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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
RICHARD STERNE,)	
Employee)	OEA Matter No. 1601-0082-12
)	
v.)	Date of Issuance: January 21, 2015
)	
D.C. FIRE AND EMERGENCY)	
MEDICAL SERVICES)	
DEPARTMENT,)	
Agency)	Eric T. Robinson, Esq.
)	Senior Administrative Judge
_____)	
James W. Pressler, Esq., Employee Representative		
Eric A. Huang, Esq., Agency Representative		

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Richard Sterne (“Employee” or “Sterne”) filed a petition for appeal with the Office of Employee Appeals (“OEA” or “Office”) contesting the District of Columbia Fire and Emergency Medical Services Department’s (“FEMS” or “Agency”) action to reduce him in rank from Battalion Fire Chief to Captain. The effective date of the demotion was April 8, 2012. The Agency contends that there was cause for the demotion and that the demotion was appropriate. Employee disagrees and has alleged that there was no cause for his demotion and that the demotion was inappropriate.

An evidentiary hearing was held in this matter on May 29, 2014. Afterwards, the parties were required to submit written closing arguments in support of their positions. Both parties complied with this order. The record is now closed.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) states:

The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:

That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 628.2 *id.* states:

The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The Agency shall have the burden of proof as to all other issues.

STATEMENT OF THE CHARGE

By letter dated January 7, 2012, the Agency issued to Employee a 15-day advance notice of a proposal to reduce him in rank from Battalion Fire Chief to Captain with the District of Columbia Fire and Emergency Medical Services Department. The proposed action was based upon the following cause: any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations, to include: Neglect of Duty, regarding his failure to apply the Agency's progressive discipline policy and carry out the duties of his position when disciplining two charged firefighters. Specifically:

You were the Battalion Fire Chief (BFC) designated to conduct the BFC Conferences in Case Numbers: U-12-017 (Sgt. Charles Preslipsky) and U-12-015 (Lt. Robert Ellerbe). In each instance the members were charged with the following: violation of D.C. Fire & EMS Department's Order Book, Article VI, Section [6], which states in relevant part, "Department members shall not...permit the presence of intoxicants or illegal substances in or on any property used or occupied by the FEMS Department," and violation of D.C. Fire & EMS Department's Rules and Regulations, Article VI, Section 17, which states, "Members shall not directly or indirectly in their official capacities...receive presents, rewards, or gifts in money or goods of any description..." In the January 8, 2012, Memoranda to Assistant Fire Chief Timothy H. Gerhart, you state that you conducted a joint conference at the request of the members involved.

These disciplinary actions arose out of an incident which occurred at the quarters of Engine 9. As noted in your findings of fact:

“On the evening of September 14, 2011 a citizen entered the quarters of Engine 9 and Truck 9 carrying two twelve packs of beer. The first person he encountered was Sergeant Charles Pre[s]lipsky. The citizen stated that he wanted to give the beer to the firefighters in appreciation for their excellent service during an earlier alarm at his residence. Sergeant Pre[s]lipsky explained that he could not accept the beer. There was a continuing exchange, whereupon the citizen said something to the effect of [‘]well I’m not taking it home,[‘] placed the beer on the apparatus lane floor and left quarters. Sergeant Pre[s]lipsky stated that his first concern was to remove the beer from public view by removing it from the glass fronted apparatus bay and taking it to Lieutenant Ellerbe who was the senior officer on duty that tour. Neither officer [‘]accepted[‘] the gift of beer.”

You concluded that the members were not guilty of Charge No. 2, i.e. accepting a gift. The Fire & EMS Department’s Rules and Regulations which formed the basis of this Charge, does not require that a member “accept” anything. The language clearly states that, “Members shall not directly or indirectly in their official capacities...**receive** presents, rewards, or gifts in money or goods of any description...” [Emphasis added] Your failure to hold the members accountable for their receipt of the beer in violation of the Rules of Conduct brings into question your ability to exercise proper judgment in the performance of your assigned duties and responsibilities.

You did find the members were guilty of Charge No. 1, i.e., allowing the presence of alcohol in the quarters of Engine 9. You state in your Special Report of January 20, 2012, that after a review of the Douglas factors, and based upon your training you opined that disciplinary action should be corrective rather than punitive. You state further that while you did not have the member’s prior disciplinary history, you previously served as Chair of a Fire Trial Board involving Sgt. Preslipsky which resulted in disciplinary action. You note that his previous misconduct was inapplicable to the matter before you, and was not considered.

You issued both members an Official Reprimand.

The rules which govern the conduct of District government employees are set forth in 6B D.C.M.R §1800 et seq. In accordance with §1803.1:

“An employee shall avoid action, whether or not specifically prohibited by this chapter, which might result in, or create the appearance of the following:

- (b) Giving preferential treatment to any person;
- (f) Affecting adversely the confidence of the public in the integrity of government.”

As a sworn member of this Department, serving in a command position, you are held to the highest standards of conduct. As stated in D.C. Fire & EMS Department's Rules and Regulations, Article IV, Section 3, you are not only responsible for ensuring observance of the Rules of Conduct, you must also set an example for those under your command as to how the Rules of Conduct must be applied.¹ Failure to do so, adversely affects the confidence of the public in the integrity of government.

As you are aware, Fire and EMS Department's General Order, Article VIII, Section 4 states: ["[T]he AFC shall refer a matter directly to a [BFC] Conference, a [DFC] Conference, or a Trial Board...based on a consideration of the nature of the offense, the member's past disciplinary history and any relevant factor or aggravating factors." In the instant matters, the AFC took into account the three (3) enumerated factors and proposed that each member receive a suspension of twelve (12) hours for each Charge.

As stated in your Special Report you knowingly failed to take into consideration Sgt. Pre[s]lipsky's disciplinary history. Your failure is compounded by the fact that you served as Chairman of his 2008 Fire Trial Board. You knew that the Office of Compliance had a record of his prior history, yet you neglected your duty to have the information that was necessary to perform a penalty analysis. While it is within your authority to reduce the proposed penalty, you are unable to explain how your application of the Douglas factors resulted in the imposition of a penalty that is considerably less than what was proposed. Your admitted neglect and subsequent failure to apply the Department's policy of progressive discipline creates an appearance of giving preferential treatment to this member and thus interferes with good order.

The presence of alcohol on the premises of the Fire & EMS Department resulted in the need to take immediate action by myself, to insure the safety of the citizens whom we serve. Engine 9 had to be taken out of service and the members were subjected to substance abuse testing at great expense to the Department. These steps could have been avoided if those in command positions, i.e. Sgt. Pre[s]lipsky and Lt. Ellerbe had not performed their duties in a "spiritless, lax, surly, or careless manner."

Finally, you state in your Special Report that the publicity surrounding this matter was the basis for your decision to issue "some penalty". It would appear that the negative publicity was the sole factor taken into consideration and but for that fact, you would not have recommended any penalty at all. Your decision to issue an Official Reprimand in response to serious infractions by those members is inconsistent with the duties and responsibilities of a command official. To consider their misconduct a "teachable moment" brings into question your ability to perform your duties and responsibilities. I have concluded that your actions are a detriment to effective workplace operations and have resulted in a loss of my

confidence in you and belief that you cannot be relied upon in your current position.

In determining the appropriate penalty, I have considered the fact that you have no disciplinary actions in the past three years, the nature of the offense and its relation to your position, duties, and responsibilities. For the above stated reasons, I conclude that your neglect of duty has interfered with the efficiency and integrity of government operations. Thus, this action is proposed.

SUMMARY OF RELEVANT TESTIMONY

Kenneth S. Ellerbe (Transcript pages 18 to 203)

Kenneth Ellerbe (“Ellerbe” or “Chief Ellerbe”) is currently the Chief of the D.C. Fire and Emergency Medical Services Department (Agency or Fire and EMS). He has held this position since January 3, 2011. Prior to working for Agency, Ellerbe was the Chief of Fire and Emergency Medical Services in Sarasota, Florida from 2009 to 2010; prior to his position in Florida, Ellerbe was a firefighter from 1982 to 2009. As a Chief, Ellerbe’s duties include overseeing Fire and EMS, which includes management activities; budget authority; budget responsibility; oversight and purchasing; procurement; and anything the director is responsible for. Ellerbe also plays a role in the disciplinary process; once a decision has been rendered, he is responsible for accepting, reducing, or dismissing a penalty that is recommended by the Fire Trial Board or a hearing officer. This authority to accept, reduce or dismiss a penalty is pursuant to a collective bargaining agreement that establishes rules of conduct for the Fire and EMS Chief during disciplinary proceedings.

Ellerbe stated that he is familiar with Battalion Fire Chief (“BFC”) and Deputy Fire (“DFC”) conferences. He testified that he has held both positions, and that the difference between the two conferences is the level of disciplinary action that can be rendered. He explained that the BFC can render up to 120 hours or less discipline than the DFC. Ellerbe testified that the Trial Board can also render discipline up to and including dismissal. When Ellerbe was a BFC, he did at least ten conferences. When he was a DFC, he conducted at least ten conferences. He noted that the process for the two conferences is the same. He explained that in a BFC conference, the chief’s role is to listen to the facts of the matter and render a decision. He explained that he had to look at any prior disciplinary actions or the history of the employee and use the Douglas Factors a part of the decision making process. Ellerbe testified that those considerations are articulated in Agency’s General Orders. Ellerbe explained that General Orders are directives that govern the behavior and conduct of employees within the department and also provide guidance in the department. He noted that all employees are required to be aware of the general orders and they are intended to be permanent in nature. However, Ellerbe testified that Special Orders have a particular time frame.

With regard to the disciplinary process for when an employee has been accused or charged with violating rules and regulations or the articles of conduct, Ellerbe explains that the BFC conference decisions are based on a review of the member's personnel records and cited relevant factors. These factors include but are not limited to the length of employment and prior disciplinary infractions, including '169's' which have occurred in the past three years. The prior infractions do not need to be for same cause as the one pending infraction. Ellerbe noted that as a BFC, he would also consider whether the conduct negatively impacted the reputation of Agency and whether or not it was a reflection of the employee's ability to continue with employment based on the egregiousness of the infraction. Ellerbe testified that anything that casted doubt on the employee or the ability of the Agency to perform vital public functions was considered. He also stated that Agency would also consider if there was an opportunity for redress through the disciplinary process for other employees and how that would impact Agency. He noted that the consideration of prior past history was consistent with the government's policy of progressive discipline.

Ellerbe explained that the District Personnel Manual at Chapter 16 discusses the penalties, and usually progresses from reprimand for the first offense up to and including termination for a potential second or third offense, depending on the nature of the incident. Ellerbe stated that Agency used the Table of Penalties. He noted that this process is no different for the deputy BFC conferences. With regard to how a firefighter is recommended for a BFC conference, Ellerbe explained that the Assistant Chief reviews the charges and makes a recommendation based on the facts that they are aware of and determines whether the employee should be placed before a BFC, DFC, or a trial board. During the conference, the BFC will gather reports and as much information as possible; hear testimony from a member to confirm or deny the facts as they know them or have reviewed them; and make a decision. He stated that the decision is written out or the events are transcribed, and then the penalty is proposed. However, Ellerbe noted that a penalty may not be proposed and the charges may be dismissed. Ellerbe explained that the events at hand are reviewed for whether the offense violated Agency's rules and regulations or the District personnel rules and regulations. What is also reviewed is the behavior's impact on Agency or other employees, the Douglas Factors and any past disciplinary renderings or procedures.

With regard to Captain Sterne ("Employee"), Ellerbe testified that prior to the incident involving beer in the firehouse, he had not had any prior problems with Employee. His understanding of the incident was that a citizen took beer to a fire station because he was appreciative of the work that had been done by the members of the station. The members extinguished a fire that occurred in the citizen's residence. Ellerbe became aware of the incident via an anonymous telephone call. The caller stated that there was a beer in the firehouse at Engine 9 located at 16th and U Street, NW, DC. Ellerbe stated that he needed to immediately verify whether or not the caller was correct, so he went to the fire station. He assembled the managers from headquarters to go with him. He stated that he had two concerns: whether or not

the person who called had called anyone else, particularly the media, and whether the caller's statement was true. Ellerbe noted that if he asked someone else to verify, they may or may not have told him whether or not the beer was in the fire station.

Ellerbe personally went to the fire station and confirmed that there was beer in the firehouse. As a result of finding beer in the firehouse, Ellerbe had to take every employee from the fire station to Agency's clinic for a urinalysis to determine whether any of them had been drinking while on duty. He testified that part of Agency's rules and regulations is an expectation that employees will not place themselves under the influence while on duty. In addition, Agency's rules strictly prohibit having alcohol on the premises of the fire station.

After the incident, an investigation took place and special reports were ordered. Ellerbe testified that the presence of beer was serious offense because the members of Agency are required to be fit for duty at all times. He explained that if there had been an emergency, he did not want drivers to be under the influence nor did he want any of the members to be under the influence because of the potential harm they could do to themselves or others. Ellerbe testified that if an employee was driving a fire apparatus and was involved in a motor vehicle accident, his concern would be that Agency and the government could be considered negligent in not responding to the anonymous call informing him of the possibility of alcohol. Furthermore, he did not want employees to get injured. He explained that he wants the employees to be alert and cognizant of what is going on at all times.

Ellerbe testified that an ID report regarding the incident was written up. The ID number was CS-11-0049. The subjects of the report were Lieutenant Robert Ellerbe, Acting Lieutenant Henry Dent, and Sergeant Charles Pryzbylewski. The findings of the report were that on September 14, 2011, Lieutenant Robert Anthony Ellerbe ("Lt. Ellerbe") and Sergeant Charles Pryzbylewski ("Pryzbylewski") made a decision to accept a gratuitous gift of alcohol made from a grateful citizen for services rendered. The report's recommendation, based on the set of facts and circumstances, was that the matter be closed and sustained, and for it to be forwarded through the chain of command for a final determination.

Chief Ellerbe testified that there was a mention in the media about the beer in the firehouse incident. In addition, a notification of charges was issued to Lieutenant Ellerbe and Sergeant Pryzbylewski. The charges were pursuant to Article VII, Section 2-2.2 of the District of Columbia Fire and EMS order book which stated "any on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations." The first charge was violation of DC Fire and EMS Department's rules and regulations, Article VI, which states that members shall not permit the presence of intoxicants or illicit narcotics or drugs in or on any property used or occupied by the department. The second charge was violation of the department's rules and regulations, Article VI of the general rules of conduct, Section 17, which states in whole or in part, "members shall not directly or indirectly in their official capacity receive presents rewards, gifts and money or goods of any description."

Ellerbe testified that the cases were recommended to a BFC conference. Timothy H. Gerhart, the Assistant Chief of Operations, recommended a proposed 12-hour suspension for all three officers to be challenged by a BFC conference. Thereafter, Lieutenant Robert Ellerbe and Sergeant Charles Pryzbylewski elected to have their case heard by a BFC. The case was assigned to Employee. For the charge of improperly receiving a present, reward or gift, Employee found the members to be not guilty. With regard to the charge of allowing the presence of alcohol in the quarters of Engine 9 and Truck 9, Employee found the members to be guilty. The penalty for this charge was reprimand and was authored by Employee.

Ellerbe stated that there was a written decision on the justification for the BFC conference. The case numbers were U-12-15 for Lieutenant Robert Ellerbe and U-12-17 for Sergeant Charles Pryzbylewski. The written decision was authored by Employee. With regard to the charge of voluntarily accepting an improper gift, Ellerbe testified that Employee noted that under the circumstances, to find the members guilty of this charge would be disingenuous. With regard to the second charge, Ellerbe stated that Employee found both members guilty of permitting alcohol to be present. This guilty finding was based on permitting alcohol to be present in the quarters and a lack of action on the morning of the 15th.

Ellerbe explained that Employee stated that both employees used poor judgment and failed to take common sense steps that would have alleviated any potential issues. Employee's decision explained that the situation should have been reported to the BFC. Further, Employee's written decision explained that no matter what the chief told them to do, if they followed his instructions, they would have essentially been blameless for whatever happened thereafter. Further, Employee's decision stated that another lapse in common sense was not checking the refrigerator the next morning to make sure that the instructions had been carried out and that the beer was removed. The decision explained that given the manner in which the beer had been abandoned and thus forced upon the members, the presence of it could have been a tolerable situation. The decision provided that had the beer been removed, the situation would have never grown out of proportion. The decision further explained that the members displayed a lack of proper judgment by permitting the beer to be present since it had been placed in the refrigerator at their discretion. The decision reasoned that even though there was no intentional misconduct, the officers were expected to use good judgment in the performance of their duties and to seek advice from their commanders when they are unsure of how to handle a situation. Lastly, the decision stated that while the incident could have been easily dealt with as a mere mistaken opportunity to learn supervisory skills, the members' lack of judgment brought a measure of discredit to the department, admittedly self-reported, and required corrective action. The decision concluded that an official reprimand was the proper penalty to put the members on clear notice as to what their commanders and the public expect of officers.

Ellerbe noted that the recommendation from the Assistant Chief had gone from a 12-hour suspension recommendation to a 24 hour suspension or proposal. He noted that the employees

received a reprimand, and from a management perspective, if an Assistant Chief feels that a suspension is warranted a Deputy Chief or a Battalion Chief chooses a different direction, there would be an expectation of justification as to why they found a lesser penalty to be warranted. Based on Employee's report, Ellerbe did not see a justification for a deviation from what the Assistant Chief considered to be an appropriate consideration for penalties. He noted that if there were mitigating circumstances that were not known by the Assistant Chief that cast the Assistant Chief's direction as a harsh penalty, it should have been noted in the report. He explained that if there was a reasonable justification for not allowing the proposed penalty to stand, he would have expected to see that in the report.

Ellerbe noted that Employee's report indicated that the incident had negative media coverage, which was one of the *Douglas* Factors that should have been considered. He stated that the *Douglas* Factors in the report were not mentioned as justification for a reduction in penalty, and there was no reference to any prior disciplinary actions. Furthermore, there was no distinction of penalty between the two subject firefighters. Ellerbe stated that Employee would have been aware of Article VII, Section 8 of the General Order. He stated that this section of the General Order adheres to the District's policy of progressive discipline.

Ellerbe was aware of Pryzbylewski's prior discipline. He stated that Pryzbylewski had an infraction within the three years prior to the beer incident. However, he stated that there was no reference to the disciplinary history of Pryzbylewski found in the BFC's report. He stated that there was an expectation that there would be reference to Pryzbylewski's prior discipline, whether there was a prior disciplinary case pending over the three (3) year period, and whether two employees were charged and found guilty of the same infraction. He noted that the prior history should have an impact on the penalty that one receives. He stated that if it does not have an impact on the penalty, then that basically subverts Agency's adherence to progressive discipline and could have precedential effect. He also stated that it could cause people in the department to file a case against Agency and use this matter as a reference. Ellerbe stated that BFCs can use discretion in reducing penalties, but they have to be able to justify the use of discretion and articulate that in a report. He found that the deviation from the consideration was a neglect of duty on Employee's part. He further found that Employee's failure to take into account the prior discipline and the lack of mention of those records to be a deviation from what BFCs are supposed to do. He explained that the District Personnel Manual and Agency's procedures require the consideration of past disciplinary history when rendering a decision. He explained that managing an entire agency where there are rules that govern behavior is already difficult, and taking away a management tool in this manner could have far-reaching effects and impacts on other cases that could come up. Ellerbe stated that it is important for Agency to maintain a certain level of objectivity, but also be able to articulate any deviation in the even that a challenge comes up later on or a similar situation arises and a different decision is rendered. He stated that part of this is to protect the government and Agency in terms of consistency. He stated

that because Agency has clearly prescribed rules, it is very difficult to deviate from the rules without being able to fully explain the deviation.

As a result of Employee's report, Ellerbe stated that there was a loss of confidence in Employee. He stated that the process was problematic for him. However, he did not ask Employee to write another report. Ellerbe confirmed that on January 20, 2012, Employee wrote a report to Assistant Chief Kenneth Jackson regarding his decision rendered. The report explained why Employee reached his decision. The report stated that in considering the appropriate penalty, he reviewed the *Douglas* Factors and his training. Employee stated that the purpose of a corrective action is to encourage a positive change in an employee's behavior, rather than to be strictly punitive. The report provided that Employee had a lengthy discussion with both of the members concerning the actions in which they should have taken in regard to both the delivery of the beer and their subsequent actions. The report noted that Employee found no indication that their conduct was based on intentional misconduct, but more on a lack of experience and failure to follow up on their instructions. The report stated that both members learned an important lesson regarding their responsibility as officers and will be more proactive in their supervision. It went on to provide that while this incident could have been considered a teachable moment, Employee felt that some penalty was required based on the publicity surrounding the case. Further, Employee stated in his report that it was his decision that an official reprimand was appropriate to effect a positive change while protecting the public's confidence.

In considering the *Douglas* Factors, the report noted that Employee was not provided with either of the officers' prior disciplinary record and did not apply this factor. While Employee noted in the report that he was aware that Pryzbylewski had been found guilty of prior off-duty misconduct by a regular fire trial board, he stated that he believed this was several years ago and was not sure if it was timely. Further, he did not deem the conduct applicable to the present case and therefore did not consider it. Employee felt that each of the officers should have been treated equally because they shared equal responsibility for their actions.

Ellerbe stated that Employee's disregard for the prior disciplinary interactions was disruptive to Agency's ability to continue to hold employees accountable for their actions. He further stated that if Employee was not provided the officers' disciplinary records, he could have requested them from the Office of Compliance. Ellerbe explained that Employee could have asked the Assistant Chief to get it from Compliance, he could have called himself, or he could have asked the Internal Affairs Division to get the information. Ellerbe did not know why Employee was not provided this information, but explained that during the conferences, it was Employee's responsibility to gather all pertinent information, including past disciplinary history.

Ellerbe stated that Employee's comment that he did not deem the prior conduct applicable and did not consider it was contrary to Agency's order book. Ellerbe referenced Article VII and stated that the applicable rule does not say whether one can disregard prior

incidents. Further, he noted that treating the employees the same with regard to the penalty could be considered unfair to the employee who gets the same penalty, but does not have a prior history. He explained that the employee with no prior history could consider the penalty to be harsher than the employee with the prior history. Ellerbe believed that this issue could have opened Agency up to a host of other challenges.

Ellerbe confirmed that Agency found that over the past three years, Pryzbylewski only had one reprimand that would have been relevant to this case. Ellerbe testified that based on the fact that no past disciplinary record was mentioned with regard to Lieutenant Ellerbe, he believed that the employee did not have one.

Ellerbe testified that he authored the reprimand decisions issued to both of the employees. He explained that although he had issues with Employee's decisions, both employees received reprimands because his hands were tied and he could not increase the penalty. He explained that he could only accept, reduce, or dismiss the penalties. Ellerbe accepted the penalties.

Ellerbe confirmed that Lieutenant Ellerbe is his cousin. He testified that he did not know that Lieutenant Ellerbe was his cousin until he joined Agency. Ellerbe testified that he authored an advanced notice to Employee that charged him with neglect of duty. The primary reason for issuing this advance notice was because Employee issued both employees an official reprimand when one of the employees had a prior disciplinary history. He explained that this could be perceived as giving preferential treatment to any employee and could have adversely affected the confidence of the public and the integrity of the government.

With regard to Ellerbe's penalty selection for Employee, he stated that he considered the fact that Employee did not have any disciplinary actions in the past three years and the nature of the offense and its relation to his position, duties and responsibilities. Employee's penalty was a demotion. Ellerbe believed this penalty was appropriate because Employee failed to maintain or attempt to maintain discipline and he failed to gather the facts and proceed with progressive discipline. He noted that this case threatened the department's ability to maintain discipline in an orderly manner, and it appeared to offer or render preferential treatment to one employee versus the other. Ellerbe took into consideration the challenges presented in Article II of Agency's General Order. He noted that the penalty found in Chapter 16 of the District Personnel Manual for neglect of duty ranges from reprimand to removal. He stated that the penalty of demotion fits within that range.

Although Employee found the employees not guilty of accepting the beer, Ellerbe believed that the employees accepted the beer. Ellerbe admitted that the cited prior discipline in Pryzbylewski's advanced written notice was more than three years prior to this matter. He also admitted that the reason Employee did not consider this discipline in his decision was because the discipline was an old case. Ellerbe reiterated that the responsibility of the research for the BFC conferences rests with the BFC.

Ellerbe stated that when he went to the firehouse, he discovered an open case of Miller Lite beer. However, in an email that the citizen sent, he stated that the beer was a 12 pack of Stella beers and a 12 pack of Corona beers. Ellerbe was concerned as to why these discrepancies were not articulated in the final rendering. He noted that there were also discrepancies in where the beer was found or received. He explained that one report by an employee indicated that the citizen walked in with the cases of beer while he was sitting in the room in the back of the firehouse, while another report indicated that the beer was left on the apparatus floor, which is where the engines and trucks are located. Ellerbe explained that some of these discrepancies were part of the reason why he was uncertain of the not guilty verdict.

Ellerbe noted that if Employee had issued 12 hour suspensions for both of the employees, this matter would still be before OEA. He stated that regardless of a familial relationship, he still has a responsibility to adhere to maintaining order and discipline by following certain rules with consequence. Ellerbe stated that he believed that Employee did not conduct a disciplinary review of both of the employees. He stated that part of the *Douglas* Factors is to consider the disciplinary history. Furthermore, Ellerbe noted that Employee had the ability to reduce the proposed penalty, and that should have been articulated. Ellerbe did not believe that Employee considered mitigating and aggravating factors. Ellerbe testified that it appeared that Employee disregarded the extent to which the *Douglas* Factors were weighed.

Ellerbe testified that a BFC conducting a conference would not have to contact compliance because all they need is the personnel file of the employee in question; the disciplinary record should be contained in the personnel file. Ellerbe testified that other than the accused employee, a union representative and/or someone from the Office of the Attorney General can be present at the conference. Ellerbe testified that depending on the conference, the expectation is that the BFC or the DFC will conduct the background investigation on the employees if the charge was sustained. He explained that the investigating official reviews the facts of the matter to determine whether or not the charge of misconduct would be sustained. With regard to the disciplinary reporting procedures, Ellerbe stated that the officer or supervisors who witnesses the action or received a report shall review the member's personnel record and all relevant facts, including, but not limited to the length of employment and prior disciplinary infractions which have occurred in the past three years. He noted that the infractions included '169s' and that the prior infractions need not be for the same cause that is currently pending. Lastly, the official must prepare and forward the report through the chain of command to the appropriate Assistant Fire Chief.

Ellerbe testified that the Internal Affairs Office does not witness any actions. He explained that the BFC reviewing the case would draw out the pertinent facts during the investigation. He stated that based on Employee's report and his reference to a prior disciplinary history, he was at least aware that one employee had a prior disciplinary. He explained that this should have prompted Employee to take a look to see if there was prior disciplinary history.

Ellerbe stated that Agency's rules were written with enough breadth to allow supervisors and managers to make decisions without limiting themselves. He noted that it is common practice to refer prior disciplinary history. He testified that Employee was aware of a disciplinary history and he either disregarded it or he chose not to pursue it.

Ellerbe testified that after the reports for Pryzbylewski and Ellerbe were prepared, they were forwarded to Timothy Gearhart, Assistant Fire Chief. Gearhart's responsibility was to assign the case to a BFC, DFC, or a trial board with a proposed penalty. If the case was referred to a BFC or DFC, Gearhart would assure that the person is not within the chain of command for the employee. In determining the referral, the assistant chief would determine the potential ceiling or maximum threshold for the penalty. Ellerbe explains that the BFC conference is the lightest arena for penalties. Ellerbe testified that Gearhart could have referred the case to a DFC or a trial board. Ellerbe believed that Gearhart's referral would have been based on the potential maximum ceiling for the adverse action.

Ellerbe stated that the maximum penalty under a BFC conference is 72 hours, and the Assistant Fire Chief set the proposed penalty for Pryzbylewski and Ellerbe at 24 hours. Ellerbe testified that he did not take any action against Gearhart for not applying progressive discipline because the responsibility rested with the chief officer who was assigned the responsibility of rendering discipline based on the facts and merits of the incident and other mitigating factors. Ellerbe explained that Gearhart was not going to be the deciding official in terms of the outcome for the cases. His responsibility was to assign the case to a Battalion Chief or a Deputy Chief who would render a decision based on the circumstances of the case. He was also to determine the potential ceiling in terms of discipline. Ellerbe stated that there was nothing in the record to indicate that Gearhart did not consider whether prior disciplinary actions occurred. Ellerbe stated that the only thing he could conclude was that the penalty should not have rose above a 72 hour suspension and that is the reason Gearhart assigned it to a BFC conference.

Ellerbe stated that there was nothing prescribed that stated a BFC conference is supposed to be conducted in the manner in which Employee conducted it. He stated that, in addition to making a finding and putting it on Agency's form, a BFC can be ordered to issue a separate written decision. However, this is the only case where Ellerbe has had to issue a special order which required Employee to issue a separate decision. He stated that the logic behind Employee's decision was not clear. Ellerbe explained that if the logic behind a decision is not clear, then the officers have the authority to request clarification.

Ellerbe issued a notice of demotion to Employee. He considered Employee's response to the demotion letter and the *Douglas* factors. He noted that some of the *Douglas* factors played a prominent role in the decision in terms of the discipline that he chose for Employee. Ellerbe looked at Employee's past record and found that there were no negative actions for the past three years. He also considered Employee's years of service. Ellerbe testified that he had no negative opinion of Employee and that he looked at his case clinically and objectively. He reviewed the

case strictly on the merits and how it was administered. Ellerbe stated that he would consider a removal or a demotion beyond two ranks severe penalties. He explained that the discipline was commensurate with the offense in this case. He explained that the public notoriety of alcohol in a firehouse was something that nobody overlooked. He stated that Agency had a responsibility to meet out discipline and prevent this type of occurrence from repeating itself. He stated that in this case, progressive discipline should have been followed.

Ellerbe testified that it was not prescribed that Employee go to the Office of Compliance to obtain a past disciplinary record. However, Ellerbe explained that when an investigation is being done, it is common practice to request the employee's personnel file. He explained that the personnel file would have a historical record of disciplinary activity.

Ellerbe explained that he had three options in terms of the penalty for Employee: accept the proposed penalty, reduce it, or dismiss the matter. He noted that when he got the anonymous phone call regarding beer in the firehouse, he thought it was a prank caller. He was at headquarters when he received the call. Ellerbe stated that he hoped that there was no beer in the firehouse, and that he could not have called someone to check the firehouse for him. When Ellerbe arrived to the firehouse, Lieutenant Ellerbe was the ranking officer.

Ellerbe did not know how the media became aware of the beer incident. However, he admitted to statements he made in an article that he was a bit dismayed, shocked and surprised about his discoveries and that the older member should have known better. He also stated in the article that there would be consequence for the beer incident, and that Agency wanted to send a strong message. Further, Ellerbe stated that he took public safety very seriously. Ellerbe explained that Agency could not have this type of behavior, and some of the staff were facing possible suspensions. He stated that the command staff would also be reprimanded. Ellerbe stated that his expectation of what kind of discipline should flow from this type of incident did not have any bearing on his decision to demote Employee.

Ellerbe was not aware of whether the Compliance office was supposed to forward the disciplinary record over to the BFC. However, he stated that the BFCs and the DFCs need to be impartial. Ellerbe testified that the conferences are governed by due process and they include diligence. It is not prescribed whether the decisions need to be hand written or typed. He explained that when preparing a document for discipline or when an employee is observed violating a rule, the officer witnessing the violation prepares the charges. He testified that this is a common practice amongst lieutenants, captains and sergeants. He confirmed that the person is supposed to prepare the charges and forward them all the way up to the assistant chief level. He stated that the BFCs are supposed to gather reports relevant to those circumstances and refer the reports. As the report progresses from the individual all the way up to the assistant chief, there is a fact-finding activity that occurs and recommendations on whether that matter should go forward or not. When that matter is presented before a hearing officer or a trial board, the hearing officer or trial board attempts to ascertain as many facts as possible about the case before

a decision is rendered. The expectation is the decision will be fair to the employee and it will be given due process. There is also an expectation of completeness. Nothing in the process absolves the fire chief from having to exercise due diligence on their own. Furthermore, in the event that the chief officer did not follow Agency's prescribed common practice, employees are asked to spell out the reasoning.

Ellerbe stated that Employee's report did not have any impact on his responsibilities. He noted that the General Counsel works very closely with the Office of Compliance and that it was possible that they inquired about the disciplinary history of the employees after the decisions were issued. Ellerbe stated that Employee was previously a trial board chairman of at least one incident that involved Pryzbylewski.

Richard Sterne (Transcript pages 218-271)

Richard Sterne ("Employee") is currently a Captain with Agency. Employee has been employed with Agency for 33 years. During his tenure with Agency, Employee has been a firefighter, sergeant, and lieutenant.

When Employee became a Captain for the first time, he had a number of different assignments. He was promoted to BFC in February of 2000. He served in the 5th Battalion for a year in N.W., DC, and also as the 6th Battalion in downtown D.C. Thereafter, Employee was the Chief of the Facilities Maintenance Division and he handled buildings and supplies for the department. Employee subsequently went to the 1st Battalion in North East, DC and stayed there until the time that he was demoted. Ever since this time, Employee has been working at Truck 5 at MacArthur Boulevard.

Employee was demoted on April 8, 2012. His last evaluation as a BFC was in 2011. In 2010, he was evaluated by Cornelius Campbell, the DFC in the operations division. Employee reported to him. In 2011, Employee was evaluated by Jim Philosophicus, who took on Campbell's position.

Employee was assigned to hear the misconduct in the cases involving Lieutenant Ellerbe and Sergeant Pryzbylewski. He explained that Agency had made the decision that the Chiefs of the 1st Battalion would hear all battalion conferences citywide that occurred the on their shifts. Prior to him being assigned these cases, Employee had conducted at least 10 or 15 previous conferences. Employee was promoted to the rank of BFC in 2000.

For the cases involving Lieutenant Ellerbe and Sergeant Pryzbylewski, the Office of Compliance sent Employee a sealed envelope and the case file for the matters. He explained that the case file contained everything needed to make rulings, other than actually talking to the employees and their representatives. When Employee received the case file, he looked it over and then set a time for the conference. He noted that the case file included the proposed action from the Assistant Chief and the Internal Affairs report. He stated that there were Xerox copies

of CDs where the Internal Affairs interviewed different people to reach their conclusions. Employee noted that he reviewed that information, the documents, the Internal Affairs Report, and the proposed action form. Employee explained that there was not any information provided to him that indicated that there was a prior history for either of the two members. He explained that he knew that Pryzbylewski had a prior issue because he was involved in the issue, but because he did not see any reference to the issue, he assumed it was not timely.

Employee testified that he has conducted BFC conferences in the past where he was provided with the history of the members in terms of prior discipline. He noted that in one of the matters he found the person guilty and recommended a 48 hour suspension. Employee addressed the subject of prior discipline and stated that in considering the appropriate penalty, he considered the fact that the employee had no infractions in the past three years and that he was honest about his wrongdoing. Employee noted that he was provided the prior disciplinary history for the matter. In another matter, Employee again considered the prior discipline by stating that the employee had one prior discipline for being absent without leave. However, the charges were within weeks of being over three years. He was provided this information in the write up that he received.

Employee stated that whenever someone is charged, the officer who cites the charge or recommends charges is supposed to go and cite any prior offense within the last three years. He explained that the prior disciplinary record should be included in the file and that BFCs are not required to contact the Office of Compliance in order to determine whether there is a prior record. He testified that there was no information provided to him on Ellerbe and Pryzbylewski with regard to prior discipline.

Employee testified that he would render the same decision again and felt that he made the right decision in the cases against Pryzbylewski and Ellerbe. Employee was aware of the *Douglas* Factors and applied them to his decision. He explained that there was no formal process. He stated that the conference has been word of mouth, but it is important that one considers the *Douglas* factors and explain how they reached their decision.

After Employee reached his decision in the cases against Pryzbylewski and Ellerbe, he received an email from Kenneth Jackson, the Assistant Fire Chief, asking him to submit a special report explaining his reasoning and decision to lower the penalty for Pryzbylewski and Ellerbe. He called Chief Jackson and asked him if he received the report from Chief Gearhart. Jackson stated to Employee that he had received it, but he wanted more detail. Jackson told Employee to submit this by the next tour. Thereafter, a daily staff meeting was held, and after the meeting, Employee was told to go to headquarters. At headquarters, Employee received his advanced notice of demotion.

Employee has sat on the trial board as a Captain and as a Battalion Fire Chief. He noted that when this process began, it was an informal process. In the matters dealing with

Pryzbylewski and Ellerbe, Employee stated that he received the proposed action and the Internal Affairs report. He stated that it was unusual that there were no special reports and that he received Xeroxed copies of a CD, and there was no way to tell what was on it. Employee testified that he called Compliance and inquired about the CD and they said they would not give him the CD and to just make a decision based on what was provided. Employee noted that he expected a special report to be in the proposed action.

Employee has never had an experience where he knew of a prior discipline but did not see it in the packet received from Compliance. He noted that the level of detail for the Pryzbylewski and Ellerbe matters were different. He stated that there was nothing articulated in the rules about BFC conferences. He explained that if there was something missing in the packet he received from Compliance, he may call them and ask if there was something missing. He stated that sometimes the files are not well prepared. He stated that nothing is prescribed with regard to Compliance being required to provide the proper documentation. Employee explained that there is no written procedure. He also stated that because Pryzbylewski prior discipline did not come up, he assumed it was history.

Employee explained that it is the responsibility of the person citing the charges to note the prior discipline. Employee testified that he is not responsible for someone else's failure. He stated that if he is charging a member, he can look into the company file and see copies of previous discipline. However, if it was a member who was not assigned to him, he could call Compliance, their officer or their BFC and ask for their prior history.

Employee believed that his role in the process of discipline against Ellerbe and Pryzbylewski was completed diligently. He stated that it is not prescribed in Agency rules that he write reports. Nevertheless, he sent in the forms and was told by Compliance that he needed to do a special report. He explained that in his second report, he was asked whether he considered the prior history of discipline. He stated that he did not discuss the prior discipline in his first report because there was no indication that Pryzbylewski's prior discipline was timely. He stated that he was not trying to hide anything or that he was on the trial board of Pryzbylewski's prior disciplinary action.

Employee stated that at this point, he cannot account for why he did not mention the prior discipline in his first report. He explained that this happened a few years ago. He stated that there was no particular format for writing the reports. He assumed he was doing things correctly because the issue of how he wrote his reports was never raised before.

Employee testified that as a member on the trial board, he is provided the case file. He explained that in the trial board process, each side makes their case. He stated that the trial board cannot see the personnel file until after the finding of guilt. He explained that if something is unclear in deliberations, the trial board could request the employee's file from Compliance in order to review it for prior cases. He stated that the board does not account prior discipline until

the penalty is set. He stated that if the trial board is not provided the prior discipline, one will assume that there is none because Compliance is supposed to provide it. Employee testified that he does not recall ever seeing a person's file and that prior discipline is in the reports and in the record.

Employee stated that he knew Ellerbe. He stated that Ellerbe was on a different shift than he was; however, there were different times where he would get detailed and end up working with him. He stated that Ellerbe was into old cars and that he had a nice little Corvette. With regard to Pryzbylewski, Employee stated that he had never met him prior to him being on the trial board who disciplined him. He stated that after that point, he talked to him on the radio and gave him instructions. However there was no direct command or personal relationship.

Kevin Byrne (Transcript pages 273-313)

Kevin Byrne is a DFC with Agency. In January of 2014, he was told to retire and he is contesting the retire order. He is not actively working and does not have annuity. At the end of the calendar year, Byrne would have worked for the Agency for 36 years. He was appointed to the department in 1977. His previous positions include professional standards officer, sergeant, lieutenant, captain and BFC. He was appointed to the DFC position in 2009. That is also the time that he went to the Professional Standards office.

Byrne stated that the Professional Standards office is the regulations office that oversees compliance. He stated that compliance oversees everything that deals with discipline. Byrne was in charge of the disciplinary wing of Agency. He explained that when a person is charged, all of the paperwork is routed through Compliance. Compliance compiles the package; examines the charges; conducts a penalty analysis; compares the person's infraction to similarly situated cases; and then brings it to the attention of the Assistant Fire Chief. The Assistant Fire Chief will assign the penalty and sends the case to a hearing officer. The hearing officer will hear the facts and make a decision.

Byrne is familiar with the facts of the case dealing with the demotion of Employee. He stated that the requirements for any person short of a BFC or a DFC are to hear the case and address the member's prior disciplinary history. He explained that the endorsing officer is responsible for addressing the prior disciplinary history; the endorsing officer is usually the lowest person in rank that has proffered the charges. He stated that the Assistant Chief has to consider the past disciplinary record before the case is assigned to a BFC or DFC conference. The information that is provided to a BFC or DFC includes all relevant reports to the case. He confirmed that the disciplinary history is addressed at the investigation level, the compliance level, and the Assistant Chief level. Then the information is provided in either a written report or proposed action form to the BFC or DFC that hears the case.

Byrne testified that if a BFC was assigned to hear a case and there was no information provided about a prior history, the BFC could assume that there was no prior disciplinary history. He noted that during the time that he was in charge of professional standards, there was no written policy with regard to progressive discipline. He explained that about six months prior to the OEA hearing, he went through Agency's policy and progressive discipline was not stated. Furthermore, he testified that there is no written requirement that a BFC is required to assert a position on progressive discipline. Byrne also testified that there is no requirement that the BFC has to issue a separate written decision. He explained that they have to do the decision letter, but everything else came about when Agency started to use BFCs as hearing officers. He stated that there was no requirement that a BFC apply the *Douglas* Factors.

As head of the Professional Standards office, Byrne has had the occasion to review decisions that were made in disciplinary cases. He stated that he reviewed anywhere from 400 to 500 cases. With regard to Employee's report, Byrne testified that he read the report. He stated that the report covers the *Douglas* Factors without mentioning them by name. He stated that although the report does not enumerate the factors, it touched on a majority of the factors. Byrne stated that he has seen cases where the hearing officer does not provide an analysis on the factors.

Byrne has known Employee for most of his career. He has never worked with him directly, but he remembers when they were involved in a variety of union affairs. Byrne stated that Employee has a good reputation as a fire commander. Byrne worked with the Deputy Counsel and Fire Chief to build a training program to teach officers trial board training, and noted that Employee's documents were used. Byrne stated that Employee was the "go to" guy and that he was an all-around good person. Byrne stated that Employee is a role model.

Byrne testified that the Assistant Chief is not required to articulate whether a person has a prior history. He stated that the prior history is only known by what is documented in the proposed action form. Byrne testified that Agency employs the Table of Penalties. He stated that the conference process has evolved to mimic the trial board process. He stated that ever since 2004, when Agency came up with the system of chief hearings, there has been a structure to the disciplinary process. There is a narrative that accompanies the chief decision letter.

Byrne testified that he is familiar with the term disparate treatment and does not feel like the narratives aided in explaining why something was disparately treated. In fact, he felt like there was no value to some of the reports. He stated that the hearing officer's job was easy; he reviews the package and says guilty or not guilty. Or, the hearing officer can reduce the penalty. He stated that when employees feel that they have truly been aggrieved, they request a hearing. However, he stated that most cases have a reduced penalty.

Byrne stated that the BFC conferences aid in the due process, but he reiterated that the narratives do not provide much value to the conferences. He explained that narratives do provide

value to the trial board process because the level of scrutiny for BFC conferences is less than that of trial boards. He stated that progressive discipline is not within the BFC's domain; it was already completed before it got to the BFC. However, he admitted that the penalty is not entirely within the realm of the Assistant Chief and the BFC has a hand in the penalty. He stated that the BFC would be at a disadvantage if they did not know the history of the individual. However, if the BFC did not receive the prior history, it would not make much of a difference in the disciplinary process.

Byrne stated that it is important for the investigating officer or the Assistant Chief to take into account the prior discipline because they are the ones deciding the penalty. Byrne testified that because of the design of the process, the BFC is absolved from having to take into consideration prior discipline. Byrne reiterated that the BFC does not have to use all of the *Douglas* Factors.

Byrne testified that if an employee had no prior history and another employee had a prior history within the past 36 months, it is within the authority of the Assistant Chief to propose penalties for the members. With regard to what Employee was faced with, Byrne stated that if Pryzbylewski and Ellerbe's case was presented to him, he would make the assumption that they are identical cases with identical backgrounds. He stated that there was nothing unusual about Employee reducing the penalty for the case. He stated that if he personally knew that there was a prior discipline, he would assume that it was outside of the time requirements. Furthermore, if the Compliance office makes a mistake with providing the record, Byrne states that the BFC is absolved from this responsibility. He stated that some of the *Douglas* Factors are already considered prior to the matter getting to the BFC.

Kenneth Crosswhite (Transcript pages 315-321)

Kenneth Crosswhite is the DFC for Agency. He has been with Agency for over 25 years. He was appointed in February 13, 1989 as a firefighter. He received a promotion and became a sergeant, and then was made acting lieutenant. After that, Crosswhite became a Captain and then a BFC.

As a DFC and BFC, Crosswhite had the occasion to conduct BFC conferences. He has done about a dozen conferences as a BFC and a dozen as a DFC. Crosswhite has known Employee his whole career from the Fourth Battalion and through working on contract negotiations with Local 36. He stated that Employee was a mentor. If one had a question, they could go to Employee. Further, if one needed interpretation of the District Personnel Manual or the Order Book, they could go to Employee.

Crosswhite testified that Agency has used a lot of Employee's work throughout his career. For example, Employee was instrumental in changing Agency's department nozzles utilizing the tactical worksheet that they use for the incident commanders. Employee welcomed

Crosswhite when he became a BFC and he was also the president of the Chief Officers Association. Crosswhite explained that Employee is well respected and a well thought of individual. Crosswhite stated that Employee handled the current situation very well.

Crosswhite testified that he conducted the annual inspection for the fire station that Employee was in charge of, and it did very well. Crosswhite stated that Employee used the utmost judgment in deciding fire ground situations and personnel issues. Crosswhite explained that Employee looks at the impact on the Agency and on the employee. Crosswhite stated that Employee had the experience and knowledge to forecast and predict an outcome, and his impeccable reputation speaks for itself.

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

The Agency contends that the Employee should not have found Preslipsky and Lt. Ellerbe not guilty of receiving a gift, should have called the Office of Compliance to ensure the package of materials for each firefighter was complete, applied the prior disciplinary history of each firefighter, and used progressive discipline before deciding upon and imposing a penalty. Tr. at 70-74, 91-93. For these infractions, according to the Agency, it was appropriate for Chief Sterne to be demoted to Captain. It is apparent to the undersigned that Employee's demotion stemmed from Chief Ellerbe's disagreement with how Employee undertook the aforementioned BFC conference and the resulting punishment that was meted out to Preslipsky and Lt. Ellerbe. Through Chief Ellerbe's testimony, it is apparent to the undersigned that Chief Ellerbe faults the Employee's election to find Preslipsky and Lt. Ellerbe not guilty of accepting beer. Moreover, Chief Ellerbe in deciding to demote Employee herein noted that Employee did not make direct reference to the *Douglas factors* in opting to use corrective versus adverse action as part of the BFC Conference in question.

The *Douglas Factors* were first enunciated in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981). Although not an exhaustive list, the factors are as follows:

- 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
- 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- 3) the employee's past disciplinary record;
- 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;

- 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
- 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- 7) consistency of the penalty with any applicable agency table of penalties;
- 8) the notoriety of the offense or its impact upon the reputation of the agency;
- 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- 10) potential for the employee's rehabilitation;
- 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

Chief Ellerbe conceded that the Fire Department rules did not require Employee to go to the Office of Compliance and obtain an accounting of an employee's disciplinary record in preparation for a BFC Conference. Tr. at 169-170. Corroborating this point, Employee credibly testified that he was never instructed or trained to go to the Office of Compliance and ask for the prior discipline while acting as the hearing officer for a BFC conference. Tr. at 233. I find that Employee and Deputy Fire Chief Byrne consistently testified that it is the responsibility of the Office of Compliance and the official who is recommending the charges (the Assistant Chief) to include all of the disciplinary history in the package that is forwarded to the hearing officer to conduct the BFC conference. Tr. at 251 – 297. Moreover, Byrne and Employee credibly testified that it was not mandated that Employee enumerate which Douglas factors were under consideration when he conducted the BFC conference in question.

I find that Fire Chief Ellerbe never clearly articulated why he believed Employee's actions with respect to how he carried out the BFC conference were sufficient to sustain a charge of neglect of duty. It appears as though Chief Ellerbe simply disagreed with Employee's conduct relative to how the BFC conference was undertaken and the punishment that was ultimately

recommended by Employee for Preslipsky and Lt. Ellerbe. The rub is that Employee and Byrne credibly testified that a Battalion Fire Chief is not expected to investigate the contents of packet that is presented for them to conduct a BFC conference. It is expected that all relevant information that is required to render a proper decision is included within the packet. I further note that as part of the evidentiary hearing in this matter, FEMS was unable to point to any specific rule or regulation that mandates any of the following:

1. A rule or regulation that requires a BFC to investigate the contents of the BFC conference packet as part of his decision making process.
2. A rule or regulation that required the BFC to make specific enumerated mention of the Douglas factors as part the BFC conference.
3. A rule or regulation that required a BFC to utilize all of the Douglas factors in making their determination of the appropriate penalty in a given matter.
4. A rule or regulation that mandates exactly how BFC conference should or should not be conducted.

This is the crux of FEMS decision to demote Employee herein. I also note that FEMS is a paramilitary agency within the District government with extensive rules and regulations that govern the conduct of its members. The fact that FEMS would seek to demote an employee who has enjoyed a near spotless tenure within its rank and without clearly articulating that his conduct violated a clear rule or regulation but rather was merely a disagreement about an amorphous situation cannot be tolerated by the OEA as it reviews this matter.

Of note, with respect to the application of the Douglas factors to Employee's demotion, the Agency stated the following:

In determining the appropriate penalty, I considered the fact that you have no disciplinary actions in the past three years, the nature of the offense and its relation to your position, duties, and responsibilities. For the above stated reasons, I conclude your neglect of duty has interfered with the efficiency and integrity of government operations. Thus, this action is proposed. R. at Tab 9, p.4 (Advance Notice).

In reaching this decision, I took into account the applicable Douglas factors, including the Table of Penalties in 6B D.C.M.R. § 1619.1, and sustain the proposed action. R. at Tab 11, p.1 (Decision Notice).

I find that this is not a meaningful consideration of the *Douglas* factors as required under *Stokes*¹. Indeed, with respect to the discussion set forth in the Advance Notice, it appears as though Chief Ellerbe only makes reference to three (3) of the fourteen (14) *Douglas* factors and those that he refers to actual mitigate the penalty and do not aggravate it. Given that under the applicable Table of Penalties a Neglect of Duty finding starts with a reprimand (Tr. at 89). Also, the Agency admits that the Employee has no disciplinary action within the preceding three years. Accordingly, I find FEMS action inconsistent and it is entirely unclear to the Undersigned why Chief Ellerbe chose to elevate the penalty from a reprimand to a demotion. I conclude that given the totality of the circumstances as enunciated in the instant decision, that Agency's action of demoting Employee from Battalion Fire Chief to Captain should be reversed.

ORDER

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

1. Agency's action of demoting Employee from Battalion Fire Chief to Captain is **REVERSED**; and
2. The Agency shall reimburse Employee all back-pay and benefits lost as a result of his demotion; and
3. The Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

ERIC T. ROBINSON, Esq.
Senior Administrative Judge

¹ The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office. See, *Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994), ___ D.C. Reg. ___ (); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994), ___ D.C. Reg. ___ (). Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).