

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
Harold Dargan,) OEA Matter No. 1601-0091-13
Employee)
) Date of Issuance: October 20, 2015
v.)
) Joseph E. Lim, Esq.
D.C. Fire & Emergency Medical Services,) Senior Administrative Judge
Agency)

Frederic Schwartz, Esq., Employee Representative
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Harold Dargan (“Employee”) was an Emergency Medical Technician (“EMT”) – Intermediate for the D.C. Fire & Emergency Medical Services (“FEMS” or “Agency”). He was removed from Agency on May 3, 2013, for failing to maintain his D.C. Department of Health (“DOH”) certification.

Employee timely filed an appeal with the Office of Employee Appeals (“OEA” or “the Office”) on May 13, 2013. On February 25, 2014, this matter was assigned to the undersigned. I held several conferences with the parties from May 21, 2014, to February 11, 2015. The parties have submitted Motions for Summary Dispositions and their respective responses to each other’s briefs. After reviewing the record, I have determined that no further proceedings in this matter are warranted. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency violated D.C. Official Code § 5-1031 (a) (2001), otherwise known as the "90-day rule" in removing Employee; and
2. Whether Agency’s action of removing Employee from service was done in accordance with applicable law, rule, or regulation.

FINDINGS OF FACT¹

1. Employee is a Basic Paramedic for the Agency. Employee was converted from an Emergency Medical Technician (“EMT”) to a Basic Paramedic, DS-0699-08, effective October 2, 2005.
2. Employee held certifications that designated him as an EMT-Intermediate/99 (“EMT I/99”), which, in Employee’s case, was equivalent to his job title as a Basic Paramedic.
3. Employee possessed a Department of Health card valid from June 18, 2010 to June 30, 2012, that designated him as “qualified to serve in the District of Columbia as an EMT-Intermediate, Active.”
4. D.C. Official Code §7-2341.15(b)(2) gives the Mayor or his designee the power to deny issuance of, deny renewal of, suspend, or revoke a certification to perform the duties of emergency medical services personnel or of an emergency medical services instructor to an individual who is found to have failed to comply with any other federal or District law applicable to the duties of emergency medical services personnel.
5. The February 3, 2010 Agency Bulletin No. 83 outlined Agency’s policy for required certification of EMTs by the National Registry of EMTs (“NREMT”). This policy applied to all those, like the Employee, who provided medical assistance, medical treatment, first aid, or lifesaving interventions, on the scene of an emergency or in transit from the scene of an emergency to a health care facility or other treatment facility, to a person who is ill, injured, wounded, or otherwise incapacitated. This policy states that, “[a]ll DC Fire & EMS Department employees will be required to complete the National Registry certification process at their respective certification level (EMT-B, EMT-I/99, or EMT-P) and maintain both National Registry certification and District of Columbia (D.C. Department of Health) certification.”
6. Bulletin No. 83 stated that the certification exam consisted of two parts: the psychomotor (practical skills) examination and the cognitive (written) examination.
7. Regarding the psychomotor (practical skills) examination, Bulletin No. 83 established the following policy for those at the EMT-Intermediate/99 level:

Psychomotor (Practical Skills) Examination Policies: EMT-Intermediate/99

EMT-Intermediate/99 candidates are allowed three (3) full attempts to pass the psychomotor examination (one “full attempt” is defined as completing all eleven (11) skills and two retesting opportunities if so entitled).

¹ Parties’ Joint Statement of Facts and documentary evidence of record.

Candidates who fail a full attempt or any portion of a second retest must submit official documentation of remedial training over all skills before starting the next full attempt of the psychomotor examination and re-examining over all eleven (11) skills, provided all other requirements for National Certification are fulfilled. This official documentation must be signed by the EMT Training Program Director or Physician Medical Director of training/operations that verifies remedial training over all skills has occurred since the last unsuccessful attempt and the candidate has demonstrated competence in all skills.

DC Fire & EMS Department Employees who fail the third full and final attempt of the National Registry EMT-Intermediate/99 psychomotor examination will be subject to adverse action.

8. On June 14, 2011, while assigned to Medic No. 27, Employee and his unit responded to a call for an unconscious 32-year old female. The patient died.
9. Medical Director David Miramontes, M.D., concluded there were errors in the performance of the responding Emergency Medical Services (“EMS”) team and that Employee failed in his paramedic duties.
10. As a result, Employee was removed from his EMT job duties by the Office of the Medical Director on June 14, 2011.
11. Employee was given a Critical Remediation Action Plan and assigned to the FEMS Training Academy (“TA”) for remedial training.
12. Employee completed his classroom training in mid-July 2011.
13. Employee was then assigned to obtain Advanced Life Support (“ALS”) field evaluations with another EMT-Paramedic, beginning on July 17, 2011, and tentatively completing on July 27, 2011.
14. On September 28, 2011, the Medical Director evaluated Employee. The Medical Director checked the box “Return to Mentor,” noting “Close eval[uation] of ability to function in field. Need Fisdap² for full release. Re-assessment. (sic) Will always be ACA³ only under new paramedic partner.”
15. On October 6, 2011, Employee was assigned to obtain ALS field evaluations under mentor Paramedic Preceptor Sgt. Bachelder.

² “Field Internship Student Data Acquisition Project, also name of EMS test”

³ “Ambulance Crew Assistant”

16. On October 7, 2011, Ms. Massengale e-mailed Employee: "I wanted to reach out and let you know that the CQI⁴ department wants to assist you in maintaining the level of excellence you have demonstrated during the past few weeks at TA."
17. On January 2, 2012, Sgt. Bachelder wrote the Medical Director, noting:

[Employee] has improved and progressed from needing an occasional prompting to needing very few prompts during patient care. He has become a better provider for his patients and the agency. [Employee] has easily accepted the roll (sic) of a team member and works well with other unit members providing care. [Employee] is very knowledgeable in patient care and protocols. In my opinion [Employee] is ready to resume his role as an ACA.
18. On February 2, 2012, Medical Director Miramontes tested Employee's skills as an Advanced Life Support ("ALS") provider. Employee's performance when given a practical skills (psychomotor) scenario was deemed inadequate by the Medical Director. Thus the Medical Director rescinded Employee's I/99 certification, but allowed Employee to continue as an EMT-Advanced.
19. Dr. Miramontes told Employee that he lacked "maturity" and did not have the "cognitive and psycho-motor skills to practice as [a paramedic]," that he would not sponsor his recertification, and that he would so advise the Department of Health.
20. On February 3, 2012, Captain James Follin wrote the Medical Director for a status update. He inquired, "[Employee] is due to report to M-30-2⁵ on Wednesday per his telestaff. Due to current circumstances do you want him removed from operations? He can report to the TA on a 40 hour work week until the administrative actions are completed."
21. On February 3, 2012, the Medical Director responded to Captain Follin and other senior FEMS officials:

[Employee] is officially removed from operations. He needs a new certification card. I offered him an option, He chose another path. He can go into light duty/no patient care process on day work or as assigned until he has a certification. His EMT-I-99 will be pulled. He has no training requirements so assigning him to training makes no sense.
22. On February 3, 2012, Chief Gerald Coles responded to the e-mailed group, noting "Please refer to the email below. Accordingly, [Employee] is hereby detailed to the [Training Academy] until he has been afforded an opportunity to obtain certification."

⁴ "Continuous Quality Improvement"

⁵ M-30-2 or Medic-30-2 is an ambulance unit.

23. On February 14, 2012, Medical Director Dr. Miramontes again tested Employee's skills as an ALS provider, noting that Employee received twelve days of extensive training at the Training Academy. Employee's performance in response to a practical skills (psychomotor) scenario was again deemed inadequate by Dr. Miramontes. Consequently, Dr. Miramontes did not reinstate Employee's I/99 status noting that he did not "have confidence in [Employee's] skills as [an] ALS provider."
24. On February 14, 2012, Dr. Miramontes wrote a letter to Dr. Brian Amy of DOH. The subject was "Request downgrade of [Employee's] Certification after Quality Review." He noted:
- My assessment reveals that he does not demonstrate the cognitive nor psycho-motor skills that are required for him to function safely as an independent EMT-I-99 advanced life support provider. His technical skills were poor on my last assessment using a patient simulator with megacode session held on 2 February 2012 and again on 14 February 2012.
- Basic Paramedic skills such as medication administration, EKG rhythm recognition, and ACLS⁶ protocol compliance were not to an acceptable standard.
- I have offered him a BLS⁷ level of certification as an EMT-Advanced but cannot support him functioning as an EMT I-99 "paramedic" until such time as he completes a fully accredited Paramedic Course, gains NREMT-Paramedic certification, and completes an assessment by this agency.
- Summary of past interventions listed below when taken in context to my recent assessment supports such a decision. He also has been in training since removal from operations on 6/14/2011 after a very concerning complaint of poor performance during Cardiac Arrest run.
25. The February 14, 2012 letter concluded with Dr. Miramontes asking that Employee's DOH certification be dropped to EMT-Advanced. It further noted that he could not authorize re-certification of Employee's NREMT I-99 certification at that time.
26. Dr. Miramontes terminated Employee's remedial training necessary to satisfy his Critical Remedial Action Plan in February 2012.
27. Dr. Miramontes declined to sign Employee's May 30, 2012 DOH certification application to be an EMT I/99 under his supervision.
28. On June 25, 2012, Dr. Miramontes wrote a letter to Dr. Brian Amy of DOH, requesting revocation of Employee's certification after clinical review. He noted:

⁶ Advanced Cardiac Life Support

⁷ Basic Life Support

I have completed a CQI⁸ review for [Employee] EMT I-99 (Basic Paramedic) and have noted he has had a serious CQI interaction regarding poor performance during a cardiac arrest. [Employee] has been detailed to DCFEMS' Training Academy and was re-trained by a field mentorship provider. Shortly thereafter, I personally tested [Employee] on two occasions with a patient simulator and found him to be incompetent despite retraining. I believe [Employee] lacks the maturity, cognitive knowledge and skills to perform as an ALS provider.

29. The June 25, 2012 letter stated that there were past CQI concerns with Employee, stating that Employee received extensive retraining and extended field mentoring. The letter noted "On two separate occasions EMT I-99 [Employee] failed to perform at an acceptable level in patient simulation and multiple cognitive, medication administration and protocol errors were noted despite re-training."
30. The June 25, 2012 letter concluded that: "In light of the documented adverse events and previous remediation attempts, I cannot allow this provider to practice under my license and am hereby requesting that DOH decertify EMT [Employee] as an ALS EMS provider. I cannot authorize re-certification of his NREMT EMT I-99 certification at this time and will not sponsor him at the ALS scope of practice."
31. Thus, Employee's DOH certification expired on June 30, 2012.
32. On July 3, 2012, Mr. Robert W. Austin, through Dr. Brian Amy of DOH, wrote a Memorandum to Dr. Miramontes, noting receipt of Dr. Miramontes' letter, memorializing that Employee's District EMT-Intermediate certification (Cert # I-132) expired at midnight on June 30, 2012, with no application of renewal pending at DOH.
33. As a result, Employee was no longer eligible to continue in his duties with Agency under Bulletin No. 83. Employee was then referred to the Office of Compliance for termination.
34. Employee was offered the opportunity to apply for EMT-Advanced level certification. In an October 1, 2012 e-mail to Agency, Dr. Miramontes reported that Employee declined.
35. Based on this, by letter dated October 31, 2012, the Agency issued to Employee an advance written notice proposing removal of Employee from his position as Basic Paramedic, DS-699, Grade 8. The notice charged Employee with:

Charge No. 1: Violation of the D.C. Fire and EMS Bulletin No. 83 which reads in relevant part: General Policy "All D.C. Fire and EMS Department employees will be required to complete the National Registry certification process at their respective certification level (EMT-B, EMT-I[99], or

⁸ "Continuous Quality Improvement"

EMT-P) and maintain both National Registry certification and District of Columbia (D.C. Department of Health) certification.”

This misconduct is defined as case in Article VII, Section 2 (f) (5) of the D.C. Fire and EMS Department Order Book, which states in part: “Any on duty or employment related act or omission that interferes with the efficiency or integrity of government operations, to wit[:] Incompetence and in 16 D.P.M. § 1603.3 (f)(5) (March 4, 2008).

Specification No. 1: In order to practice as a Paramedic or EMT, an employee must maintain D.C. Department of Health (DOH) certification. Your DOH certification expired on June 30, 2012.

On June 14, 2011, while assigned to Medic No. 27, with your partner Paramedic Channel Jones, your unit responded for an unconscious 32-year old female. You failed to adequately prepare all necessary equipment before initiating a critical skill. You deviated from standard practice by placing an endotracheal tube into the patient’s airway and placing a non re-breather mask over the tube. You failed to oxygenate the patient before intubation and suctioning. You further failed to initiate ventilations for one minute with the proper use of a bag-valve mask device, and you left the patient’s airway unattended while you left to retrieve additional equipment. As it turns out, the bag-valve device was inside the bag adjacent to the patient. The patient did not survive.

On June 14, 2011, at 1530 hours, the Office of the Medical Director immediately removed you from your assigned Medic Unit No. 27, and reassigned you to the Department’s Training Academy. You were placed in a critical remediation action plan until further notice.

On February 2, 2012, Medical Director David A. Miramontes, M.D. interviewed your skills as an Advance Life Support (ALS) provider. You were given a medical scenario of a 64-year old patient with a history of chest pain that became unresponsive with a heart rhythm of ventricular fibrillation. You neither recognized the rhythm, nor did you recognize the asystole rhythm placing the patient in cardiac arrest. In light of your inadequate performance, Dr. Miramontes informed you that he would no longer sponsor you to practice as a Basic Paramedic under his medical license, but would allow you to practice as an Advance Level EMT.

On February 14, 2012, Medical Director Miramontes again interviewed your skills as an Advance Life Support provider. You were given another medical scenario of a patient having chest pain with a blood pressure of 204/106, and a pulse rate of 120. You stumbled with your medications and dosages. Dr. Miramontes informed you that he lacked confidence in your skills as an ALS provider, but suggested that you could work as a basic

life support provider.

Thus, after having lengthy remediation and numerous evaluations, you continued to demonstrate a lack of maturity, and a deficiency in cognitive psycho-motor skills to practice as a Basic Paramedic. Accordingly, Dr. Miramontes submitted documentation to DOH communicating his decision to withdraw his sponsorship of you to practice as an ALS provider with the Department.

Your position of record is a Basic Paramedic. Accordingly, you are required to maintain all certification requirements associated with your position. Your DOH certification expired on June 30, 2012. Your inability to meet the requirements of this position renders you incompetent to render services as a Basic Paramedic.

Your lack of certification further places both you and the citizens of the District of Columbia in danger and, therefore, interferes with the efficiency and integrity of government operations.

Because you have failed to maintain your DOH certification, you are precluded from performing the duties of Basic Paramedic in the District of Columbia, as outlined in Bulletin No. 83 "National Registry of EMT's (NREMT) Certification Policy EMT." Accordingly, this action is proposed.

36. Employee was advised of his rights to review material upon which the proposed action was based, to respond in writing within six (6) days of receipt of the Notice, and to an administrative review by a hearing officer.
37. Employee submitted an undated response through counsel.
38. The hearing officer's written decision, issued on April 5, 2013, found that Agency had cause to remove Employee and sustained the recommended proposed removal action.
39. On April 24, 2013⁹, Agency's Chief Kenneth B. Ellerbe issued the final decision sustaining the removal. The Chief expressly noted his consideration of D.C. Official Code § 7-2341.15 (d), which prohibits the Agency from employing persons who no longer possess the requisite certifications.
40. Employee's ACLS certification expired in May 2013.
41. Employee's employment with Agency was terminated effective May 3, 2013.

⁹ The Final Decision letter was misdated March 24, 2013.

42. Employee's Cardio Pulmonary Resuscitation (course C) certification expired in July 2013.
43. Employee's EMT I/99 certification from the National Registry of Emergency Medical Technicians expired on March 31, 2014.

ANALYSIS AND CONCLUSION

Whether Agency violated D.C. Official Code § 5-1031 (a) (2001), otherwise known as the "90-day rule" in removing Employee.

The first challenge raised by Employee is that Agency violated D.C. Code Section 5-1031(a), which requires Agency to initiate an adverse action against a sworn member of the police force no later than 90 days from the date Agency "knew or should have known of the act or occurrence allegedly constituting cause." Employee argues that the matter should be dismissed because Agency failed to propose his termination in a timely manner, in that it failed to propose the adverse action within 90 days of when it knew or should have known of the charged conduct. Agency contends that it did act within the 90 day period.

§ 5-1031. Commencement of corrective or adverse action states as follows:

(a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.

(b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of Corporation Counsel, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

Employee argues that Agency knew or should have known of the act or occurrence allegedly constituting cause on June 14, 2011, when a 32-year-old female patient died. This argument can be disposed of in short order. As Agency points out, Employee was removed from his position not because his negligence contributed to the death of a patient, but for failing to maintain the required DOH certification to do his job.

Employee then argues that the second potential date that Agency knew or should have known of the act or occurrence allegedly constituting cause occurred on February 14, 2012, when Employee failed the tests on his skills as an independent EMT – 1-99 advanced life support provider. Again, this argument fails as the "cause" – the loss of his DOH certification had not yet occurred then.

Finally, Employee argues that the final potential date that Agency knew or should have known of the act or occurrence allegedly constituting cause is the expiration of Employee's DOH certification on June 30, 2012.

In accordance with D.C. Official Code § 5-1031 (a) (2001) cited above, ninety days from June 30, 2012, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department knew or should have known of the act or occurrence allegedly constituting cause, specifically the expiration of Employee's DOH certification, is November 1, 2012. Since Agency issued its advance notice of adverse action on October 31, 2012, Agency was still within the ninety day rule when it commenced adverse action against Employee.

After carefully reviewing the record and the arguments of the parties, the Administrative Judge concludes that Agency did initiate the adverse action in a timely manner. Thus, I find that Employee's argument is without merit.

Whether Agency's action of removing Employee from service was done in accordance with applicable law, rule, or regulation.

Agency Bulletin No. 83 cited in the above findings of facts outlined the Agency's requirement that all its EMTs maintain their certification by the National Registry of EMTs. The certification exam required passing both the psychomotor (practical skills) examination and the cognitive or written examination. EMT-Intermediate/99 candidates are allowed three full attempts to pass the psychomotor examination.

Employee had trouble passing the psychomotor (practical skills) examination and indeed, failed it three times: September 28, 2011; February 2, 2012; February 14, 2012.

Employee challenges the Medical Director's decision because it was "contrary to the other record evidence." *Employee's Motion at 19*. To buttress his argument, Employee asserts that he has maintained a number of prior certifications and had completed the courses necessary for certification. Then, Employee concludes that, "[t]hus, the failure was not [Employee's], but rather that of the Medical Director."¹⁰

This reasoning is faulty. A person who got a medical skills certification years before can, and do, fail to recertify by failing to maintain the standards required for recertification. A prior certification does not preclude a subsequent failure at re-certification.

Finally, Employee argues that Medical Director Dr. Miramontes violated his due process right by denying him more opportunities to attempt to pass his psychomotor examination. Employee asserts that he "was not even permitted [to] complete one full attempt to pass his psychomotor examination, much less the three full attempts required under [Agency] Bulletin No. 83."¹¹

¹⁰ Employee's Motion for Summary Disposition at 17-18.

¹¹ Employee's Motion for Summary Disposition at 21.

In order to establish the veracity of this argument, it is necessary to restate the salient, undisputed facts in this matter. The undisputed facts establish that as a result of Employee's failure to follow established medical protocol in dealing with a patient on June 14, 2011, a patient died. Acting within his authority, Medical Director Dr. Miramontes removed Employee from further contact with future patients and placed Employee in a critical remediation action plan. This consisted of Employee being placed at the Training Academy for intensive retraining. Employee completed his classroom training in mid-July 2011. For the remainder of the month, Employee was then assigned to another EMT-Paramedic for Advanced Life Support ("ALS") field evaluations.

On September 28, 2011, the Medical Director evaluated Employee and found Employee still lacking in the skills required to re-assign him back to full duty. Thus, on October 6, 2011, Employee was assigned to Paramedic Preceptor Sgt. Bachelder for further ALS field evaluation training.

Based on Sgt. Bachelder's January 2, 2012, letter stating that Employee has improved, Medical Director Dr. Miramontes tested Employee's skills as an ALS provider on February 2, 2012, and again found his performance inadequate. The next day, Captain Follin asked Dr. Miramontes for an update on Employee's status and was informed that Employee could not work as an ALS provider. Although Dr. Miramontes opined that it made no sense, Captain Follin nonetheless put Employee back to the Training Academy for 12 days of extensive training.

On February 14, 2012, Medical Director Dr. Miramontes again tested Employee's skills as an ALS provider and again found Employee's performance inadequate. At this point, Dr. Miramontes asked DOH to downgrade Employee's certification from ALS to EMT-Advanced, explaining his basis in a detailed letter on February 14, 2012.

On June 25, 2012, Dr. Miramontes wrote a letter to DOH requesting revocation of Employee's certification after clinical review, and again detailed his rationale for the request. Medical Director Dr. Miramontes stated that he would not sign Employee's May 30, 2012, DOH certification application to be an EMT I/99 under his supervision.

Dr. Miramontes offered Employee the opportunity to apply for EMT-Advanced level certification instead, but Employee declined.

Thus, the facts belied Employee's claim of not being allowed to complete one full attempt to pass his psychomotor examination.

Bulletin No. 83's established policy for those at the EMT-Intermediate/99 level states that "EMT-Intermediate/99 candidates are allowed (3) full attempts to pass the psychomotor examination (one "full attempt" is defined as completing all eleven (11) skills and two retesting opportunities *if so entitled*). Emphasis supplied.

While Bulletin No. 83 allows for three testing opportunities, the clause "if so entitled" clearly reflects that a total of three tests is not *mandatory*, just that three testing opportunities is

the *maximum* number of tests that can be taken before adverse action is required. Thus, the three full attempts to pass is not mandated. It is given only if the candidate is entitled to another attempt. It is clear from Bulletin No. 83 that the Medical Director must verify that the candidate “has demonstrated competence in all skills” in order to sign off on official documentation before retesting can occur.

Here, the Medical Director allowed for a full attempt, and then for a second attempt once Employee had undergone retraining. After the second failed attempt, the Medical Director, within his discretion, lawfully declined to find that Employee had demonstrated “competence in all skills.” He was not required, under Bulletin No. 83, to allow the Employee another retest. He offered Employee the opportunity to work at a lower level of care, and Employee refused.

Indeed, the record shows that Employee got the three attempts that Bulletin No. 83 provides for. The record evidence does not support that the procedures in Bulletin No. 83 were ignored. I therefore conclude that Employee is not entitled to more than what he was afforded.

In essence, Employee disagrees with the Medical Director’s assessment of his psychomotor skills. One must keep in mind that lives of potential patients are at stake. It is within the legal framework that the Medical Director tests the skills of EMT-Intermediate/99 candidates and uses his medical expertise and judgment to ascertain that EMT-Intermediate/99 candidates are qualified to perform their medical duties.

Appropriateness of the Penalty

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that “managerial discretion has been legitimately invoked and properly exercised.”¹² OEA has previously held that the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.¹³ When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment.¹⁴ As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.¹⁵

¹² *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

¹³ *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

¹⁴ *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011); *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (February 1, 1996); and *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995).

¹⁵ *Love* also provided that

[OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance;

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.¹⁶ The evidence did not establish that the penalty of termination for failure to maintain the statutorily required medical certification constituted an abuse of discretion.

Based on the aforementioned, there is no clear error in judgment by Agency. Termination was a valid penalty under the circumstances, and indeed, is mandated under medical regulations. Based on a preponderance of the evidence, I conclude that given the aforementioned findings of facts and conclusions of law, Agency's action of terminating Employee from service should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of terminating Employee from service is **UPHELD**.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge

such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.

citing *Douglas v. Veterans Administration*, 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).

¹⁶*Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency*, OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).