**THE DISTRICT OF COLUMBIA**

**BEFORE**

**THE OFFICE OF EMPLOYEE APPEALS**

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| In the Matter of: | ) | |
| | ) | |
| SHALONDA SMITH, | ) | OEA Matter No. 1601-0195-11 |
| Employee | ) | |
| | ) | Date of Issuance: March 3, 2015 |
| v. | ) | |
| | ) | |
| D.C. FIRE & EMERGENCY MEDICAL SERVICES DEPARTMENT, | ) | |
| Agency | ) | |
| | ) | |

OPINION AND ORDER
ON
PETITION FOR REVIEW

Shalonda Smith ("Employee") was a Firefighter with D.C. Fire and Emergency Medical Services Department ("Agency"). On July 22, 2011, Agency issued a Letter of Decision informing Employee that she would be suspended for one hundred and sixty-eight hours. Employee was charged with any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: misfeasance. Specifically, the Fire Trial Board ("Trial Board") found Employee guilty of two counts of misfeasance for (1) violating Agency's Special Order 20 and (2) providing misleading information regarding the location of her ambulance.[1]

Employee contested the suspension and filed a Petition for Appeal with the Office of

[1] Under Special Order 20, employees who are operating Ambulance 32 ("A-32") must update the unit to 'available for service' once it reaches its service area. *Petition for Appeal*, p. 7-18 (August 25, 2011).

Employee Appeals ("OEA") on August 25, 2011. She provided that Agency's penalty was too harsh because she did not have any previous disciplinary actions. Furthermore, she explained that her failure to update her unit to 'available for service' was unintentional and common practice. Therefore, Employee requested that OEA vacate Agency's decision.[2]

Agency submitted its response to the Petition for Appeal on September 30, 2011. It argued that per the OEA's rules, Employee's Petition for Appeal was untimely filed. Additionally, Agency asserted that pursuant to *D.C. Metropolitan Police Department v. Elton L. Pinkard*, 801 A.2d 86 (D.C. 2002), OEA's review of its decision was limited to determining whether the action was supported by substantial evidence. Agency argued that ". . . Employee's misconduct was established by a preponderance of evidence presented to [the Trial Board]."[3] Accordingly, it requested that the suspension be upheld.[4]

The AJ, subsequently, issued an Amended Post Pre-hearing Order which provided that the case would be reviewed pursuant to the *Pinkard* analysis.[5] He also found that although Agency submitted five charges to the Trial Board, the Trial Board found that Employee was guilty of only two of the five charges. The AJ stated that the Trial Board did not provide a break-down of the allotted hours for each guilty charge. As a result, he ordered Agency to provide the allotment of hours for each guilty charge.[6]

In response to the Amended Post Pre-hearing Order, Agency provided that Employee

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[2] *Id.* at 2.
[3] *Agency's Answer to Employee's Petition for Appeal,* p. 5 (September 30, 2011).
[4] Thereafter, the matter was assigned to the OEA Administrative Judge ("AJ"), who scheduled a Pre-hearing Conference and later ordered Employee to address the timeliness of her appeal. The AJ issued an Order Regarding Jurisdiction which provided that because Agency's final decision did not provide an effective date, the thirty-day deadline to appeal to OEA was not made clear. As a result, the AJ found that Employee's appeal was timely. *Order Regarding Jurisdiction* (September 17, 2013).
[5] The AJ explained that under this analysis, he needed to address whether Agency's decision to suspend Employee was supported by substantial evidence; whether there was harmful procedural error with the Trial Board's decision; and whether the decision was in accordance with all applicable laws and regulations.
[6] *Amended Post Pre-hearing Order* (October 7, 2013).

admitted that she failed to update A-32 when returning to the service area. Agency argued that Employee failed to establish a disparate treatment claim. Additionally, it provided that there was evidence in the record to support its finding that Employee provided misleading information. Lastly, Agency submitted that it considered the *Douglas* Factors and concluded that the suspension was the appropriate penalty.[7] Therefore, it requested that its action be sustained.[8]

In response to Agency's Brief, Employee explained that it was normal procedure for employees who drove A-32 to not make it available until they reached the service area. Moreover, she provided evidence to show that no other employee was disciplined for their failure to comply with Special Order 20. With regard to the misleading information charge, Employee argued that Agency's evidence was inaccurate and unreliable. Ultimately, Employee believed that she was subjected to disparate treatment and requested back-pay for the suspension hours.[9]

The AJ issued his Initial Decision on November 27, 2013. First, he found that pursuant

[7] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

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

[8] *Agency's Brief in Opposition to the Appeal,* p. 4-7 (October 29, 2013).
[9] *Employee's Response to Agency's Brief* (November 13, 2013).

to *Pinkard*, he must defer to the Trial Board's credibility determinations. With regard Employee's violation of Special Order 20, the AJ held that there were other employees who did not update the unit to available for service until the unit was " . . . at or near Engine 32's quarters."[10] The AJ stated that these employees were similarly situated to Employee and that this procedure was a common practice.[11] He explained that this common practice directly contradicted Special Order 20. As a result, the AJ held that there was disparate treatment and reversed the first charge of misfeasance.[12]

With regard to the second charge of misfeasance, the AJ found that Employee provided Agency the exact same information that her partner did; however, her partner was found not guilty for this charge. The AJ stated that Employee established a *prima facie* argument that she was treated differently than her partner and ruled that the second charge for misfeasance must also be reversed. Accordingly, Agency's action was reversed, and it was ordered to reimburse Employee all back-pay and benefits lost as a result of the suspension.[13]

Agency filed a Petition for Review with the OEA Board on January 2, 2014. The Petition for Review simply provided that the Initial Decision was based on an erroneous interpretation of statute, regulation, or policy.[14] Agency also filed a motion for an extension of time to submit its Memorandum of Points and Authorities to support its Petition for Review.[15] On January 31, 2014, Agency submitted its memorandum which explains that when the AJ ruled on the first charge of misfeasance, he relied on a document that was not admitted into the evidence during

[10] *Initial Decision,* p. 13 (November 27, 2013).
[11] Further, the AJ found that no other employee was charged for not updating their unit once they reached the service area.
[12] *Id.,* 12-14.
[13] *Id.,* 14-15.
[14] *Agency's Petition for Review,* p. 2 (January 2, 2014).
[15] *Agency's Motion for an Extension of Time to Submit Memorandum of Points and Authorities in Support of Petition for Review* (January 2, 2014).

the Trial Board hearing.[16] In addition, Agency claims that the AJ erred when he relied on the testimony of Lieutenant Nickens, and not the testimony of the head of the organizational unit, when reviewing Employee's disparate treatment claim.[17] Lastly, Agency submits that it did not subject Employee to disparate treatment for the second misfeasance charge.[18] Thus, Agency requests that the Board grant its Petition for Review, vacate the Initial Decision, and affirm its action.[19]

OEA Rule 633.3 provides the following:

> The petition for review *shall set forth objections to the initial decision supported by reference to the record* (emphasis added). The Board may grant a petition for review when the petition establishes that:
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> (a) New and material evidence is available that, despite due diligence, was not available when the record closed;
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> (b) The decision of the Administrative Judge is based on an erroneous interpretation of statute, regulation or policy;
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> (c) The findings of the Administrative Judge are not based on substantial evidence; or
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> (d) The initial decision did not address all material issues of law and fact properly raised in the appeal.

In this case, Agency's petition failed to offer any objections to the Initial Decision that were supported by reference to the record. This is a mandatory requirement for Petitions for Review filed before the OEA Board. Agency wholly failed to comply with this requirement by merely offering a one-sentence reason why it sought review of the Initial Decision.

The OEA Board lacks the authority to grant any requests for extensions for filing

[16] Agency explains that Employee submitted a Unit History Report for A-32, but this document was not admitted into evidence. *Agency's Memorandum in Support of the Petition for Review,* p. 5-6 (January 31, 2014).
[17] Agency cited *Robert Aronson v. District of Columbia Fire and Emergency Medical Services Department,* OEA Matter No. 1601-0128-99, *Opinion and Order on Petition for Review* (January 31, 2007) and asserted that for the purposes of reviewing a disparate treatment claim, the head of an organizational unit is the supervisor.
[18] Agency provided that there was no requirement that its findings be consistent among Employee and her partner.
[19] *Agency's Memorandum in Support of the Petition for Review,* p. 6-8 (January 31, 2014).

Petitions for Review. There are no rules or regulations which bestow on this Board the ability to rule on motions for extensions. In accordance with OEA Rule 633.1 "any party to the proceeding may serve and file a petition for review of an initial decision with the Board within thirty-five (35) calendar days of issuance of the initial decision." Furthermore, D.C. Official Code § 1-606.03(c) provides that ". . . the initial decision . . . shall become final 35 days after issuance, unless a party files a petition for review of the initial decision with the Office within the 35-day filing period." The D.C. Court of Appeals held in *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991) that "the time limits for filing appeals with administrative adjudicative agencies, as with courts, are mandatory and jurisdictional matters."[20] Therefore, OEA has consistently held that the filing deadline is mandatory in nature.[21]

In the current case, the Initial Decision was issued on November 27, 2013. Although Agency filed its Petition for Review on the thirty-fifth day, the filing failed to comply with OEA Rule 633.3 by offering support of its position as referenced in the record. Agency did not file a complete Petition for Review until January 31, 2014. This was well past the thirty-five day deadline. It appears to this Board that Agency quickly filed a petition to meet the thirty-five day deadline. Agency then requested nearly a one-month extension in which to amend its Petition for Review. This Board believes that Agency was aware that its initial Petition for Review was

[20]Also see *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991) (citing *Woodley Park Community Association v. District of Columbia Board of Zoning Adjustment*, 490 A.2d 628, 635 (D.C. 1985); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985); *Gosch v. District of Columbia Department of Employment Services*, 484 A.2d 956, 958 (D.C. 1984); and *Goto v. District of Columbia Board of Zoning Adjustment*, 423 A.2d 917, 923 (D.C. 1980)).

[21] *Alfred Gurley v. D.C. Public Schools*, OEA Matter No. 1601-0008-05, *Opinion and Order on Petition for Review* (April 14, 2008), *James Davis v. Department of Human Services*, OEA Matter No. 1601-0091-02, *Opinion and Order on Petition for Review* (October 18, 2006); *Damond Smith v. Office of the Chief Financial Officer*, OEA Matter No. J-0063-09, *Opinion and Order on Petition for Review* (December 6, 2010); and *Jason Codling v. Office of the Chief Technology Officer*, OEA Matter No. J-0151-09, *Opinion and Order on Petition for Review* (December 6, 2010).

incomplete which is why it requested the extension to file its detailed response to the Initial Decision. Because the filing deadline is mandatory, this Board does not have the authority to waive the requirement. Accordingly, Agency's Petition for Review is DISMISSED.[22]

[22] Assuming that this Board could consider Agency's arguments, it would find that they lack merit. First, Agency claims that the head of the organizational unit and not Lieutenant Nickens, should have been considered Employee's supervisor in this matter. However, it appears that Agency is confusing the language of the disparate treatment ruling. The D.C. Court of Appeals in *O'Donnell v. Associated General Contractors of America*, 645 A.2d 1084 (D.C. 1994) and *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227, 236 (D.C. 1998), held that to show disparate treatment an employee must show that he worked in the same organizational unit as the comparison employees AND that both the petitioner and the comparison employees were disciplined by the same supervisor within the same general time period (emphasis added). There is no requirement that the parties must be disciplined by the head of an organizational unit or that this person is deemed the supervisor. The requirement is that the parties be in the same unit and that they are disciplined by the same supervisor. Therefore, the AJ's reliance on testimony from Lieutenant Nickens was appropriate.

As for Agency's claim that the AJ relied on evidence not admitted in evidence, it is clear from the Initial Decision that the AJ relied on testimony from Lieutenant Nickens pertaining to when units went into service. Nickens provided during the hearing that he would not be surprised to know that there were forty-nine instances where units switched to available at or near the station's headquarters, which did not comply with Special Order 20. Although Agency objected to Employee's exhibit being entered into evidence during the hearing, the Trial Board did allow testimony regarding the exhibit. *D.C. Fire Department Trial Board Disciplinary Hearing*, p. 30-37. Therefore, even if the exhibit was improperly considered by the AJ, the testimony of Lieutenant Nickens was a part of the transcript that was considered by the Trial Board regarding this issue. Accordingly, the AJ properly relied on Lieutenant Nickens' testimony in rendering his decision on disparate treatment.

It must be noted for the record that it is clear from the hearing transcript that the Trial Board was unaware of the requirements to consider for disparate treatment matters. Employee attempted to present evidence to establish disparate treatment in this case. However, Battalion Chief Donlon rigorously opposed it. It was not until an observer and Agency's counsel made the panel aware that disparate treatment should be considered that the Trial Board allowed limited testimony on the issue. *D.C. Fire Department Trial Board Disciplinary Hearing,* p. 31-38 and 41-44. This is also evident in its Findings of Fact and Recommendations. For *Douglas* Factor #6, consistency of penalty with those imposed upon other employees for the same or similar offense, the Panel provided that it did not receive any evidence of this factor. This is clearly not accurate given the record. *Agency's Answer to Employee's Petition for Appeal,* Tab #5 (September 30, 2011). Therefore, the AJ correctly considered the disparate treatment argument based on testimony provided during the hearing.

## ORDER

It is hereby **ORDERED** that Agency's Petition for Review is **DISMISSED**. As provided in the Initial Decision, Agency's suspension action is **REVERSED.** Accordingly, Agency shall reimburse Employee all back-pay and benefits lost as a result of the suspension action. Agency shall file with this Board within thirty (30) days from the date upon which this decision is final, documents evidencing compliance with the terms of this Order.

FOR THE BOARD:

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William Persina, Chair

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Sheree L. Price, Vice Chair

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Vera M. Abbott

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A. Gilbert Douglass

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Patricia Hobson Wilson

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.