In this same vein, Employee asserts that this history also "supports the conclusion that the 90-day rule is not tolled until the conclusion of the criminal prosecution…[i]ndeed the whole purpose of the time limit is to stop management from keeping its employees in disciplinary limbo by forcing management to quickly decide whether or not to charge an employee with a disciplinary violation."[71] Employee reiterates that it is clear from the legislative history that the "D.C. Council was clearly concerned with the fate of the FEMS and MPD employees who were being subjected to these unreasonably lengthy disciplinary proceedings…"[72] Employee goes on to cite that while management objected in some ways regarding the 90-Day Rule, the D.C. Council moved forward with is implementation.

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[62] *Id.* at Page 6.
[63] *Id.* citing to D.C. Code §5-1031
[64] *Id.* at Page 6-7.
[65] *Id.* at Page 8
[66] *Id.* at Page 8. Citing *Fowler*.
[67] *Id.* at Page 8.
[68] *Id.* at Pages 8-9.
[69] *Id.* at Page 9.
[70] *Id.* citing to *Jordan*.
[71] *Id.* at Page 10.
[72] *Id.*

Employee avers that "FEMS is now attempting to circumvent the firm deadline imposed by the 90-Day rule by arguing that the length of the tolling should be expanded beyond the actual investigation until the end of the trial, then sentencing, then the appeal and so forth…[t]his determination is at odds with the legislative history on this issue in that it ignores the D.C. Council's overriding concern with bringing **finality** for the protection of the employee in the disciplinary process."[73] Employee asserts that Agency's argument that "it could not bring an adverse action against [Employee] until the conclusion of the criminal case because of [Employee's] Fifth Amendment privilege against self-incrimination would be disingenuous as it would go against the law."[74] Employee contends that while the Agency could not have compelled him to do an interview and "relinquish his privilege on the threat of being fired, the Fifth Amendment privilege does not bar the Department from bringing the adverse action against the employee in the first place."[75] Employee further avers that "much OEA's precedent on this issue establishes a bright line approach to the application of the 90-Day rule." Employee proffers that in "*Ebert v. MPD, OEA* Matter No. 1601-0223-98 (Dec. 31, 2002) at pp.2-3, the AUSA issued a letter of declination, which was held to be the objective bright line for when the investigation ended…[i]n *Ahn v MPD*, OEA Matter. No. 1601-0159-93 (Jan 27, 2005) at pp. 14-15, the OEA was not asked to determine an exact date on which on the criminal investigation concluded, and the OEA further explained that there was evidence in the record which showed there was an investigation which continued for several months following the guilty plea because the "Employee continued to actively cooperate with Agency and federal officials with a view toward uncovering corruption within the Department.""[76]

Employee argues that "[i]f taken to its logical conclusion, under FEMS' presumed argument, the Department is free to simply do nothing as long as a criminal case is pending against one of its members…[t]his exactly what the 90-day rule was put in place by the D.C. Council-to prevent the Department from doing mothing while its employees suffer in disciplinary limbo."[77] Employee asserts that he was not served with the proposed notice until July 1, 2022 "521 business days after the criminal investigation was over and the charges were filed on May 22,2020 – the 90-day rule requires that the Agency's decision be set aside and the charges against [Employee] be dismissed."[78]

2. Use of 2012 DPM

Employee asserts that in review of the instant administrative action, the "charges brought against [Employee] are improperly premised on an old (and inactive) version of DCMR 6-B, Chapter 16 and District Personnel Manual (DPM) Chapter 16."[79] As such, Employee avers that the charges should be rescinded. Specifically, Employe argues that he was "charged with misconduct under the 2012 version of the DPM…[h]owever the 2012 version of the DPM was not in effect and had been replaced by the 2017 version of the DPM…[g]iven that Employee's alleged misconduct occurred in 2020, the 2017 version of the DPM applied."[80] Employee notes that he faced one charge and one specification. He cites that "the Department relied heavily on the 2012 version of the DPM." Further, Employee avers that in the 2017 DPM version, the charge of Neglect of Duty "remains the

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[73] *Id.* at Page 15 citing to *DC FEMS v OEA (re: Walker)*, 986 A.2d. 419, 425 (D.C. 2010).
[74] *Id.*
[75] *Id.*
[76] *Id.* at Page 16.
[77] *Id.* at Page 17.
[78] *Id.* at Pages 17-18. Citing to *Alice Lee v MPD*, OEA Matter No. 1601-0087-15 (March 15, 2017) and *Sheila Thomas v MPD*, OEA Matter No. 1601-0039-17 (April 30, 2018)
[79] *Id.* at Page 18.
[80] *Id.*

same [as the 2012 version], the allegation concerning "a criminal offense whether or not the act results in a conviction" is not listed and/or identified in the 2017 DPM."[81] Employee cites to *Employee v DC FEMS*[82], wherein the AJ therein ruled that the 2017 DPM went into effect on May 12, 2017. Employee asserts that his case is substantially similar and that the use of the incorrect version of the DPM requires that Agency's action be rescinded.[83] Employee also avers that this exact finding was made in another ruling issued by OEA on June 1, 2023, regarding the use of the DPM.[84] Employee cites that because the whole charged is "predicated on 16 DPM § 1603.3" that his charges must be dismissed.

Further, Employee cites that this Office should not follow the holding from the D.C. Superior Court in *Ceasar.*[85] Employee avers that "OEA has the responsibility to make decisions that are consistent with Chapter 6 Subtitle B of Title 6 of the District of Columbia Municipal Regulations." Employee also notes that the "DCMR provides that [a]n employee or agency may appeal a final decision to the District of Columbia Superior Court in accordance with the District of Columbia Government Comprehensive Merit Personnel Act of 1917 ("CMPA")…[b]ut nowhere does the DCMR or the CMPA entrust binding authority to the Superior Court on OEA determinations."[86] Employee contends that the "D.C. Court of Appeals provides that an appellate court reviews agency decisions on appeal from the Superior Court the same way it reviews administrative appeals that come to it directly….D.C. Court of Appeals confines itself strictly to the administrative record, meaning the appellate court reviews the Office of Employee Appeals' (OEA) decision, not the decision of the Superior Court."[87] As such Employee reiterates that OEA is not required to follow *Ceasar*. Alternatively, Employee argues that "OEA should follow the trend of cases that have denied Agency's petitions for review and/or reversed adverse actions based on the incorrect use of the 2012 DPM."[88]

Employee also avers that *Ceaser* is distinguishable from the instant matter for several reasons. First, Employee asserts that "at its core, *Ceasar* admonishes the AJ for addressing an issue *sua sponte* as to whether the 2012 DPM was proper when charging the employee…[b]ut the pretext in *Ceasar* presumes that all rights and due process were afforded to employee from the start of the proceedings before the Trial Board and thereafter."[89] As such, Employee argues that "nowhere does *Ceasar* exclaim that the employee lodged an objection-unlike here where [Employee] explicitly asked for 15 more days to review and prepare for the hearing before the FTB."[90] Employee also proffers that the "crux of the Agency's argument falls on whether the collective bargaining agreement between FEMS and Local 36, to implement discipline consistent with the 2012 version of the DPM, precludes OEA from reaching the issue, and by default considering the due process concerns articulated herein."[91] Employee further avers that "Agency's suggestion that the instant matter is similar to *Ceasar* because FEMS and Local 36 agreed to follow the 2012 DPM as part of their collective bargaining agreement is flagrantly false."[92] Employee asserts that the Order Book

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[81] *Id.* at Page 19.
[82] OEA Matter No, 1601-0040-21 (January 19, 2023).
[83] *Id.* at Page 20
[84] *Id.* at Page 21. Citing to *Anthony Thomas, v OEA*, 1601-25-22 (June 1, 2023).
[85] Employee's Supplemental Brief at Page 2. (June 10, 2024).
[86] *Id.* at Page 4.
[87] *Id.* at Pages 45. Citing to *Walker v D.C. Off. Of Emp. Appeals*, 310 A.3d 597, 599.
[88] *Id.* at Page 5.
[89] *Id.* at Page 6.
[90] *Id.*
[91] *Id.* at Pages 6 -7.
[92] *Id.* at Page 7.

Article VII "makes clear that discipline proposed by FEMS is not limited to the 2012 version of the DPM." Employee asserts that the articles language "identifies that all discipline will be governed by Chapter 16 of the DPM, and does not limit discipline to the 2012 DPM version." Employee asserts that "the applicable provisions for Employee are the current[93] provision, which to date means the 2017 version of the DPM, not the outdated 2012 DPM version."

Employee notes that it is true that "OEA has a limited role in *Pinkard* matters as the Agency argues..[b]ut it is equally true that Agency's use of the 2012 was a harmful procedural error that adversely impacted Employee in this matter."[94] Employee argues that "it seems prudent that OEA should be able to reconcile such matters in the absence of other remedies…[t]o say that this brief concerns the 'unchallenged use of Article VII incorporating the 2012 DPM' completely misses the point..(citing to Agency's Supplemental Brief. At 5).[95]" Employee further avers that the waiver doctrine should not apply here because he lacked representation before the Trial Board. Employee argues that "even if Local 36 and FEMS agreed that FEMS Trial Board would have the authority to consider matters otherwise decided by OEA, the FTB cannot have its cake and eat it too...[i]n other words, the FTB cannot deny the right to counsel needed for Employee to effectively navigate the FTB panel hearing process – and make the necessary objections to Article VII and the 2012 DPM – and then also direct OEA not to step in to help atone for FEMS' missteps."[96]

3. Due Process

Employee maintains that Agency violated his due process by "summarily terminating him prior to the holding of the trial board and then preventing Employee from confronting his accuser."[97] Employee proffers that "each disciplinary matter and adverse action hearing must subscribe to and obey the legal requirements of due process."[98] Employee asserts that Agency violated the standard as set forth in by the Supreme Court and "reaffirmed recently in *Lightfoot v. District of Columbia*, 448 F.3d, 401 (D.C. Cir 2006 (per curium)(Silberman, J., concurring) (stating that the issue in the "Supreme's court due process jurisprudence…is always…whether or not the claimant has had a fair opportunity – sometimes rather informal – to present his case" emphasis added)."[99] Employee further argues that "in its quest to rid themselves of [Employee] before holding a proper administrative hearing, the Department, again cites to the incorrect 2012 version of the DPM notwithstanding that the alleged misconduct clearly occurred in 2020, well after the 2017 version of the DPM was enacted."[100] Employee further notes that "the Agency's attempted summary removal violated the parties' collective bargaining agreement (CBA)…[n]otably, while the DPM applies in most instances, when there is a conflict or different procedure, the CBA controls."[101] Employee cites that upon realization of its error "on August 4, 2022, FEMS rescinded its summary removal against Employee and restored him to active duty status." Employee avers that the damage had already been done such that he could not "escape bias and prejudice." Employee further contends that "every Fire official who serves at the pleasure of the Fire Chief knew that Chief Donnelly wanted [Employee] terminated.

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[93] *Id.*
[94] *Id.* at Page 8.
[95] *Id.*
[96] *Id.* at Pages 8-9.
[97] Employee's Brief at Page 22.
[98] *Id.*
[99] *Id.*
[100] *Id.* at Page 23.
[101] *Id.*

Employee proffers that in *Stone v. FDIC*, 179 F.3d 1368 (Fed. Cir 1999), the principle was established "that an employee has a right of notice to the allegations against them, the employee must be given an opportunity to confront those allegations, and the employee has a right to an unbiased deciding official to make findings on those allegations."[102] Employee contends that "bias by agency officials is one of the greatest threats to fairness and due process in an administrative hearing."[103] Employee further argues that in his matter, "all of the elements of undue influence have been met…[h]ere, FEMS' command officials knew that Fire Chief Donnelly had already attempted to terminate Employee's employment through summary removal…[g]iven that each Fire Trial board is comprised of high ranking senior officials on the Department (many of whom could either be promoted or demoted based on the desire of the Fire Chief)."[104] Because of this, Employee maintains that despite the recission of the summary removal, "each Panel member knew that Fire Chief had already summarily tried to terminate Employee for this action" and as such, "forever ruined [Employee's] ability to have an unbiased Trial Board Panel."[105] Employee also asserts that he requested additional time and continuances to obtain legal representation. He cites that on the day of the FTB hearing on October 14, 2022, he reiterated his request and that the response from the FTB is "clear evidence of a sham hearing."[106] Employee assert that he told FEMS he needed an additional 15 days to "onboard the attorney" and the "Agency denied his request for a brief continuance which resulted in Employees being prevented from cross-examining the alleged victim (AB)."[107] Employee avers that his inability to confront, question and cross-examine AB is "a serious due process violation which requires dismissal of the charges."[108]

ANALYSIS AND CONCLUSIONS OF LAW[109]

Pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department*,[110] OEA has a limited role where a departmental hearing has been held. According to *Pinkard*, the D. C. Court of Appeals found that OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings.[111] The Court of Appeals held that:

> "OEA may not substitute its judgment for that of an agency. Its review of the agency decision…is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. The OEA, as a reviewing authority, must generally defer to the agency's credibility determinations."

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[102] *Id.* at Page 24. Citing also to *Svejda v DOI*, 7 M.S.P.R. 108 (M.S.P.B. July 9, 1981).
[103] *Id.* at Page 25.
[104] *Id.* at Page 26.
[105] *Id.*
[106] *Id.* at Pages 27-28.
[107] *Id.* at Page 28.
[108] *Id.* at Page 29.
[109] 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").
[110] 801 A.2d 86 (D.C. 2002).
[111] *See* D.C. Code §§ 1-606.02(a)(2), 1-606.03(a),(c); 1-606.04 (2001).

Additionally, the Court of Appeals found that OEA's broad power to establish its own appellate procedures is limited by Agency's Collective Bargaining Agreement. Thus, pursuant to *Pinkard*, an Administrative Judge of this Office may not conduct a *de novo* hearing in an appeal before him/her, but must rather base his/her decision solely on the record below, when all of the following conditions are met:

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
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> 2. The employee has been subjected to an adverse action;
>
> 3. The employee is a member of a bargaining unit covered by a collective bargaining agreement;
>
> 4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard*, *i.e.*: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, Adverse Action Panel] has been held, any further appeal shall be based solely on the record established in the Departmental hearing"; *and*
>
> 5. *At the agency level, Employee appeared before an Adverse Action Panel that conducted an evidentiary hearing*, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee (emphasis added).

There is no dispute that the current matter falls under the purview of *Pinkard*. Employee is a member of the D.C. Fire and Emergency Medical Services Department and was the subject of an adverse action (termination); Employee is a member of the International Fire Fighters. Local 36, AFL-CIO MWC Union ("Union") which has a Collective Bargaining Agreement ("CBA") with Agency. The CBA contains language similar to that found in *Pinkard* and Employee appeared before a Trial Board Panel on October 14, 2022, for a hearing. This Panel made findings of fact, conclusions of law and recommended that Employee be terminated from his position. As a result, I find that *Pinkard* applies in this matter. Accordingly, pursuant to *Pinkard*, this Office may not substitute its judgement for that of the Agency, and the undersigned's review of Agency's decision in this matter is limited to the determination of (1) whether the Trial Board Panel's decision was supported by substantial evidence; (2) Whether there was harmful procedural error; and (3) Whether Agency's action was done in accordance with applicable laws or regulations.

Whether the Adverse Action Panel's decision was supported by substantial evidence

Pursuant to *Pinkard*, the undersigned must determine whether the Trial Board Panel's ("FTB" or "Panel") decision was supported by substantial evidence. Substantial evidence is defined *as evidence that a reasonable mind could accept as adequate to support a conclusion*.[112] If the

[112]*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).

Panel's findings are supported by substantial evidence, then the undersigned must accept them even if there is substantial evidence in the record to support findings to the contrary.[113] Employee has argued that his inability to cross-examine AB precluded his ability to present his case before the Panel and thus was a violation of his due process[114].

In the instant matter, I find that within the confines of the *Pinkard* standard of review OEA must operate under, that the Trial Board's findings were supported by substantial evidence. Based upon the review of the Trial Board transcript, the Panel remained engaged and listened to all witnesses. After consideration of the testimonial and documentary evidence, the Panel determined that the charge against Employee should be sustained. As a result, I find that the Board's findings to sustain the charges were supported by substantial evidence and in accordance with the standards of *Pinkard*, I find that those findings can be sustained.

Whether there was harmful procedural error & Whether Agency's action was in accordance with applicable laws, rules and regulations

Employee argued that Agency violated his due process in its administration of the instant matter by not allowing him additional time to seek representation for the FTB hearing and by summarily removing him prior to the FTB hearing. Further, Employee avers that Agency committed harmful procedural error when it used the 2012 DPM version and not the 2017 version in its administration of the instant action. Additionally, Employee asserts that Agency violated the "90-Day Rule" as promulgated in D.C. Code § 5-1031 (b), because he was arrested for the charge on May 20, 2020, and it was not until July 1, 2022, that he was served with the Notice of Proposed Adverse Action. Agency avers that its actions did not constitute harmful procedural error, and assuming arguendo that there was an error, that it would be subject to "harmless error." Agency further asserts that it did not deny due process to Employee because he was present for his FTB hearing and that the Stay Away order from the D.C. Superior Court precluded him from contact with AB. Agency further noted that continuances were provided to Employee to ascertain counsel and that Employee failed to obtain representation by the October 14, 2022, FTB Hearing. Agency also asserts that it rescinded the summary removal and made Employee whole, thus it did not impact his due process. Agency further avers that it did not violate the "90-Day Rule" because the prosecutorial authority did not conclude its investigation until the conclusion of Employee's criminal trial in this matter which was held on June 27, 2022. Agency also avers that its use of the 2012 DPM was appropriate as Employee's union and Agency bargained for/agreed upon its use for disciplinary matters.

90 Day Rule

In the instant matter, Employee argues that the undersigned should reverse Agency's decision because Agency committed harmful procedural error by failing to commence the adverse action in accordance with the "90 Day Rule" pursuant to D.C. Code § 5-1031. The "90-Day Rule" requires agencies to initiate adverse actions against sworn members of FEMS no later than 90 days from the date that Agency "knew or should have known of the act or occurrence constituting cause."[115] Agency argues that it adhered to the provisions of the 90 Day rule, and that even if there was a

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[113] *Baumgartner v. Police and Firemen's Retirement and Relief Board,* 527 A.2d 313 (D.C. 1987).
[114] The undersigned will address the issues of due process and other claims within the other prongs of the Pinkard analysis required – whether it was harmful procedural error and whether Agency's actions were in accordance with applicable laws rules and regulations.
[115] *Alice Lee v MPD*, OEA Matter No. 1601-0087-15 (March 15, 2017).

violation of the rule that it would constitute harmless error. Further, Agency argues that it could not commence adverse action against employee until the conclusion of his criminal matter so as not to impinge upon Employee's Fifth Amendment rights against self-incrimination. D.C. Code §5-1031 - Commencement of Corrective Adverse Action provides in pertinent part that:

> **(**a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department knew or should have known of the act or occurrence allegedly constituting cause.
>
> (a-1) Repealed.
>
> (b) ***If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department or any law enforcement or prosecuting agency with jurisdiction within the United States, the Office of the United States Attorney for the District of Columbia, or the Office of the Attorney General, or is the subject of an investigation by the Office of the Inspector General or the Office of the District of Columbia Auditor, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.*** (Emphasis added)

The legislative purpose of the 90 Day Rule enacted by the D.C. Council first in 2004, and then updated in 2015, was to ensure that adverse actions against employees were commenced and administered in a timely manner.[116] Specifically, the Council cited that the 90-Day rule "protects employees who are being administratively investigated from working under the threat of disciplinary action for an excessive length of time."[117] Additionally, Council cited that as it relates to MPD, this rule incentivizes the Agency to "follow up on allegations efficiently and to resolve disciplinary cases in a timely fashion."[118] Additionally, the D.C. Court of Appeals has found that the D.C. Council, in enacting this legislation, "sought to expedite the process and provide certainty with some degree of balance and flexibility."[119] As a result, the 90-Day rule provides guidance and timelines for the commencement of adverse actions.

At issue here is whether Agency, in administering the instant adverse action, adhered to the provisions of this law, specifically D.C. Code 5-1031 (b). Here, Employee avers that Agency violated the 90-day rule because they did not issue the Notice of Proposed Adverse Action ("NPAA") until July 1, 2022. Employee argues that the criminal investigation in this matter, conducted by the United States Attorney's Office ("USAO") ended with his arrest on May 20, 2020, and as a result, Agency's July 1, 2022, NPAA was "grossly untimely." Agency argues that the end of the criminal investigation was not complete until the trial held in D.C. Superior Court by Judge Krauthamer concluded and resulted in Employee being found guilty of misdemeanor sexual assault. Agency argues that the criminal investigation was ongoing until the end of the criminal disposition of this matter because the prosecutorial authority did not complete its investigation until the conclusion

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[116] Employee Brief at Page 21 and Exhibit 5. (December 22, 2017).
[117] *Id.*
[118] *Id.*
[119] *D.C. Fire and Medical Services Department v D.C. Office of Employee Appeals*, 986 A.2d 419, 425-526 (D.C. 2010).

of the criminal matter. Further Agency asserts that the 90-Day rule is also meant to prevent overlap of criminal matters and administrative matters, such that an employee's Fifth Amendment rights against self-incrimination or otherwise are not affected. Employee maintains that Agency failed to show that any criminal investigation was "actually ongoing" after Employee's arrest on May 20, 2020.

Both parties cite to the D.C. Court of Appeals *Jordan*[120] case, wherein the Court of Appeals discussed the 90-Day Rule and the tolling during a criminal investigation. In *Jordan*, the Court of Appeals weighed the interpretation of the phrase "conclusion of a criminal investigation", under the then 45-Day rule cited as D.C. Code § 1-617(b-1). The Court of Appeals held that the D.C. Superior Court and OEA erred in concluding that the criminal investigation in this matter ended with the submission of the report by the Inspector General. The Court held that neither entity cited to any binding cases that determined when a criminal investigation ends and that the Court of Appeals knew of none. However, the Court of appeals did hold that "the natural meaning of the statutory language, however, is that the *"conclusion of a criminal investigation" must involve an action taken by an entity with prosecutorial authority – that is, the authority to review evidence, and to either charge an individual with commission of a criminal offense or decide that charges should not be filed* (Emphasis Added)."[121]

In the instant matter, Employee was investigated and arrested for sexual assault which occurred in the bunkroom of Engine 14 on April 25, 2020. Agency asserts that it was notified by the Metropolitan Police Department (MPD) on April 27, 2020, of the alleged assault. Employee was subsequently charged and arrested on May 20, 2020. Employee maintains that Agency's subsequent issuance of the Notice of Proposed Action was issued in violation of the 90-Day rule because Agency cannot show that an investigation was "actually ongoing" until the end of Employee's criminal matter in the D.C. Superior Court. Conversely, Agency argues that the prosecutorial authority had maintained the ability to investigate and that by and through the processes of the criminal matter, and also in consideration of Employee's Fifth Amendment rights, it could not have commenced the administrative disciplinary process until the conclusion of the investigation which it avers in this matter coincided with the conclusion of Employee's criminal trial and the guilty verdict by Judge Krauthamer.

OEA has held that the 90-Day rule is mandatory and that it must be adhered to. The particular section of 5-1031 at issue here is section (b) which cites to a tolling pending an investigation. While both parties have noted their own "brightline" tests for where that ends, the undersigned would note that by and through the OEA Board and Superior Court decisions, the considerations of when an investigation concludes seemingly rests upon consideration of the matter in a "case-by-case" basis. The undersigned wholly agrees with Employee's argument that the legislative history of the 90-Day Rule suggest that the D.C. Council wanted to ensure that employees weren't in a perpetual limbo regarding the status of potential discipline. Thus, it would stand to reason that an investigatory period should evince "action." This noted, Agency's position regarding the conclusion of a criminal investigation within the realm of the prosecutorial authority, lends itself to the complexities of litigation and investigation while criminal matters are pending.

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[120] *District of Columbia v District of Columbia Office of Employee Appeals and Robert L. Jordan*, 883 A.2d 124 (2005).
[121] *Id.* at 128.

Further, in the matter of *Bullock v. MPD*[122] the D.C. Superior Court held that the 90-Day rule tolls when the "prosecutorial body's exercise of its discretionary authority concluded, and the case was dismissed pursuant to a [deferred sentencing agreement]." Here, the Court reviewed a Petition from MPD wherein OEA had found that the 90 Day rule was violated when the proposed notice was issued outside of 90 Days of employee's arrest in that matter. The Superior Court Judge disagreed, citing that "neither party would have benefitted from MPD moving forward into disciplinary that would have run parallel to the [employee's] criminal case and pending fulfillment of the [deferred sentence agreement] requirements."[123] In the instant matter, Employee's criminal trial concluded on June 27, 2022, and Agency issued in the proposed notice on July 1, 2022. While the undersigned agrees that the timing of the advance notice was incredibly lengthy in consideration that Employee was charged in May of 2020 for the crime; in consideration of the Superior Court's findings regarding the discretion of the prosecutorial authority and its investigation for the criminal trial; I must find that Agency did not violate the 90-Day rule in this matter.

Use of 2012 DPM[124]

In the instant matter, Employee asserts that Agency used the outdated 2012 version of the DPM. Because his alleged misconduct occurred in 2020, Employee avers that the 2017 version of the DPM should have been utilized and that because Agency failed to do so, the charges should be dismissed. Similarly situated matters regarding Agency and employees and Agency's use of the DPM have been presented before this Office. Agency asserted that Employee's union and Agency had bargained for and agreed upon the use of the 2012 DPM and thus its administration of the action under the 2012 DPM was warranted. Both parties' addressed the *Ceasar* matter which, before this Office held that Agency's use of the 2012 DPM was incorrect and reversed Agency's action. The OEA Board also issued an Opinion and Order which upheld this ruling. This noted, the D.C. Superior Court for the District of Columbia issued a ruling in *D.C. Fire and Emergency Medical Servs. Department v. D.C. Office of Employee Appeals*,[125] 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 held that the action 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*[126], that "… current case law dictates that Agency's use of the 2012 DPM in this matter was proper."[127] While the undersigned would note that matters regarding the use of the 2012 DPM are still pending before both D.C. Superior Court and the Court of Appeals; I find that I must hold consistent with the

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[122] *See*. 2018 CA 003991 P(MPA) (March 19, 2019).
[123] *Id.*
[124] The undersigned would note that at the time of the issuance of this Initial Decision, the *Ceasa*r matter is no longer pending in the DC Court of Appeals. However, matters are still currently pending in both D.C. Superior and the D.C. Court of Appeals that have issues regarding Agency's use of the 2012 DPM. .Those matters currently pending are: **Superior Court: *Danaraye Lewis v DCFEMS***. 2025-CAB- 002167 (at the time of the undersigned's January 16, 2024, Order for supplemental briefs this matter pending before Judge Kravitz in 2023-CA- 001068); **and DC Court of Appeals: *Anthony Thomas v DCFEMS***, 25-CV-0159 (on January 16, 2024, it was previously pending before Judge Scott in 2023 CAB-003933). Further, Agency had filed a Notice of Authority pursuant to the *Ceasar* decision in the *Danaraye Lewis* matter.
[125] 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).
[126] OEA Matter No. 1601-0050-23 (January 16, 2025).
[127] *Employee v. DCFEMS*, 1601-0040-21R 24 (*citing* to OEA Board decision in *Employee v. DCFEMS, Opinion and Order on Petition for Review*, OEA Matter No. 1601-0050-23 (January 15, 2025)).

OEA Board's ruling that the "current case law dictates that Agency's use of the 2012 DPM in this matter was proper."

Due Process

Employee argues that his due process was violated when Agency summarily removed him prior to his FTB hearing. In so doing, Employee avers that this caused "prejudiced and biased" and he was not afforded a fair hearing. Additionally, Employee avers that because Agency denied his request for a continuance to obtain counsel, he was precluded from questioning AB, and that disallowed him from presenting a full body evidence for consideration by the Panel. Agency avers that it did not violate any of Employee's due process in the hearing and further notes that Employee was subject to a Stay Away Order as a result of his criminal matter, and thus he was not permitted to have contact with AB without representation. Agency asserts that it had granted previous continuances for Employee to obtain counsel.

When making a determination of whether the government has violated the Fifth Amendment Due Process clause, the court "must determine whether [the employee] was deprived of a protected interest, and if so, whether [he] received the process [he was] due."[128] The United States Court of Appeals, Federal Circuit, has held that "[w]hen a public employee has a property interest in continued employment, the Due Process clause of the Fifth Amendment requires that the employee be afforded notice "both of the charges and of the employer's evidence and an opportunity to respond."[129] In the instant matter, while Employee was improperly summarily removed prior to his FTB hearing, the Agency rescinded that removal and returned Employee to active-duty status. While Employee argues that this tainted the hearing, based on the review of the transcript of the FTB Hearing and the record under the *Pinkard* review, I find that Employee has not provided any evidence of prejudice or bias by the FTB Panel members.

Agency's denial of the request for a continuance on the day of the hearing so that Employee could retain counsel presents a unique challenge in this matter, given that due to the Stay Away Order, Employee could not question or cross-examine the main witness (AB) for whom he was charged with assaulting. The record reflects Employee's request for continuance and Agency's denial. Further, the Agency maintains it had granted previous requests, but each time Employee failed to obtain counsel. As previously noted, the Fifth Amendment requires that the employee be afforded due process in the form of notice and the opportunity to respond. The D.C. Superior Court has held that "an essential principle of due process is that a deprivation of a property interested be preceded by notice and opportunity for a hearing appropriate to the nature of the case….[t]his principle requires 'some kind of a hearing' prior to the 'discharge of an employee who has a constitutionally protected property interest to [his]employment."[130] In the context of administrative hearings, like those of the Fire Trial Board and OEA; due process standards apply given the protected property interest of employment, albeit those standards may not be as strictly adhered to as would be in a criminal proceeding wherein the loss of life and liberty may be at risk.

In the instant matter, Employee requested a continuation of the October 14, 2022, FTB Hearing because he had not been able to retain counsel. Agency denied this request and noted that previous continuances had been granted. Of note here, because of Employee's previously adjudicated

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[128] *District Council 20 et al, v District of Columbia et al.* No. Civ A 97-0185 (EGS), 1997 WL 446254 (D.D.C. July 29, 1997).
[129] *Ward v. U.S. Postal Service*, 634 F.3d 1274, 1279 (2011)
[130] *Walker v. DC OEA and DCEOM*, Case No. 2015 CA 1893 P(MPA) (October 31, 2015).

criminal matter where he was found guilty of misdemeanor sexual assault, a stay away order was also issued which precluded him from contact with AB. This meant that Employee was unable to directly question AB without having an attorney present to do so. Employee avers that this prevented him from presenting a fully developed case before the FTB panel. Employee did have counsel during his criminal trial held in D.C. Superior Court before Judge Krauthamer.[131]

The undersigned finds that Agency's denial of Employee's request for a continuance to obtain counsel was unwarranted. Agency did not proffer any real reasons to suggest that an additional continuance would have prejudiced either party. Further, given that the FTB Panel heard direct testimony from AB, it would have been more equitable for Employee to have been able to cross-examine this witness as well. This stated, in review of the aforementioned standards of the due process requirements for notice and to have a hearing with the opportunity to respond; the undersigned finds that despite Employee's inability to cross-examine AB, he was still able to present his case and respond to the charges before the FTB Panel. Further, he had the opportunity to offer his own testimony to counter the testimony provided by AB. Additionally, he was present during the hearing, and while he could not question AB, he did have the opportunity to hear the testimony presented and responded during his own testimony before the FTB. Administrative hearings do not have a requirement of the right to counsel and in many administrative hearings, employees appear *pro se*/represent themselves. Accordingly, while the undersigned finds that while it would have been more prudent for Agency to allow the additional continuance of time, particularly given the circumstances regarding witness AB; because Employee was still able to have a hearing and an opportunity to respond/present his matter before the FTB – I find Agency's denial of continuance, while it was unwarranted and was without due consideration of Employee's limitations due to the stay away order - does not rise to a violation of due process in this administrative setting.

Whether the Penalty was Appropriate

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).[132] Therefore when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercise." Specifically, OEA held in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), that selection of a penalty is a management prerogative that is not subject to the exercise of discretionary disagreement by this Office.[133] Accordingly, when an Agency charge is

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[131] Employee noted during the FTB Panel hearing that he had pursued actions regarding ineffective assistance of counsel for his criminal matter, but no further details were expounded upon in that regard. See. Transcript at pages 193-194.

[132] *See also. Anthony Payne v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0054-01, *Opinion and Order on Petition for Review* (May 23, 2008); *Dana Washington v. D.C. Department of Corrections,* OEA Matter No. 1601-0006-06, *Opinion and Order on Petition for Review* (April 3, 2009); *Ernest Taylor v. D.C. Emergency Medical Services,* OEA Matter No. 1601-0101-02, *Opinion and Order on Petition for Review* (July 21, 2007); *Larry Corbett v. D.C. Department of Corrections,* OEA Matter No. 1601-0211-98, *Opinion and Order on Petition for Review* (September 5, 2007); *Monica Fenton v. D.C. Public Schools,* OEA Matter No. 1601-0013-05, *Opinion and Order on Petition for Review* (April 3, 2009); *Robert Atcheson v. D.C. Metropolitan Police Department,* OEA Matter No. 1601-0055-06, *Opinion and Order on Petition for Review* (October 25, 2010); and *Christopher Scurlock v. Alcoholic Beverage Regulation Administration*, OEA Matter No. 1601-0055-09, *Opinion and Order on Petition for Review* (October 3, 2011).

[133] *Love* also 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

upheld, this Office will "leave 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 judgement."[134] Based on the aforementioned, the undersigned finds that Agency acted in accordance with all applicable laws, rules and regulations, that its charges were based on substantial evidence and that there was no harmful procedural error. Consequently, the undersigned concludes that the Agency's action 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/ Michelle R. Harris**
Michelle R. Harris, Esq.
Senior Administrative Judge

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, it is 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)).

[134] *Id. See also Sarah Guarin v Metropolitan Police Department*, 1601-0299-13 (May 24, 2013) citing *Stokes supra*.