THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	
v.	)	OEA Matter No.: 1601-0046-21
	)	
	)	Date of Issuance: January 19, 2023
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT, Agency	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee worked as a Firefighter/Emergency Medical Technician ("FF/EMT") and an Assisting Crew Member Aide ("ACA") with the Department of Fire and Emergency Services ("Agency"). On August 7, 2020, Agency issued a Proposed Notice of Adverse Action, charging Employee with violation of the D.C. Fire & Emergency Services Order Book, Article XXIV, Section 10, Section 11 of the Patient Bill of Rights, and Special Order No. 54, Series 2012. Agency's first charge levied against Employee alleged that he neglected his duty and unreasonably failed to aid a member of the public during an emergency call. The second charge was that he

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.

violated the Pre-Hospital Treatment Protocols by neglecting his duty to properly document the Electronic Patient Care Report ("ePCR") for the incident.

On July 1, 2021, Agency's Fire Trial Board held an administrative hearing on the charges against Employee. Employee pleaded not guilty as to Charge No. 1, Specification No. 1 and guilty as to Charge No. 2, Specification No. 1. After eliciting the documentary and testimonial evidence, the Trial Board found Employee guilty of both charges and recommended the penalty of a 720-hour suspension for Charge No. 1, Specification No. 1, and a twenty-four-hour suspension for Charge No. 2, Specification No. 1. On August 17, 2021, Agency's Chief issued a Final Agency Decision accepting the Trial Board's recommendations. Employee's suspensions became effective on August 23, 2021.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on September 15, 2021. In his appeal, Employee argued that a 744-hour suspension was egregious because this was his first disciplinary action during his tenure with Agency. He further opined that the imposed penalty was inconsistent with employees who were similarly situated. As a result, Employee requested that Agency reduce the suspension to an official reprimand or reverse the adverse action in its entirety.[2]

Agency filed an answer to the petition on November 17, 2021. It contended that Employee's misconduct was thoroughly investigated; special reports were prepared; and applicable documents were considered. Ultimately, Agency determined that Employee deviated from the appropriate standard of care and abandoned his patient, such that disciplinary action was warranted. It further reasoned that Employee's appeal should be denied because there was

[2] *Petition for Appeal* (September 15, 2021).

substantial evidence to support each of the Trial Board's findings. Lastly, Agency submitted that it considered the *Douglas* factors and concluded that the suspensions were the appropriate penalties.[3]

On May 19, 2022, the Administrative Judge ("AJ") held a status conference to determine the outstanding issues in this matter.[4]

During the conference, it was determined that the Collective Bargaining Agreement ("CBA") between Agency and Employee's union, as well as the holding in *Pinkard v. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2006), precluded a *de novo* hearing.[5] Therefore, the parties were ordered to submit written briefs addressing whether Agency's termination action was supported by substantial evidence; whether Agency committed a harmful procedural error; and whether Employee's termination was taken in accordance with all applicable laws, rules, and regulations.[6]

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[3] *Agency Answer to Petition for Appeal* (November 17, 2021). 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.

[4] *Order Convening a Prehearing/Status Conference* (May19, 2022).

[5] Under the holding in *Pinkard*, this Office may not conduct a de novo hearing in an appeal before him/her, but must rather base his/her decision solely on the record below, when all of the following conditions are met: the appellant is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department; the employee has been subjected to an adverse action; the employee is a member of a bargaining unit covered by a collective bargaining agreement; the collective bargaining agreement contains language essentially the same as that found in *Pinkard*; and at the agency level, the employee appeared before a Trial Board that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.

[6] *Post-Status Conference Order* (May 20, 2022).

In its brief, Agency argued that both charges levied against Employee were based on substantial evidence. As it related to Charge No. 1, Specification No. 1 (neglect of duty/unreasonable failure to give assistance to the public), Agency submitted that during a dispatch call, Employee failed to make face-to-face contact with the patient; failed to do a proper assessment of the patient; and told the patient's caregiver (mother) that it was fine to give the patient Tylenol and call 911, if needed. Additionally, it asserted that Employee's ambulance ("Ambulance 32") violated protocol when it returned to service without obtaining a proper refusal from the patient. According to Agency, Employee's conduct placed the patient in danger because he failed to perform a visual assessment and because the child was at risk of developing serious complications from a high fever, including seizures.[7]

As it related to Charge No. 2, Specification No 1, Agency opined that it met its burden of proof because Employee failed to comply with clear orders and directives regarding the documentation of patient interactions, in violation of 6B DCMR 1603.3. Lastly, it reasoned that the imposed penalty was an appropriate exercise of managerial discretion based on a reasonable consideration of the relevant *Douglas* factors. Consequently, Agency requested that Employee's suspension be sustained.[8]

In response, Employee argued that Agency's imposition of the 744-hour suspension was not in accordance with the *Douglas* factors. Specifically, he stated that factor six, consistency of the penalty with those imposed upon other employees for the same or similar offenses, was applicable in this case. According to Employee, a similar case to the instant matter only resulted in the employee receiving a 120-hour suspension for the same conduct. Employee noted that he

[7] *Agency Brief* (June 10, 2022).
[8] *Id.*

had no previous disciplinary history; therefore, he contended that a 744-hour suspension was excessive and unreasonable under the circumstances. Therefore, he maintained that Agency's adverse action was improper.[9]

An Initial Decision was issued on September 7, 2022. Concerning Charge No 1., Specification No. 1, the AJ held that the Trial Board met its burden of proof in establishing that Employee both neglected his duty as a FF/EMT and unreasonably failed to provide assistance to the public during the May 22nd emergency call. She explained that Employee did not dispute that he and his partner did not follow the proper patient care protocol in their interaction with the 6-year-old patient and his mother during the service call. Further, the AJ stated that Employee admitted to not having any contact with the patient prior to departing the scene. She noted that Employee admitted to being unsatisfied with his performance during the call and that he admitted that he could have performed his duties better in hindsight.[10]

As it related to Charge No. 2, Specification No. 1, the AJ agreed with Agency that despite clear directives outlined in the Pre-hospital Treatment Protocols, the Consent/Refusal of Care Policy, as well as the Special Order No. 54, Series 2012, Employee and his partner failed to perform any assessment of their patient; failed to follow the Department's Refusal of Care policy; and failed to properly complete an ePCR with the corresponding incident report. The AJ further acknowledged that Employee pleaded guilty to this charge and specification during the Trial Board Hearing. As a result, she held that Charge No. 2 was supported by substantial evidence.[11]

[9] *Employee Brief* (July 7, 2022).
[10] *Initial Decision* (August 24, 2022).
[11] *Id*.

However, the AJ concluded that Agency utilized the incorrect version of the District Personnel Manual ("DPM") in instituting its adverse action. Concerning the neglect of duty cause of action, she explained that the applicable DPM version went into effect in the District on May 12, 2017. Therefore, Employee's suspension, which commenced after the effective date was subject to the new version of the DPM. The AJ went on to provide that a specification of neglect of duty under the 2012 version and the current version of the DPM, while encapsulated in different subsections, did not substantively differ because the specification was captured in both versions of the DPM. Since both versions provide for a maximum penalty of termination, the AJ held that Agency's error was harmless.

Unlike neglect of duty, the AJ determined that a specification of unreasonable failure to give assistance to the public under the 2012 version of the DPM did not have a corresponding provision in the current version. She noted that the substantive changes in the DPM and the corresponding penalties rendered her unable to decipher which specification should have been levied against Employee had Agency utilized the appropriate version of the DPM. As a result, the AJ dismissed the specification because Agency committed a harmful procedural error.[12]

Next, the AJ assessed whether Agency's adverse action was conducted in accordance with all applicable laws or regulations. With respect to neglect of duty, the AJ provided that the specification includes failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties; failure to assist the public; undue delay in completing assigned tasks or duties; careless work habits; conducting personal business while on duty; abandoning an assigned post; and sleeping or dozing

[12] *Id.*

on-duty or loafing while on duty. She stated that contrary to Employee's assertion that he did not do anything to intentionally cause harm to the patient in May of 2020, the charge does not have an intent component. Moreover, Employee admitted that his conduct did not conform with the Patient Bill of Rights and proper patient care protocol. Employee also acknowledged that Ambulance 32 did not have a face-to-face contact with the patient, and they failed to assess the patient as required. Based on the record, the AJ found that Agency's decision to levy the neglect of duty specification against Employee was done in accordance with applicable laws and regulations.[13]

For unreasonable failure to give assistance to the public, she held that Employee's failure to have face-to-face contact or evaluate the child was not unreasonable given the COVID-19 Public Health Emergency. In further support of her conclusion, the AJ noted that the lack of proper guidance due to the novelty of the disease; the mother's concern for potential COVID exposure; and her refusal to have her son transported to the hospital with the ambulance, were factors which supported the conclusion that Agency lacked cause to levy this charge against Employee. Therefore, she concluded that Agency improperly levied the charge of unreasonable failure to give assistance.[14]

Last, the AJ relied on the holding in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), in assessing whether the imposed penalty was appropriate.[15] Regarding Charge No. 2, Specification No. 1, Employee's guilty plea, in addition to a review of the record, led the AJ to conclude that the charge was supported by substantial evidence. Therefore, Agency's imposition

[13] *Id.*
[14] *Id.*
[15] In *Stokes*, the Court of Appeals held that OEA must determine whether the penalty was within the range allowed by law, regulation, and any applicable Table of Illustrative Actions ("TIA"); whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by Agency. The Court further provide that an agency's decision will not be reversed unless it failed to consider relevant factors, or the imposed penalty constitutes an abuse of discretion.

of a twenty-four-hour suspension for neglect of duty was sustained. However, for Charge No. 1, Specification No. 1, the AJ concluded that Agency failed to utilize the appropriate version of the DPM in its administration of this action, and that Agency failed to provide a breakdown of the penalty with respect to each cause of action listed in Charge No. 1, Specification No. 1. Consequently, she held that the 720 duty hours suspension levied against Employee for Charge No. 1, Specification No.1 was inappropriate under the circumstances. Consequently, Agency's action of suspending Employee for twenty-four hours was upheld; Agency's action of suspending Employee for 720 hours was reversed; and Agency was ordered to reimburse Employee all pay and benefits lost as a result of the 720-hour suspension.[16]

Agency disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on September 28, 2022. It asserts that the Initial Decision should be reversed because it was inappropriate to decide the case based on an issue that was not addressed by the parties; the issue on which relief was granted was waived by Employee; and Agency properly charged Employee using the applicable procedures. It contends that Agency was required to rely upon the Order Book and the 2012 DPM because the 2017 amendments would modify bargained-for procedures and notes that Impacts & Effects bargaining have not occurred between Agency and Employee's Union. Further, Agency opines that even if its reliance on the 2012 DPM constituted an error, it was harmless. Thus, it requests that the Petition for Review be granted.[17]

Substantial Evidence

The Board may grant a Petition for Review when the AJ's decision is not based on substantial evidence. The Court in *Baumgartner v. Police and Firemen's Retirement and Relief*

[16] *Initial Decision* at p. 29.
[17] *Petition for Review* (September 28, 2022).

Board, 527 A.2d 313 (D.C. 1987), found that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[18] After reviewing the record, this Board believes that the AJ's rulings were based on substantial evidence.

Discussion

As previously stated, the holding in *Pinkard* applies to this matter; therefore, OEA's review of Agency's adverse action is limited to the determination of whether the Trial Board's decision was supported by substantial evidence; whether there was harmful procedural error; and whether Agency's action was done in accordance with applicable laws or regulations. While Agency's suspension action was based on two charges, Employee pleaded guilty to Charge No. 2, Specification No. 1. Therefore, this Board will only determine whether the AJ's conclusions of law with respect to the remaining charge and specification are based on substantial evidence in the record.

Charge No. 1, Specification No. 1 against Employee, as provided in its Answer to Employee's Petition for Appeal, states the following in pertinent part:

> Violation of D.C. Fire and Emergency Medical Department Order Book Article XXIV, § 10 Position Responsibilities, which states:
>
> C. Position Responsibilities Continued – Medical Duties: …
> Driver (Position No. 1): …
> 2. Duties at the Incident Scene:
>
> - Status DEK Button # 2 when arriving on scene.
> - Applies Oxygen and AED, when applicable.

[18] Black's Law Dictionary, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002

- Obtains Vital Signs.
- Establishes IV line, when applicable.
- Checks the scene for equipment prior to leaving the scene.
- Checks the scene for equipment and any discarded material that would be classified as medical waste prior to leaving the scene.
- Status DEK Button #6 when transporting to hospital.

Further violation of D.C. Fire and Emergency Medical Services Department Bulletin No. 13, § 11, which states: As our patient, you have the right to expect competent and compassionate service from us….

This misconduct is defined as cause in D.C. Fire and Emergency Medical Department Order Book Article VII, § 2(f)(3), which states: "Any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations to include: Neglect of Duty." See also 16 DPM § 1603.3(f)(3) (August 27, 2012). (Emphasis added).

This misconduct is defined further as cause in D.C. Fire and Emergency Medical Department Order Book Article VII, § 2(f)(9) which states: "Any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operations to include: unreasonable failure to give assistance to the public." See also 16 DPM § 1603.3(f)(9). (Emphasis added).

DPM Version

In her analysis, the AJ provided a thorough assessment of why Agency utilized the incorrect version of the DPM in initiating its adverse action against Employee. The AJ correctly concluded that the applicable DPM version went into effect in the District on May 12, 2017. Thus, all adverse actions commenced after this date were subject to the new regulations. Since the alleged misconduct giving rise to this appeal occurred after the implementation of the new DPM, Employee's appeal must be scrutinized using the correct iteration of the regulations.

Agency does not dispute that it charged Employee with misconduct under the 2012 version of the DPM. Specifically, Agency charged Employee with violating DPM §1603.3(f)(3) (March

4, 2012). Under the 2012 version, "[a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations" neglect of duty charge included but was not limited to failure to follow instructions or observe precautions regarding safety; failure by a supervisor to investigate a complaint; failure to carry out assigned tasks; or careless or negligent work habits. The penalty for the first offense for neglect of duty under the 2012 DPM ranged from reprimand to removal.

Under the 2017 version of the DPM, a charge of neglect of duty includes, but is not limited to, failing to carry out official duties or responsibilities as would be expected of a reasonable individual in the same position; failure to perform assigned tasks or duties; failure to assist the public; undue delay in completing assigned tasks or duties; careless work habits; conducting personal business while on duty; abandoning an assigned post; or sleeping or dozing on duty, or loafing while on duty."[19] The penalty for the first offense is counseling to removal.

Here, Employee was suspended based on his failure to carry out the essential functions of his position during an emergency call. As the AJ held, this specification is captured in both the older and the new versions of the DPM. Therefore, we believe that the AJ provided a rational basis for concluding that find that a charge of neglect of duty did not substantively different from the older version utilized by Agency. Accordingly, we will leave her ruling on this issue undisturbed.

In Charge No. 1 of the Notice of Proposed Suspension, Agency also alleged that Employee violated 16 DPM § 1603.3(f)(9) for "unreasonable failure to give assistance to the public." As the AJ noted, this cause of action does not have a corresponding provision in the newer version of the

[19] The 2017 version of the DPM moved all the adverse action charges to DPM § 1605. Thus, the charge of neglect of duty can now be found in DPM § 1605.4(e), with its corresponding penalty found in DPM § 1607.2(e).

DPM. Further, we agree with the AJ's finding that there were substantive changes made to the 2012 DPM with regard to the charges and penalties, such that an affected employee would be unable to determine which charges should have been levied had Agency utilized the 2017 version of the DPM. In support of her conclusion, the AJ cites to the holdings in *George v. D.C. Office of the Attorney General*, OEA Matter No. 1601-0050-16, *Opinion and Order* (July 16, 2019); *Office of the District of Columbia Controller v. Frost*, 638 A.2d 657, 662 (D.C. 1994); *Johnston v. Government Printing Office*, 5 M.S.P.R. 354, 357 (1981); and *Sefton v. D.C. Fire and Emergency Services*, OEA Matter No. 1601-0109-13 (August 18, 2014), in which it was held that an employee must be aware of the charges for which they are penalized in order to appropriately address or appeal those charges. Further, she noted that Agency did not provide a breakdown of the penalty of proposed suspension hours with respect to each cause of action as encapsulated in Charge No. 1. Accordingly, the AJ deemed it improper to 'guess' or 'estimate' what the appropriate charge and suspension penalty would have been had Agency used the appropriate DPM version. This Board believes that the AJ provided a thorough assessment of this issue and finds that her conclusions are supported by substantial evidence.

In *Fulford-Cutberson v. Department of Corrections*, OEA Matter No. 1601-0010-13 (December 19, 2014), OEA held that it is required to adjudicate an appeal on the "grounds invoked by agency and may not substitute what it considers to be a more appropriate charge." This requirement was also highlighted in the holdings in *Francois v. Office of the State Superintendent of Education*, OEA Matter No. 1601-0007-18, *Opinion and Order* (July 16, 2019) and *Linnen v. Office of the State Superintendent of Education*, OEA Matter No. (February 13, 2019). In *Francois*, the OEA Board concluded that Agency's reliance on the incorrect version of the DPM in the charging documents constituted a harmful error because Employee could not adequately defend

herself against the charges levied against her. The AJ in *Francois* noted that penalties in the 2012 and 2017 DPM versions were vastly different and could have resulted in a different outcome and significantly affected Agency's final decision. Likewise, in *Linnen*, the OEA AJ held that Agency erred in relying on the 2012 version of the DPM and reversed the agency's adverse action because she could not determine what the corresponding charges in the 2017 DPM would have been to those cited by Agency from the 2012 DPM version.

Since Agency utilized an out-of-date version of the DPM, we agree with the AJ's conclusion that it is impossible to bifurcate how many hours Employee would have been suspended based on "neglect of duty" and "unreasonable failure to give assistance to the public" because the causes were both contained under the same umbrella of Charge No. 1. Consequently, we will leave the AJ's ruling undisturbed.

Harmless Error

In its Petition for Review, Agency argues that its use of the 2012 version of Chapter 16 of the DPM was harmless error. OEA Rule 631.3 provides the following:

> Notwithstanding any other provision of these rules, the Office shall not reverse an agency's action for error in the application of its rules, regulations, or policies if the agency can demonstrate that the error was harmless. Harmless error shall mean an error in the application of the agency's procedures, which did not cause substantial harm or prejudice to the employee's rights and did not significantly affect the agency's final decision to make the action.

Because the wrong version of the regulation was used, Employee could not adequately defend himself against the charges levied by Agency. The penalties in the 2012 and 2017 versions are vastly different and could very well have resulted in a different outcome and significantly affected Agency's final decision. This created substantial harm and severely prejudiced Employee's rights. Consequently, this Board agrees with the AJ's ruling that Agency's utilization

of the wrong version of the DPM does not amount to harmless error. Employee should not have been placed in a position where he had to speculate as to which penalty would have been used had Agency utilized the proper version of the DPM; therefore, it is difficult to uphold Agency's action.

Conclusion

Under the holding in *Pinkard*, the AJ was limited to determining, based on the record, whether Employee's suspension was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. Agency provides no persuasive basis to support its position that she was not permitted to address *sua sponte* that it utilized the incorrect version of the DPM. This issue is germane to the disposition of this appeal. Further, Agency's reliance on the 2012 version of the DPM was not a harmless error, as it caused substantial harm to Employee. While a charge of "neglect of duty" has corresponding causes and penalties under both the 2012 version and the 2017 version of the DPM, a charge of "failure to provide assistance to the public" does not. Thus, the AJ properly concluded that she could not recreate the adverse action for Agency and assign a proper penalty for each basis of cause. Consequently, this Board cannot uphold Agency's suspension action for Charge No. 1. Based on the forgoing, we find that the AJ's conclusions of law are supported by substantial evidence in the record. Accordingly, Agency's Petition for Review is denied.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's Petition for Review is **DENIED**. Agency's action of suspending Employee for 720 duty hours is **REVERSED**. Agency is therefore **ORDERED** to reimburse Employee for all pay and benefits lost as a result of the 720-hour suspension.

FOR THE BOARD:

_____
Clarence Labor, Jr., Chair

_____
Jelani Freeman

_____
Peter Rosenstein

_____
Dionna Maria Lewis

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