

THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ERIC V. BANKS)	OEA Matter No. 1601-0023-06
Employee)	
)	Date of Issuance: February 1, 2008
)	
)	Rohulamin Quander, Esq.
DISTRICT OF COLUMBIA FIRE)	Senior Administrative Judge
AND EMERGENCY MEDICAL)	
SERVICES)	
Agency)	
_____)	

Robert H. Stropp, Jr., Esq., Employee Representative
Sandra Little, Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On January 27, 2006, Eric V. Banks, Employee (“Employee”), a Fire Fighter with the D.C. Fire and Emergency Medical Services Department (the “Agency”), filed a Petition for Appeal with the Office of Employee Appeals (the “Office”) pursuant to *D.C. Official Code* § 1-606.03(a) (2001), appealing Agency’s imposition of a ninety-six (96) duty hour suspension by Adrian H. Thompson, then Fire Chief of the Agency. The suspension was effective from 0700 hours January 30, 2006, until 0700 on February 12, 2006. Employee’s suspension was the result of an evidentiary hearing conducted on November 22, 2005, by the Police and Firefighters Retirement and Relief Board (the “Trial Board”) in Case # U-05-346, which sustained the sole charge that Employee violated Article XX, Section 6 of the *D.C. Fire and EMS Order Book*. The essence of the charge is that on July 26, 2005, Employee operated his fire apparatus, a ladder fire truck, in such a manner as to cause a traffic accident.

ISSUES

The issues to be decided are:

- 1) Whether Agency's action to suspend Employee for 96 duty hours was taken for cause, as that term is defined by the D.C. Office of Personnel (DCOP) Rule 1603.3, 47 D.C. Reg. 7094, 7096 (2000);
- 2) If Agency's action was taken for cause, whether Employee's violation of the cause standard was *de minimus*; and,
- 3) Whether the decision was in accordance with law or applicable regulations.

STATEMENT OF THE CHARGE

Charge –

Violation of Article XX, Section 6 of the *D.C. Fire and EMS Order Book*

Specification -

In that said Firefighter Eric Banks, an employee of the District of Columbia Fire and Emergency Medical Services Department and subject to the rules and orders governing said Department did, nevertheless, on the 26th day of July 2005 cause a motor vehicle collision, resulting in heavy damage to the Department vehicle and civilian vehicle. The driver of the civilian vehicle and its passengers and Firefighter Banks sustained injuries.

According to the report submitted by Major Crash Investigation Unit/Motor Carrier Safety Unit, Metropolitan Police Department, Firefighter Banks drove Truck 14 through a red light and entered the intersection of Georgia Avenue and Kennedy Street where he was struck by a 1993 Toyota Previa, which had the green light. Members of Truck 14, including Firefighter Banks, told investigators that they did not recall the color of the traffic light prior to entering the intersection. The report included results from the DDEC electronic control module which indicated that Truck 14 was traveling 37 miles per hour at impact. It also identified two witnesses, Mr. Edward Jewell and Mr. Ohuka Chiedozi, who observed Firefighter Banks proceed through a red light without slowing down.

Firefighter Banks is in violation of Article XX, Section 6, which states, “[a]t no time shall any member of the Department drive, operate, place in position, or leave in a condition any Department vehicle or equipment so as to endanger life and/or property.

SUMMARY OF MATERIAL TESTIMONY RECEIVED DURING THE
TRIAL BOARD PROCEEDINGS OF NOVEMBER 25, 2005

Agency's Witnesses¹

William M. Fitzgerald, Assistant Fire Chief – Assistant Fire Chief Fitzgerald (the “witness”) serves as the Agency’s Risk Management Officer. In that capacity, he is responsible for the safety of both all department personnel and Agency’s fire equipment. He obtained the After Accident Report (the “Report”), a special investigative report that is prepared when certain particular events occur, such as a traffic accident involving a D.C. fire apparatus. The Report, dated September 1, 2005, was prepared by Detective Michael Miller from the Metropolitan Police Department’s (“MPD”) Motor Crash Accident Investigation Unit. *Transcript (“Tr.”) 24-24*. No one was cited or ticketed as a result of this accident. The posted speed limits in the area were 30 miles per hour for Georgia Avenue, and 25 miles per hour for Kennedy Street. *Tr. 26*.

The witness did not personally visit the accident scene himself, nor did he speak to Firefighter Banks, Firefighter Bell, Lieutenant Smith, or the driver of the Toyota van that collided with the fire apparatus. Also, the witness never personally spoke with any eyewitnesses to the accident. *Tr.27-28*. However, the witness did speak with Detective Miller, who provided to the witness the report in question. He also spoke to Chief Thurmann, Captain Dugan, and a battalion fire chief whose name was unrecalled. All three of them were safety officers who reported to the scene of the incident. *Tr. 27-28*. The witness recalled seeing Captain Dugan’s separately prepared fire department report, dated August 25, 2005, which stated that there were no Toyota or fire engine skid marks observed at the scene. *Tr. 29-30*. Miller’s Report indicated that the fire truck was traveling at 37 mph at impact. This determination is based in part upon the DDAC Electronic Control Module data. *Tr. 30-34*.

Employee was subsequently charged by the Agency’s Office of Compliance based. Upon the accumulation of data from various sources, of which the DDAC was a component, a closer inspection of the DDAC report reflects “Hard Brake No. 1” at 1412 hours, although the accident in question did not occur until 1630 hours, more than 2 hours later. The witness observed that there could possibly be a time discrepancy in the equipment. Based upon the information at hand, the witness likewise noted that the term “Hard Brake”, generally refers to the mechanical system that can measure the speed of a vehicle both immediately before and after an incident. *Tr. 32-34*.

The witness did not draw any conclusions based upon what the DDAC indicated, admitting further that he did not know how to read the data anyway. He relied on the content of MPD’s report, which indicated that the fire truck was traveling 36 mph at the moment of impact. That speed was listed in Agency’s records incidental to the sole

¹ Several of the witnesses were secured by and listed as “Agency’s witnesses” in the Fire Trial Board proceeding. Some of them were Employee’s coworkers, and their respective testimonies were kindly disposed to the Employee.

charge lodged against Employee.² *Tr.* 35.

Lieutenant James R. Smith – Lieutenant James R. Smith (the “witness”) was riding in the fire engine with the Employee when the unit was initially dispatched as a rescue squad. Just shortly before they arrived at the scene of the fire they were responding to, the unit was given a stand down order when another rescue squad unit came back into service. *Tr.* 59-62. Deputy Fire Chief Thurman responded to the accident site within minutes, and interviewed the witness. Capt. James Dugan, responding as safety chief, also questioned the witness, who was perturbed by Dugan’s implication that he was challenging the witness’s veracity about whether the witness was lying on behalf of the Employee, particularly with regard to questions relating to whether the light was green or red.

The witness testified to the Trial Board that he did not see the color of the traffic light, and was unsure of the traffic light’s color at the moment the incident occurred. The witness has been driven by the Employee for about seven years. He considers the Employee to be both an exemplary employee of the Agency, as well as a superior truck driver, one of the best in the Agency. *Tr.* 64-65; 67.

At the time of this incident, when they arrived at the intersection, it was clear. They proceeded through it, as there was an urgent need to get to the fire scene. It was reported that people were trapped, with fire showing on the second floor. All traffic on Georgia Avenue had pulled over, leaving a clear roadway. The tractor was through the intersection, when the witness heard a loud noise, although he did not feel any impact and never saw the vehicle coming. *Tr.* 66-67.

Firefighter George W. Bell, Jr. – George W. Bell (the “witness”) has 21 years of experience as a fire fighter, and was the tiller man on the fire truck, with two years of service in that position. From his vantage point as the tiller driver, he could not see the traffic in front of the truck, and was unaware of the traffic volume at the site. *Tr.* 70-72. To the Trial Board’s question of whether the witness considered the accident to have been avoidable, he replied, “I think if the person that was coming to hit us ... it could have been avoidable but this person never hit the brakes or never ... I seen the car coming. I did see the car but he didn’t never hit brakes.” From his vantage point, he could not see the traffic light and was unaware of the color of the light at the moment of impact. *Tr.* 74. The fire apparatus was already in the intersection when the witness first saw the approaching vehicle, which was just at the crosswalk. *Tr.* 76.

He has known the Employee the entire tenure of employment and, unlike some other drivers who turn corners too sharply, knows him to be a very dependable and predictable driver, one who inspires a lot of confidence. His skill in operating the truck reduces the

² Employee’s counsel dissented from the witness’s testimony regarding the 36 mph speed, noting that Employee was charged with 37 mph speed. Other data in the record underscored that the speed difference is significant in terms of the exceptionally short time span accorded for reacting to the sudden appearance of a moving emergency vehicle into the path of the citizen’s vehicle. However, the difference in speed more addresses how hard the impact would be, and the distance and trajectory angle of the smaller vehicle after it collided. There is still the great likelihood of a collision, given the only one mile per hour difference in speed, covering such a short time frame and short distance.

workload of the tiller who has to compensate at the rear of the vehicle. *Tr. 76-77.*

Detective Michael Miller, Metropolitan Police Department – Detective Miller (the “witness”) is a member of the staff of MPD’s Major Crash Investigations Unit. He was contacted on July 26, 2005, the date of the accident, investigated the incident, and subsequently prepared the After Accident Report. He did not personally interview the two civilian eyewitnesses to the incident during his investigation. The two eyewitnesses to the accident allegedly told the other officers who were on the scene that the fire truck passed through a red light, but failed to slow down, and that a collision occurred. *Tr. 80.*

Concerning the speed analysis component of his report and the law of linear momentum, the witness gave a detailed explanation of how the accident occurred, using the latest technology to digitally map out the accident. His testimony addressed several factors, including: inertia, equal and opposition reactions, weight of the respective vehicles, angles of approach and departure, respective vehicular sizes, vehicular rotation of the striking vehicle, non evidence of braking prior to impact, among other considered factors. At the end of this phase of the process, the witness digitally constructed a forensic map. *Tr. 81-82.*

In addition, certain data that was created or retrieved was entered into a computer aided drawing program (“CAD”). Based upon the full analysis of the data, the witness concluded that at the time of impact, the fire ladder truck was traveling at a minimum speed of 36 miles per hour. Due to several varying factors relative to the difference in size between the fire vehicle and the Toyota, the report reflects that the Toyota speed was between 21 and 49 miles per hour. If the Toyota was traveling at the higher speed, i.e., 49 miles per hour, then the evidence would yield a determination that the fire truck was traveling at 37 miles per hour. *Tr. 83.* The witness subsequently interviewed Mr. Harshaw, the driver of the Toyota, after he had recovered from his injuries. Harshaw advised the witness that the traffic light on Kennedy Street was green, as verified by the two eye witnesses. *Tr. 85.*

On cross examination, the witness concluded that the accident was unavoidable, based upon several relevant factors, including:

- a) the speed of the ladder truck;
- b) Harshaw’s (the van driver) needed human time to analyze the situation;
- c) when you first hear a fire engine air horn, your initial reaction is to look behind you, not in front of you;
- d) when you hear a siren, the civilian driver has to triangulate where the direction of the siren is coming from;
- e) the existing building lines imposed a visual line of sight obstruction of the approaching fire apparatus;
- f) Although sound does travel around building obstructions, it is a muffled sound and the listener must determine where the affected sound is coming from; and
- g) in a circumstance such as this one was, valuable and crucial time was being spent, and the chance to successfully effect a stop and to avoid a collision was being eliminated. *Tr. 86-87; 97.*

The witness underscored that when people are driving, and an emergency such as this one occurs, the driver still needs a distance and requires some time in order to initially perceive and detect the situation. Only then will the driver begin to make a physical reaction to the situation. Further, the driver will still need a stopping distance. This is converted into feet per second at 20-25 mph, divided by fractions of a second, given the driver's perception and response time when he heard the siren, even before he saw the ladder truck. The witness concluded there was not enough time for the Toyota van to come to a complete stop before striking the ladder truck. *Tr. 87-88.*

He noted that with the ladder truck at 36 mph (on Georgia Avenue), and if the van driver was three seconds back (on Kennedy Street), the driver would have a second and a half to respond/react to the stimulus (saying to himself, "OK, a ladder truck is there, I've got to stop"). The time already consumed would not include the required stopping distance, resulting in the crash being unavoidable because of the building line obstruction. *Tr. 88.*

The witness provided some examples. First, if the Toyota was traveling at 49 mph (73 feet per second), and the average person takes about 1.6 seconds to react, the Toyota was about 109 feet back from the point of impact before the driver could even react. That's just a buffer time, and does not consider that actual contact with another vehicle was made. At 49 mph, the driver would need 228.5 feet to stop, including the perceptual response time of 109 feet. *Tr. 89-91.*

Second, if the Toyota was traveling at 25 mph, the driver would need 86 feet to stop, once he sees, perceives, and hears the ladder truck. The driver would still barely strike the fire engine. In this case, the driver struck the ladder truck without first seeing it. From the relevant angle, with all factors taken into consideration, the driver would have to lean past the person in the passenger seat to actually see the fire engine coming from his right. The driver's peripheral vision was narrowed as he traveled down the street with buildings on both sides. Therefore, he did not actually see the fire engine (until impact) *Tr. 93-94.*

The witness concluded that if the Toyota van driver was traveling at 25 mph, the crash was still going to occur, because the driver has used up the entire space for him to travel the distance to proceed and to successfully stop. Based upon the above-noted information, the witness concluded that the accident was unavoidable, given the calculated and determined speed of the two vehicles. *Tr. 93-94.*

Pursuant to the provisions of 18 DCMR, if Employee has his audible and visual emergency equipment activated (siren, exhaust whistle, air horn) and had emergency lights on, he can pass a red light, speed, and go the wrong way on a one way street. Because Employee's lights and siren were activated, according to witnesses, Employee was in compliance with the above-noted regulation at the time that he was operating the vehicle while responding to an emergency. As well, Mr. Harshaw, Toyota driver, could not have avoided the crash. The witness concluded that neither driver committed a traffic violation. Therefore, neither driver was cited or ticketed. *Tr. 93-96.*

Eric V. Banks, Employee and Witness – Eric V. Banks (the “Employee”) has been with the Agency for 19 years, driving a fire truck for the last 10 years. He has had no prior accidents while driving a fire vehicle. On July 26, 2005, he was operating his fire engine, responding to a fire emergency site. *Tr. 43-44.* As he approached Georgia Avenue at Kennedy Street, Northwest, he noted that all North-South traffic had stopped. There was no visible west or east bound traffic on Kennedy Street either. Traffic had stopped in both directions. Still, he slowed down at the intersection, saw that it appeared to be clear, and then accelerated through the intersection. *Tr. 45.* He did not actually see the approaching vehicle in advance, noting that it must have entered the crosswalk while the fire engine was already in the middle of the intersection. *Tr. 50-52.* While driving to the fire emergency scene, Employee did not have discussions with, nor was he distracted by radio communications from fire headquarters officials who might have been discussing the situation at the fire scene. *Tr. 46.*

Employee did not discuss the details of the accident with fire chiefs Smith and Dugan, both of whom came to the accident site. His first discussion of the accident was with the staff of the D.C. Metropolitan Police Department at the Major Crash Unit. It was there that he gave his information for MPD’s report. *Tr. 46-47.*

Employee could not recall whether the traffic light at Georgia Avenue and Kennedy Street was red or green when he arrived at the intersection and went through it. However, his truck was struck at the rear tractor wheels (on the left side). Employee did not receive a traffic citation, and was uncertain whether the other driver was cited. *Tr. 49.* With regard to the question of how fast can a fire vehicle be operated above the posted speed limit, Employee testified that the emergency response procedures provide that the vehicle can be operated at 10 miles over the speed limit in good weather, and his speed was at 37 mph and within the allowed speed according to the rules. *Tr. 50.*

Employee was familiar with 18 DCMR, the traffic code regulations for emergency vehicles, especially the need to slow down before entering intersections, and to make certain that the intersection is safe. If the driving condition includes heavy traffic, there is even a greater need to pay particular attention to driving, as automobiles sometimes do not stop or pull over. They might even pull out in front of you. Employee had not been ticketed nor disciplined by the Agency within the prior three years. *Tr. 52-53.*

When Employee first saw the Toyota van, it had not yet entered the intersection, and was still in the crosswalk. The fire engine was already in the middle of the intersection. On the date of the incident, it was rush hour at the time of the accident, and traffic was heavy on Georgia Avenue. There was good weather. *Tr. 55-57.*

FINDINGS OF FACT, LEGAL ANALYSIS, AND CONCLUSIONS OF LAW

The *D.C. Official Code* at § 1-616.51 (2001) provides the general discipline policy parameters for employees in the Career and Educational services. The statute requires creation of a disciplinary system including, in pertinent part that:

- 1) A provision that disciplinary actions may only be taken for cause;
- 2) A definition of the causes for which a disciplinary action may be taken.

District of Columbia Office of Personnel Rule (“DCOP”) 1603.3, 47 D.C. Reg. 7094 (2000) sets forth the definition of “cause” and provides, in pertinent part:

1603.3 For the purpose of this chapter, “cause” means . . . any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations; and any other on-duty or employment-related reason for corrective or adverse action that is not arbitrary and capricious. This definition includes, without limitation . . . negligence, incompetence, insubordination, misfeasance, malfeasance . . . *Id.* at 7095.

In the matter before me, Employee was charged with operating Agency’s fire vehicle in a manner that caused a motor vehicle collision. The legal term “negligence” was not specifically enumerated as a component of the specification. Rather, Employee was specifically cited for a violation of Article XX, Section 6, of the *D.C. Fire and EMS Order Book*. That provision states under the heading “Responsibility for Accidents:

At no time shall any member of the Department drive, operate, place in position, or leave in a condition any Department vehicle or equipment so as to endanger life and/or property. The fact that traffic regulations of the District of Columbia do not apply (with certain exceptions) to the apparatus vehicles of the Department while responding on emergency incidents, or when operating at the scene of an emergency, shall not be construed as relieving officers and members from responsibility for accidents that may occur by reason of lack of care or exercise of proper precautions.

Therefore, Agency has charged Employee with a less strict legal standard than the proof of formal negligence on his part might require, by asserting that he operated his fire vehicle with a lack of exercise of proper precautions, and that his act of omission conduct directly contributed to the causing of a motor vehicle accident in the traffic intersection. If proven, Employee’s conduct could still constitute “cause” as an employment-related act of omission which interfered with the efficiency of government operation, and the basis for adverse action under a plain reading of the above-quoted definition.

OEA rule 629.1 *et seq.*, provides that Agency, in order to make its case, must prove by a preponderance of the evidence presented that Employee committed the alleged offenses. This rule defines “preponderance of the evidence” as:

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.

An evidentiary hearing was convened before a Trial Board on November 22, 2005. Employee, who was represented by legal counsel, was present at the hearing and testified on his own behalf. Agency presented several witnesses, two of whom were Employee's coworkers. These two witnesses testified in superlative terms with reference to their experience in working with Employee over a sustained period, highlighting not only his professionalism on the job, but his skill in operating the fire ladder truck, particularly in tight traffic.

However, after considering all of the evidence presented, including the mandatory components of the Douglas Factors³, the Fire Trial Board, through a consensus, found

³ In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth a number of factors that are relevant for consideration in determining the appropriateness of a penalty. Although not an exhaustive list, the factors are as follows:

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

Employee guilty of the sole charge, and that on July 26, 2005, he operated his fire apparatus in such a manner as to cause a traffic accident. The Board recommended a ninety-six (96) duty hour suspension. On December 29, 2005, Adrian H. Thompson, Fire Chief, accepted the Trial Board's recommendation, and imposed the suspension, effective from 0700 hours on January 30, 2006, until 0700 hours on February 12, 2006.

The Board looked at the evidence both globally and specifically before reaching its recommended decision. They noted the police report prepared by Detective Michael D. Miller (See Agency Tab #6) reflected that eyewitness Edward Jewell, who did not testify before the Board, told the investigating officer that the fire engine did not slow down before entering the intersection. Further, they noted that Ohuka Chiedozie, another eyewitness, who was standing in a different location in the intersection, stated that the fire engine entered the intersection on the red light. His statement as reflected in Miller's police report did not specifically address the issue of speed or whether the vehicle slowed before entering the intersection. Like Jewell, Chiedozie did not testify before the Trial Board. However, the Trial Board did not rely solely upon the statements of these two persons in the process of finding the facts and then reaching its conclusions.

Scientific evidence was incorporated into the investigation from at least two different approaches, each separately drawing a conclusion that the fire vehicle was traveling at either 36 or 37 miles per hour at the moment of impact. One report reflected that the ladder truck was at full throttle at the moment of impact. It is not a great leap, then, to find that the ladder truck could not have been slowed to the point where Employee was exercising sufficient caution and diligence, able to either stop his vehicle or greatly slow it down, if he observed an approaching vehicle traveling at legal speed which also had the green light. Had he been able to complete either of these above-noted scenarios, there is a high likelihood that he could have either avoided the accident completely, or greatly lessened the impact.

Employee's counsel has pointed out that there was some discrepancy in the records regarding the exact time of the accident. While all data points to the official time of approximately 1630 hours (4:30 pm), some of the scientific data listed 1412 hours (2:14 pm) as the time of the accident. While all conceded that the hour of the day was clearly wrong, there is no evidence in the record that this misstated time, which might actually be no more than the need to reset a timing device, had any bearing upon the accident in this case or the investigation into the accident. I find that the misstated time is but a harmless error, and does not affect the outcome of the MPD investigation and the issuance of the After Accident Report, the Agency's own separate investigation and report, how this Trial Board handled its procedures, or my analysis of how the Trial Board discharged its duties.

In applying which of the *Douglas* Factors seemed most applicable here, the Trial Board considered both adverse and mitigating elements. Adverse to the Employee were the facts that: a) he had received training for the safe operation of the vehicle, but concluded that

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

his conduct in this specific instance went contrary to that training; b) as a result of his conduct, a serious accident occurred, which inflicted serious personal injury to several people, as well as massive property damage to two vehicles; c) Employee's misconduct imposed a direct relationship upon his performance of his duties as a fire truck driver; and d) Employee's misconduct imposed an adverse impact upon the general public confidence in the Agency's ability to safely accomplish its mission.

Conversely, the Trial Board did not hesitate to also consider the relevant mitigating factors, including: a) Employee has 19 years of service to the Agency; b) he has 10 years of service as a fire truck driver, and has established himself as an exemplary driver, one who inspires great confidence in the men and women who are riding on the vehicle that he is operating; and c) he has no prior existing disciplinary record on file.

I conclude that the mitigating factors are extensive and overwhelmingly to the Employee's benefit. That he had an unfortunate accident is a matter of record. However, his much larger record is assuredly more favorable than unfavorable, as it underscores excellence and outstanding work. Anyone who would have occasion to evaluate Employee's job performance can see that. That he had a mishap on one day, perhaps a momentary slip in his personal diligence or good judgment, was unfortunate. However, it does not detract overall from his credibility, reliability, and sense of responsibility that he has earned among his peers, who have rightfully placed the trust of their lives and safety into his experienced hands.

The Trial Board then found and concluded that there was enough substantial evidence to support a finding that the Employee should be held liable as charged. This was a sufficient enough legal standard upon which to base a finding of liability on the part of the Employee. Agency seemed to get confused when it stirred in the components of Article XVII, Section #23, of the Order Book, which was not a part of the initial Charge or Specification. That section mandates actually stopping the fire emergency vehicle at each red light and stop sign. Fortunately, Agency's confusion did not mislead the Trial Board, which stayed focused on the requirements of Article XX, and its dictates for the responsible operation of emergency vehicles, without regard to considering whether "responsible operation," as contained in Article XVII also included a need to stop the vehicle at every red stop light or stop sign.

The provisions of 18 DCMR 2002.2(b), allow emergency vehicles to proceed past a red light or stop sign, "but only after slowing down as may be necessary for safe operation." Further, at 2002.4, it states that, "The provisions of this section shall not relieve the driver of an authorized emergency vehicle from the duty to drive with due regard for the safety of all persons, nor shall these provisions protect the driver from consequences of his reckless disregard for the safety of others." Both of these provisions are fully applicable in the present situation, underscoring that the duty of the emergency vehicle operator is to always be fully cognizant of the traffic situation. Further, the driver must exercise both care and diligence when responding to emergencies, so that the safety of everyone is always given the highest consideration.

In *D.C. Metropolitan Police Department v Pinkard*, 801 A.2d, 86, the District of Columbia Court of Appeals overturned a decision of the D.C. Superior Court that held, *inter alia*, that this Office had the authority to conduct *de novo* hearings in all matters before it. Although the *Pinkard* case was initiated by the Metropolitan Police Department, because there is a precluding collective bargaining agreement, the holding likewise applies to Fire Trial Board proceedings. According to the appellate court:

On this appeal from the Superior Court, the MPD contends (1) that an evidentiary hearing before the OEA administrative judge was precluded by a collective bargaining agreement between the MPD and the Fraternal Order of Police, a labor union to which Pinkard belongs, [and] (2) that the OEA administrative judge abused her discretion in ordering a second [and *de novo*] evidentiary hearing. . . .

As a general rule, this court owes deference to an agency's interpretation of the statute under which it acts. There is, however, an exception to this general rule, which is that we will not defer to an agency's interpretation if it is inconsistent with the plain language of the statute itself. This case falls within the exception because the OEA's reading of the [Comprehensive Merit Personnel Act or CMPA] is contrary to its plain language and inconsistent with it. We therefore hold that, under the statute, the collective bargaining agreement controls and supersedes otherwise applicable OEA procedures, and consequently, that the OEA administrative judge erred in conducting a second hearing.

The OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives the OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings.

The MPD contends, however, that this seemingly broad power of the OEA to establish its own procedures is limited by the collective bargaining agreement in effect at the time of Pinkard's appeal. The relevant portion of the collective bargaining agreement reads as follows:

[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing has been held, *any further appeal shall be based*

solely on the record established in the Departmental hearing. [emphasis added]. . .

It is of course correct that a collective bargaining agreement, standing alone, cannot dictate OEA procedures. But in this instance the collective bargaining agreement does not stand alone. The CMPA itself explicitly provides that systems for review of adverse actions set forth in a collective bargaining agreement must take precedence over standard OEA procedures. D.C. Code ' 1-606.2(b) (1999) (now ' 1-606.02 (2001)) states that A[a]ny performance rating, grievance, adverse action, or reduction-in-force review, which has been included within a collective bargaining agreement . . . *shall not be subject to the provisions of this subchapter.* (emphasis added). The subchapter to which the language refers, subchapter VI, contains the statutory provisions governing appellate proceedings before the OEA. *See* D.C. Code ' 1-606.3 (1999) (now ' 1-606.03 (2001)). Since section 1-606.2(b) specifically provides that a collective bargaining agreement must take precedence over the provisions of subchapter VI, we hold that the procedures outlined in the collective bargaining agreement B namely, that the appeal to the OEA A shall be based solely on the record established in the [trial board] hearing@ B controls in Pinkard=s case.

The OEA may not substitute its judgment for that of an agency. Its review of the agency decision B in this case, the decision of the trial board in the MPD=s favor B 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. Mindful of these principles, we remand this case to the OEA to review once again the MPD=s decision to terminate Pinkard, and we instruct the OEA, as the collective bargaining agreement requires, to limit its review to the record made before the trial board.

See *Pinkard* at 90-92. (citations omitted).

In summary, pursuant to *Pinkard*, an AJ of this Office may not conduct a *de novo* hearing in an appeal before the Office, but must rather base the decision solely on the record below, when all of the following conditions are met:

1. The appellant (Employee) is an employee of either the Metropolitan Police Department, or the D.C. Fire & Emergency Medical Services Department;
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.: A[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [i.e., Trial Board] 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 a Trial Board 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, *inter alia*, Employee=s suspension.

All of these conditions are met in this matter. Thus, according to *Pinkard*, my review of the final Agency decision imposing a suspension is limited: a) to a determination of whether the final Agency decision was supported by substantial evidence;⁴ b) whether there was harmful procedural error; or c) whether it was in accordance with law or applicable regulations.⁵ Further, I must generally defer to the agency=s credibility determinations.⁶ Therefore, my review is restricted to the record made before the Trial Board.⁷

Whether the Trial Board=s findings were supported by substantial evidence.

⁴ According to OEA Rule 629.3, 46 D.C. Reg. 9317 (1999), an agency has the burden of proof in adverse action appeals. Pursuant to OEA Rule 629.1, *id.*, that burden is by Aa preponderance of the evidence@, which is defined as A[t]hat 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.@ In *Pinkard*-type cases previously decided by this Office (including the initial decision in *Pinkard* itself that resulted from the remand), we have held that there must be substantial evidence to meet the agency=s preponderance burden. See, e.g.; *Hibben*, *supra*; *Davidson*, *supra*; *Kelly*, *supra*; *Pinkard v. Metropolitan Police Department*, OEA Matter No. 1601-0155-87R02 (December 20, 2002), _ D.C. Reg. ___(); *Bailey v. Metropolitan Police Department*, OEA Matter No. 1601-0145-00 (March 20, 2003), _ D.C. Reg. ___().

⁵ 801 A.2d at 91.

⁶ *Id.*

⁷ 801 A.2d at 92.

According to *Pinkard*, I must determine whether the Trial Board=s findings, beginning with the need to first establish that “cause” is present, were supported by substantial evidence. Substantial evidence is Asuch relevant evidence as a reasonable mind might accept as adequate to support a conclusion.@⁸ Further, A[i]f the [Trial Board=s] findings are supported by substantial evidence, [I] must accept them even if there is substantial evidence in the record to support contrary findings.@⁹

As noted earlier, *Pinkard* counsels me, as the Areviewing authority@, to Agenerally defer to the agency=s credibility determinations.@ Based on my own review of the several witnesses’ testimony, I can find no reason to disturb the Trial Board=s credibility determinations. As to the Trial Board=s findings regarding the charges brought against Employee, my review shows that there was certainly substantial evidence to support those findings. Thus, there is no reason to overturn them.

*Whether Agency committed harmful procedural error, and
Whether the decision was in accordance with law or applicable regulations.*

This Office has held on many prior occasions, when assessing the appropriateness of a penalty, that the Office is not to substitute its judgment for that of the agency, but is simply to assure that Amanagerial discretion has been legitimately invoked and properly exercised.@¹⁰ Further, when the charge is upheld, the Office has held that it will leave Agency=s penalty Aundisturbed@ when Athe penalty is within the range allowed by law, regulation or guidelines and is clearly not an error of judgment or abuse of discretion.@¹¹

Based on my review of the record below, I conclude that the penalty was reasonable and should not be disturbed. Since Agency’s action was not in error, there is no harmful error to remedy. I further conclude that substantial evidence exists to support the Agency’s final decision and thus find no reason to overturn its findings.

ORDER

It is hereby ORDERED that Agency’s decision to impose a ninety-six (96) duty hour suspension upon this Employee is UPHELD.

FOR THE OFFICE:

/ s /

ROHULAMIN QUANDER, ESQ.

⁸ *Davis-Dodson v. D.C. Department of Employment Services*, 697 A.2d 1214, 1218 (D.C. 1997) (citing *Ferreira v. D.C. Department of Employment Services*, 667 A.2d 310, 312 (D.C. 1995)).

⁹ *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).

¹⁰ *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

¹¹ *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

Senior Administrative Judge