THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
EMPLOYEE[1]	
v.	OEA Matter No.: 1601-0050-23
D.C. FIRE & EMERGENCY MEDICAL SERVICES, Agency	Date of Issuance: January 16, 2025

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Firefighter/Emergency Medical Technician ("FF/EMT") with the Department of Fire and Emergency Medical Services ("Agency"). On December 30, 2020, Employee was arrested by the Prince George's County Police Department for possession of a stolen handgun, possession of a loaded handgun on his person, and possession of a loaded handgun in a vehicle, hereinafter ("Case No. U-21-087").[2] On March 14, 2021, Employee was arrested again in Prince George's county for second degree assault, acting in a disorderly manner, resisting

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] Employee pleaded guilty to the possession of a loaded handgun charge. The remaining charges were disposed of by way of nolle prosequi (this term is used in the criminal legal system to signify that the prosecution is discontinuing or will not prosecute). Agency's Office of Internal Affairs ("OIA") issued an August 24, 2022, report sustaining the allegations leading to Employee's arrest.

arrest, and obstructing and hindering a police officer, hereinafter ("Case No. U-21-154").[3] As a result of Case No. U-21-087, Agency charged Employee with any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law; any act which constitutes a criminal offense whether or not the act results in a conviction; and any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations to include: neglect of duty."[4]

As a result of Case No. U-21-154, Employee was similarly charged with any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law; any act which constitutes a criminal offense whether or not the act results in a conviction; and any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations to include: neglect of duty."[5] On December 1, 2022, Agency held a Trial Board hearing wherein Employee pleaded not guilty to the charges for both Case Nos. U-21-087 and U-21-154. The Trial Board determined that Employee was guilty in each matter and recommended termination. The Fire Chief subsequently adopted the Trial Board's recommendation, and Employee's termination became effective on June 24, 2023.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on July 13, 2023. He argued that his termination was discriminatory in nature and that members of the Trial Board received similar charges but were not terminated. Therefore, Employee asked that his termination be reversed and that he be made whole.[6]

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[3] All charges for this case were disposed of by nolle prosequi on August 9, 2022. OIA issued an August 24, 2022, report determining that the allegations leading to Employee's second arrest were sustained.
[4] *Agency's Notice of Proposed Termination* (September 14, 2022).
[5] *Id*.
[6] *Petition for Appeal* (July 13, 2023).

Agency filed its answer on August 11, 2023. It asserted substantial evidence existed to support a finding that Case Nos. U-21-087 and U-21-154 were taken for cause. Agency submitted that no harmful procedural error was committed in administering Employee's termination action. Additionally, it characterized his claims related to discrimination as baseless. According to Agency, there was no evidence to suggest that members of the Trial Board committed similar offenses to Employee within the past three years. Thus, it reasoned that his termination was taken in accordance with all applicable laws and regulations.[7]

The OEA Administrative Judge ("AJ") held a prehearing conference on September 12, 2023. During the conference, the AJ determined that this matter was governed by *Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). Accordingly, the parties were ordered to submit briefs addressing whether the Trial Board's decision was supported by substantial evidence; whether there was harmful procedural error; and whether Agency's termination action was taken in accordance with all applicable laws and regulations.[8] Both parties submitted responses accordingly.

In its brief, Agency argued that the termination action was based on substantial evidence. As it related to Case No. U-21-087, it contended that on December 30, 2020, Body Worn Camera Footage ("BWC") confirmed that Employee was in possession of a stolen handgun in a vehicle of a parking lot. It went on to note that Employee pleaded guilty to the charge of possession of a "loaded handgun on person" in the District Court of Maryland for Prince George's County. Regarding Case No. U-21-154, it provided that on March 14, 2021, BWC confirmed that Employee assaulted a police officer, resisted arrest, assaulted another person, engaged in disorderly conduct, disturbed the peace, and obstructed/hindered a police investigation. Agency

[7] *Agency Answer to Petition for Appeal* (August 11, 2023).
[8] *Post-Status Conference Order* (September 25, 2023).

further submitted that its subsequent investigation into both matters supported a finding that Employee committed the alleged misconduct. Therefore, it opined that both criminal matters were supported by the record, which warranted Employee's termination.[9]

Concerning discrimination, Agency stated that there was no evidence to substantiate Employee's claim. It posited that Employee also failed to identify with specificity what bylaws or standing orders were violated in this regard, and relayed that he did not provide a sufficient basis for establishing a claim of disparate treatment. Alternatively, Agency asserted that even if Employee could present such evidence, OEA lacked jurisdiction to adjudicate the issue. Moreover, it argued that no harmful procedural error was committed in terminating Employee. According to Agency, Employee was properly disciplined pursuant to the 2012 District Personnel Manual ("DPM"). It explained that Employee was also charged pursuant to Article VII of its Order Book because that was the procedure for which Agency and Employee's union bargained. Agency alternatively suggested that even if its application of the 2012 DPM was in error, it was harmless because the charges from the 2012 DPM have corresponding charges in the subsequent iterations of the regulations.[10]

Finally, Agency submitted that its decision to terminate Employee was based on a consideration of the *Douglas* factors.[11] It cited the Trial Board's conclusion that Employee must

[9] *Agency's Brief* (October 20, 2023).
[10] *Id*.
[11] 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

be held accountable for his acts of misconduct, and his actions warranted removal. Because Agency believed that it did not abuse its managerial discretion to discipline Employee, it asked that the termination action be upheld.[12]

In response, Employee claimed that Agency erred by holding the Trial Board hearing on the same day, with the same panel, for two unrelated incidents. In his view, Agency's decision resulted in unjust prejudice. Employee further asserted that Agency improperly relied on an obsolete version of the DPM in its charging documents, which constituted a harmful procedural error. As it concerned Case No. U-21-087, he argued that he never threatened anyone and left the residence after a verbal disagreement. Pertaining to Case No. U-21-154, Employee believed that an overzealous police officer initiated unwarranted charges against him, which were eventually dismissed. Employee's brief further emphasized that he received numerous awards and accolades for his performance as an FF/EMT. According to him, all three members of the Trial Board had previous criminal cases involving weapons charges, but none of them were terminated. Thus, he reiterated that his termination was discriminatory. As a result, Employee requested that OEA reverse Agency's termination action.[13]

The AJ issued an Initial Decision on March 15, 2024. First, the AJ concluded that the Trial Board established cause to discipline Employee in Case No. U-21-087 because Employee pleaded

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

[12] *Agency's Brief* at p. 25.

[13] *Employee's Brief* (November 17, 2023).
Agency filed a reply brief on November 21, 2023, wherein it argued that contrary to Employee's belief, there were no lies, inaccuracies, or fabrications presented to the Trial Board related to his acts of misconduct. It reiterated that the 2012 DPM were the applicable, bargained-for regulations at the time of the termination proceedings. Agency noted that Employee could not establish any harm in holding one Trial Board hearing for both cases against Employee. It also reasoned that the *Douglas* factors were properly considered. Therefore, it again requested that Employee's termination be upheld. *See Agency's Reply Brief* (November 21, 2023).

guilty to the charge of "loaded handgun on person." She also held that cause existed to discipline Employee in Case No. U-21-154 because Agency proved that Employee: assaulted a police officer; disrupted the peace, government, and dignity of the state; willfully acted in a disorderly manner; intentionally resisted arrest; and intentionally annoyed, obstructed, and hindered a police officer in the performance of their lawful duties.[14]

In examining harmful procedural error, the AJ ruled that Agency utilized the incorrect version of the DPM in its charging documents. She explained that under both Case Nos. U-21-087, Charge No. 1, Specification No. 1, and Case No. U-21-154, Charge No. 1, Specification No. 1, Employee was charged with: (1) any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law; (2) any act which constitutes a criminal offense whether or not the act results in a conviction; and (3) neglect of duty, pursuant to Agency's Order Book and the 2012 DPM. However, she assessed that the applicable regulations at the time of Employee's termination were found in the 2019 DPM based on her reading of the language contained in Article 31, Section A of the Collective Bargaining Agreement ("CBA") between Employee's union and Agency, as well as Article VII of Agency's Order Book.[15] The AJ went on to discuss how all three charges imposed against Employee did not exist in the 2019 iteration of the regulations; thus, she was unable to ascertain which charges should have been levied against Employee had Agency utilized the correct DPM. She, therefore, reasoned that Agency's failure to provide Employee with the specific charges underlying the proposed termination deprived him of a fair opportunity to defend against his removal.[16] As such, she held

[14] *Initial Decision* (May 15, 2023).
[15] *Id*.
[16] As will be discussed herein, the AJ relied on the holding in *Francois v. Office of the State Superintendent of Education*, OEA Matter No. 1601-0007-18, (October 31, 2018) in support of her ruling.

that Agency's failure to follow the appropriate laws, rules, and regulations amounted to a harmful procedural error.[17]

Next, while there was substantial evidence in the record to support the Trial Board's finding that Employee committed the misconduct as alleged, the AJ opined that his actions on March 14, 2021, and December 30, 2021, were not related to his employment with Agency as a Firefighter/EMT and did not occur while Employee was on duty. Therefore, she held that Agency could not charge Employee with any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law. Based on the same rationale, the AJ found that Agency was precluded from charging Employee with neglect of duty since DPM §§ 1605.4(e)(2019) defined this cause of action as "[c]areless or negligent work, general negligence, loafing, sleeping or dozing on-duty, wasting time, and conducting personal business while *on duty*."(emphasis added).[18]

With respect to the charge of any act which constitutes a criminal offense, whether or not the act results in a conviction, the AJ provided that because this cause of action did not exist in the 2019 regulations, she was unable to adjudicate this issue. Additionally, the AJ could identify no basis for deciding Employee's discrimination claims, noting that OEA lacked jurisdiction over his arguments. Based on the foregoing, she ruled that the charges were not supported by the record. Therefore, the AJ reversed Agency's termination action and ordered that Employee be reinstated with backpay and benefits.[19]

Agency disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on April 18, 2024. It argues that the AJ erred in finding that the incorrect iteration of the

[17] *Initial Decision* at p. 25.
[18] *Id*. at p. 27.
[19] *Id*.

DPM was used in the charging documents. First, Agency posits that by not challenging the use of the 2012 DPM before the Trial Board, Employee waived the issue before OEA. It notes that Employee was represented before the Trial Board and submits that both parties have a common understanding that relying on the Order Book and the 2012 DPM was lawful. Further, Agency contends that any reference to the 2012 DPM was the result of bargaining with Employee's union, International Fire Fighters Local 36, AFL-CIO MWC ("Local 36"). It reasons that Local 36, by agreement, established disciplinary procedures that differed significantly from the default procedures established by regulation. Agency maintains that the AJ overstepped her authority in determining that Agency erred in using the 2012 DPM because the Public Employee Relations Board ("PERB"), and not OEA, has the principal obligation to oversee labor-management relations between the District and its workforce. It, therefore, opines that OEA cannot unilaterally impose a disciplinary scheme that would conflict with PERB case law requiring management to bargain as to any changes that modify a practice or bargaining agreement.[20]

Agency also argues that the AJ misconstrued and ignored past Superior Court decisions in finding that the use of the 2012 DPM was erroneous. It reiterates that even if its reliance on the 2012 regulations was an error, it was harmless. Agency further disagrees with the AJ's finding that Employee could not be charged with neglect of duty or any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations because they were not related to his employment and because the conduct was committed while off duty. It asserts that the AJ's conclusions were contrary to both Article VII's definition of "employment-related," as well as OEA Board precedent. Additionally, it is Agency's position that it was in conformance with the 2019 DPM concerning the charge of any act which constitutes a criminal

[20] *Petition for Review* (April 18, 2024).

offense, whether or not the act results in a conviction, even if the Board finds that Agency was not permitted to rely on the 2012 DPM. Agency is firm in its position that Employee was able to adequately defend against the charges levied against him. Therefore, it requests that his termination be upheld.

Substantial Evidence

According to OEA Rule 637.4(c), the Board may grant a Petition for Review when the AJ's findings are not based on substantial evidence. The Court in Baumgartner v. Police and Firemen's Retirement and Relief Board, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[21]

Applicable DPM

While Employee's appeal was pending before OEA, the 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*, 2023-CAB1076 (D.C. Super Ct. December 29, 2023).[22] The Court's decision addressed the identical issue pending before this Board: whether OEA erred in ruling that Agency incorrectly utilized the 2012 DPM in its charging documents to the employee. Citing the holding in *Pinkard*, the Court ruled that OEA may not substitute its judgment for that of Agency. It provided that this Office's review of an agency's decision is limited to *inter alia* whether the adverse action was in accordance with applicable law or regulations. It went on to clarify that such

[21] Black's Law Dictionary, Eighth Edition; *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).
[22] Agency filed a Notice of Authority on January 4, 2024, May 9, 2024, and November 6, 2024. The notices were related to the Court's ruling in Case No. 2023-CAB1076 (D.C. Super. Ct. December 29, 2023).

regulations include "procedures required by a collective-bargaining agreement between the agency and a union." The Court agreed with Agency and found that Local 36 bargained to implement a disciplinary system consistent with the 2012 version of the DPM. It reasoned that the charges levied against the employee were brought in accordance with the charges and penalties outlined in the bargained-for version of the DPM, and not the revisions which brought about "substantial changes…with regard to charges and penalties." Therefore, it ruled that there was no harmful procedural error committed by Agency.

The Court also rejected OEA's reliance on the holding in *Francois v. Office of the State Superintendent of Education*, OEA Matter No. 1601-0007-18, (October 31, 2018), finding that unlike the employee in *Francois*, Local 36 and Agency in that matter agreed to utilize the disciplinary system outlined in the 2012 DPM. As a result, the Court in *D.C. Fire and Emergency Medical Servs. Department v. D.C. Office of Employee Appeals* reversed OEA's ruling and affirmed the Trial Board's decision to suspend the employee.[23] Accordingly, current case law dictates that Agency's use of the 2012 DPM in this matter was proper.[24] Therefore, we must conclude that the AJ's finding to the contrary constitutes a reversible error.

Substantive Charges

Based on the record, and the recent Superior Court decision, we must remand this matter to the AJ to make additional findings in accordance with the 2012 DPM and Article VII of Agency's Order Book. Employee was charged in both Case Nos. U-21-087 and U-21-154 with any on-duty or employment-related act or omission that the employee knew or should reasonably

[23] On November 6, 2024, the Court denied Employee's Motion for Reconsideration. *See D.C. Fire and Emergency Medical Servs. Department v. D.C. Office of Employee Appeals*, 2023-CAB1076 (D.C. Super. Ct. December 29, 2023).
[24] Employee appealed the Superior Court's ruling to the D.C. Court of Appeals. The matter is pending before the Court as of the date of this decision. *See* Case No. 24-CV-0484.

have known is a violation of the law. The AJ held that substantial evidence existed to support a finding that Employee committed the underlying misconduct; however, she opined that Agency was precluded from imposing this charge since his actions on December 30, 2020, and March 14, 2021, were unrelated to his employment with Agency and because both incidents occurred while Employee was off duty.[25]

However, Article VII, Section 2 of the Order Book defines an "employment-related act or omission" as "an act or omission, occurring during a time that the member was other than on duty, and which adversely and materially has affected, or is likely to affect, the efficiency of government operations or the member's performance of his or her duties."[26] Further, in *Employee v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0375-10, *Opinion and Order on Petition for Review* (June 9, 2015), the OEA Board held the following:

> "Because Article VII, Section 2 exists, this Board does not believe that the requirement for a nexus to Employee's position is needed. This section specifically covers incidents that occurred while an employee is off duty that affects Agency's operation or Employee's performance of her duties."

The AJ in this case did not make findings related to how, or if, Employee's conduct on December 30, 2020, and March 14, 2021, adversely and materially affected, or was likely to affect, the efficiency of government operations or the performance of Employee's duties. Moreover, Article VII, Section 2 does not require members to be on duty as a perquisite to imposing discipline. Since the record is devoid of this analysis, this Board cannot reasonably conclude that the Initial Decision is based on substantial evidence. For this same reason, we must remand the

[25] The AJ noted that her findings pertinent to any on-duty or employment-related act or omission that the employee knew or should reasonably have known is a violation of the law would be identical under both the 2012 and 2019 versions of the DPM. *See Initial Decision* at footnote 37.
[26] *Agency's Brief*, Exhibit E.

matter to the AJ to reconsider her findings related to neglect of duty.[27] The AJ similarly concluded that this charge could not be imposed because Employee was not on duty when the misconduct occurred and because the underlying conduct was unrelated to his duties as an FF/EMT. In light of the language concerning "employment related" as outlined in Agency's Order Book, as well as OEA Board precedent, additional analysis is required.

Finally, Employee was charged in both Case Nos. U-21-087 and U-21-154 with violation of D.C. Fire and Emergency Medical Services Order Book, Article VII, § 2(h), which states: "any act which constitutes a criminal offense whether or not the act results in a conviction." The AJ declined to rule on this charge, stating "because this cause of action does not exist in the current and applicable version of Chapter 16 of the DPM (2019 version), the undersigned cannot adjudicate this issue."[28] However, as previously discussed, the Court in *D.C. Fire and Emergency Medical Servs. Department v. D.C. Office of Employee Appeals supra* ruled that the 2012 DPM should have been utilized in determining if Agency's charges were supported by the record. Since the AJ erred in applying the 2019 DPM, we must remand this matter to be adjudicated based on an analysis of the 2012 regulations and Agency's Order Book.

[27] The AJ also concluded that her findings related to neglect of duty would be identical under both versions of the regulations.
[28] *Initial Decision* at p. 27.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED**. This matter is therefore **REMANDED** to the Administrative Judge for findings consistent with this ruling.

FOR THE BOARD:

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Dionna Maria Lewis, Chair

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Arrington L. Dixon

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Jeanne Moorehead

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LaShon Adams

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.