THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
BERLIN HILIGH, JR.,	)	
Employee	)	OEA Matter No. 1601-0020-08
	)	
v.	)	Date of Issuance: July 20, 2009
	)	
D.C FIRE AND EMERGENCY	)	
MEDICAL SERVICES,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge
	)	

Sandy F. Bellamy, Esq., Employee Representative
Pamela Smith, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On December 3, 2007, Firefighter/Technician Berlin Hiligh, Jr., ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the District of Columbia Fire and Emergency Medical Services Department ("Agency" or "FEMS") adverse actions of suspending him for seven hundred and sixty eight (768) duty hours, removing Employee from the 2006 promotional register, forcing into a last chance agreement in order to continue working for Agency, as well as other miscellaneous penalties.

According to the documents of record, here is how I understand the incident that gave rise to the instant matter. On or around November 22, 2006, Employee was arrested for an incident that occurred while Employee was at home, in Prince Georges County, Maryland and off-duty. As a result of his arrest, and in consideration of his options, Employee entered into a plea agreement with the Prince Georges County State's Attorney wherein he agreed to plead guilty to a misdemeanor charge of reckless endangerment. Employee was also required to make restitution. It was initially thought by all parties[1] that Employee would *likely* receive probation before judgment ("PBJ") but that outcome was not guaranteed. Employee then entered into a settlement agreement[2] with FEMS

[1] Employee, Employee's legal representative, Interim Fire Chief Brian Lee, then Agency General Counsel Theresa Cusick, Esq., and the assistant Prince Georges County State's Attorney.
[2] The settlement agreement entered into by and between Agency and Employee shall be discussed in greater detail *infra*.

wherein the parties agreed to "fully and completely resolve, without further litigation or expense, all charges that were brought or could have been bought against [Employee] resulting from his arrest and conviction, as well as his enforced leave…" Settlement Agreement at 1. Unfortunately for Employee, when sentenced, instead of receiving PBJ, he was incarcerated.

Agency charged Employee with being Absent Without Official Leave ("AWOL") as a result of Employee's approximate three month incarceration. On September 20, 2007, the Agency held a Trial Board Disciplinary Hearing relative to the charge of AWOL levied against Employee. As a result of that proceeding, Employee was ultimately penalized with a suspension, removal from the promotional register, and other penalties. Employee seeks redress before this Office.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) 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 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUES

Whether the Trial Board's decision was supported by substantial evidence, whether there was harmful procedural error, or whether Agency's action was done in accordance with applicable laws or regulations.

STATEMENT OF THE CHARGE

On June 19, 2007, Employee was served with a proposed notice of adverse action in Case No. U-07-157 which charged him with an on-duty or employment related act or

omission that interferes with the efficiency or integrity of government operations. This case was based upon the following specification:

> In that said Firefighter Berlin Hiligh, an employee of the District of Columbia Fire and Emergency Medical Services Department and subject to the rules and orders governing said Department was, nevertheless, on the 24th day of May 2007, committed and sentenced to serve a six-month prison term inside the Prince George's County Government Department of Corrections for reckless endangerment, Case No. CT070079X. As result, Firefighter Hiligh has not reported for duty and has been carried in an AWOL status since June 10, 2007. The AWOL is documented on his time and attendance records.

SUMMARY OF THE TESTIMONY

On September 20, 2007, the Agency held a Trial Board Disciplinary Hearing ("Trial Board). During the Trial Board, testimony and evidence was presented for consideration and adjudication relative to the instant matter. The following represents what I determine to be the most relevant facts adduced from the Trial Board findings of facts as well as the transcript[3] generated and reproduced as part of the instant matter before the undersigned.

Sergeant Derek Brachetti

Sergeant Derek Brachetti ("Brachetti") testified in relevant part that: he is a seven year employee with the Agency and that he currently holds the position of Sergeant assigned to Truck 6, Number 1 which is detailed to the Training Academy. Brachetti testified that he was Employee's supervisor. *See*, Tr. at 20 – 21. He noted that Employee was absent without leave starting June 10, 2007. *See*, Tr. at 24.

Captain Tony Sneed

Captain Tony Sneed ("Captain Sneed") testified in relevant part that: he was assigned to Engine Company 4 and that he is the Company Officer in charge of the firehouse. He has known Employee for 12 years and described him as a hard worker. Captain Sneed noted that Employee was AWOL because he was incarcerated. *See*, Tr. at 61. Captain Sneed also read into the record a portion of the settlement agreement entered into by and between the Agency and Employee. Captain Sneed noted that relative to his AWOL, many of Employee's colleagues were willing to work for him in order to cover Employee's shifts while he was incarcerated. This practice is referred to as making a "trade". *See generally*, Tr. at 63 – 70 and 80 – 82.

Captain Sneed noted that the Agency's payroll department is tasked with updating the amount of leave Agency's employees have accrued. Further, the Battalion Chief is

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[3] Transcript will be denoted herein as Tr.

the one with the ultimate authority to grant or deny employee leave requests. *See*, Tr. at 61. Captain Sneed made said request but the Battalion Chief never responded to him. *See*, Tr. at 83 – 88.

Assistant Fire Chief of Operations Loren Schultz

Assistant Fire Chief of Operations Loren Schultz ("Schultz") testified in relevant part that: he has known Employee for approximately eight or nine years and described Employee as having an "excellent work ethic." Tr. at 101. Schultz was the Agency official that signed the charging notice that contained the instant charge and specification. Schultz verified the information contained within said document before having it served upon Employee. *See*, Tr. at 101 – 102. Schultz confirmed that just because an employee has available annual leave that said employee must still have said leave granted before it can be utilized. *See*, Tr. at 102 – 104. In deciding to disallow the practice of trades during Employee's incarceration, Schultz explained that the Agency must maintain the public's trust and in that vein, allowing Employee to draw a paycheck while incarcerated would, in his opinion, violate said trust. *See generally*, Tr. at 118 – 119.

Sergeant John Sneed

Sergeant John Sneed ("Sergeant Sneed") testified in relevant part that: he has known Employee for approximately six to seven years. He described Employee as an "excellent wagon driver" and overall "excellent employee." Tr. at 160. When asked to describe his understanding of the instant matter he responded that he knew of the circumstances that were reported through the media and he was also aware of other circumstances because he is related to Captain Sneed.

Sergeant Sneed then related his experience as a union liaison for discipline and in that capacity he worked as a Trial Board Coordinator. *See generally*, Tr. at 161. Sergeant Sneed then described his understanding of placing an employee on enforced leave, which occurs when, an employee:

> …committed any act or anything that the [Agency] felt has a nexus or a negative impact on the job, that individual could be placed on enforced leave, and the [Agency] would have the ability to keep them on enforced leave until that matter or issue or whatever took place was adjudicated in the courts or handled to the capacity where the [Agency] felt like that individual could come back to work…
>
> And what would happen is if the [Agency] and his attorney and that individual came to an agreement, whatever penalty, hours, or whatever the [Agency] saw fit, that individual could be given the hours, and the amount of hours that they (*sic*) was off on enforced leave could suffice for it.

> If it was more than excess of what that individual was given, then just say - - if he was off for 500 hours and the [Agency] gave him a 250-hour penalty, then they would receive that 250-hour penalty, and anything in excess of that they would paid (*sic*) for it. Tr. at 162 – 163.

Sergeant Sneed then read the following excerpt from the aforementioned settlement agreement into record: "[w]hereas, the parties wish to fully and completely resolve, without further litigation or expense, all charges that were brought or could have been brought against [Employee] resulting from his arrest and conviction as well as his enforced leave." Tr. at 164. After reviewing the settlement agreement, Sergeant Sneed was then asked his opinion on whether the AWOL charge, which is the subject of the instant matter, is within the scope of the settlement agreement and whether Agency's posture of seeking additional charges is a breach of said agreement. Sergeant Sneed responded in pertinent part as follows:

> …once they come to an agreement, you know, whatever the penalty is they agree to, all parties sign off on it. And as far as the Local's position, and the individual which they represent, and the document that is here and presented in front of me, once they sign off on this agreement, any punishment, penalties, anything resulting from this particular arrest and his arrest that may result or affect his job, is resolved with this issue...
>
> Then, once … it's adjudicated in a court of law, and they reach a settlement, once they sign off on this settlement, the [Agency] and that individual, he can't appeal it to lower it or whatever, change it. And the [Agency] can't add any other penalty on him or charge him again for that same offense. Tr. at 168 – 170.

Sergeant Sneed then opined that the charge of AWOL against Employee is a result of the aforementioned conviction and that said charge of AWOL is a breach of the settlement agreement. *See generally*, Tr. at 171 – 172.

Technician Mark O'Baylor

Technician Mark O'Baylor (O'Baylor) testified in pertinent part that: he is currently assigned to Engine 4 Number 2. He has known Employee for approximately eight years. O'Baylor described Employee as a good hard worker. O'Baylor noted that he volunteered a trade for Employee but was later informed that he would not be able to do that. *See*, Tr. at 203.

Firefighter Mark Culbert

Firefighter Mark Culbert ("Culbert") testified in pertinent part that: he is currently assigned to Truck Company 16, Number 2 Platoon as a firefighter. He has known

Employee for seven years and would describe Employee as a very hard worker. *See*, Tr. at 205.

Assistant Fire Chief Brian Keith Lee

Assistant Fire Chief of Planning and Policy Brian Keith Lee ("Lee") testified in relevant part that: he is tasked with overseeing various departments within FEMS, including Compliance, Discipline, Internal Affairs Division, Risk Management Division, Equal Employment Opportunity Office, Sexual Harassment, and Diversity among others.

Lee noted that annual leave requests from employees may be either granted or denied depending on the needs of FEMS. *See generally*, Tr. at 212 – 214. Lee described the practice of "trades" as follows:

> Trades generally are honored on a case-by-case basis, and in general it's because an employee needs to work a shift for another employee. We are open to employees having trades. However, that is totally discretionary upon management. Some trades we allow, and some we don't. You have to be in a full-duty capacity, working a normal shift in order for us to begin to honor your trade.
>
> For example, we can't honor trades on - - in general on sick leave. It has to be a special occasion, if we worked out something for that. And, in general, we don't honor trades, period, for bad time. Tr. at 215.

Lee was notified that Employee was involved with an incident wherein he discharged his firearm in an attempt to prevent his car from being stolen. At the time that this incident occurred, Lee was serving as Interim Chief of FEMS. *See generally*, Tr. at 216 – 217. During the Trial Board, Lee was afforded the opportunity to review the settlement agreement entered into between the Agency and Employee. Regarding his understanding of the circumstances at the time that said agreement was entered into, Lee was under the impression that Employee would not serve jail time and that he would not be convicted. *See generally*, Tr. at 217 – 219. Lee further asserted that at the time that the settlement agreement was entered into, had he or the Agency thought that Employee would be convicted and required to serve jail time, the Agency would not have entered into a settlement agreement with Employee. *See*, Tr. at 220. However, during re-cross examination Lee, was unable to point to any portion of the settlement agreement wherein the terms of the agreement are predicated on Employee definitely receiving probation before judgment as opposed to the conviction he ultimately received. See, Tr. at 240 – 242.

Battalion Chief Scott Kane

Scott Kane, Battalion Chief, Special Operations, Number 1 Platoon ("Kane") testified in relevant part that: he has known Employee since he first started with FEMS

and described him as "…an Energizer bunny kind of guy. He's a (inaudible), energetic, hard-working fireman." Tr. at 260. Kane asserted that Employee was unable to come to work during the period he was listed as AWOL because he was incarcerated. Kane was aware that Employee requested use of his leave as well as use of trades for the period of his incarceration. See Tr. at 263 – 264. Kane described the use of trade as a right that cannot be discriminated against. One of the main factors that he would consider would be whether the employees, who are requesting a trade, have the same certification for the same positions, so that FEMS would not have to incur overtime for a trade Employee's absence from the job site. *See generally*, Tr. at 264 – 266. He went on to state that:

> [A]s far as trades go, it's a very common practice in the Fire Department. If someone has an injury, an illness, a death in the family, or some other type [of] tragedy in their life, that firefighters will trade indefinitely for that type [of] person. It could be two months, three months, and it's generally done in the Battalion Office, with a list of employees willing to work. And it's done frequently. Tr. at 265.

Kane explained that he was unaware of any written FEMS rule or regulation that prevented trades for an employee that was convicted of a misdemeanor. He further asserted that the use and granting of leave is handled in a similar manner and as long as there is coverage it "should not be denied." Tr. at 267.

During cross examination, Kane elaborated that the Battalion Chief is the one who grants or denies trades and that you have little recourse if it is denied. *See generally*, Tr. at 267 – 268. Kane further commented that the process for requesting leave follows similar channels. *See generally*, Tr. at 269. He further asserted that as a Battalion Chief he would approve a trade for a FEMS employee who is incarcerated for less than a year because he would "have no right to disapprove them." Tr. at 271. Kane then clarified that under this same or similar scenario; his superiors would probably be involved and would tell him what to do under these circumstances. *See generally*, Tr. at 271 – 272.

Firefighter Berlin Hiligh ("Employee")

Employee testified in relevant part that: he is assigned to Engine Company 4, Number 1 Platoon as a Technician. He has worked for the Agency for seven years. Employee admitted that he was convicted of a misdemeanor and that he subsequently entered into a settlement agreement with the Agency. *See*, Tr. at 277 – 278. The following excerpt, from Employee's direct examination, is relevant to the instant matter:

> Q: All right. I'd like to bring your attention to Defense Exhibit - - I think it's D-2.
>
> A: Okay. The settlement?
>
> Q: Right there. All right. And what was the likely - - what was the

charge that people had hoped to get, or the conviction that people had hoped to get?

A: The sentence?

Q: Yes.

A: Everybody was hoping for PBJ, but the - - when we entered into the negotiation with the State's Attorney, Prince Georges County, when the deal was done and that - - and the language of the deal specifically said that the prosecution was free to allocate jail time on a sentence.

Q: All right. And was that communicated to any of the parties that - -

A: Yes.

Q: -- negotiated and executed the agreement?

A: Yes. It was given to the [Agency], and they knew that the County State's Attorney office did express that they were free to allocate for jail time.

Q: And specifically to whom was that information provided?

A: It was provided to Devki, to Theresa Cusick, to Brian Lee, and I believe Chief Schultz also. I submitted it up the chain of command…

Q: Let's review the document. Can you take a moment to review the settlement agreement?

A: Yes.

Q: Paragraph 3 indicates that you would likely receive probation before judgment. Based on your testimony, it was communicated from the prosecutor to another attorney - - Theresa Cusick – and to the then Chief, Brian Lee, that additional sentence could be imposed. Is that correct?

A: Yes.

Q: And going to the paragraph after that, can you please tell us what your intent and interpretation was during the time you participated in the negotiation and settlement of this agreement, or

> execution of this agreement?
>
> A: My intent of this agreement was that no matter what the result, or what the sentence was, that I had already been sentenced by the [Agency] and no further action would come of anything out of my case after that.
>
> Q: In your opinion, do you feel that - - or why was it that you were not able to come to work?
>
> A: As a result of my conviction, I was incarcerated…
>
> Q: How long were you incarcerated?
>
> A: For a little more than three months.
>
> Tr. at 278 – 281.

Employee requested that his accumulated leave and trades be utilized to cover the time that he would be away while incarcerated. He made said request to Captain Sneed but according to a conversation Employee had with Captain Sneed, he discovered that Captain Sneed's superiors opted not to respond to his leave and trade requests. See, Tr. at 283. Employee believes that the Agency breached the settlement agreement when it imposed the instant charge of AWOL against him. *See*, Tr. at 286.

ANALYSIS AND CONCLUSIONS

This Office's review of this matter is limited pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). In that case, the D.C. 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* evidentiary hearings in all matters before it. According to the D.C. Court of Appeals:

> 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. *See* D.C. Code §§ 1-606.2 (a)(2), 1-606.3 (a), (c); 1-606.4 (1999), recodified as D.C. Code §§ 1-606.02 (a)(2), 1-606.03 (a), (c), 1-606.04 (2001); *see also* 6 DCMR § 625 (1999).
>
> The MPD contends, however, that this seemingly broad power of the OEA to establish its own appellate 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.]

Pinkard maintains that this provision in the collective bargaining agreement, which appears to bar any further evidentiary hearings, is effectively nullified by the provisions in the CMPA which grant the OEA broad power to determine its own appellate procedures. A collective bargaining agreement, Pinkard asserts, cannot strip the OEA of its statutorily conferred powers. His argument is essentially a restatement of the administrative judge's conclusions with respect to this issue.

It is of course correct that a collective bargaining agreement, standing alone, cannot dictate OEA procedure. 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 (b) (2001)) states that "any 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 this 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 procedure outlined in the collective bargaining agreement -- namely, that any appeal to the OEA "shall be based solely on the record established in the [trial board] hearing" -- controls in Pinkard's case.

The OEA may not substitute its judgment for that of an agency. Its review of an agency decision -- in this case, the decision of the trial board in the MPD's favor -- 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, also 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.[4]

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;
>
> 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;
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> 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.*, 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 an adverse action being taken against Employee.

Based on the documents of records and the position of the parties as stated during the various conferences held in this matter, I find that all of the aforementioned criteria are met in the instant matter. Therefore my review is limited to the issues as set forth in the Issue section of this Initial Decision *supra*. Further, according to *Pinkard*, I must generally defer to [the Trial Board's] credibility determinations when making my decision. *Id.*

Whether the Trial Board's decision was supported by substantial evidence.

According to *Pinkard*, I must determine whether the Trial Board's findings were supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *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)). Further, "[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

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[4] *Id.* at 90-92. (citations omitted).

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

In its findings, the Trial Board concluded that Employee was guilty of the AWOL charge described *supra*. In defending his actions, Employee conceded that he was not present and able to work for the dates and times in question. Employee instead focused his defense on the following:

> 1. The reason why Employee was AWOL was his conviction and that such an outcome, while not desired, was made evident to those who entered into the settlement agreement, and considering as much, Employee argued that Agency breached said agreement by instigating proceedings and pursuing penalties congruent with the aforementioned AWOL charge. And,
>
> 2. Employee diligently tried to ameliorate his absence by seeking to utilize his stockpiled annual leave. Employee also sought to trade with numerous colleagues who were willing to assist him through a rough situation. And,
>
> 3. Employee presented unanimous testimonial evidence describing his good character and work ethic. Said testimony came from witnesses appearing on both Employee's and Agency's behalf.

I disagree with the outcome of the Trial Board proceedings. While Employee readily admitted that he was not present to work for the time period delineated by the Agency in its AWOL charge, he also presented very credible evidence to show that he tried to mitigate his extended absence through the use of various mechanisms that, but for the dubious nature of Employee's reason for being absent, would more than likely have been approved by FEMS management as matter of due course. Moreover, there is the vexing problem of juxtaposing this instant adverse action with the settlement agreement. I agree with Employee's rendition of events and circumstances surrounding the creation and implementation of this agreement. Considering as much, I discredit Lee's rendition of events. The fact that both Lee, then Interim Chief, as well as Theresa Cusick, a licensed attorney, did not seriously consider that Employee may be subjected to jail time as part of his plea agreement seems shortsighted at best to the undersigned. However, they freely bound Agency to this settlement agreement and in so doing, Agency, under new management, must now live with its terms. However, taking into account Employee's admission that he was not present and able to work for the times listed as part of the AWOL charge, I am forced to concede that the Trial Board's decision was supported by substantial evidence. Thankfully, my review of this matter does not conclude with said concession.

Whether there was harmful procedural error and whether Agency's action was done in accordance with applicable laws or regulations.

The Trial Board unanimously concluded that the Employee was guilty of the charge specified. In coming to this conclusion, the Trial Board considered the so-called *Douglas Factors* which were first enunciated in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981). 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
>
> 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

The Trial Board found that *Douglas Factors* Nos. 1, 4, 5, 7, 9, and 10 reflected negatively on Employee while *Douglas Factors* Nos. 2, 3, and 6 reflected positively. If the settlement agreement was not as poorly worded as it was, Employee would more than likely have faced a different outcome than what is found *infra*.

In spite of the Trial Board's findings, I find that Employee has credibly argued, both before the Trial Board and the undersigned, that FEMS violated the terms of the settlement agreement when it cited Employee for being AWOL. Several clauses within the settlement agreement are relevant to this matter and are reproduced in pertinent part as follows:

> …WHEREAS, on or about November 22, 2006, [Employee] was arrested in Prince Georges County, Maryland; and
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> WHEREAS, the [Agency] placed [Employee] on enforced leave effective December 2, 2006; and
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> WHEREAS, on or about January 12, 2007, [Employee] entered into an agreement with the State's Attorney under which he agreed to make restitution and to plead guilty to one count of reckless endangerment, a misdemeanor, and will ***likely*** receive [PBJ].
>
> ***WHEREAS, the parties wish to fully and completely resolve, without further litigation or expense, all charges that were brought or could have been brought against [Employee] resulting from his arrest and conviction, as well as his enforced leave;***
>
> NOW, THEREFORE, the parties agree as follows:
>
> 1. [Agency] agrees to impose and [Employee] agrees to accept, a suspension of two hundred and forty (240) duty hours commencing on December 2, 2006. Any enforced leave hours charged against [Employee] shall be counted towards this suspension. To the extent that [Employee] has served enforced leave hours in excess of the hours of his suspension, he shall receive pay for the balance…

> 2. [Employee] waives his rights under the collective bargaining agreement between Local 36 of the International Association of Firefighters… and the [Agency] with respect to the above-referenced charges, and agrees to withdraw any pending appeal of his enforced leave status…
>
> ***4. The parties agree that this document contains the entire agreement…***
>
> Emphasis Added.

Agency contends that they never considered the option of Employee being incarcerated as a result of his plea agreement. After reviewing the transcript for the Trial Board, the Trial Board's findings in this matter, as well as my own common sense, I find that Agency's contention is either extremely shortsighted or disingenuous. The settlement agreement states that PBJ was likely as opposed to PBJ being a certainty. Also, Employee testified that all parties were informed that, while PBJ was likely, it was not a certainty. *See generally*, Tr. at 278 – 281. Moreover, the Trial Board found that Prince Georges County Assistant State's Attorney David I. Weinstein, Esq., indicated to the Trial Board that "both sides were free to allocate at sentencing." Trial Board Findings at 3. The Trial Board went on to posit that said "reference appears to support [Employee's] contention that the responsible FEMS officials should have been fully aware of the different variables concerning [Employee's] Plea Agreement with the Prosecuting State's Attorney. Specifically, and hypothetically thinking, that [Employee] could be incarcerated in accordance to the applicable guidelines by the deciding official as a result of his guilty plea." *Id*. at 3. Emphasis Omitted.

Given the instant circumstances, it seems dubious to the undersigned that the then Interim Fire Chief and his then General Counsel, entered into this agreement with an employee that they *allegedly* believed would not face any jail time. To avoid this Initial Decision, which is to its detriment, Agency simply could have either, included clauses within the settlement agreement that would account for different scenarios if Employee was incarcerated; or Agency could have simply waited until Employee's criminal proceeding concluded before entering into negotiations (or other proceedings) with Employee. For whatever reason(s), Agency opted to forge ahead with this settlement agreement; it must now live with the consequences of its actions. I find that Agency's imposition of the instant adverse action and its attendant penalties against Employee was a breach of the oft cited settlement agreement. I further find that said breach constitutes both harmful procedural error as well as not being done in accordance with applicable laws or regulations. This initial decision only encompasses Employee's suspension and its attendant penalties as imposed by Agency against Employee as a part of its AWOL charge. Employee's absence while he was incarcerated is not included in this initial decision.

I CONCLUDE that, given the totality of the circumstances as enunciated in the instant decision, the Agency's action of suspending Employee and the other related

miscellaneous penalties should be reversed.

ORDER

Based on the foregoing, it is hereby **ORDERED** that:

1. Agency's disciplinary actions taken against Employee are **VACATED** and Agency's action of suspending Employee for seven hundred and sixty eight (768) duty hours is **REVERSED**; and

2. The Agency shall reimburse Employee all back-pay and benefits lost as a result of his suspension; and

3. Agency shall adjust Employee's official personnel record to remove any adverse information indicative of Employee having been suspended for seven hundred and sixty eight (768) duty hours; and

4. The last chance agreement that Employee was forced to enter into in order to preserve his position is hereby **VACATED**; and

5. Employee's name shall be reinstated to Agency's current Promotional Register; and

6. The time period that Employee was not present at work due to his incarceration is excluded as calculable time towards his back-pay reimbursement; and

7. The Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Administrative Judge