THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
SELENA WALKER,	)	
Employee	)	OEA Matter No. 1601-0133-06
	)	
v.	)	Date of Issuance: June 26, 2007
	)	
D.C. FIRE AND EMERGENCY MEDICAL SERVICES,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Administrative Judge

Frederic W. Schwartz, Jr., Esq., Employee Representative
Ross Buchholz, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Prior to her removal, Selena Walker ("the Employee") was employed by the District of Columbia Fire and Emergency Medical Services ("the Agency") as an Emergency Medical Technician ("EMT") DS-699-7. By notice dated June 16, 2006, the Employee was notified of Agency's proposal to remove her from service based on a charge of "any on-duty or employment-related act or omission that interferes with the efficiency or integrity of government operation". By letter dated July 10, 2006, Adrian H. Thompson, then Fire and Emergency Medical Services Chief, notified the Employee of Agency's final decision affirming Employee's removal effective on July 14, 2006. On August 10, 2006, the Employee timely filed a petition for appeal with the Office of Employee Appeals ("OEA" or "the Office") contesting the Agency's adverse action of removing her from service. A prehearing conference and multiple status conferences were held in this matter. During the course of these proceedings, I initially decided that an evidentiary hearing was required. However, after carefully considering the Employee's Motion for Summary Reversal, the Agency's Opposition to Employee's Motion for Summary Reversal, and Employee's Reply to Agency's Opposition to Her Motion for Summary Reversal, I have since decided that no further proceedings are warranted[1]. The record is now closed.

[1] Of note, I provided both parties an opportunity (verbally) to supplement their briefs in light of my

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 629.1, 46 D.C. Reg. 9317 (1999) states:

> The burden of proof with regard to material issues of fact shall be by a preponderance of the evidence. "Preponderance of the evidence" shall mean:
>
> > That degree of relevant evidence which a reasonable mind, considering the record as a whole, would accept as sufficient to find a contested fact more probably true than untrue.

OEA Rule 629.3 *id.* states:

> For appeals filed on or after October 21, 1998, the Agency shall have the burden of proof, except for issues of jurisdiction.

ISSUE

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

FINDINGS OF FACT, ANALYSIS AND CONCLUSION

The following findings of facts, analysis and conclusions of law are based on the documentary evidence as presented by the parties during the course of the Employee's appeal process with this Office.

The Employee contends that the Agency's adverse action of removing her from service should be reversed because the Agency failed to comply with Title V, Section 502, of the Omnibus Public Safety Agency Reform Amendment Act of 2004, D.C. Official Code § 5-1031 (2005 Supp.), which states that:

> Commencement of corrective or adverse action.

---

decision to not hold an evidentiary hearing. Both parties verbally opted to proceed without submitting any other documents.

> (a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Emergency Medical Services Department or the Metropolitan Police Department **knew or should have known of the act or occurrence allegedly constituting cause**. (**Emphasis added**).
>
> (b) If the act or occurrence allegedly constituting cause is the subject of a criminal investigation by the Metropolitan Police Department, the Office of the United States Attorney for the District of Columbia, or the Office of Attorney General, or an investigation by the Office of Police Complaints, the 90-day period for commencing a corrective or adverse action under subsection (a) of this section shall be tolled until the conclusion of the investigation.

The Employee further contends that by virtue of her position as an EMT with the Agency she is afforded the unique protection that is provided by D.C. Official Code § 5-1031. The Employee argues the Agency knew or should have known of the act or occurrence allegedly constituting cause "...no later than January 18, 2006... [yet] the action against [the Employee] was initiated on June 16, 2006, considerably beyond the statutory constraint." *See*, Employee's Motion for Summary Reversal at 8. Lastly, the Employee contends that since the instant matter did not lead to a criminal investigation of the Employee, D.C. Official Code § 5-1031 (b) is inapplicable to the instant matter.

The Agency does not dispute the validity or the applicability of D.C. Official Code § 5-1031 (a) to this matter. The Agency argues that the D.C. Official Code § 5-1031 (a) time limit did not toll in the instant matter until the District of Columbia Office of the Inspector General ("OIG") completed its investigation and report regarding this matter. The Agency further argues that D.C. Official Code § 5-1031 (a) had not tolled until the Agency had collected sufficient evidence to substantiate a removal action against the Employee. The Agency cites *Graves v. Office of Employee Appeals*, 805 A.2d 245 (D.C. 2002), as providing authority for this argument[2]. Considering the record as a whole, the Agency asserts that the commencement of its adverse action against the Employee should be considered timely in light of D.C. Official Code § 5-1031 (a). The Agency does not address whether D.C. Official Code § 5-1031 (b) is applicable to the instant matter. Based on the arguments as presented by the parties in their respective legal briefs, I find that D.C. Official Code 5-1031 (b) is inapplicable to the instant matter.

In order to better assess how D.C. Official Code § 5-1031 applies in this matter a timeline of salient (and tragic) events must be discussed in order to accurately ascertain when the Agency knew or should have known of the act or occurrence allegedly

[2] The substance of Agency's argument relative to the *Graves* decision shall be discussed in Note 9 *infra*.

constituting cause in the instant matter[3].

January 6, 2006

On this date, according to *Respondent Responses to the Appellant's Petition for Appeal*, the Employee, along with Firefighter/EMT Michael Deems responded to a medical call at 3859 Gramercy Street, Northwest for what was termed as a "man down" situation. The person who was the subject of this call was later identified as Mr. David Rosenbaum ("Rosenbaum" or "the patient"). Rosenbaum was initially classified as medical priority three[4]. According to Agency's regulations, a patient would normally be transported to the closest medical facility to an incident. Given the location of this incident, it is the Agency's position that the closest hospital to this incident was Sibley Hospital. However, Rosenbaum was actually transported to Howard University Hospital, which is in fact further away than Sibley Hospital, relative to 3859 Gramercy Street, Northwest. Tragically, Rosenbaum passed away as a result of the injuries he endured after he had been transported to Howard University Hospital.

On this same day, the Employee, among others, was required to submit a memorandum to Agency officials[5] regarding her actions in responding to the above referenced medical call. In a nutshell, the Employee relates that she responded to the aforementioned medical call and further relates that Rosenbaum was incoherent at the time of their arrival. She further relates that Rosenbaum was subsequently loaded onto a stretcher and after her partner Deems assessed Rosenbaum's condition as medical priority three, he was then transported to Howard University Hospital.

January 10, 2006

On this day, the Employee submitted another memorandum to then Agency Chief Adrian Thompson relative to the January 6, 2006, incident involving Rosenbaum. The sum and substance of this memorandum is not markedly different from Employee's January 6, 2006, memorandum with the notable exception that the Employee related that "[t]here was no particular reason for transporting [Rosenbaum] to Howard rather than Sibley."

January 11, 2006

On this day, the Employee submitted another memorandum relative to the January 6, 2006, incident involving Rosenbaum to a different Agency official[6], it reads as

---

[3] The events that are listed in this Initial Decision are not all of the events that have occurred in the instant matter. The events listed herein are only the relevant events that must be assessed in order to reach an appropriate decision in this matter.

[4] "Patients are assigned a transport code based on their medical status... Code 3 is assigned to low priority patients with stable medical conditions." *See* Respondent's Responses to the Appellant's Petition for Appeal at Note 1.

[5] Amit Wadhwa, MD, Medical Director, was the Agency official to whom the responsive memorandum was addressed.

[6] This memorandum was addressed to Douglas L. Smith, Jr., AFC – Operations. This memorandum

follows:

> Based on the reports given by both E-20 and their F/F-EMT and my partner F/F-EMT Deems following their assessments, the patient was deemed a low priority and by protocol the patient was transported to Howard University Hospital. At no time was any suggestion given by F/F-EMT Deems as to what hospital the patient should be transported.

January 18, 2006

The Agency convened a panel ("Interview Panel") in order to interview all of the Agency's employees' who were on the scene responding to the aforementioned medical call. The Interview Panel consisted of the following persons: Douglas Smith, Assistant Fire Chief, Operations; Jerome Stack, Battalion Chief for Operations, EMS Division; Rafael Sa'adah, Acting Battalion Fire Chief for Services ("Sa'adah"), EMS Division; Theresa Cusick, General Counsel, Fire and Emergency Medical Services Department; and Dr. Walter Faggett, Acting Chief Medical Officer, D.C. Department of Health. The Interview Panel interviewed the following persons: Firefighter/EMT-B Reginald Chandler; Firefighter Anthony Fields; Firefighter/EMT-A Michael A. Roy; Firefighter/EMT-B Frelimo Simba; Firefighter/EMT-B Michael Deems; and the Employee.

The notes from this interview were codified in a seven page memorandum dated January 24, 2006, by Sa'adah ("Interview Memo"). The salient portions of the Interview Memo shall be reproduced and discussed below.

January 24, 2006

The aforementioned Interview Memo was sent to then Fire and Emergency Medical Services Chief Adrian H. Thompson ("Thompson") on this date. I take note that each page of this document is labeled "Confidential Prepared in Anticipation of Litigation" and as was stated previously, it memorialized and summarized the interview of the aforementioned Agency personnel who responded to the medical call at 3859 Gramercy Street, Northwest. Of paramount relevance to the instant matter are the notes of the interview of the Employee and Firefighter/EMT-B Michael Deems ("Deems").

The following is excerpted, in pertinent part, from the Interview Memo regarding the Employee's interview with the Interview Panel:

> [The Employee] states that she was driving A-18 for the first half of the 12-hour shift beginning the evening in question... [The Employee] reports that A-18 was at Providence Hospital after dropping off a patient when they received the dispatch for 3859

---

incorrectly references the date as January 11, 2005. I find that this is a mere typographical error and that the corrected date should read January 11, 2006.

> Gramercy Street, NW...
>
> [The Employee] denies any involvement in patient assessment or patient care during the entire course of this call. She states: "My partner said: 'I've got it,' so I assumed he had it."...
>
> [The Employee] states that [Deems] told her that the patient was a "[transport priority] Code 3." [The Employee] states that after checking hospital status, she decided to transport the patient to "Hospital 5" (Howard University Hospital). When asked why she chose this transport destination, [the Employee] stated variously: "I don't know," and "I don't remember." Asked if she remembers what other hospitals were open when she checked for hospital status, she stated: "I can't remember what other hospitals were open." Asked if she knew how to navigate to Sibley or Georgetown Hospital from upper northwest, she stated that she did.
>
> Interview Memo at 4-5.

The following is excerpted, in pertinent part, from the Interview Memo regarding Deems' interview with the Interview Panel:

> Deems states that the MPD officer asked him what hospital they would be transporting the patient to. [Deems] states that he told the MPD Officer that they were going to Sibley Hospital, as it was closest. He states that [the Employee] then said: "No, we are going to Howard."
>
> When questioned further by the interviewers about the basis for the selection of Howard University Hospital as a transport destination, [Deems] states: "Look you want to know the truth? She [the Employee] told me before we reached the scene that 'We're going to transport this patient to Howard, because she needed to run her errands in that neighborhood, including going to the ATM and going by her house." He states that he ultimately deferred to [the Employee] on this issue because; "She was the ACIC (Ambulance Crewperson in Charge] and she has higher medical certification than me." He states that it was his understanding that because [the Employee] is an EMT-A and he is an EMT-B that she was the officer in charge of the unit and had authority over him.
>
> [Deems] variously describes his mental impression of the patient being a [transport code] Priority 2 or Priority 3. He states that the final transport code of Priority 3 was assigned by [the Employee] and that she did not ask for his input. He states that [the

> Employee]: "Got lost leaving Gramercy St." and that he was giving her driving directions through the window in the back of the ambulance...
>
> [Deems] states that after leaving Howard University Hospital, [the Employee] then drove A-18 to the ATM and to her residence, where her child "came down and gave her some medicine while we waited outside." ...
>
> Interview Memo at 6-7.

The following is an excerpt from the Interview Memo regarding the Employee's follow-up interview with the Interview Panel[7]:

> During re-interview, [the Employee] was asked if she recalls telling her partner before arriving at Gramercy Street that she was going to transport the patient to Howard and then needed to go to the ATM and her residence. She replies that she "doesn't recall" this conversation. She admits that she "probably" went to the ATM after dropping off the patient at Howard, but "doesn't recall" going to any other destinations.
>
> Interview Memo at 7.

June 15, 2006

On this date, the OIG released to the Agency a special report titled "Emergency Response to the Assault on David E. Rosenbaum" ("OIG Report"). This report memorialized the findings of the OIG investigation into the District of Columbia government response in this matter, including but not limited to, the response by both the Agency as well as the Metropolitan Police Department. According to the OIG Report, the OIG investigation into this matter included reviewing and considering the aforementioned Interview Memo. As a result of the OIG Report, the Agency instituted the adverse action which underlies this Initial Decision.

June 16, 2006

On this date, by notice ("Proposed Removal Notice"), the Employee was informed of Agency's proposed adverse action of removing her from her position of record for the cause of "any on-duty or government-related act or omission that interferes with the efficiency or integrity of government operations". According to the Proposed Removal Notice, the facts and circumstances that support Agency's action are reproduced in relevant portion as follows:

> On January 6, 2006, you and your partner were dispatched on a

[7] I note that this follow-up interview occurred after the Interview Panel heard Deems' account of the matter.

> medical call to 3859 Gramercy Street, N.W. for a priority three patient. The closest available hospital was Sibley Hospital. However, you made the decision to transport the patient to Howard University Hospital. The OIG report found that you decided to transport the patient to Howard University Hospital for personal reasons. Specifically, the report found that you made the decision to transport to Howard University Hospital so that you could retrieve something from your home. This is in violation of the emergency medical protocols which require that patients be transported to the nearest appropriate hospital. District of Columbia Fire and EMS Emergency Ambulance Bureau states on page 26 section 15. A. Hospital Destination:
>
> > Refers to the medical protocol on selection of the hospital to which patients shall be transported to the closest appropriate emergency department. If because of compelling circumstances it is deemed necessary by the ACIC that the patient should be transported to a more distant emergency department, Medical Control will be established and authorization from the medical control physician obtained.
> >
> > This shall be fully documented on the F.D. 151 form...
>
> In your January 10, 2006, special report you stated that you "had no particular reason" for transporting to Howard University Hospital. **During a January 24, 2006 interview with Agency officials, you repeatedly stated that you "did not know" or "did not remember" why you went to Howard University Hospital. (Emphasis Added).**

After being notified of Agency's intent to proceed with said adverse action, the Employee went before a hearing officer and after receiving an adverse recommendation from the hearing officer and then a final notice of removal from the Agency, the Employee filed a petition for appeal with the OEA.

In defending the timeliness of the institution of its adverse action against the Employee[8], the Agency argues in pertinent part that:

> As a result of the OIG report, Agency 1) was able to resolve the discrepancy between Deems' statements and those of Employee, in favor of Deems; and 2) obtained previously undisclosed statements

[8] All Agency actions in the instant matter relate to the time requirements as enunciated in D.C. Official Code § 5-1031.

> from Employee that showed that she transported the patient to Howard for personal reason in violation of Agency protocols. Agency then knew of the act constituting cause for the adverse action and issued its Notice of proposed Removal the next day. Therefore, Employee's argument lacks merit.
>
> Agency's Opposition to Motion for Summary Reversal at 8. (**Emphasis in original**).

As a result of Employee's allegedly admitting to the OIG that she did not follow Agency protocols relative to her choice of which hospital to transport the patient to, the Agency seemingly argues that it did not know of the facts and circumstances that constituted cause in this matter until the OIG issued the OIG report. However, Agency seemingly neglects to address D.C. Official Code § 5-1031 (a) in its entirety, which provides in pertinent part that "no corrective or adverse action against any sworn member or civilian employee of the [Agency] ... shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the [Agency] knew or should have known of the act or occurrence allegedly constituting cause". The Agency argues that it only knew of the act constituting cause after receiving the OIG Report. The question that remains then, is when the Agency *should have known* of the act or occurrence that supported Agency's adverse action.

As was stated *supra*, on January 18, 2006, the Agency convened an Interview Panel that conducted a series of interviews of all Agency personnel who responded to 3859 Gramercy Street, Northwest, on January 6, 2006.

According to the Interview Memo, the Interview Panel received conflicting accounts from the Employee and Deems. In the memo, the Employee stated that "after checking hospital status, she decided to transport the patient to 'Hospital 5' (Howard University Hospital). When asked why she chose this transport destination, [the Employee] stated variously: 'I don't know,' and 'I don't remember'." *See*, Interview Memo at 5.

Whereas Deems, in relating his version of events to the Interview Panel, states that: "Look you want to know the truth? She [the Employee] told me before we reached the scene that 'We're going to transport this patient to Howard' because she needed to run her errands in that neighborhood, including going to the ATM and going by her house." *See*, Interview Memo at 6. Deems goes on to state to the Interview Panel that "after leaving Howard University Hospital, [the Employee] then drove A-18 to the ATM and to her residence, where her child 'came down and gave her some medicine while we waited outside.'" *See*, Interview Memo at 7.

Given this conflicting account of events, the Interview Panel re-interviewed the Employee regarding her alleged conversation with Deems about deciding to transport Rosenbaum to Howard University Hospital prior to her arriving to 3859 Gramercy Street, Northwest, and her subsequent travels after completing said transport. The Interview

Memo notes that the Employee "doesn't recall" this conversation as well as her admitting to the Interview Panel that she "probably" went to an ATM after transporting Rosenbaum to Howard University Hospital. *See*, Interview Memo at 7. As was stated previously, the notes from the Interview Panel were memorialized in a confidential memorandum which was sent to Thompson on January 24, 2006.

Having evaluated Agency's step-by-step process, whereby it assessed the Employee's professional actions on the occasion of the patient's death, I find that Agency's argument, that it complied with the time limits as enunciated in D.C. Official Code § 5-1031 (a) because it *knew* of the act or occurrence that constituted cause in the instant matter only *after* it received the OIG report, lacks merit[9]. As it relates to the instant matter, I further find that all of the elements of the underlying cause of action came into existence on January 6, 2006, as the Employee responded to the medical call and allegedly violated Agency's rules regarding where to transport the patient under said circumstances. Based on the foregoing timeline of relevant events, I further find that the Agency, at the very least, *should have known* of the act or occurrence that supported its adverse action against the Employee on January 18, 2006, when the Interview Panel concluded its interview of all Agency personnel who responded to 3859 Gramercy Street, Northwest on January 6, 2006.

The Interview Panel consisted of several high ranking Agency personnel, including Douglas Smith, Assistant Fire Chief, Operations; Jerome Stack, Battalion Chief for Operations, EMS Division; Sa'adah; and Theresa Cusick, General Counsel, Fire and Emergency Medical Services Department; among others. It was during this interview process that the Agency was first made aware that the account of event as provided by Deems conflicted with the Employee's version of events. I note that the members of the Interview Panel are generally involved with assisting Thompson in managing the Agency's workforce in all aspects of the Agency's mission, including but not limited to recommending Agency employee's for corrective or adverse actions. As such, any of

---

[9] Agency's attempt to buttress its argument by partially relying on *Graves* is unpersuasive. The Employee in Graves sole argument was, "that the period of 45 business days within which an adverse action could be commenced against him under the applicable provision of the CMPA, D.C. Code § 1-617.1 (b-1)(1) (1992) (repealed 1998) ... had expired by August 2, 1991. *Graves*, at 246. The Agency in *Graves* instituted its adverse action after it determined that it could prove the cause of "inexcusable absence without leave". *Id.* at 247. This was then defined by the D.C. Code and the District Personnel Manual (both being read in tandem) as being absent without official leave ("AWOL") for 10 consecutive days or more. The Agency waited for the Employee to not report to work for 10 consecutive days before considering his action as acceptable cause for removal. The Employee contended that the Agency knew before he was absent for 10 consecutive work days that it had cause for removal. As such, the employee in *Graves* argued that the Agency's commencement of its adverse action was untimely. Conversely, the Agency contended that since it waited until the Employee was AWOL for 10 consecutive days or more before attempting to impose its adverse action, that said action was timely. The Court ultimately agreed with the Agency, citing *Doe v. District of Columbia Comm'n on Human Rights*, 624 A.2d 440 (D.C. 1993), in noting, *inter alia*, that "a statute of limitation begins to run at the time the right to maintain the action accrues, i.e., from the time that all the elements of a cause of action have come into existence." Wherein in *Graves*, the elements of the cause of action did not accrue until he had been AWOL for 10 days or more, such is not the case in the instant matter.

these officials could (and/or should) have conducted further inquiry, investigation, or action in an efficient and expeditious manner, so as to potentially comply with the time limits for instituting such actions as mandated by D.C. Official Code § 5-1031.

As is mandated by D.C. Official Code § 5-1031 (a), I further find that the Agency, if it intended to do so, should have instituted its adverse action against the Employee within 90 days of January 18, 2006, not including Saturdays, Sundays, or legal holidays. By my calculation, this would require the Agency to have proposed said action on or before May 26, 2006.

"The starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 753, 756 (1975). "A statute that is clear and unambiguous on its face is not open to construction or interpretation other than through its express language." *Caminetti v. United States*, 242 U.S. 470 (1916); *McLord v. Bailey*, 636 F.2d 606 (D.C. Cir. 1980); *Banks v. D.C. Public Schools*, OEA Matter No. 1602-0030-90, *Opinion and Order on Petition for Review* (September 30, 1992), _ D.C. Reg. __ ( ). The language within D.C. Official Code § 5-1031 is clear and unambiguous and its time limits are mandatory in nature, which considering the record as whole, the Agency failed to comply with.

In the instant matter, the Agency, through its Proposed Removal Notice dated June 16, 2006, informed the Employee of its proposed adverse action of removing her from her position of record. I further find that this date is well beyond the 90 day time limit as mandated by D.C. Official Code § 5-1031 (a) for instituting adverse actions against Agency employees.

Based on the foregoing, I CONCLUDE that the Agency's adverse action of removing the Employee from service must be REVERSED[10].

ORDER

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

1. Agency's action of removing the Employee from service is REVERSED; and

2. The Agency shall reinstate the Employee and reimburse her all back-pay and benefits lost as a result of her removal; and

3. The Agency shall file with this Office, within thirty (30) days from the date on which this decision becomes final, documents evidencing compliance with the

[10] Because this initial decision is based solely on the legality of Agency's action relative to D.C. Official Code § 5-1031, I am unable to address the factual merits of this matter.

terms of this Order.

FOR THE OFFICE:

Eric T. Robinson, Esq.
Administrative Judge