THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
Katharine Buckley-Clark	)	OEA Matter No. 1601-0114-11
Employee	)	
	)	Date of Issuance: February 25, 2014
v.	)	
	)	Joseph E. Lim, Esq.
DC Fire & Emergency Medical Services Dept	)	Senior Administrative Judge
Agency	)	

Sandy Bellamy, Esq., Employee Representative
Kevin Turner, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On June 3, 2011, Employee, a Fire Fighter with the D.C. Fire and Emergency Medical Services Department (the "Agency" or "D.C. F&EMSD") 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 action terminating her for "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations: neglect of duty." The charge that generated Employee's adverse action was a finding as a result of an evidentiary hearing conducted from March 22 and 24, 2011, by the Fire Trial Board (the "Trial Board"). In Case # U-11-32, the Trial Board sustained three of the four specifications against Employee.

Agency was served with a copy of Employee's Petition for Appeal on June 7, 2011, and filed a comprehensive reply document. Agency's response contained 10 tabs or attachments, including the complete transcript of the Trial Board hearing and all of the underlying documents which Agency maintained were supportive of the charges and Agency's election to take action against Employee. The matter was assigned to the undersigned administrative judge (the "AJ"), on August 30, 2012. I held a Prehearing Conference on March 8, 2013. I closed the record after receiving legal briefs and final arguments from the parties.

JURISDICTION

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

ISSUES

The issues to be decided by the undersigned are: a) Whether Agency's decision to suspend Employee for 180 hours, based on the Trial Board's recommendation, was supported by substantial evidence; b) Whether Agency committed harmful procedural error; and c) Whether the decision was in accordance with law or applicable regulations.

Agency's Position:

Agency charges Employee with several specifications under the "any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations, to wit: Neglect of Duty." On the first specification, the Trial Board found that Employee disobeyed a direct order to respond to a medical emergency at 1449 Oak Street, N.W. On the second specification, the Trial Board found that Employee violated standard operating guidelines by failing to manually status the I/Mobile MDC unit to reflect that Ambulance 12 was available mobile and not available in quarters. Consequently, Agency failed to dispatch its closed available unit to the Oak Street address. On the third specification of Misfeasance, the Trial Board acquitted Employee. On the fourth specification of violating DCFEMS Rules and Regulations, Article XVII, § 7(b), "In responding to and returning from alarms apparatus shall be driven over the shortest available route," the Trial Board found Employee guilty.

Employee's Position:

Employee asserts that Agency's decision was not supported by substantial evidence and that Agency failed to properly consider the Douglas Factors[1] in choosing Employee's penalty.

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[1] 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;
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> 2) The employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
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> 3) The employee's past disciplinary record;
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> 4) The employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
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> 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;

Employee is a member of the International Association of Firefighters, Local 36 (the "Union"), and is covered by a provision of the collective bargaining agreement (the "Agreement") that specifically restricts the scope of this Office's review in adverse actions to the record previously established in the Trial Board's administrative hearing. Therefore, and based upon the decision of the District of Columbia Court of Appeals in *District of Columbia Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002), my role as the deciding AJ is limited to reviewing the record previously established, and determining whether the Trial Board's decision was supported by substantial evidence; whether there was harmful procedural error; or whether it was in accordance with applicable law or regulation. See *Pinkard*, 801 A.2d at 91.

Uncontested Material Facts:

1. Employee, a member of the International Association of Firefighters, Local 36 (the "Union"), was employed as a firefighter by Agency for 8 years.

2. As a Firefighter, Employee was assigned to Ambulance 12 at Engine 12.

3. However, on September 29, 2010, Employee was detailed to Engine 11. Employee was ordered to respond to a medical emergency at 1449 Oak Street, N.W. Agency alleges that due to failure to do so, the patient was declared dead upon arrival at the hospital.

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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.

4. After conducting an investigation, Agency issued Employee a Notice of Summary Removal on November 22, 2010, charging Employee with the following Charges and Specifications.

   Charge 1:
   Violation of the DC Fire & EMS Order Book, Article VII, Section 2 which states, "Any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations". This misconduct is further defined in the D.C. Fire and EMS Rules and Regulations, Article VI, Section 2, which states, "Members shall devote proper attention to the service, exert their greatest energy and full ability in the performance of their duties, not perform their duties in a spiritless, lax, surly, or careless manner, not neglect nor fail to perform any portion of the their duties required by rule, regulation, order, common practice, or the necessities of the situation involved;…be efficient; exercise proper judgment in the performance of their duties." This misconduct is defined as cause to wit: "Neglect of Duty", in 6B D.C.M.R. Section 1603.3(f) (3), 55 DCR 1775 (February 22, 2008).

   Specification 1:
   On the morning of September 29, 2010, you were assigned to Ambulance 12. At 05:43:59 Ambulance 12 was dispatched by the Office of Unified Communications (OUC) for a patient experiencing a dangerous hemorrhage at 1449 Oak Street, N.W., Washington, DC, 20010 (Event No. F100133258).

   At 05:44:22 the I-Tracker lists Ambulance 12 at 4th and Michigan Avenue, N.E., headed in the direction of Engine 12. At 05:44:49 Ambulance 12 acknowledged the dispatch for Event No. F100133258 and responded that it was en route to 1449 Oak Street, N.W. However, Ambulance 12 did not respond to the Delta Hemorrhage at 1449 Oak Street, N.W. as indicated by your response to the dispatch, and instead disregarded the emergency call in order to swap out your crew.

   Your failure to respond to the emergency call for service at 1449 Oak Street, N.W., after responding to the OUC that you were en route and the decision to continue to the quarters of Engine 12 so that you and your partner could end your tour of duty and changeover represents a neglect of your duties as Firefighter.

   Charge 2:
   Violation of the DC Fire and EMS Order Book, Article VII, Section 2 which states, "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations." This misconduct is further defined in the D.C. Fire and EMS Special Order 2009-30 (7/24/09) which states in relevant part, "[U]nits in Operations will begin to manually status the I/Mobile MDC when in and out of quarters." This misconduct is defined as cause to wit: "Neglect of Duty", in 6B D.C.M.R. Section 1603. (f)(3), 55 DCR 1775 (February 22, 2008).

   Specification 1:
   At 05:36:46 you and FF/EMT Heckman left Engine 11 in order to return to the

quarters of Engine 12. Upon leaving Engine 11, you failed to manually status the I/Mobile MDC unit to reflect that you were available mobile and not available in quarters. Consequently, the OUC failed to dispatch the closest available unit to respond to the Delta-Bleed event on Oak Street. Your neglect of duty resulted in the delay of emergency medical services by approximately fifteen (15) minutes.

Charge 3:
Violation of the DC Fire and EMS Order Book, Article VII, Section 2 which states, "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations." This misconduct is further defined in the D.C. Fire and EMS Rules and Regulations, Article VI, Section 8, which states, "Members shall refrain from immoral conduct, deception, violation or evasion of law or official rule, regulation, or order; and from false statements." This misconduct is defined as cause, to wit: "Malfeasance" in 6B D.C.M.R. Section 1603. (f)(6), 55 DCR 1775 (February 22, 2008).

Specification 1:
At 05:43:59 you received the dispatch for Event No. F100133258. According to the I-Tracker at 05:44:22 you were in the area of 4th and Michigan Avenue, N.E., however, you contacted your relief crew at Ambulance 12 and represented that you were located at 4th and Rhode Island Avenue, N.E., about to pull into the "back lot" of Engine 12. You made this representation knowing it to be inaccurate and misleading.

Charge 4:
Violation of Article VII, Section 2.2. of the DC Fire and EMS Order Book which states, "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations." This misconduct is further defined in the D.C. Fire and EMS Rules and Regulations, Article VI, Section 2, which states, "Members shall devote proper attention to the service, exert their greatest energy and full ability in the performance of their duties, not perform their duties in a spiritless, lax, surly, or careless manner, not neglect nor fail to perform any portion of the their duties required by rule, regulation, order, common practice, or the necessities of the situation involved;…be efficient; exercise proper judgment in the performance of their duties." DC Fire & EMS Order Book Article XXIV, Section 2(4) which states, "The EMS Provider with the highest certification will be designated the ACIC and the other members as ACA. When both personnel have equal certifications, the member possessing the greatest seniority at the certification level shall be designated the ACIC," and the DC Fire & EMS Rules and Regulations, Article XVII, Section 7(b), which states in relevant part, "In responding to and returning from alarms apparatus shall be driven over the shortest available route." This misconduct is defined as cause, to wit: "Neglect of Duty" in 6B D.C.M.R. Section 1603(f) (3), 55 DCR 1775 (February 22, 2008).

Specification 1:
As the ACIC of Ambulance 12 you had a responsibility to perform your duties in the most efficient, professional manner possible. By delaying the arrival of Ambulance 12 your actions were negligent and contributed to a delay in adequate medical care the

provision of emergency medical services to Event No. F100133258. You neglected your duties as ACIC by: failing to notify the OUC that you were no longer quartered at Engine 11, but had left and was in a mobile status on your way to Engine 12; by allowing the ambulance to proceed to Engine 12 to swap crew rather than immediately changing direction and driving in the most direct route to 1449 Oak Street, N.W., and by misrepresenting your location when you contacted your relief crew at Engine 12.

5. On charges that Employee disobeyed several longstanding orders, Employee along with fellow employee Jeremy Heckman, appeared before the Fire Trial Board on March 22 and 24, 2011, for an administrative hearing. Agency submitted a complete transcript of the hearing. (Agency Tab #7) Employee was represented by Joshua Shiffrin, Esq. The Trial Board sustained three of the four specifications of the charge and recommended two penalties ranging from a 60-day suspension to termination. Specifically, the FTB recommended that Employee be found guilty of Charge 1 Specification 1, Charge 2, Specification 1, and Charge 4, Specification 1. The FTB recommended that Employee be removed for being found guilty of Charge 1, Specification 1, Charge 4, Specification 1. The FTB recommended as 60-duty hour suspension for Charge 2. The FTB found Employee not guilty of Charge 3. (Agency Tab 8.)

6. The Findings and Recommendations were accepted as Agency's Final Decision by Kenneth B. Ellerbe, Fire and EMS Chief for Agency. Employee was notified of the Fire Trial Board Recommendations by a Final Agency Decision document dated May 5, 2011. (Agency Tab #9)

7. The Trial Board's Findings and Recommendations recited that the selection of the proposed penalties was made after considering the "Douglas Factors" and Employee's past record.

SUMMARY OF RELEVANT TESTIMONY RECEIVED DURING THE TRIAL BOARD PROCEEDINGS

Paramedic Ryan Fleming ("Fleming"): Mar. 22, 2011 Transcript, Page 23-32, hereafter *"Tr., 23"*

Fleming testified that on September 29, 2010, he, along with Lt. Carroll, Technician Kelvin Vincent and Firefighter Herbert Young, were stationed at Engine 11 quarters when they was dispatched to 1449 Oak Street, N.W. at around 0543 hours for a delta hemorrhage, which meant that a paramedic response was necessary and critical.

Arriving at the scene, they found a bleeding female patient beside her son. They stopped the bleeding and got her condition stabilized for transport to a hospital. They placed an intravenous line on the patient and tried to clear her vomit from her airway. Fleming asked Lt. Carroll if Ambulance 12, the transport unit, had arrived on the scene. At some point, the now unconscious patient was transported to Howard University Hospital. (See Agency Exhibit 1.)

Lt. Jamal Carroll ("Carroll"): Mar. 22, 2011 tr. 32- 55.

Carroll supported Fleming's testimony and testified that they performed CPR on the patient after she collapsed. It was then that Ambulance 12 arrived on the scene. However, the crew on Ambulance 12 was not the same crew that was in Ambulance 12 when it left Engine 11. The new crew informed him that they had relieved the original crew which included Employee. Carroll affirmed his own written report and the reports of Firefighter Herbert Young and Technician Kelvin Vincent. (See Agency Exhibit 2, 3 and 4.) A check of the I/Tracker, I/Mobile showed that it took over 17 minutes for Ambulance 12 to arrive at the scene despite the fact that both their unit and Ambulance 12 were at Engine 11 at the same time. It had taken their unit about 6 minutes to arrive at the patient due to the crowded and narrow road of the patient's residence. However, at the hospital, a doctor informed him that the patient had died despite their best efforts.

Battalion Fire Chief Sean Carter ("Carter"): Mar. 22, 2011 tr. 55-107.

Carter, the chief for 1st Battalion, Platoon 3, testified that he investigated the incident. His investigation revealed that at the time of the dispatch to the patient, Employee's Ambulance 12 was at 4th Street and Michigan Avenue en route to Engine 12 to be relieved from their shift an hour and fifteen minutes later. Based on his investigation, Carter concluded that Employee's and Heckman's accounts (Agency Exhibits 8 and 9) were not corroborated by the I/Tracker report of their movements. Instead of responding to the dispatch to 1449 Oak Street, N.W., Employee and Heckman returned to Engine 11 and relieved themselves of duty and passed on the equipment to another crew. If Employee had taken the run, they could have arrived at the scene in nine minutes at the prevailing traffic pattern.

Carter emphasized that crewmembers must respond to a dispatch call regardless of how close they were to Engine 11. Under cross-examination, he admitted his approximation of the distance that Employee was from point A was more accurately 0.7 miles instead of 2 miles. Nonetheless, his investigation revealed that Employee's ambulance was the closest to the medical emergency at the time.

Deputy Fire Chief Demetrios Vlassopoulos ("Vlassopoulos"): Mar. 22, 2011 tr. 108-188.

Chief Vlassopoulos described his duties managing Agency's communications infrastructure GPS system, including the I/Tracker, Live CAD, and Halo perimeter system. This system is able to pinpoint the location of Agency's resources such as ambulances, fire trucks, and other equipment at any given point in time and allows instant communication between the dispatch office and the mobile firefighters, paramedics, and other personnel. Nonetheless, employee firefighters are required to inform the dispatcher of their whereabouts and status. When an employee changes their status and indicates that their unit is out of service, then the dispatcher removes the unit from the system.

Based on the need, whether there is a fire or a medical emergency, the dispatcher is able to send the nearest appropriate unit to the site. Vlassopoulos discussed the drift phenomenon whereby at times the exact location of a unit due to the obstruction posed by buildings and other structures has to be triangulated and approximated by the system. Although he did not do any

testing, Vlassopoulos indicated that they would have been immediately aware of any technical problems due to the huge number of emergency calls that they receive daily. He denied that there was any complaints about the accuracy of the system on the day in question and emphatically stated based on his years of experience, the system is very accurate.

Sergeant Richard Polish ("Polish") Mar. 22, 2011 Tr. 190-229.

Polish is the Battalion Fire Chief's aide in the 2nd Battalion on No. 1 Platoon. He testified that he trained personnel on the use of the I/Mobile and I/Tracker. He testified that back in 2008-2009, drift and dead zones in the Verizon wireless coverage could cause the I/Mobile to be inaccurate. Polish admitted that programs were instituted to account for drift and that he last worked at Engine 7 in July 2009. Under cross-examination, he admitted he had no technical training on I/Mobile or I/Tracker and that he does not know whether the system was accurate on September 29, 2010. He indicated that whenever he is in service and receives a call, he would respond to the emergency regardless of his location.

Deputy Fire Chief Kenneth Crosswhite ("Crosswhite") Mar. 22, 2011 Tr. 230-251.

Crosswhite works in the Logistics Section. He described Employee as professional, courteous, compassionate, and disciplined and opined that Employee should continue in Agency's employ. Crosswhite testified that he has no personal knowledge of what occurred on September 29, 2010.

Sergeant Stephen Murphy ("Murphy"): Mar. 22, 2011 Tr. 252-260.

Sgt. Murphy works as a Battalion 6 aide on Platoon 2. He testified that he never had any problems with Employee. Murphy opined that once an employee receives an emergency call, he should take it.

Firefighter Dave Gregg ("Gregg"): Mar. 22, 2011 Tr. 261-281; Mar. 24, 2011 Tr. 290-306.

Gregg is a firefighter in Engine 17, Platoon 4. On September 29, 2010, he was assigned to Ambulance 12. He relieved Employee and Firefighter Heckman at 0500 hours once Ambulance 12 arrived at quarters. Gregg testified that after he spoke to Communications, he spoke to Heckman to tell him that he and his partner Grimes were ready to relieve them of duty. However, Heckman later called back to say that he just got dispatched to go on a run but that they were about to pull into the back lot of Engine 12. As soon as the ambulance arrived, Gregg and his partner took the Ambulance 12 to 1449 Oak Street, N.W. He described the route they took and indicated that it took about 6 to 10 minutes for them to bring the patient to the hospital once they arrived on the scene. He described the patient as conscious when they arrived but had then passed out.

Gregg described the GPS system as accurate but slow to catch up on their actual whereabouts. Gregg agreed that once a crew receives an emergency call, it was not permissible to ignore the call and switch out the crew. Gregg agreed that on a medical emergency, seconds count. He testified about Agency Orders regarding relief and when the company is out. When

faced with the I/Tracker record, Gregg admitted that their movements took much longer than he had thought due to the excitement of the moment.

Firefighter Seth Grimes ("Grimes"): Mar. 24, 2011 Tr. 307-357.

Grimes is a firefighter assigned to Engine 12, Platoon 4. Ambulance 12, on September 29, 2010, along with Gregg. When he arrived at work, Grimes did not see Ambulance 12 but was told by Gregg that it was arriving for them to relieve Employee's crew. The ambulance was still not in quarters when the dispatch to 1449 Oak Street came. They jumped into Ambulance 12 as soon as it arrived to respond to the dispatch. Basically consistent with Gregg's account, he described the route they took and what they encountered once they arrived at the scene. Grimes indicated that they were continually doing CPR on the unconscious patient all the way to the hospital.

Grimes indicated that Agency's tracking system is a little behind their movements on the road so they use mainly the map function to get to their destination. He admitted that he knew little about the technical side of Agency's tracking sytem. Grimes agreed that Agency's regulations mandate that a crew status the I/Mobile on their location and respond immediately to a dispatch. It does not provide for a crew accepting a dispatch and then switching crews.

Employee: Mar. 24, 2011 Tr. 357-450.

Employee testified that she was a trained advanced EMT. She said that she had no prior disciplinary history. On September 29, 2010, Employee was the crewmember in charge with Firefighter Jeremy Heckman as her partner at Engine 12 on Ambulance 12. They were told to report to Engine 11 due to a fire. They were due to be relieved by Platoon 4 around 500 hours with the knowledge of their supervisor Lt. Dewitt. Heckman informed her that the Emergency Liaison Officer ("ELO") had given them permission to return to Engine 12. Employee testified that there was an informal policy that allows crews to be relieved two hours early.

Employee testified that she had status herself as en route to Engine 12 when they received a dispatch to 1449 Oak Street about a delta hemorrhage. At that time, they were at 4th and Rhode Island Avenue. Employee and Heckman made a collective decision not to proceed to the call but instead return to quarters to be relieved by the next crew. She then instructed Heckman to call Gregg that they were about to come in to be relieved as they were close to pulling up on the parking lot of Engine 12. Employee admitted that she made a mistake in not taking the dispatcher's call.

Employee admitted that although she was trained to do so, she did not push the necessary button to status communications where they were. However, Employee disputed the accuracy of Agency's tracking system although she admitted that the failure of the GPS system never caused a delay in their response time. Employee said she was aware of Agency's general orders regarding their job.

Lt. Robert Dewitt ("Dewitt"): Mar. 24, 2011 Tr. 451-495.

Dewitt is a lieutenant assigned to Engine Company 12, No. 3 Platoon. He testified that he was Employee's supervisor and considered her to be an exemplary employee. Dewitt stated that based on his own experience, the I/Mobile system was not always reliable. He agreed that what Employee and her partner Heckman did violated Agency's orders and guidelines.

EMS Captain Andre Spriggs ("Spriggs"): Mar. 24, 2011 Tr. 495-531.

Spriggs was the EMS supervisor for the 1st Battalion at the day of the incident. He testified that he had given Employee good performance evaluations and would have no problems getting her back on the force. Sprigs agreed that Employee should have taken the call instead of going back to the firehouse to be relieved.

Lt. Charlie Glaze ("Glaze"): Mar. 24, 2011 Tr. 531-561.

Glaze was Heckman's supervisor at Engine 17, No. 3 Platoon and gave Heckman a superior performance evaluation. He agreed that there were problems with the accuracy of the I/Mobile.

Lt. Terry Wiliams: Mar. 24, 2011 Tr. 561-590.

Williams trained Heckman in PEC Engine 26, No. 3 Platoon. He considered Heckman and Employee to be excellent employees. Williams had a poor opinion of the I/Mobile system but added that Agency was working on it. He has no personal knowledge of the September 29 incident but had heard rumors. He agreed that punishment was warranted but that termination was extreme.

Firefighter Jeremy Heckman: Mar. 24, 2011 Tr. 590-668.

Heckman confirmed that Employee was in charge of their crew in Ambulance 12 on September 29, 2010. He controlled the I/Mobile and GPS unit to get to their destination, although he did not consider the GPS component to be reliable. At around 520 hours, he received a call from Gregg that they were ready to relieve them based on the permission from the.ELO. They were trained to status the ambulance on air if they are leaving the firehouse but he admitted that they did not do that. As they were returning to Engine 12, they received a dispatch for a delta hemorrhage at 1449 Oak Street when they were already approaching 4th Street and Rhode Island Avenue. He and Employee decided to just go back to the station to be relieved as they were nearby and have the next crew respond to the dispatch. He testified about the time it took for them to return to quarters. Heckman stated that foregoing the run was a split-second decision and indicated that if he had to do it again, he would have taken the call. He admitted that their action violated Agency orders and that it was a bad decision to not take the dispatch.

Documentary evidence admitted at the Agency Trial Board Hearing:

Agency Exhibits: No. 1 Re Ambulance 12 FF Fleming, No. 2 Re Ambulance 12 FF Carroll, No. 3 Re: Ambulance 12 FF Young, No. 4 Re: Ambulance 12 FF Vincent, No. 5 Re: Ambulance 12

BFC Carter, No. 6 Unit History Ambulance 12, No. 7 I/Tracker Screen Captures, No. 8 Re: Unusual Occurrence, Buckley-Clark, No. 9 Re: Unusual Occurrence, Heckman, No. 10 Google Maps 4th St. NW to Engine Company 12, No. 11 Google Maps 4th St. NW to 1449 Oak St. NW, No. 12 Notice of Summary Removal w/ attachments, No. 13 DC EMTs Accused of Lying About Rescue, NBC 4, 11-22-2010, No. 14 Special Order I/Mobile MDC Status Changing Procedures 7-24-2009, No. 15 Event Chronology F100133258.

Employee Exhibits: No. 1 I/Mobile Essentials V. 8.1, No. 2 NBC news, No. 3 Lexis Nexis D.C.M.R., No. 4 EMS Evaluation Report 4-10-09, No. 6 Monthly Evaluation Report 8-12-09, No. 7 Employee Performance Evaluation, No. 8 Summary Chart of Discipline Against Firefighters, No. 9 Response to Request For Information from DC Fire & EMS, No. 10 Response to Request For Information from DC Fire & EMS, No. 11 Radio Procedures, No. 13 Google Maps 4th St NE to Rhode Island Ave., No. 14 Color Photocopies-3 sheets, No. 15 I/Mobile 0537, No. 16 AT&T Phone Records of FF Jeremy Heckman, Board No. 1 EC FEMS Order Book Article VIII, Section 5.

FINDING OF FACTS, LEGAL ANALYSIS, AND CONCLUSIONS OF LAW

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 negotiated between Employee's union and Agency, the holding likewise applies to Fire Trial Board proceedings. According to the 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. . . .
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> 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.
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> 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 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 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, namely, that the 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 the 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, 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).

Thus, 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;
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> 2. The employee has been subjected to an adverse action;
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> 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 (employee's removal, suspension, demotion, or personal performance rating) or a reduction-in-force.

All of these conditions are met in this matter. Thus, according to *Pinkard*, my review of the final Agency decision to impose terminate Employee is limited "to a determination of whether [the final Agency decision] was supported by substantial evidence,[2] whether there was

[2] 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 "a preponderance of the evidence", which is defined as "[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); *Bailey v. Metropolitan Police Department*, OEA Matter No. 1601-0145-00 (March 20, 2003).

harmful procedural error, or whether it was in accordance with law or applicable regulations."[3] Further, I "must generally defer to the agency's credibility determinations."[4] My review is restricted to "the record made before the trial board."[5]

The Trial Board unanimously concluded that Employee committed three of the four specifications under the "any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations" as charged.

1. Whether the Trial Board's findings were 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."[6] 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 findings."[7]

Employee's first argument is that Agency's decision was not supported by substantial evidence. I shall examine each of the specifications of the charges and examine the Trial Board's findings.

Charge 1: Violation of the DC Fire & EMS Order Book, Article VII, Section 2 which states, "Any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations". This misconduct is further defined in the D.C. Fire and EMS Rules and Regulations, Article VI, Section 2, which states, "Members shall devote proper attention to the service, exert their greatest energy and full ability in the performance of their duties, not perform their duties in a spiritless, lax, surly, or careless manner, not neglect nor fail to perform any portion of the their duties required by rule, regulation, order, common practice, or the necessities of the situation involved;…be efficient; exercise proper judgment in the performance of their duties." This misconduct is defined as cause to wit: "Neglect of Duty", in 6B D.C.M.R. Section 1603.3(f) (3), 55 DCR 1775 (February 22, 2008).

Specification 1:

The Trial Board found that at 05:43:59, Ambulance 12 was dispatched by the Office of Unified Communications, (OUC), for a patient experiencing an uncontrollable hemorrhage at 1449 Oak Street, N.W., Washington, D.C. At approximately 0500, on the morning of September 29, 2010, David Gregg arrived for duty at Engine 12 and contacted ELO Captain William McHugh to seek permission to relieve Employee from duty. The request was granted but the ambulance was instructed to remain in service. At 05:36:46, Employee was informed of this and left Engine 11 en route to Engine 12. Ambulance 12, though it had left Engine 11 reported that

[3] See *D.C. Metropolitan Police v. Pinkard*, 801 A.2d 86, at 91.
[4] *Id.*
[5] *Id.* at 92.
[6] *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)).
[7] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).

they were available in quarters at Engine 11 rather than acknowledging that they were available and mobile. *See* Notice of Summary Removal pg. 2. At 05:44:49 while Ambulance 12 was in the vicinity of 4th St. and Michigan Ave.,, NE, approximately seven minutes from the location of the call, Ambulance 12 acknowledged the dispatch for the aforementioned call and falsely represented that it was en route to 1449 Oak Street, N.W.

Employee admitted in her testimony that Ambulance 12 did not respond to the Delta Hemorrhage at 1449 Oak Street, N.W. Instead, Ambulance 12 contacted those employees set to relieve Employee and represented that Ambulance 12 was pulling into Engine 12. In so doing, Employee disregarded the emergency call in order to be relieved from duty. At 05:46:41 Ambulance 12 arrived at the quarters of Engine 12. The changeover took place and at 06:00:47 Ambulance 12 arrived at 1449 Oak Street, N.W. over fifteen minutes after the call originally came in at 05:43:59. Upon arriving at Engine 12, Employee ate breakfast. *See* Fire Trial Board Transcript (Tr.), pg. 424, ln 14-17. The patient was declared dead upon arrival at the hospital. *Id.* at 46, ln 20.

Thus, Employee's own testimony supports the Trial Board's guilty finding on Charge 1, Specification 1 of "Any on duty or employment-related act or omission that interferes with the efficiency and integrity of government operations". After it determined that Employee failed to respond to an emergency call for service but instead, continued to the quarters of Engine 12 so that she and her partner could change crews on the ambulance and end their tour of duty early.

Employee testified as follows:

Q Now, if I understood your testimony correctly, you were at 4th and Rhode Island when the dispatch went out.
A Over the computer.
Q Right. And you and Jeremy looked at each other and you made a collective decision not to proceed . . . not to proceed to a call, but to, instead, change crews?
A Yes.
Q And you did that knowing that it was in violation of the Department's Order Book?
A. Yes."

Fire Trial Board Transcript, pg. 395-96.

As shown above, Employee admitted that she received the call and then willfully chose to delay her response thereto with full knowledge that doing so was a violation of the Agency's rules. Employee even further acknowledged that she was aware that the call was for a Delta Hemorrhage and that Delta Hemorrhage calls are "serious". *Id.* at 397. This admission of willful unprofessional conduct is, in and of itself, sufficient evidence to satisfy the substantial evidence standard and uphold Agency's termination decision.

Essentially, Employee admitted to the misconduct charged in Charge 1, Specification 1, when she testified that when she was at Engine 12, the status of her ambulance was in service at

quarters, and that she did not push the button to change the status when she departed Engine 12. Tr. 370. I therefore find that the Trial Board's finding is supported by substantial evidence.

Charge 2: Neglect of Duty, Specification 1:

The Trial Board found that at 05:36:46 Employee and FF/EMT Heckman left Engine 11 in order to return to the quarters of Engine 12. Upon leaving Engine 11, Employee failed to manually status the I/Mobile MDC unit to reflect that she was available mobile and not available in quarters. Consequently, the OUC failed to dispatch the closest available unit to respond to the Delta-Bleed event on Oak Street. Based on the tracking records submitted, the Trial Board determined that this delayed emergency medical services by approximately fifteen (15) minutes. I therefore find that based on the documentary evidence submitted at the hearing, the Trial Board's finding is supported by substantial evidence.

Charge 3: Malfeasance, Specification 1:

The Trial Board determined that the I-Tracker was not always accurate and thus found Employee innocent of making a false representation.

Charge 4: Neglect of Duty, Specification 1:

DC Fire & EMS Order Book Article XXIV, Section 2(4) states, "The EMS Provider with the highest certification will be designated the ACIC and the other members as ACA. When both personnel have equal certifications, the member possessing the greatest seniority at the certification level shall be designated the ACIC," and the DC Fire & EMS Rules and Regulations, Article XVII, Section 7(b), which states in relevant part, "In responding to and returning from alarms apparatus shall be driven over the shortest available route." This misconduct is defined as cause, to wit: "Neglect of Duty" in 6B D.C.M.R. Section 1603(f) (3), 55 DCR 1775 (February 22, 2008).

The Trial Board determined that as the ACIC of Ambulance 12, Employee had a responsibility to perform her duties in the most efficient, professional manner possible. Again, Employee's own testimony supports the Trial Board's finding regarding Charge 4, Specification 1. Agency alleges that Employee allowed the ambulance to proceed to Engine 12 to exchange the crew rather than immediately changing direction and driving in the most direct route to 1449 Oak Street, N.W., and misrepresented their location when she contacted her relief crew at Engine 12.

As discussed *supra*, Employee admitted that she did not status the dispatcher to reflect the ambulance was no longer at quarters. She also admitted that rather than respond to the dispatch, her ambulance headed to quarters to exchange crews, Employee's actions resulted in a delay in medical response to a patient in a critical need of medical care and who later died. Again, I find that Employee's own testimony provided substantial evidence for the Trial Board's findings.

As noted earlier, *Pinkard* counsels me, as the "reviewing authority", to "generally 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 charge brought against Employee, my review shows that there was certainly substantial evidence to support those findings. I note that the Trial Board often relied on Employee's own admissions of not following Agency's orders to convict her. Thus, there is no reason to overturn them.

2. Whether Agency committed harmful procedural error, or 3. Whether the decision was in accordance with law or applicable regulations.

Finally, Employee argues that Agency failed to properly consider the Douglas Factors in choosing Employee's penalty. Again, the evidentiary documents submitted at the Trial Board hearing does not support Employee's contention. Indeed, in its findings and recommendations, (See Agency Tab 8, Fire Trial Board Panel Findings and Recommendation) the Trial Board goes at length on the different Douglas factors and how they weighed them in their determination of the chosen penalty.

On March 24, 20111, the Fire Trial Board recommended that Employee be found guilty of Charge 1 Specification 1, Charge 2, Specification 1, and Charge 4, Specification 1. The FTB recommended that Employee be removed for being found guilty of Charge 1, Specification 1, Charge 4, Specification 1. The FTB recommended as 60-duty hour suspension for Charge 2. The FTB found Employee not guilty of Charge 3. Agency Tab 8.

I have reviewed the evidence and have found that Agency carefully and meticulously laid out their consideration of the Douglas factors one by one. That Agency may not have weighed these factors in the exact same manner as Employee would have preferred is not a ground for overruling Agency's determination.

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the agency, but is simply to assure that "managerial discretion has been legitimately invoked and properly exercised."[8] When the charge is upheld, the Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation or guidelines and is clearly not an error of judgment."[9]

Under the circumstances, I see no basis to conclude that Agency acted capriciously in deciding to terminate Employee. Based upon 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 Agency's final decision and thus find no reason to overturn its findings.

ORDER

[8] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).
[9] *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

It is hereby ORDERED that Agency's decision to terminate Employee from her position is UPHELD.

FOR THE OFFICE: **JOSEPH E. LIM, ESQ.**
Senior Administrative Judge