THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
EMPLOYEE[1]	)	
	)	
v.	)	OEA Matter No.: 1601-0025-22
	)	
	)	Date of Issuance: June 1, 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") with D.C. Fire & Emergency Services ("Agency/EMS"). Employee was charged with District Personnel Manual ("DPM) § 1603.3(f)(3) neglect of duty and DPM § 1603.3(f)(9) unreasonable failure to give assistance to the public,[2] as a result of violating Agency's Bulletin No. 3 (Patient Bill of Rights); Order Book Article XXIV (Sections 9 and 10); Department EMS Protocols, and Special Order No. 54 (Series 2012). On June 25, 2021, and August 4, 2021, Employee appeared before a Fire Trial Board ("Trial Board"). He pleaded not guilty to Charge No. 1 and Charge No. 2. The Trial Board subsequently determined that Employee was guilty on both charges and recommended

[1] Employee's name was removed from this decision for the purposes of publication on the Office of Employee Appeals' website.
[2] There were two charges rendered against Employee, both containing one specification.

termination. On November 1, 2021, the Agency Chief accepted the Trial Board's recommendation and issued a Final Notice of Termination. Employee's termination became effective on November 6, 2021.[3]

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on December 2, 2021. He argued that Agency committed various procedural errors in conducting its investigation. Employee opined that similarly situated FF/EMTs were punished less severely than him. He explained that this was the first disciplinary action that he was subject to during his twenty-year tenure with Agency. As a result, Employee requested that Agency's termination action be reversed and that the imposed discipline be reduced to a suspension and re-education.[4]

Agency filed its answer on January 5, 2022. It contended that Employee's termination should be upheld because each of the Trial Board's findings were supported by substantial evidence. Agency disagreed with Employee's argument that it committed any procedural errors in administering the instant adverse action. Lastly, it submitted that each of the relevant *Douglas* factors was properly considered and maintained that termination was the appropriate penalty.[5]

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[3] *Final Notice of Termination* (November 1, 2021).
[4] *Petition for Appeal* (December 2, 2021).
[5] *Agency Answer to Petition for Appeal* (January 5, 2022). 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.

An OEA Administrative Judge ("AJ") was assigned to the matter in March of 2022. On April 20, 2022, the AJ held a status conference to assess the parties' arguments. During the conference, it was determined that the Collective Bargaining Agreement ("CBA") between Agency and Employee's union, International Association of Firefighters, Local 36 ("Local 36" or the "Union"), as well as the holding in *Pinkard v. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2006)[6], precluded a de novo hearing. 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.[7]

In its brief, Agency argued that the Trial Board's findings were supported by substantial evidence because Employee deviated from the required standard of care during an emergency call on June 23, 2020. It clarified that although Employee claimed that he received an informed refusal of treatment from the patient during his first call to the residence, the refusal was not in writing, and Employee made no written notation of his exchange with the patient to confirm her refusal to receive treatment. Agency also contended that it committed no harmful procedural error during Employee's termination proceedings because it held a Trial Board disciplinary hearing within 180 days of service of the Initial Written Notification ("IWN"). Additionally, it reasoned that

[6] 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 the employee.
[7] *Post-Status Conference Order* (April 21, 2022).

termination was appropriate based on the *Douglas* factors and the Table of Offenses and Penalties. Therefore, Agency believed that Employee's termination was proper.[8]

In response, Employee submitted that Agency violated Article 31, Section B (5) of the CBA by failing to hold a Trial Board hearing within 180 days of receipt of the IWS. He believed that Agency's error was harmful because the language of the CBA is mandatory, and violation of the CBA constituted grounds for reversal of the termination action. Employee further argued that the Trial Board's findings for Charge No. 1 and Charge No. 2 were not supported by the record because his conduct did not constitute a neglect of duty or the failure to aid a member of the public under the regulations. Finally, he contended that termination was not the appropriate penalty given Agency's unreasonable assessment of the *Douglas* factors and his performance history as an FF/EMT. As a result, Employee again requested that his termination be reversed and that the imposed penalty be reduced.[9]

Agency filed a sur-reply brief on September 9, 2022. It claimed that any procedural error related to the purported violation of Article 32 of the CBA was harmless because Employee would have still been terminated but for the error. Agency echoed its previous averment that the Trial Board's decision was supported by substantial evidence. It reiterated that the penalty of termination was appropriate because Employee's failure to act on June 23, 2020, worsened the patient's condition and delayed her ability to receive the appropriate medical care.[10]

After reviewing the record, the AJ noticed that Agency utilized an older version of the District Personnel Manual ("DPM") in its charging documents. Therefore, she ordered the parties

[8] *Agency Brief* (May 25, 2022).
[9] *Employee's Brief* (August 1, 2022).
[10] *Agency Sur-Reply Brief* (September 9, 2022).

to address the issue. In its stipulation, Agency contended that it charged Employee relying on Article VII of the Order Book because that is the procedure for which Agency and Local 36 bargained. It stated that the Order Book, which is expressly incorporated into the CBA by way of Article 31, defines the causes of action for which Agency is permitted to charge bargaining unit employees. According to Agency, because the 2012 DPM was in effect at the time the Order Book was issued, it was required to rely on the older iteration of the regulations because, absent impact and effects bargaining, doing otherwise would violate labor law.[11] Agency went on to explain that it was precluded from implementing the 2017 and subsequent DPM versions to employees represented by Local 36. Therefore, it reasoned that Employee's termination was properly initiated pursuant to the Order Book and the 2012 DPM.[12]

Employee filed an objection to Agency's stipulation on October 28, 2022. He submitted that utilizing the 2017 or 2019 versions of the DPM would not violate the principles of labor law. Employee opined the language of the CBA and the Order book do not limit Agency to a particular version of the DPM in initiating adverse actions, as it only provides that all discipline shall be governed by Chapter 16 of the personnel manual. According to Employee, Agency should have utilized the 2017 or 2019 version of the DPM. He further suggested that the plain language of Article 31 incorporated nothing by reference which stated that Agency's Order Book was required to limit and control the discipline that is charged to employees. Additionally, Employee stated that a December 23, 2015, memorandum from Local 36 to the Office of Labor Relations and Collective Bargaining ("OLRCB")[13] made it clear that the Union expected the proposed changes to the DPM

[11] Impact and Effects bargaining is a type of bargaining which involves certain decisions that are within management's right to make, which have an impact on mandatory subjects of bargaining.
[12] *Agency Stipulation* (October 26, 2022).
[13] OLRCB has authority to represent Agency in bargaining proceedings. *See* Mayor's Order 2001-168 (November 14, 2001).

to be implemented. Therefore, he objected to Agency's stipulation and asserted that it was improper to be charged under the 2012 version of the regulation.[14]

The AJ issued an Initial Decision on January 10, 2023. Regarding Charge No. 1, Specification No. 1, and Charge No. 2, Specification No. 1, the AJ held that Agency met is burden of proof in establishing that Employee neglected his duties and failed to provide assistance to a member of the public during the June 23, 2020, emergency call. She provided that the record supported a finding that Employee violated Special Order No. 54 because he failed to obtain a refusal of treatment from the patient; improperly documented the patient's refusal or treatment; and improperly characterized the initial call as "no patient contact" instead of "refusal." The AJ went on to discuss that Employee's failure to thoroughly and truthfully document the patient's vital signs violated Bulletin No. 3 of the Patient Bill of Rights. As such, she determined that the Panel's findings of fact regarding Employee's conduct were based on substantial evidence.[15]

With respect to whether Agency committed a harmful procedural error, the AJ first addressed whether Agency's reliance on the 2012 DPM was proper even though a newer version of the regulations existed at the time. The AJ provided that Chapter 6-B of the D.C. Municipal Regulations ("DCMR") and Chapter 16 of the DPM regulate the manner in which District agencies administer adverse actions. Since Employee was terminated effective November 6, 2021, and the applicable version of the DPM went into effect in the District on June 12, 2019, the AJ concluded that all adverse actions commenced after this date were subject to the new regulations.[16]

[14] *Employee Objection to Agency Stipulation* (October 28, 2022).
[15] *Initial Decision* (January 10, 2023).
[16] *Id*.

The AJ also highlighted Order Book, Article VII, Section 1, which provides that disciplinary actions against firefighters at the rank of captain and below shall be governed by the CBA and Chapter l6 of the DPM, and in the event of a conflict between the CBA and DPM Chapter 16, the CBA shall prevail. She disagreed with Agency's argument that it was required to use the 2012 DPM pursuant to the CBA and the Order Book, finding that Article 31 only required disciplinary procedures to be governed by the applicable provisions of Chapter 16. The AJ found unpersuasive the supporting case law provided by Agency in support of its position that it was legally precluded from implementing the new DPM regulations. She held that the instant matter was distinguishable because Employee's union did not make a request to bargain over the proposed changes to Chapter 16 of the DPM.[17]

Additionally, the AJ determined that the parties were not engaged in impact and effects bargaining when the adverse action was initiated against Employee; Agency assured Local 36 that any proposed changes to Chapter 16 would not impact its members but did not state that it would continue using the 2012 DPM; and the changes did not affect the mandatorily negotiated terms and conditions of employment subject to the mandatory duty to bargain. Since Employee was charged with neglect of duty and unreasonable failure to give assistance to the public pursuant to the Order Book and the 2012 DPM when the current and appliable version was the 2019 DPM, the AJ held that Agency's utilization of an out-of-date DPM iteration constituted a harmful procedural error.[18]

Concerning the substantive charges, the AJ explained that Section 1603.3(f)(3) did not exist in the 2019 DPM because the 2017 version moved all the adverse action charges to Section

[17] *Id.*
[18] *Id*.

1605. Thus, a charge of neglect of duty could now be found in DPM § 1605.4(e), with its corresponding penalty found in DPM § 1607.2(e). Likewise, a charge of unreasonable failure to give assistance to the public under the 2012 DPM was previously located in Section 1603.3(f)(9), but the 2017 update to the DPM and subsequent versions of the regulations did not have a corresponding provision for this cause of action. Because there were substantive changes that resulted from the 2017 and subsequent versions of the DPM, with regard to the charges and penalties for employees, the AJ was unable to ascertain which charges should have been levied against Employee had Agency utilized the correct version of the regulations. As a result, she opined that Agency's failure to provide Employee with the specific charges based on the appropriate version of the DPM deprived him of a fair opportunity to oppose the proposed removal action. Since Agency failed to utilize the correct DPM, she assessed that Employee could not adequately defend himself against the charges in the proposed notice. Consequently, the AJ dismissed Charge No. 1 and Charge No. 2.[19]

As it related to Employee's argument that Agency violated Article 31, Section B (5) of the CBA by failing to hold a Trial Board hearing within 180 days of the receipt of the IWR, the AJ held that Employee's hearing was conducted 217 days after the IWR was received, which violated the terms of the agreement. However, while Section B (5) was a bargained-for provision between the parties, the AJ surmised that the OEA Board's holding in *Quamina v. Department of Youth Rehabilitation Services*[20] provided guidance in determining whether the language of a CBA was directory, rather than mandatory in nature. Subsection B (5) of the CBA in this matter did not specify a consequence for Agency's violation of the prescribed time limit; therefore, the AJ

[19] *Id*. at 40.
[20] OEA Matter No. l60l -0055-17, *Opinion and Order on Petition for Review* (April 19, 2019).

reasoned that the public interest to adjudicate this matter on its merits outweighed Agency's procedural delay in conducting a Trial Board hearing within 180 days. Therefore, she concluded that Agency's error was harmless.[21]

Finally, in determining whether the penalty was appropriate, the AJ relied on the holding in *Stokes v. District of Columbia*, which requires this Office to assess whether the selected penalty was within the range allowed by law, regulation, or any Table of Illustrative Actions; whether the penalty is based on a consideration of the relevant factors; and whether there was a clear error of judgment by Agency.[22] Although the AJ concluded that Agency established cause for neglect of duty under both Charge No. 1, Specification No. l, and Charge No. 2, Specification No. 1, she found that Agency nonetheless committed a harmful procedural error against Employee as it related to the charge of failure to provide assistance to the public because this charge did not exist in the 2019 DPM. Further, Agency failed to provide a breakdown of the penalty with respect to each of the two causes of action under Charges No. 1 and 2; therefore, the AJ believed that it would be improper to essentially estimate what the appropriate penalty would have been had Agency used the correct DPM version. Consequently, she concluded that the penalty of termination was inappropriate under the circumstances. Therefore, Agency's termination action was reversed, and Agency was ordered to reimburse Employee all backpay and benefits lost as a result of the termination action.[23]

Agency disagreed with the Initial Decision and filed a Petition for Review with the OEA Board on February 14, 2023. It argues that the AJ erred by rendering a decision on an issue not

[21] *Initial Decision* at 44.
[22] 502 A.2d 1006 (D.C. l985).
[23] *Id*.

raised by the parties, namely in determining that Agency erred in utilizing the 2012 DPM. Because neither party raised the issue of whether it was permissible to rely on an out-of-date version of the regulations, Agency explains that it was nonetheless improper for the AJ to address this issue *sua sponte* because Employee's failure to raise his argument at the hearing level constituted a waiver of the issue. Agency further claims that it was required to rely on the Order Book and the 2012 DPM because the amendments to the DPM would modify bargained-for procedures and because impact and effects bargaining have not yet occurred between Agency and Employee's union. It echoes its previous position that relying on any other iteration of the DPM would violate the principles of labor law. Alternatively, Agency suggests that if its reliance on the 2012 DPM constituted an error, it was harmless. Additionally, it suggests that the bargaining of the revised regulations is a question of material fact that requires additional fact finding through the reopening of the record. Consequently, Agency asks that the Board grant its Petition for Review.[24]

Employee filed an Opposition to Agency's Petition for Review on May 2, 2023Employee cites to *Employee v. D.C. Fire & Emergency Services*, OEA Matter No. 1601-0040-21, in which this Board was presented with nearly identical arguments to this matter. He states that the Board previously held that Agency's use of the 2012 DPM in the aforementioned appeal constituted a harmful procedural error and notes that the agency is the same; the charges against the employees are the same; and the issue of proper advance notice regarding the charges levied against the employees are the same. Thus, it is his position that the Initial Decision is based on substantial evidence. Employee, again, argues that the Order Book and the CBA do not limit Agency to use of the 2012 DPM and that contrary to Agency's argument, when read in conjunction, the governing

[24] *Agency Petition for Review* (February 14, 2023).

authorities only require the use of the applicable version of the regulations. Additionally, Employee provides that the parties have not engaged in impact and effects bargaining over the continued use of the 2012 DPM. Employee objects to Agency's request to have this matter remanded for additional fact finding because the parameters provided in *Pinkard* render this case ineligible for remand. Therefore, he requests that the Board uphold the Initial Decision and deny Agency's Petition for Review.[25]

DPM Version

Agency does not dispute that it charged Employee with misconduct under an old version of the DPM. Instead, it asserts that charging Employee pursuant to an out-of-date version of the regulations was proper because it is the procedure for which Agency and the Union bargained. Agency also reasons that the parties agreed to the continued utilization of the 2012 DPM until impact and effects bargaining occurred related to the 2017 updates. In support thereof, Agency references the Order Book and Article 31 of the CBA, which provide in pertinent part the following:

> **Article VII:** Disciplinary actions against firefighters at the rank of captain and below shall be governed by the collective bargaining agreement between the Department and D.C. Fire Fighters' Association Local 36 and *Chapter16 of the D.C. Personnel Manual* (DPM). In the event of a conflict between the collective bargaining agreement and Chapter 16, the collective bargaining agreement shall prevail.
>
> **Article 31, Section A:** Governing Rules and Regulations - Disciplinary procedures are governed by applicable provisions of Chapter 16 of the District Personnel Manual, and the Department's Rules and Regulations and Order Book, except as amended/abridged 2 by this Article.

[25] *Petition for Review* (May 2, 2023).

This Board agrees with Employee's argument that the language relied upon by Agency does not limit it to a particular version of the DPM. Rather, when read in conjunction, this Board interprets the aforementioned language to indicate that Agency's disciplinary actions must be governed by the *applicable* version of the DPM. Moreover, as Employee proffers, nothing within the language of Article 31 implicitly incorporates by reference any language which states that the Order Book was intended to limit and control the discipline that is charged to employees.

We are also unpersuaded by Agency's assertion that the parties agreed to continue utilizing the 2012 DPM until it could conduct impact and effects bargaining with Local 36 over the amendments to the DPM. Agency cites to the December 23, 2015, letter from the Union to OLRCB which discussed the proposed changes to the DPM as it related to disciplinary language. The letter provides the following:

> "Notwithstanding our concerns, I understood you to confirm during our conversation that no changes to the disciplinary or grievance process applicable to the Local 36 bargaining unit was intended by these proposed revisions. It is therefore unclear to us what impact, if any, the revisions – assuming they are adopted – would have on the Union's members. We reserve our rights under Article 9 should the District identify any such impact on the unit in the future.…"[26]

The AJ provided a thorough assessment in support of her finding that Local 36 and Agency were not, and have not to date, engaged in impact and effects bargaining over the changes to the 2012 DPM. There is nothing in the record to indicate that Local 36 made an effort to initiate bargaining or that it even was apprised by Agency that it would continue to utilize an out-of-date version of the DPM. The Union reserved its right to request bargaining in the future, and it appears from this

[26] *See Agency's Stipulation*, Attachment 3.

communication that the Union was unaware at the time that there would be any substantive changes under the proposed updates to the 2017 DPM.

In sum, this Board believes that that the AJ's findings regarding the inapplicability of the 2012 DPM are supported by the record. The facts giving rise to the instant adverse action occurred during a service call performed by Employee on June 23, 2020. Chapter 16 of the DPM was updated in May of 2017, and again in 2019, but the 2019 changes did not affect the adverse action/disciplinary action section. Further, we conclude that the language contained in the Order Book and the CBA does not serve to limit Agency to the continued use of the 2012 version of the DPM. Rather, we assess that Agency was required to utilize the applicable version of the regulations. Agency and Employee's union have been aware of the proposed changes to the disciplinary actions captured within Chapter 16 dating back until at least 2015. Without intervention, it follows that Agency will continue to utilize regulations that have been obsolete for nearly six years. This includes potentially charging employees with causes of action that no longer exist within the District's personnel regulations. As such, we agree with the AJ's finding that Agency's error was reversable because the 2019 DPM was applicable at the time Employee committed misconduct. We will, therefore, leave her finding undisturbed on this issue.

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 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.[27] After reviewing the record, this Board believes that the AJ's rulings were based on substantial evidence.

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. Charge No. 1 against Employee states the following in pertinent part:

> Violation of D.C. Fire and Emergency Medical Services Department Bulletin No. 3, Patient Bill of Rights, which states: As our patient, you have the right to expect competent and compassionate service from us….
>
> Violation of D.C. Fire and Emergency Medical Department Order Book Article XXIV, § 10 Position Responsibilities….
>
> Further violation of D.C. Fire and Emergency Medical Services Department Emergency Medical Services Manual and Pre-hospital Treatment Protocols (2017), Standard Operating Guidelines, CONSENT REFUSAL OF CARE POLICY….
>
> Further violation of D.C. Fire and Emergency Medical Services Department Order Book Article XXIV, § 9, Patient Transport Guidelines….
>
> This misconduct is defined as caused in D.C. Fire and Emergency Medical Services Department Order Book Article VII, section 2(f)(3), which states: "Any on-duty or employment related act or omission that interferes with the efficiency or integrity of government operation, to include: Neglect of Duty." See also 16 DPM §1603.3(f)3. (August 27, 2017).
>
> This misconduct is further defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(f)(9) which states: Any on-duty or employment related act or

[27] 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

> omission that interferes with the efficiency or integrity of government operation, to include: unreasonable failure to give assistance to public." See also 16 DPM §1603.3(f)(9). (August 27, 2017).

Similarly, Charge No. 2 against Employee states the following:

> Violation of D.C. Fire and Emergency Medical Services Department Manual and Pre-Hospital Treatment Protocols (2017), Standard Operating Guidelines, CONSENT / REFUSAL OF CARE POLICY….
>
> Further violation of the D.C. Fire and Emergency Medical Services Department Special Order No. 54, series 2012, Patient Care Reporting (ePCR) Directive (effective 10/25/2012)….
>
> Further violation of D.C. Fire and Emergency Medical Services Department Bulletin No. 3….
>
> This misconduct is defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, Section 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).
>
> This misconduct is further defined as cause in D.C. Fire and Emergency Medical Services 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 operation, to include: unreasonable failure to give assistance to public." See also 16 DPM §1603.3(f)(9). (August 27, 2012).

As previously discussed, the AJ correctly concluded that the applicable DPM went into effect in the District in 2019. 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 charged Employee with violating DPM §1603.3(f)(3) (March 4, 2012) for "[a]ny on-duty or employment related act or omission that interferes with the efficiency and integrity of government operations." A neglect of duty charge under the 2012 DPM 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 a first offense of neglect of duty under the old DPM ranged from reprimand to removal. The 2017 version moved all the adverse action charges to Section 1605. Thus, a charge of neglect of duty can now be found in DPM § 1605.4(e), with its corresponding penalty found in DPM § 1607.2(e). The penalty for the first offense is now counseling to removal.

Here, Employee was suspended based on his failure to carry out the essential functions of his position during the June 23, 2020, 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 that a charge of neglect of duty did not substantively different from the older version utilized by Agency. Accordingly, we will leave her ruling unchanged.

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 versions of the DPM. Further, we agree with the AJ's finding that there were substantive changes made to the 2012 DPM with regard to disciplinary charges and penalties, such that an affected employee would be unable to determine which charges should have been levied had Agency utilized the correct version of the regulations. 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, No. 20-CV-0482 (D.C. 2023); *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), wherein 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. The AJ noted that Agency did not provide a breakdown of the penalty with respect to each cause of action or specification under Charge No. 1 and Charge No. 2. Accordingly, the AJ deemed it improper to 'guess' or 'estimate' what the appropriate charge and corresponding penalty would have been had Agency used the appropriate DPM. This Board believes that the AJ provided a logical 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.

Agency utilized an obsolete version of the DPM which resulted in Agency disciplining Employee for "unreasonable failure to give assistance to the public" under the same charge as that of "neglect of duty" which rendered it impossible to bifurcate the imposed penalty because the causes were both contained under the same umbrella of Charge No. 1. As a result, we find that the AJ's findings on this matter are supported by substantial evidence in the record and find no credible basis for disturbing her ruling.

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 regulations was used, Employee could not adequately defend himself against the charges levied by Agency. The penalties encapsulated in the 2012 and 2017 or 2019 DPM versions vary significantly. 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 constituted a harmful procedural 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

Agency erred in utilizing the 2012 version of the DPM, as the Order Book and the CBA warrant the use of the applicable version of the DPM. Under the holding in *Pinkard*, the AJ was limited to determining whether Employee's termination was supported by substantial evidence; whether there was harmful procedural error; or whether termination was in accordance with law or applicable regulations. Agency provides no persuasive basis to support its position that the AJ was precluded from addressing *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 DPM did not constitute a harmless error because it caused substantial harm to Employee's rights. While a charge of "neglect of duty" has corresponding causes and penalties under both the 2012 version and the 2017 and 2019 versions 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 termination action. 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**.

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.