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THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	OEA Matter No.: 1601-0078-18
GREGORY GREEN,)	
Employee)	
)	Date of Issuance: August 26, 2019
v.)	
)	ARIEN P. CANNON, ESQ.
DISTRICT OF COLUMBIA FIRE AND)	Administrative Judge
EMERGENCY MEDICAL SERVICES,)	
Agency)	
_____)	
Marc Wilhite, Esq., Employee Representative)	
Milena Mikailova, Esq., Agency Representative)	

INITIAL DECISION

INTRODUCTION AND PROCEDURAL HISTORY

Gregory Green (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA”) on August 10, 2018, challenging the District of Columbia Fire & Emergency Medical Services’ (“Agency” or “FEMS”) decision to remove him from his position as a Firefighter/Emergency Medical Technician (“EMT”). Agency filed its Answer on September 14, 2018. I was assigned this matter on December 5, 2018.

A Prehearing Conference was held in this matter on January 28, 2019, where both parties were present. A Post Prehearing Conference Order was issued the same day which required the parties to submit briefs addressing the issues under a *Pinkard* analysis.¹ Both parties submitted their briefs accordingly. The record is now closed.

JURISDICTION

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

¹ *Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002). Based on the collective bargaining agreement between the two parties, Employee’s appeal to this Office is limited to the issues listed below in the “Issues” section.

ISSUES

1. Whether Agency's Adverse Action Panel's decision was supported by substantial evidence;
2. Whether there was harmful procedural error; and
3. Whether Agency's action was done in accordance with applicable laws or regulations.

FINDINGS OF FACT, ANALYSIS, AND CONCLUSIONS OF LAW

Employee's removal was based on the follow charges²:

Charge No. 1: Violation of D.C. Fire and Emergency Medical Services Department Order Book, Article VI, § 5, Use of Intoxicants or Illegal Substances, which states:

Department members shall not:

1. Place themselves under the influence of intoxicants while on duty,
2. Use illegal substances in any form while on or off duty,
3. Report for duty under the influence of intoxicants or illegal substances,
4. Permit the presence of intoxicants or illegal substances in or on any property used or occupied by the Fire & EMS Department.
5. Ingest or expose themselves to any intoxicant or illegal substance likely to affect their full performance of duty.

Further violation of D.C. Fire and Emergency Medical Services Department Order Book, Article VI, § 6, which states: "Conduct unbecoming an employee includes conduct detrimental to good discipline, conduct that would adversely affect the employee's or the agency's ability to perform effectively, or any conduct that violates public trust or law of the United States, any law, municipal ordinance, or regulation of the District of Columbia committed while on-duty or off-duty."

This misconduct is defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(i), which states: "Use of illegal drugs, unauthorized use or abuse or prescription drugs, use of alcohol while on duty, or a positive drug test result." See also 16 DPM § 1603.3(i).

This misconduct is defined as cause in D.C. Fire and Emergency Medical Services Department Order Book Article VII, § 2(f)(3), which states: "Any on-duty or employment related act or omission that interferes with the

² The proposed adverse action against Employee was based on three (3) separate charges; however, the Adverse Action Panel/Trial Board only sustained Charge 1 and Charge 2. Employee was found "Not Guilty" with respect to Charge 3. Accordingly, this decision will only address Charges 1 and 2.

efficiency or integrity of government operations, to include: Neglect of Duty.” See also DPM § 1603.3(f)(3).

Specification No. 1: In her Final Investigative Report (dated 11/17/2017), Sergeant Joyce Morton describes FF/EMT Green’s misconduct as follows:

SUMMARY AND CONCLUSION

At 11:37:48 hours, OUC received a 911 call in reference to a conscious 3-year old female that had fallen.

At 11:40:02 hours, A-30 was dispatched to 271 37th Street, N.E. in Washington, D.C., for a fall. A-30 arrived at 11:48:55 hours. F/F Turner said that he drove to the scene. F/F Turner said when they arrived in the home he was standing in the hallway outside the bedroom door while F/F Green was inside the bedroom, assessing the 3-year old that had fallen off the bed while playing. F/F Turner said that the grandmother; asked F/F Green "is everything ok". F/F Turner said when they began to walk outside, with the father carrying the 3-year old, the grandmother/citizens inquired about F/F Green being Drunk/Intoxicated. F/F Turner said he and the father of the child were walking toward A-30 and that was when someone hit F/F Green. F/F Turner said he called communications several times for assistance. F/F Green fell on the ground and appeared dazed but managed to get up and walk up the hill, where he was standing in front of a white van. F/F Turner couldn't recall "who" hit F/F Green nor did he see anyone videotaping the assault. F/F Turner said he saw the video on the local news channel.

AFC Douglas began to ask F/F Turner about "who did the patient assessment in the home, on the 3-year old child/patient"? F/F Turner's response was; "F/F Green" then he became uncomfortable and wanted to stop the interview and request union representative from Local 36. The interview was stopped and rescheduled.

F/F Paramedic Stephen Gerber from E-30 admitted that he smelled alcohol emanating from F/F Greens's breath during his assessment but didn't write it in his Special Report. FF/P Gerber was asked; "why didn't he write his findings in his report". FF/P Gerber said he used to be a Security Officer and he needed a legal document to confirm what he assessed/smelled. Captain Michael Baker (EMS 3), is actively an MPD reserve officer and he said he smelled alcohol on F/F Green and he looked intoxicated. However, EMS 3 said he also needed confirmation before he could place his findings/assessment in his Special Report. EMS 3 says he shared his findings with Paramedic Blatzheim from M-30.

This writer interviewed DFC Edward Pearson and he said when he was informed by BFC Louis Carter regarding the allegations regarding F/F Green being intoxicated on the scene and being injured, he then noticed Assistant Fire Chief Craig Baker of Operations and Assistant Fire Chief Milton Douglas of Technical Services. DFC Pearson said he directed BFC Carter to adhere to Bulletin # 5–section 2 (Reasonable Suspicion). DFC Pearson said he received the results that night from the Washington Hospital Center–Medstar, which revealed F/F Green's BAC of .357.

Contrary to the clear mandates set forth in Order Book, Article VI, § 5, FF/EMT Green responded on a medical local smelling like alcohol, and subsequently tested positive for alcohol during a Reasonable Suspicion Test administered at Washington Hospital Center. FF/EMT Green's positive alcohol test result, failure to carry out assigned tasks, and careless work habit constitute unauthorized use of alcohol while on duty and neglect of duty. Accordingly, this termination action is proposed.

Charge No. 2:

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....You may expect: (1) To receive timely and appropriate medical services without regard to age, race, religion, gender, sexual orientation or national origin....(5) To have your past medical history, medications and your current complaint of illness or injury, along with the assessment, interventions and treatment performed by our emergency personnel, thoroughly and truthfully documented on your patient care report....(8) That all of our personnel who come to help you will be clean, neat, dressed in appropriate uniforms, and looking professional....(10) That all of our personnel will be polite, compassionate, considerate, empathetic, respectful and well-mannered.

Further D.C. Fire and Emergency Medical Services Department Rules and Regulations, Article VI, § 2, which states:

Members shall devote proper attention to the service, exert their greatest energy and full ability in the performance of their duties, not perform their duties in a spiritless, lax, surly, or careless manner, not neglect nor fail to perform any portion of their duties required by rule, regulation, order, common practice, or the necessities of the situation involved; avoid connection with any clique tending to interfere with good order; be efficient; exercise proper judgment in the performance of their duties.

This misconduct is 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 operations, to include: Unreasonable failure to give assistance to the public.” See also 16 DPM 1603.3(f)(9).

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

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AFC Douglas began to ask F/F Turner about "who did the patient assessment in the home, on the 3-year old child/patient"? F/F Turner's response was; "F/F Green" then he became uncomfortable and wanted to stop the interview and request union representative from Local 36. The interview was stopped and rescheduled.

F/F Paramedic Stephen Gerber from E-30 admitted that he smelled alcohol emanating from F/F Greens's breath during his assessment but didn't write it in his Special Report. FF/P Gerber was asked; "why didn't he write his findings in his report". FF/P Gerber said he used to be a Security Officer and he needed a legal document to confirm what he assessed/smelled. Captain Michael Baker (EMS 3), is actively an MPD reserve officer and he said he smelled alcohol on F/F Green and he looked intoxicated. However, EMS 3 said he also needed confirmation before he could place his findings/assessment in his Special Report. EMS 3 says he shared his findings with Paramedic Blatzheim from M-30.

This writer interviewed DFC Edward Pearson and he said when he was informed by BFC Louis Carter regarding the allegations regarding F/F Green being intoxicated on the scene and being injured, he then noticed Assistant Fire Chief Craig Baker of Operations and Assistant Fire Chief Milton Douglas of Technical Services. DFC Pearson said he directed BFC Carter to adhere to Bulletin # 5—section 2 (Reasonable Suspicion). DFC Pearson said he received the results that night from the Washington Hospital Center—Medstar, which revealed F/F Green's BAC of .357.

Upon dispatch, the Patient Bill of Rights required FF/EMT Green to render competent, compassionate and empathetic emergency medical services to the patient. Yet, F/F Green responded on the medical local smelling like alcohol, alarming family members, enraging on-lookers, and subsequently testing positive for alcohol during a Reasonable Suspicion Test administered at Washington Hospital Center. FF/EMT Green's discourteous treatment of the public; violation of Department customer service standards; failure to carry out assigned tasks; and careless work habits constitutes both neglect of duty and unreasonable failure to give assistance to the public. Accordingly, this termination action is proposed.

Employee was found “guilty” on Charge 1 and Charge 2. The penalty imposed against Employee for each charge was termination.

Pursuant to the D.C. Court of Appeals' decision in *Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002), an Administrative Judge of this Office may not conduct a *de novo* hearing in an appeal before him/her, but rather must base his/her decision solely on the record below at the Adverse Action Panel Hearing, when all of the following conditions are met:

1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
2. The employee has been subjected to an adverse action;
3. The employee is a member of a bargaining unit covered by a Collective Bargaining Agreement;
4. The Collective Bargaining Agreement contains language essentially the same as that found in *Pinkard*, i.e.: “[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [i.e., Trial Board Hearing] has been held, any further appeal shall be based solely on the record established in the Departmental hearing”; and
5. At the agency level, Employee appeared before an Adverse Action Panel (Fire Trial Board) that conducted an evidentiary hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action being taken against Employee.³

Based on the documents of records and upon consideration of the legal briefs submitted, I find that all the aforementioned criteria have been met. Thus, according to *Pinkard*, my review of the final Agency decision to remove Employee from his position is limited “to a determination of whether [the Final Notice of Adverse Action] was supported by substantial evidence, whether there was harmful procedural error, [and] whether Agency’s action was in accordance with the law or application regulations.”⁴ Furthermore, the undersigned must generally defer to the Trial Board’s credibility determinations.⁵

Agency’s position

Agency contends that substantial evidence was presented to the Fire Trial Board to support its decision to terminate Employee. Agency presents the facts as follows: Employee assumed his duty on August 13, 2017, at 7:00 a.m. At 11:39, Ambulance 30 (“A-30”) was dispatched to 271 37th Street, SE for a three-year old girl who fell. Employee and his partner, Firefighter Adam Turner (“FF Turner”), arrived on scene at 11:48 a.m. in A-30. Ms. Towanda Conner (“Conner”), the three-year old’s grandmother, met FF Turner and Employee at the back door and led them into the house. While leading them through the house, Ms. Conner notice the smell of alcohol emanating from Employee and declined to allow them to treat her granddaughter. After Ms. Conner refused to let them treat her granddaughter, Employee and FF Turner left the residence,

³ *Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002).

⁴ *Id.*

⁵ *See Id.*

with Employee stumbling and staggering. Because of Employee's inebriated condition, Ms. Conner called 911 to request another ambulance. Ms. Conner reported to the dispatcher that Employee was "very intoxicated," that she could smell alcohol on Employee's breath, and requested for a supervisor and the police to be called to the scene. After Employee and FF Turner exited the residence, and before other Agency and Metropolitan Police Department ("MPD") officials arrived on scene, Employee was assaulted by civilian(s) who observed Employee in an altered state.

Employee was initially treated on scene in A-30 and was subsequently transported to MedStar Washington Hospital Center at 12:47 p.m. A Computer Tomography ("CT") scan revealed that Employee had a left mandibular angle fracture but no temporomandibular dislocation and no acute intracranial hemorrhage. A toxicology screen was also performed which revealed that Employee had a blood alcohol content ("BAC") of .357 when a sample was collected at 1:55 p.m. on August 13, 2017. Agency argues that this indicates that Employee was also intoxicated at 11:39 a.m. when A-30 arrive on the scene to assist Ms. Conner's three-year old granddaughter. Because Employee reported to work and attempted to render care while under the influence of alcohol, Agency initiated the instant adverse action. Agency asserts that the fact that Employee was under the influence of alcohol at the scene is corroborated by the observations of at least two objective witnesses—Ms. Conner and MPD Officer Marcia Slaughter.

Employee's Position

Employee contends that his termination should not be upheld for the following reasons: (1) there is insufficient evidence to support both charges sustained by the Fire Trial Board Panel—Charge 1 and Charge 2; (2) the Panel incorrectly considered evidence of Employee's past discipline and medical history and incorrectly limited evidence and questions with respect to one of Employee's essential witnesses in violation of his due process rights; and (3) upon review of the Panel's application and analysis of the *Douglas* factors, termination is excessive and inappropriate under the circumstances.

Employee recounts his version of events as follows: At 11:39 a.m. on August 13, 2017, Employee was dispatched to 271 37th Street, SE for a call concerning a three-year old who had fallen from a bed. Employee rode as a passenger in A-30 which was driven by FF Turner. After arriving at the scene to treat the child, Employee was assaulted and suffered blunt trauma as he was walking towards the curb. Employee was subsequently transported to MedStar Washington Hospital ("MedStar") and received treatment. A CT scan revealed Employee had a left mandibular angle fraction. As a result of the assault, Employee underwent multiple surgeries, was diagnosed with a concussion, and suffered a broken jaw. Employee was discharged from MedStar on August 16, 2017, three days after being admitted.

Summary of Transcript

On May 9 and 10, 2018, Agency held a Fire Trial Board Adverse Action Hearing. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was generated following the conclusion of the

proceeding. Both Agency and Employee presented documentary and testimonial evidence during the Fire Trial Board Hearing to support their position.

Agency's Case-in-Chief

Olusola Malomo ("Dr. Malomo") Tr. Vol I, pp. 22-76⁶

Dr. Malomo has been employed as a doctor with the Police and Fire Clinic ("PFC") in the District of Columbia since March 2008. Dr. Malomo testified that Employee was involved in an incident on August 13, 2017, where he was attacked by a group of people while responding to a call after appearing to be impaired.⁷ Malomo reported that after the assault Employee was transported to the emergency room at MedStar Washington Hospital Center ("MedStar"). Malomo explained that at the hospital, Employee had a very high blood alcohol content and was treated for facial injuries, and then discharged. Dr. Malomo reviewed Employee's MedStar medical records and Employee's Plan of Care, which was completed during Employee's August 13-16, 2017 hospital stay. During his hospital stay, Employee received a toxicology screening, a CT scan, and was diagnosed with a mandible fracture. *Tr. Vol I, 25-27*. The blood test was collected at 1:55 pm on August 13, 2017. Per the report, Employee had a .357 blood alcohol level. Dr. Malomo indicated that most users, even heavy users, typically lose consciousness or would be close to a loss of unconsciousness at a .4 blood alcohol level. Dr. Madolo reported that muscle coordination, loss of balance, and a sense of inertia were common between levels .3 and .4.⁸ She surmised that Employee would have likely consumed alcohol within three hours of the lab test being drawn for his levels to be that high. *Tr. Vol I, 30-21*.

Dr. Malomo testified that the MedStar medical record showed a past medical history of seizures related to alcohol. Dr. Malomo had personal knowledge of Employee experiencing two alcohol withdrawal seizures while on duty between 2010 and 2015. *Tr. 35-37*. Upon further questioning, Dr. Maloma confirmed that Employee received seizure related treatment at PFC. She also testified that she issued a final report to FEMS Medical Services Officer Chair on December 14, 2017, citing Employee as unfit for duty, because he failed to engage in a relapse prevention program that was recommended by her evaluation. *Tr Vol. I, 38*. Dr. Malomo determined that due to the nature of Employee's job, he would need to participate in an alcohol prevention program, and be alcohol free for a period of time before returning to full duty. Upon being shown video of Employee on the scene at the August 13, 2017 incident, and being asked to describe his behavior, Dr. Malomo testified that Employee looked impaired. *Tr. Vol I, 38-40*.

During cross examination, Dr. Malomo testified that she was not present at the hospital when Employee's blood was drawn for the BAC test, because she does not work for the hospital and did not order the blood tests. When questioned about the validity of a September 1997 study from an NCCLS, an interdisciplinary international organization, that stated that "the disinfectant used for cleaning the venipuncture site should not contain alcohol or other volatile organic

⁶ "Tr. Vol I," denotes the transcript for day 1 of the of the Trial Board Hearing—May 9, 2018. "Tr. Vol II" denotes day 2 of the hearing—May 10, 2018.

⁷ Bystanders at the scene reported that Firefighter Green was under the influence of alcohol while on duty.

⁸ Tendency of a body to maintain its state of rest or uniform motion unless acted upon by an external force.

substances"...to avoid contamination of blood specimens", Dr. Malomo remarked that contamination usually refers to infection and not a high BAC. She denied the claims made in the report. *Tr. Vol I, 48-53*. Dr. Malomo later testified that not everyone with a .3 or .4 BAC would experience a coma or severe symptoms and that it is possible to score a 15 on the Glasgow Coma Scale and have an accurate BAC of .357. *Tr. Vol I, 57-59, 75*.⁹ Lastly, Dr. Malomo identified Agency Exhibit 5, as a letter she received from Dr. Kurrok at The Neurology Center dated March 22, 2013. During an office visit for a seizure evaluation, Employee admitted to previously lying to Dr. Malomo and admitted to alcohol abuse. *Tr. Vol I, 70-72*.

Charles Mack ("Mack") *Tr. Vol I, pp. 76-82*

Chief Charles Mack has been with DC FEMS since 1997 and currently serves as a Deputy Fire Chief. Mack testified that he first met Employee when he was in recruit school and found him to be diligent and have leadership potential. Mack stated that Employee was a good young man and he believed him to be an asset to the Department. *Tr. Vol I, 77-80*. Upon cross examination, Chief Mack testified that he and Employee were not friends outside of work and his general understanding of the charges brought against Employee were based upon what he had witnessed in the media.

Erlesha Webster ("Webster") *Tr. Vol I., pp. 84-89*

Webster is a firefighter assigned to Engine 30, Shift No. 2. Webster testified that she hugged Employee the morning of August 13, 2017 and denied noticing an odor or anything out of the ordinary regarding Employee's demeanor that day. *Tr. 85-87*. Webster testified that she arrived to the scene of the incident after responding to a 10-33 call and noticed that Employee's face and jaw were swollen.¹⁰ Webster assisted Employee to the ambulance and administered patient care on him. Webster further denied smelling alcohol on Employee during the time of the incident. Webster testified that she witnessed video of Employee on the scene and was shocked to hear Employee's blood alcohol level results. *Tr. Vol I, 86-89*.

Upon cross examination, Webster testified that she administered an ice pack on Employee's jaw and recalled him being a little confused and unable to respond to her questions. Webster stated that she has come across drunk individuals in her line of duty. However, she witnessed the Instagram video of Employee at the scene and attributed his disposition to being beat up and knocked out, not drunk. *Tr. Vol I, 90-92*.

Milton Douglas ("Douglas") *Tr. Vol I, pp. 94-140*

Douglas worked as an Assistant Fire Chief with FEMS and helped investigate Employee's case regarding the incident. Douglas testified that Employee drove Ambulance 30 to the scene

⁹ The Glasgow coma scale is used to assess patients in a coma. The initial score correlates with the severity of brain injury and prognosis. The Glasgow Coma Scale provides a score in the range 3-15; patients with scores of 3-8 are usually said to be in a coma; 15 is the maximum score with the best prognosis. Employee scored a 15 on the scale upon arriving to the ER on the date of the incident.

¹⁰ A 10-33 call refers to an assault on a firefighter. *See Agency Answer to Employee Petition for Appeal*. (September 14, 2018).

once the call came in at 11:39 am. *Tr. Vol I, 94-98*. MPD was dispatched to the scene at 12:01 pm.¹¹ Douglas testified that MPD responded to the scene wearing body cameras and reported that the footage had been narrowed down from hours to what he believed to be twenty minutes of relevant material. *Tr. Vol I, 98-100*. Douglas testified that Sergeant Joyce Morton of Agency's Internal Affairs made several attempts to reach Employee by phone and email after the incident. Chief Douglas stated that Sergeant Morton made contact with Employee on November 15, 2017 and explained that she wanted to schedule an interview regarding the August 13, 2017 incident. Employee reported that he was not feeling well, was on medication, and was not sure when he could come in for an interview. Sergeant Morton noted that Employee was on Performance of Duty ("POD") status and it was ultimately his decision to report for an interview. *Tr. Vol I, 101-104*.

During cross examination, Douglas testified that based on the investigation, he surmised that Employee was surrounded and assaulted once he stepped outside the door of the apartment they were called to service. Chief Douglas said that out of roughly twenty-three interviews, not a single person in the Department who saw Employee before the incident suggested that he was acting unusual that morning. *Tr. 111-112*. Douglas confirmed that once the BAC results came back, an email was forwarded from Chief Baker stating, "it appears we will need to follow up on accurate BAC". *Tr. Vol I, 132-133*.

On re-cross examination, Douglas viewed the body camera footage of Sergeant Slaughter. Within the footage, Sergeant Slaughter and three fellow officers reported to their superior that none of them smelled alcohol on the Employee. Chief Douglas confirmed these statements. *Tr. Vol I, 138-140*.

Towanda Conner ("Conner") *Tr. Vol I, pp. 141-166*

Conner explained that around mid-day on August 13, 2017, she was at home with her son, her granddaughter, the mother of her granddaughter, and another granddaughter, when she called 911, because one of her granddaughters fell off the bed and hit her head on a wall. Conner testified that two firefighters responded. Conner identified Employee as one of the firefighters who responded. Conner led the firefighters through the backdoor of her home and was leading up the stairs when Employee asked where the child was located. When Employee asked where the child was located, Conner noticed the smell of alcohol on Employee and declined to let Employee treat the child. Conner then called upstairs for someone to call the ambulance, police, and to call a supervisor because Employee was intoxicated and could not transport the child to the hospital. When Conner asked Firefighter Turner if he smelled alcohol on Employee, since he sat next to him in the truck; Firefighter Turner responded by saying, "I just started." *Tr. Vol I, 142-144*.

Conner testified that her son carried her granddaughter outside to put her in her mother's van so they could drive her to the hospital themselves. She followed them outside and someone in the neighborhood came over and asked what was happening. By that time a second ambulance and the police had arrived, Employee came out stumbling up the steps. Conner explained that

¹¹ Chief Webster listens to two 911 calls regarding the incident and confirmed that he came across the cell phone video of the incident.

Employee smelled of alcohol upon entering the house and was staggering and falling up the steps. Employee reach for the child as her son was carrying her out and her son pushed Employee's hand away from the child. Conner further testified that Employee walked up to someone's van in the neighborhood and the man asked him what he was doing and told him this was not his ambulance. *Tr. Vol I, 145-146.* Conner testified that a crowd gathered around Employee and began saying things to him. She heard someone say, "you drunk and you out here trying to help somebody?" Conner expressed concern regarding what could have happened if her granddaughter was seriously hurt, but then had to wait for a second ambulance for transport. *Tr. Vol I, 148-150.*

On cross-examination, Conner testified that Employee was hit in the face as he came up the steps near her home and was later "jumped on" by a group of people while on the sidewalk. *Tr. 153-155.* She testified that her son may not have smelled alcohol on Employee because he did not interact with him; rather he was concerned about getting his daughter to the hospital. *Tr. 156-158.* After listening to audio of the 911 call she made to the police, Conner testified that on the call she stated that Employee was "at somebody else truck." Conner explained that Employee went to stand in front of a van in the neighborhood after he was assaulted on the steps. *Tr. 160-162.* When asked if she made the allegation of Employee's intoxication to police after Employee was assaulted by someone she knew, Conner remarked that Employee was intoxicated when he entered the home and stumbled before he got hit.¹² *Tr. Vol I, 164-166.*

Michael Scott Baker ("Baker") *Tr. Vol. I, pp.183-198*

Lieutenant Baker worked at Agency for 32 years and served as an active Lieutenant and Chief of EMS. *Tr. Vol I, 184.* Baker was called to the scene of the incident after a 10-33 had been declared. When Baker arrived at the scene he found a group of men, aged fifteen to thirty, leaving the area. After exiting his vehicle, he went to check on Employee who was being treated by a paramedic and was told that Employee had been assaulted and was unconscious at the time. Baker suggested that they transport Employee to the hospital. Baker testified that the original patient was still inside the house. However, Medic 30 was in route and the police and EMS were on the scene. He stated that the grandmother of the child was upset and screaming that Employee showed up to her home intoxicated. *Tr. 186-189.* Baker said that he observed visible facial injuries on Employee and heard allegations on the scene that he was intoxicated. Baker called MedStar, notified them of the incident and allegations, and discussed getting blood alcohol content with the charge nurse. *Tr. Vol I, 191-193.*

On cross-examination, Baker testified that he did not recall smelling alcohol on Employee. Upon being presented with the Internal Affairs report prepared by Sergeant Morton, which asserts that Baker said *he did smell alcohol* emanating from Employee, Baker maintained that he did not recall smelling alcohol on Employee. Baker stated that based on his visual assessment, Employee's appearance was consistent with being "roughed up", assaulted, or having a concussion. *Tr. 194-197.*

¹² Conner left the trial abruptly in the middle of questioning. Attorney Lake proceeded to show video and body camera footage to contradict witness statements to police stating that two men who can be seen on camera taunting Employee were not involved with the incident. *Tr. 166-177.* Attorney Lake further alleged that witness called 911 after Employee was assaulted and not when he initially entered the home as previously reported. *Tr. Vol I, pp. 142-144.*

Employee's Case-in-Chief

Leonard Burke ("Burke") Tr. Vol II, pp. 7-18

Burke has been with Agency for twenty-six (26) years and currently serves as a Lieutenant for Truck 17. Burke has been Employee's direct supervisor since 2012. Burke testified that Employee was a good worker, dependable, and came in early and did anything that was asked of him. Burke testified that he saw Employee the morning of the incident and did not notice anything unusual about him or smell alcohol on him. *Tr. Vol. II, 8-10.*

On cross-examination, Burke noted that he was not aware of Employee having a history of alcohol problems. *Tr. Vol. II, 10-12.* He stated that he had very little interaction with Employee at the scene of the incident but admitted that Employee appeared confused in the video from the scene and reported in his Internal Affairs interview that Employee's demeanor was different than usual and that Employee appeared drunk. However, he later learned that Employee was concussed. *Tr. Vol. II, 13-15.*

Christopher Graham Watts ("Watts") Tr. Vol II, pp. 19-46

Watts has worked as an Emergency Room ("ER") Nurse for approximately nine (9) years and is employed in Prince William County, Virginia. Watts testified that he has treated thousands of intoxicated individuals and guessed that approximately half of those treated had blood alcohol content levels in the high 3's.¹³ *Tr. Vol II, 19-21.* The symptoms in patients with a BAC of .3 or higher range from being completely unconscious to slurred speech, inability to walk, nausea, and vomiting. Watts testified that a patient can die from aspirating vomit into their lungs and stated that it would be unlikely for the emergency room to prescribe a narcotic pain medication to someone in that state because it could further decrease their level of consciousness. Watts stated that he reviewed Employee's medical records and testified that he had been given four repeated doses of a narcotic pain medicine called Fentanyl which is a strong narcotic. *Tr. Vol II, 22-24.* Based on the record, in Watts' opinion, it did not appear that any specific precautions were made in the emergency room to address intoxication and further stated that a person with an alcohol content of .35 would likely score a 10-14 on the Glasgow Coma Scale. *Tr. Vol II, 26-28.*

On cross-examination, Watts acknowledged that an individual with alcohol abuse problems could potentially have a higher tolerance for alcohol. Upon redirect examination, he stated that chronic alcohol abusers often have liver failure, kidney failure or other medical problems like skin problems and hair loss. During re-cross examination, Watts testified that chronic elevation in liver enzymes could be a symptom of chronic alcohol use. *Tr. Vol II, 32-34.* Watts also testified that when drawing blood for alcohol levels he cannot use an alcohol swab to clean the surface because the alcohol would 100 percent taint the outcome of the test and show alcohol where there was no alcohol in the blood and would invalidate the test. *Tr. Vol II, 35-37.* Watts further explained that if he was unaware that a patient was intoxicated, he would have no problem giving them a narcotic pain medication. *Tr. Vol. II, 39.*

¹³ Meaning a Blood Alcohol level above .3.

On re-cross examination, Watts testified that in reviewing Employee's medical records, there was no indication that the disinfectant wipes used on him contained alcohol. Watts stated that he has seen alcohol wipes taint blood samples and cause a patient who was already intoxicated to maintain the same level of alcohol during a redraw of blood twelve to fifteen hours later when the level should have dropped, because alcohol was used to clean the skin. Watts would be surprised to learn of a 2017 study concluding that using ethanol-containing antiseptics before venipuncture are not considered important causes of false positive result of alcohol. *Tr. Vol. II, 39-43*. Lastly, Watts testified that there is a possibility that someone who does not have alcohol in their blood can have a test returned that reads .357 BAL given a certain set of conditions. *Tr. Vol. II, 45-47*.

Gregory Green, Jr. (“Employee”) *Tr. Vol II, pp. 48-91*

Employee worked as a Firefighter/EMT with the Department since September 17, 2007. Employee maintained that he was not intoxicated on the day of the incident and did not have a sip of alcohol that day. Employee stated that his appearance in the cell phone video was a result of being assaulted and struck in the head. He further testified that he suffered a broken jaw, abrasions on his head and face, and a bruise on his right shoulder from the assault. Employee stated that he had a permanent plate and six screws placed in the left side of his face because of the assault. Employee testified that he had three surgeries between August 15, 2017 and December 27, 2017, and experienced significant pain in between the procedures. He was prescribed a few medications and stated that his memory was affected by the assault and was spotty when he was asked questions. *Tr. Vol. II, 48-51*.

Employee testified that he recalled driving to the scene of the incident, walking through the door of the apartment and asking where the child was located. Employee stated that his memory of what happened next was spotty, but he recalled trying to get to the ambulance after walking out of the back of the house and seeing people in front of him outside. Employee asserted that he was struck as he started to walk up the stairs and remembers sitting on the curb and getting evaluated by his colleagues.

On cross-examination, Employee testified that he was not sick on August 13, 2017, and did not know what his partner Firefighter Turner meant when he reported in the video that Employee was sick that day. Employee asserted that the video on Instagram was shot after he was assaulted. Employee reviewed his medical record from MedStar Washington Hospital Center and read aloud, “. . . .ETOH was 357. U tox, negative. Patient reported that he had gone out the previous night.”¹⁴ Employee testified that he made that statement because he was asked what he had done the night before and he was not trying to explain his blood alcohol level. *Tr. 58-62*. Employee testified that he did not have any explanation as to why he was assaulted and not his partner at the scene of the incident. Employee denied having been previously attacked or having issues in that neighborhood before the day of the incident. Employee admitted to having seizures in 2010 and 2012 and testified that he had used alcohol heavily around the time of both seizures. *Tr. Vol II, 63-65*.

¹⁴ See Administrative Record (“AR”), Tab C, Bates Stamp number 287. The documents submitted with Agency’s Answer on September 14, 2018, will be referred to as the “Administrative Record.”

Employee further testified that he stayed in the house the night before, watched TV, and drank in moderation until about midnight or one o'clock AM. Employee stated that he was assaulted and diagnosed with a concussion, but did not recall if an alcohol swab was used when they drew his blood for the blood alcohol test. *Tr. Vol II, 66-69.* Employee testified that he was in a weekly program at PFC, based on a strong suggestion from the doctors at PFC. Employee stated that he voluntarily attended a prior program in 2013 and reported that he was getting better after treatment. Employee admitted to getting a DWI in 2012 and attending another program in 2017 because it was highly recommended. *Tr. Vol II, 70-72.* Employee further testified that he was not ordered to attend the Internal Affairs interview, so he did not go because he was in pain. He asserted that Chief Douglas informed him that there was paperwork that he could email to him instead of attending, but Chief Douglas never got back to him with regard to the interview. *Tr. Vol II, 77-79.*

On cross examination, Employee testified that it was possible that alcohol was still in his system from the drinks he had from the night before, but he felt comfortable going to work the next day and getting behind the wheel. Employee testified that he does not believe he has a problem with alcohol. *Tr. Vol II, 81-83.* Employee responded to a written letter from March 22, 2013, where it was documented that his mother said, "enough is enough." Employee remarked that he did not know why his mother would say that. *Tr. Vol II, 84-86.*

Timothy McGann ("McGann") *Tr. Vol. II, pp. 91-101*

Mr. McGann served as a Lieutenant with Engine 30 and has been with Agency for approximately 14 years. McGann shared a shift with Employee at Agency but was not his direct supervisor. McGann testified that Employee was a good and dependable worker. McGann stated that he saw Employee the morning of the incident and nothing seemed amiss.

On cross examination, McGann testified that Employee appeared different than usual on the scene and Employee's mental state was different from when he had spoken to him earlier that morning. McGann's first impression of Employee when he observed him on scene was that he has been roughed up and jumped since the 10-33 call went out. McGann testified that he may have stated in his internal affairs interview that Medic Bladtzien mentioned to him that he may have smelled alcohol on Employee's breath. McGann could not say with certainty who he heard it from but he testified that he was 85 percent certain Medic Bladtzien made the comment. *Tr.96-98.*

Ericka Sellers (By phone) ("Sellers") *Tr. Vol. II, pp. 101-108*

Sellers worked as an EMT Medic and testified that she interacted with Employee the morning of the incident. EMT Sellers testified that prior to the incident she did not notice anything out of the ordinary about Employee and stated that he was being his normal self. She stated that she responded to the scene of the incident with her partner, Joe Bladtzien, and placed Employee on a stretcher, put him in the ambulance, and took his blood pressure. Sellers testified that she did not smell alcohol on Employee at that time.

On cross-examination, EMT Sellers testified that she was asked by Sergeant Morton to do a special report stating what happened that day, but denies hearing anyone at the scene mention that Employee was under the influence of alcohol. *Tr. 102-107*.

Stephen Gerber (“Gerber”)*¹⁵ *Tr. Vol II, pp. 108- 115

Gerber submitted a declaration and Agency’s counseled examined him under oath to ask follow-up questions about his declaration. Gerber is a Firefighter Paramedic with DC FEMS, but is currently on approved leave without pay from the Agency and working at George Washington Hospital.

Gerber testified that he has a birth defect called encephalocele that resulted in the incomplete formation of his sinus cavity and stated that there are times that people can smell things that he does not smell. He stated that because of this, unless a patient admits to alcohol use, he does not include it in his record. *Tr. Vol. II, pp 109-111*. Gerber testified that he believed that he told Paramedic Bladtzien that he smelled alcohol. However, he did not mention his impaired sense of smell during his Internal Affairs interviews on October 4, 2017, because it "was not at the front of his mind." Gerber testified that he amended his statement shortly before the scheduled Trial Board Hearing because his impairment suddenly came to mind during his conversation with Employee.

Whether the Trial Board’s decision was supported by substantial evidence.

Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.¹⁶ The D.C. Court of Appeals has 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.¹⁷

It is undisputed that Employee responded to 271 37th Street, SE to assist with a three-year old child who fell off a bed. The facts of this case, as presented by both parties, diverge as to whether Employee was under the influence of alcohol when he responded to the scene and at what point in time Employee was attacked by unknown assailants. There is no dispute that Employee was in fact attacked while on the scene of the incident.

Dr. Malomo, a doctor with Agency’s Police and Fire Clinic (“PFC”), testified that she reviewed Employee’s medical records from MedStar hospital after being admitted for the August 13, 2017 incident. Upon review of Employee’s medical records, Dr. Malomo testified that Employee received a toxicology screening, a CT scan, and was diagnosed with a mandible fracture. The results of Employee’s toxicology screening and blood tests, which were drawn at 1:55 pm on August 13, 2017, resulted in a BAC of .357. Dr. Malomo surmised that Employee had likely consumed alcohol within three hours of his blood being drawn for the toxicology screening. Dr.

¹⁵ Gerber’s Declaration was first identified as an exhibit in *Tr. Vol I, p.200*

¹⁶ *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); *See also Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

¹⁷ *See Baumgartner v. Police and Firemen’s Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987).

Malomo further stated that the test results further suggest that Employee was intoxicated at 11:39 am on August 13, 2017, the time he responded to the call on 37th Street.

Employee argues that the Trial Board's findings are devoid of any evidence which considered the head trauma and assault that Employee suffered while on the scene to explain his disoriented disposition. Employee further points to the testimony of several of Agency employees who interacted with him the morning of August 13, 2017, who stated that Employee did not appear intoxicated at the firehouse. Specifically, Lieutenant Burke and Lieutenant McGann testified that they spoke with Employee the morning of August 13, 2017, and did not smell alcohol or notice anything amiss about him.¹⁸

The D.C. Court of Appeals has held that because alcohol intoxication is considered a matter of common knowledge, lay witnesses may render opinion testimony regarding alcohol intoxication.¹⁹ Agency's contention that Employee was under the influence of alcohol is corroborated by at least two witnesses on scene, Ms. Conner and MPD Officer Slaughter.²⁰ Because Conner smelled alcohol on Employee's breath, and perceived him to be intoxicated, she refused to allow him to render aid to her three-year old granddaughter. Conner testified that when Employee asked where the child was located, she noticed the smell of alcohol on Employee and declined to let Employee treat the child. Conner also testified that she observed Employee staggering up the steps.²¹ Conner then called upstairs for someone to call the ambulance and police because Employee was intoxicated and could not transport the child to the hospital. When Conner asked Employee's partner, Firefighter Turner, if he smelled alcohol on Employee, Firefighter Turner simply responded by saying, "I just started." Further, MPD Officer Slaughter can be heard on body camera footage saying "you can smell it," in apparent reference to alcohol on Employee's breath.²²

Conner had no motive to fabricate her observation that she smelled alcohol on Employee's breath or that she observed Employee stumbling up a set of stairs outside of her home after she refused to allow Employee to treat her grandchild. Additionally, video evidence, along with a video posted on Instagram of Employee being taunted by several civilians on the scene, appear to support the contention that Employee was under the influence. Employee argues that his appearance and disposition on this footage was a result of being assaulted by unknown assailants which left him disoriented. Employee further argues that the blood tests from the toxicology report were invalid and inaccurate. To support this position, Employee seems to rely on the testimony of Watts who has worked as an ER Nurse for approximately nine (9) years in Prince William County, Virginia. Watts testified that when drawing blood for BAC tests, he cannot use an alcohol swab to clean the surface because an alcohol swab would taint the outcome of the test and show alcohol in a person's system when the person never actually consumed alcohol, thus invalidating

¹⁸ See AR Tab Q, at 11, 93-94.

¹⁹ *Durant v. United States*, 551 A.2d 1318 (D.C.1988).

²⁰ AR Tab P at 144; Flash Drive-18.02.05 BWC, 20170813-10-33_DCFD-177_37TH_ST_SE at 04:00-04:46.

²¹ See AR Tab P, Tr. Vol I, 144-147.

²² Agency's Brief, Attachment, Flash Drive-18.02.05 BWC, 20170813-10-33_DCFD-177_37TH_ST_SE at 04:00-04:46 (March 15, 2019). The body worn camera footage from various personnel on the scene was submitted with Agency's brief on March 15, 2019. Although the body camera footage is not a part of Agency's Administrative Record submitted to OEA, the transcript and the Findings of Fact and Recommendation issued by the Trial Board (Administrative Record, Tab R) indicate that the body worn camera footage was considered as part of the evidence.

the test.²³ Watts was not present at MedStar during the administration of Employee's toxicology tests on August 13, 2017, and has no direct knowledge of what type of swab was used at the venipuncture site. Further, Watts, nor Employee, presented any evidence that disinfectant wipes containing alcohol were used during the administration of Employee's toxicology tests at MedStar on August 13, 2017. The suggestion that a swab containing alcohol was used on the venipuncture site appears to be speculation. Accordingly, there is nothing in the record to support Employee's position that the toxicology test was improperly administered other than speculation to explain the high BAC test results.

Based on the observation of Conner and MPD Officer Slaughter (through her body camera), who observed the smell of alcohol on Employee and acting in a manner consistent with being under the influence of alcohol, coupled with Employee's toxicology report results of a .357 BAC, I find that there is substantial evidence in the record to support the Trial Board's findings. Furthermore, I find that there was substantial evidence for Agency to sustain Charges 1 and 2, as set forth above, against Employee.

Whether there was harmful procedural error.

Employee contends that Agency committed harmful procedural error when it considered evidence of Employee's past discipline and medical history and limited the testimony of Employee's expert witness—Watts, who was an emergency room Registered Nurse. Further, Employee asserts that because Agency's key witness, Conner, dismissed herself from the hearing in the middle of cross-examination²⁴, that it was a detrimental procedural due process error for the Panel to rely on her testimony despite there being inconsistencies in her version of the story presented to law enforcement and her testimony at the Trial Board.

Employee asserts that the Trial Board committed a procedural error when it limited the testimony of his expert witness, Mr. Watts, who is a registered nurse and had previously administered blood drawings as part of toxicology reports. Specifically, Employee maintains that the Trial Board incorrectly limited the testimony concerning the drawing of blood during lab tests (toxicology testing). Because Watts did not have direct or first-hand knowledge of the procedures employed in the instant case regarding the drawing of blood, Agency objected on the grounds of relevance. The Trial Board then stopped the witness from answering questions regarding the procedures for performing a blood test as Watts had no relevant knowledge of the procedures used when Employee's blood was drawn on August 13, 2017.

It is uncontroverted that Watts was not present during the administration of blood tests on Employee on August 13, 2017. Thus, Watts was not aware of what procedures were followed in conducting the blood tests. Employee asserts that the BAC test results were inaccurate; however, Employee offers no direct evidence that the BAC tests results were unreliable other than asserting that a .357 BAC is "implausible, because were that true, Employee would have been in a coma, vomiting, or incoherent."²⁵ However, Dr. Malomo testified that, "the more tolerant an individual

²³ See AR Tab Q, Tr. Vol II, 35-37.

²⁴ See AR Tab P, Tr. Vol 1, pp. 150-166

²⁵ Employee Brief, at 10 (May 8, 2019).

is of alcohol, the more they are able to [] function[] at higher levels.”²⁶ Although Dr. Malomo testified that a person with a .4 BAC (even most heavy users) lose consciousness, the evidence *does not* support that Employee’s BAC was a .4. Employee further speculates that an alcohol swab was used on the venipuncture site without any evidence supporting such contention. Moreover, Employee did not present any evidence that *had* an alcohol swab been used at the venipuncture site, that it would have resulted in a .357 BAC result. Because Employee’s expert witness, Watts, did not have any direct knowledge regarding the procedures used in the blood test performed on Employee on August 13, 2017, I find that the Trial Board did not commit a harmful procedural error when it limited the testimony of Employee’s expert witness on the grounds of relevancy.

Additionally, Employee maintains that the Trial Board improperly considered his 2016 DUI arrest and past medical history regarding alcohol abuse. Employee received an 80-hour suspension effective August 22, 2016, for a DUI infraction. Employee argues that his DUI from 2016 should not have been allowed to be considered by the Trial Board because it was not relevant to the instant case nor could it have been used to establish a pattern or practice. Additionally, Employee maintains that the Trial Board improperly considered Employee’s medical treatment for alcohol withdrawal seizures that occurred between 2010 and 2015. Employee argues that allowing this evidence to be considered by the Trial Board improperly colored their view of Employee, despite the fact that these occurrences were years prior to the facts giving rise to the instant case.

The undersigned disagrees with Employee’s assertion. Although Employee did not drive to the scene in the instant case, his 2016 DUI arrest speaks to his propensity to exercise poor judgment when it comes to the consumption of alcohol—a trait certainly relevant in the instant case. Employee’s alcohol withdrawal seizures and medical treatment pertaining to alcohol abuse have probative value addressing his tolerance levels. Employee’s history with alcohol cannot be ignored as the consumption of alcohol is largely the basis for the adverse action against Employee. Accordingly, I find that the Trial Board did not commit harmful procedural error when considering this evidence.

Lastly, Employee asserts that the Trial board committed a detrimental procedural due process error when it relied on Conner’s testimony, despite her leaving the hearing in the middle of cross-examination. It is apparent that Conner became a hostile witness during cross-examination after testifying at length about what she perceived occurred on August 13, 2017. It appears that Conner excused herself from testifying on cross-examination when Agency’s counsel confronted her about what it perceived as inconsistencies in her story about when she observed Employee stumbling, and at what point she personally dialed 911 to inform them that she smelled alcohol on Employee. Employee further suggests that Conner only called 911 to report the smell of alcohol on Employee once he was assaulted by individuals known to Conner.²⁷ Nearly sixteen (16) pages of testimony was elicited from Conner during cross-examination by Agency’s counsel. Despite Conner leaving the hearing in the middle of cross-examination, it appears that the Trial Board credited Conner’s testimony when she testified that she smelled alcohol on Employee’s breath when he asked where the child was located. While Employee’s counsel was unable to

²⁶ See AR Tab P, Tr. Vol I, p. 32.

²⁷ Employee’s Brief, at 7 (May 8, 2019).

finish their cross-examination of Conner, they were not completely deprived of confronting Conner's supposed various statements during cross-examination

As previously stated, the undersigned must generally defer to the Trial Board's credibility determinations.²⁸ The inconsistencies of Conner's testimony asserted by Employee seem to stem from Employee's argument and belief that Conner only observed Employee staggering *after* he was assaulted rather than when he initially entered the home to render aid. Because Conner observed an odor of alcohol when Employee asked where the child was located, he was denied access to the child. Further, Employee asserts that Conner gave inconsistent statements regarding the sequence of events leading up to her calling 911 and informing them that she smelled alcohol on Employee.

I do not find Employee's argument that Conner called 911 to report the smell of alcohol on Employee *after* he was assaulted by individuals known to her to be persuasive. Employee offers no plausible explanation as to why he would be assaulted without provocation. The more conceivable explanation was that Employee was assaulted when he attempted to render aid to a three-year old child while under the influence of alcohol. While the conduct of Employee's assailants is inexcusable, it is the more rational explanation as to why Employee was assaulted. Accordingly, I do not find that the Trial Board committed harmful procedure error when it credited Conner's testimony despite her leaving the hearing in the middle of her cross-examination.

Whether Agency's action was done in accordance with applicable laws or regulations.

Employee asserts that removal was excessive and an inappropriate penalty under the circumstances. Specifically, Employee contends that the Trial Board's analysis of the *Douglas* factors²⁹ is unsupported by the record and many of the factors lack a sufficient explanation. Based on the Trial Board's findings, Agency imposed termination of Employee's position. The

²⁸ *Pinkard*, 801 A.2d 86 (D.C. 2002).

²⁹ See *Douglas v. Veteran Administration*, 5 M.S.P.B. 313 (1981); The *Douglas* factors are:

- (1) The nature and seriousness of the offense, and its 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 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

undersigned may only amend Agency's penalty if Agency failed to weigh relevant factors or Agency's judgment clearly exceeded limits of reasonableness.³⁰ When assessing the appropriateness of a penalty, OEA is not to substitute its judgment for that of Agency, but rather ensure that managerial discretion has been legitimately invoked and properly exercised.³¹

At the conclusion of the Adverse Action Panel/Trial Board, the Panel issued its Findings of Fact and Recommendation, which also includes an analysis of the *Douglas* factors. While Employee may disagree with the weight and analysis provided for each factor, the *Douglas* factor analysis provides sound reasoning for the weight given to each factor and illustrates that each relevant factor was considered in the Trial Board's termination recommendation. As such, I find that the Trial Board did not exceed the limits of reasonableness in its recommendation to terminate Employee and that Agency's action was done in accordance with all applicable laws and regulations.

ORDER

Accordingly, it is hereby **ORDERED** that Agency's removal of Employee from his position as a Firefighter/EMT is **UPHELD**.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge

³⁰ *See Id.*

³¹ *Id.*