

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
DONNALLE D. HACKLEY,)	
Employee)	OEA Matter No. 1601-0076-07
)	
v.)	Date of Issuance: June 9, 2009
)	
D.C. FIRE AND EMERGENCY)	ROHULAMIN QUANDER, Esq.
MEDICAL SERVICES)	Senior Administrative Judge
DEPARTMENT,)	
Agency)	
_____)	

Lathal Ponder, Esq., Employee Representative
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Donnalle D. Hackley (the “Employee”), former employee of the D.C. Department of Fire and Emergency Medical Services (“FEMS”) was employed as a Firefighter, FS-081, until he was terminated, effective April 27, 2007, based upon allegations of his failure to adhere to the terms of his Last Chance Agreement (“LCA”), which required him to pass a fitness for duty examination.

In response to the aforementioned adverse action, Employee, through counsel, submitted a letter, dated May 31, 2006, stating his intent to resign from his firefighter position with Agency. *See Agency Record at Tab 2.* Employee subsequently changed his mind, electing to pursue an evidentiary hearing before a Fire Trial Board (the “FTB”). The FTB convened on June 16, 2006, but the hearing was continued until September 29, 2006, to accommodate Employee’s unavailability, due to a personal medical crisis. However, the FTB, when confronted with a day-of-hearing Motion for Continuance, and while evaluating whether to grant the continuance, received testimony from Dr. Janice Berry Edwards, Employee’s therapist, who testified that, based upon Employee’s depression and suicidal tendencies at the moment, she determined that she could not allow him to attend or participate in his FTB evidentiary hearing. The FTB granted the continuance, convening and completing the evidentiary hearing on September 29, 2006, at which time the below noted charges and specifications were considered.

CHARGES AND SPECIFICATIONS AGAINST EMPLOYEE

Charge 1: Absence Without Official Leave (AWOL) / Abandonment of Position

Specification 1: In that said Firefighter Donnalle D. Hackley, an employee of the District of Columbia Fire and Emergency Medical Services Department and subject to the rules and orders governing said Department has remained on unauthorized absence since January 30, 2006.

Firefighter Hackley was placed back to full duty by the Police and Fire Clinic on January 24, 2006. He reported sick under the Minor Illness Program (MIP) on his next scheduled tour, January 26, 2006.

On January 30, 2006, Firefighter Hackley was scheduled to work, but failed to report. He did not request leave or notify his officer of his absence, nor did he report to the Clinic for medical illness. Firefighter Hackley has remained on unauthorized absence since January 30, 2006. His unauthorized absences have been charged to AWOL on the time and attendance records. Firefighter Hackley's continued AWOL has a negative impact on the efficiency of the service.

Charge 2: Violation of Article XI, Section 5 of the D.C. Fire and EMS Order Book

Specification 1: In that said Firefighter Donnalle D. Hackley, an employee of the District of Columbia Fire and Emergency Medical Services Department and subject to the rules and orders governing said Department did, nevertheless, on the 24th day of January 2006, fail to report his change in duty status.

According to the Police and Fire Clinic Data Record, Firefighter Hackley was placed back to full duty on January 24, 2006. However, he did not report his change in duty status to his officer. He is therefore in violation of Article XI, Section 5 of the D.C. Fire and EMS order Book, which states:

Any member whose duty status is changed by a PFC physician shall immediately notify, or cause to be notified, the on-duty company officer/immediate supervisor of their station and, if on detail to another division, their immediate supervisor. In the Fire Fighting Division, if unable to reach the on-duty company officer, the member shall notify: (1) their on-duty battalion commander, (2) any on-duty battalion

commander, or (3) the division commander
in that order.

Charge 3: Violation of Article XI, Section 33 of the D.C. Fire and EMS Order Book.

Specification 1: In that said Firefighter Donnalie Hackley, an employee of the District of Columbia Fire and Emergency Medical Services Department and subject to the rules and orders governing said Department did, nevertheless, on the 8th day of February 2006, fail to report to the Police and Fire Clinic (PFC) for a follow up medical appointment.

Firefighter Hackley did not contact the Medical Services Officer (MSO) to reschedule the appointment or notify the MSO of the need to cancel the appointment. He is therefore in violation of Article XI, Section 33 of the D.C. Fire and EMS Order Book, which states “[d]ue to emergency situations or unforeseen situations members must contact the Medical Services Officer (MSO) for permission to reschedule their appointments.”

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.

ISSUES

Whether the FTB’s decision was supported by substantial evidence, whether there was harmful procedural error, or whether Agency’s action was done in accordance with applicable laws or regulations.

SUMMARY OF THE TESTIMONY

A/ Date of Hearing Motion for Continuance

On June 16, and September 29, a 2006, a three person FTB convened to consider the Charges and Specifications levied against Employee. Employee was represented by counsel on both occasions, but did not attend the June 16th proceeding. On that date, Employee's counsel requested a short notice day-of-hearing continuance, noting that Employee was gravely ill, and psychologically unable to endure the stress of participating in an evidentiary hearing on that date. The FTB received sworn testimony from Dr. Janice Berry Edwards ("Dr. Edwards"), Employee's doctor, and based upon said testimony, the continuance was granted. The proceedings were continued, and reconvened and concluded on September 29, 2006.

Testimony of Dr. Janice Berry Edwards (Employee's Witness, June 16, 2006)

Although Employee was not present, Dr. Edwards, of the Washington Center for Psychiatry, was present. Her *voir dire* included evaluating her credentials in forensic psychiatric work, her clinical practice, her experience in psychopharmacology, her 20 years of professional experience, including that she publishes extensively, and is licensed as an independent clinical social worker in Washington, D.C., and Maryland. She was accepted as an expert witness on behalf of Employee, and allowed to testify. She has also been previously qualified and testified on many prior occasions as an expert witness. The essence of her testimony was focused on the need to continue the hearing until Employee was both mentally and physically capable of attending and fully participating in the proceedings. Employee became Dr. Edwards's patient in about March 2006, which was after the February 8, 2006, missed fitness for duty scheduled examination, which event generated the eventual notice of proposed termination. *Transcript 1 ("Tr.1")*, Pp 6-8; 20-21.

B/ Agency's Case

Testimony of Lieutenant Dennis Blackwell

Lieutenant Dennis Blackwell ("Blackwell") works in the Police and Fire Clinic (the "PFC"). Among his job related duties is to monitor firefighters who fail to keep scheduled clinic appointments. Employee was returned to a full duty status on January 24, 2006. Based upon Employee's failure to keep his follow up fitness for duty appointment, scheduled for February 8, 2006, Blackwell generated a "No Show Report." As well, there was no indication in the PFC's written or telephone message records reflecting that Employee contacted the clinic either prior to or after that date. If so, the PFC's records would reflect his contacting this witness or the chief in charge of the clinic, to schedule a new examination date. This action did not occur. If he had called the PFC and left a voice mail message, either during office hours or after office hours, to explain his absence or seeking to reschedule his missed appointment, that effort would likewise be reflected in the PFC's records. *Tr. II, P.16; 19-20; Agency Exhib. #1.*

Testimony of Captain Lawrence Anderson

Captain Lawrence Anderson (“Anderson”) was Employee’s platoon commander, and kept the record of attendance for the platoon. After the incident in which Employee struck a pedestrian with his private vehicle in early January 2006, Employee became distraught. It was obvious that he was under some personal distress and upset related to the incident. After attempting to return to a working schedule, Employee went on sick leave for awhile, about January 30th, and remained in that status. Later, he failed to keep his mandated fitness for duty visit on or about February 8th. *Tr. II, Pp. 35; 37-40.*

C/ Employee’s Case

Combined Testimony of Lt. Gerald Burton, Capt. John M. Faulkner, Firefighter Namon Powell, Sgt. Tyrone Jenkins, Firefighter Kenneth C. Cole, and Firefighter Eric Jenkins

Employee called several fellow firefighters, including supervisory staff, to testify on his behalf. All of them had exemplary things to say about Employee, some repeated several times, painting a picture of a man who was described as motivated and a conscientious firefighter, who performed his duties in a professional manner; an all around good person, who was easy to work with; punctual and never AWOL; a man of high integrity who takes pride in his work, never placing either his fellow firefighter or a civilian in jeopardy. However, as a result of the incident in January 2006, when he struck a pedestrian, Employee’s demeanor changed, and he went downhill emotionally from that time forward. Apparently, he took the teasing from his fellow firefighters so personally, that he came to believe that he had lost the trust of his co-workers, and decided that they had lost faith and confidence in him, and that he was no longer competent enough to drive the fire engine. *Tr. II, Pp. 78-98.*

Testimony of LaTanya McLendon, Employee’s wife

LaTanya McLendon, Employee’s wife, testified about the emotional toll that the incident of striking a pedestrian had taken on her husband. Further, the ridicule he received from his fellow firefighters and officers, including incidents of co-workers placing a mannequin under the wheels of fire equipment, was not seen as a good natured joke. Rather, the anonymous act(s) inflicted greater emotional trauma upon her husband, who became more and more distraught. He felt that he was entitled to some compassion and understanding, and an appreciation for the emotional upset that he was enduring. Instead, the reverse became the case, causing him to believe that he had lost the confidence of his co-workers, and that they no longer had faith in him as their driver. As a result of the incident, and the manner in which Employee has been treated, he has been unable to work, with the resulting loss of family income. They are struggling financially, due to his loss of income. *Tr. II, Pp. 101-108.*

Testimony of Donnalie D. Hackley, Employee

Employee has been with Agency as a firefighter for several years, but as a result of the accident in January 2006, he felt incompetent, and that he could not fulfill his duties as a firefighter, which caused him to stop going to work. He admitted that, as a result of this incident and the emotional trauma associated with it, he was absent without official leave (AWOL) for a period of time. Initially, he took a day or two of leave, probably annual leave, but when the time was up, he was emotionally unable to bring himself to return to duty, and had a feeling of being not wanted, and that his co-workers had lost faith in him as a wagon driver. Further, he tried to

not let the teasing get to him, but some of the things that were said to him or about him, took their emotional toll. *Tr. II, Pp. 115-117.*

When he attempted to return to duty, about January 30, 2006, he was advised that there had been a change of duty status, and that he was mandated for a fitness for duty examination, which was scheduled for February 8th. Realizing that he was not going to be able to keep the appointment, he called the clinic, and left a message on an answering machine, to advise of his anticipated absence.¹ Sometime later, he sought the help of Dr. Janice Edwards, who diagnosed his condition as severe depression. He was mentally helped by his twice a week visits for three to four weeks, at \$150.00 per session, but ceased the visits when his personal funds ran out. Only later did he learn that his visits to Dr. Edwards might have been covered by his health insurance. As a result of learning this information, but not until after a several month break in time and medical follow up had been incurred, he sought the assistance of Brock Hanson, another doctor, who was continuing to treat the Employee for post-traumatic stress.² *Tr. II, Pp. 117-124.*

Employee, after a period of indecision, including some thought of tendering his resignation, or even taking a leave of absence while he sorted things out, decided that he definitely wanted to return to his job as a firefighter. Despite his admitted absence from his job site and duties, Employee never considered himself as having abandoned his job, in that he never neglected his job-related duties while on duty. He loved his job, working for the fire department, and especially helping people who were stressed at a time of great personal need. *Tr. II, Pp.124-126.*

FINDINGS OF FACT, LEGAL ANALYSIS, AND CONCLUSIONS OF LAW

The following facts are not in dispute:

1. The recommendation of the FTB was that Employee could be terminated as a result of having been found guilty of all three charges. However, the FTB also stated that, in lieu of termination, it would not be opposed to the imposition of a 1,068 duty hour suspension and the adoption of a Last Chance Agreement (the "LCA"), which mandated that Employee "***must*** (emphasis added in the FTB's recommendation) pass a complete return to duty physical."³ Adrian H. Thompson, Fire and EMS Chief, issued a letter of decision, dated December 19, 2006, which officially removed Employee from his firefighter position, but then stated that in lieu of termination, that Employee could pursue a LCA.
2. On or about February 1, 2007, Employee and Agency entered into a negotiated LCA. Pursuant to the LCA, Employee was to continue as a firefighter, provided certain conditions were met, including that he ***must*** pass a fitness for full duty physical prior to returning to a full duty status. *See Agency Record at Tab #8.*

¹ Employee's testimony does not reflect whether he called on February 8th, the day of the appointment or the day before. Further, it does not reflect a specific indication of why he elected not to keep the appointment.

² Based on Dr. Edwards's testimony, and Employee's reference to when he first saw Dr. Hanson, I calculate that he was without ongoing medical evaluation and assistance been late June to late September 2006, a period of approximately three months.

³ See the FTB's *Findings, Charges, and Specifications*, Agency Tab 7, P. 3.

3. Paul Matera, M.D., of the PFC medical staff, evaluated the results of Employee's March 12, 2007, medical visit, and issued a medical report on March 27, 2007, who concluded in pertinent part, "In review of the recent Fitness for Duty Evaluation for Donnalde D. Hackley, ..., I conclude the following: The individual is not (emphasis in original) currently fit for duty." See *Agency Record at Tab 9*. Dr. Matera set a return and follow up evaluation date for April 23, 2007.
4. On March 19, 2007, Employee had a professional visit with Jacqueline Jackson, Ph.D., a PFC staff member, who, after conducting her examination and evaluation of Employee's physical and mental status, authorized his return to work, but placed him into a "limited duty" work status, an official work category status which was less than the "full duty" work status, contemplated by the terms of the LCA.
5. Advised that Employee had been determined as not currently fit for duty, on March 28, 2007, William T. Flint, Battalion Fire Chief, Medical Services Officer, issued a fitness-for-duty-results notice to Brian K. Lee, Fire Chief, advising that Employee had been evaluated and determined to be not fit for return to a full duty status. See *Agency Record at Tab 9*.
6. On April 19, 2007, Dennis L. Rubin, Acting Fire & EMS Chief, issued Employee a Notice of Termination (the "Notice"), effective April 27, 2007. See *Agency Record at Tab 10*. In the Notice, Chief Rubin stated that Employee was being terminated due to Employee's failure to pass a fitness for duty examination as required by his LCA.
7. Lathal Ponder, Esq., Employee's legal counsel, by letter of April 26, 2007, directed to Theresa Cuisick, Esq., Agency's General Counsel, requested a delay of the termination, citing his belief that an incorrect draft of the LCA had been signed by his client. See *Agency Record at Tab 11*. Ponder admitted that the differences between the final LCA and the allegedly draft document LCA were not major, but requested that the allegedly incorrect LCA be set aside, and that the FTB Order be reinstated.
8. The wording in Item #4 of both LCA documents, which mandates that Employee must pass a fitness for duty physical before returning to full duty, is identical. However, Item #6, in the allegedly corrected LCA, has the two words, "recommending termination" crossed through. Regardless of the slight variation in the two LCA documents language, both versions of the FTB's recommendation included the requirement that, "Firefighter Hackley must pass a fitness for duty examination" in order to return to duty. See *Agency Record at Tab 7, and Employee's Brief, Attachment 1*.
9. Upon termination, Employee filed a Petition for Appeal with the Office of Employee Appeals (the "Office" or "OEA") on May 21, 2007, stating as a basis for appeal that:
 - a) the FTB did not recommend termination;
 - b) he did not receive a letter from the Chief regarding the FTB;
 - c) Employee was not allowed to review the results of his examination;
 - d) the rules were not complied with regarding the FTB,; and
 - e) the Douglas Factors were not applied in terminating Employee.
10. On June 26, 2007, Agency filed an *Answer to the Petition for Appeal*, asserting that Employee's arguments have no merit and maintaining that the Notice of Termination must be upheld.
11. Pursuant to an Order issued by this administrative judge (the "AJ") on November 23, 2007, Employee submitted *Employee's Brief* on December 19, 2007, which enumerated Employee's assertions of alleged Agency errors and wrongdoing, most specifically as follows:
 - a) Employee was terminated, despite the FTB's not recommending termination;

- b) The Fire Chief neglected to provide the requisite written documentation, stating specifically whether he concurred with or disagreed with the FTB's recommendation, in violation of Agency personnel regulation;
- c) Although Employee was terminated for allegedly not passing the fitness for duty examination, he was not allowed the opportunity to review the results of the examination;
- d) Agency failed to comply with existing rules and regulations concerning FTB's decisions and terminations; and
- e) The Douglas Factors were not considered in Agency's final determination.

Standard of Review

The Office has consistently determined that it will uphold an agency decision, unless: 1) it is unsupported by "substantial evidence";⁴ 2) there was harmful procedural error; or 3) it was not in accordance with law or applicable regulations. See *D.C. Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. App 2002). The underlying consideration for whether the "substantial evidence" standard has been invoked requires: 1) the agency to make written findings of the basic facts on all material issues at hand; 2) the accumulated findings, when taken together, must rationally lead to conclusions of law which, under the governing statute, regulations, etc., are legally sufficient to support the agency's decision; and 3) each basic finding must be supported by evidence sufficient to convince reasonable minds of its adequacy. See *Citizens Association of Georgetown, Inc. v. D.C. Zoning Commission*, 402 A.2d 36, and *Dominique v. D.C. Department of Employment Services*, 574 A.2d 862, 866 n.3 (D.C. 1990).

Parties Arguments and Replies:

Failure to adhere to Agency's own regulations, Notice Provisions

Employee would have this AJ find that Agency violated the Substantial Evidence Rule, and likewise ignored Agency's commission of several errors which were more than merely harmless. Employee also maintains that Agency-committed error adversely affecting the outcome of this case, including denying Employee the opportunity to settle his case and return to work as a firefighter, reinstated to his prior position as a fire wagon driver.

Employee argues that Agency violated the terms of Article 31, Section "B" of the negotiated union contract between Agency and Local 36, as Agency failed to provide Employee with a proper Initial Written Notice (the "IWN") within 75 days of the alleged infraction or complaint. Further, Agency subsequently neglected to advise him within another 60 days of the type of Agency action that would be pursued, i.e., the timely issuance of a written notification that would be titled, "The Proposed Action." The Proposed Action was issued on April 6, 2006, which Employee asserts was untimely.

⁴ "Substantial evidence" is defined as such a degree of relevant evidence which a reasonable mind, considering the record as a whole, might accept as adequate to support a conclusion that the matter asserted is true. See *George Hyman Construction Company v. D.C. Department of Employment Services*, 498 A.2d 563, 566 (D.C. 1985).

Employee enumerated several actions that Agency's Order Book, Article 7, § 3 mandates before an IWN should be issued. These actions involve a series of written reports, interviewing of witnesses, and outlining with specificity the alleged infractions, with the created document being endorsed by superior officers in the chain of command, and then expedited for immediate attention. Employee contends that although the ultimate report(s) of the incident was created by the chain of command concerning the incident that led to Employee's problem, Agency failed to adhere to its own regulations in the preliminary work that must be done prior to the issuance of the charges against him.

Agency responded, asserting that it provided Employee with timely adequate notice as established by applicable law. Further, Employee's reliance is misplaced upon the notice time line provisions of Article 32, §§ A and B, and the 75 calendar days notice provisions, when the adverse action clauses of Chapter 16 of the District Personnel Manual and the Department's Rules and Regulations Order Book, are invoked.. Newer legal provisions have since been adopted, as outlined in the *D. C. Official Code § 5-1031 Fire and Police Disciplinary Action Procedure Act of 2004*, (the "Act"), effective September 30, 2004, which supplanted the prior number of days enumerated in the negotiated Collective Bargaining Agreement (the "CBA"). This updated provision of the *D.C. Official Code* is germane to this case and must be read *in pari materia* with Article 32 of the CBA. It provides, in pertinent part, the following time line for providing notice of corrective or adverse action against a firefighter:

Except as provided in subsection (b)⁵ of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services 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 . . . knew or should have known of the act or occurrence allegedly constituting cause.

Application of the foregoing provision of the *D.C. Official Code* to the facts herein evinces that Employee's argument is without merit, as Agency had 90 *business days* (emphasis added by this AJ), or until June 1, 2006, to give Employee notice of the personnel action being taken against him. The relevant notice of personnel action in the instant case was issued on April 6, 2006. *See Agency Record at Tab 5*. The cause proceeded expeditiously from that point, including the fact that the FTB hearing was initially scheduled to convene on June 1, 2006, only to be continued on May 31, 2006, at the express request of Employee's counsel. *See Agency Record at Tab 2*.

I find that Agency met the IWN requirements in a timely manner, and that Employee was fully notified within 90 days, not including Saturdays, Sundays, and legal holidays after the date Agency knew of the act which allegedly constituted cause. Further, Agency and Employee were communicating on an ongoing basis, including considering whether Employee would resign, be given an FTB hearing, an extended duty hour suspension, an LCA, or a combination of the above. At all times, Employee was aware that he and Agency were working together, seeking to resolve the termination issue, if possible.

⁵ Section 5-1031 concerns tolling the 90-day time limit when the act or occurrence is the subject of criminal investigation which is not the present situation.

I find that Employee's claim that the fire chief neglected to provide requisite written documents stating whether he concurred with or disagreed with the FTB's recommendations is without merit. While Employee neglected to identify which individual should have sent him the referenced statement, the record herein reflects that on December 19, 2006, Adrian H. Thompson, then Fire and EMS Chief, issued a written statement, directed to Employee's business address of record, confirming that he would terminate Employee, but also extending to him the option to pursue an LCA, with conditions. The record does not reflect whether or when Employee received this document.

Having evaluated the evidence as presented by the parties, I conclude as a matter of law that Agency's decision, terminating Employee from his position as a firefighter, is supported by substantial evidence, is likewise in accordance with the law, and therefore must be affirmed for the reasons as set forth herein.

Claim that Agency Failed to Adhere to Medical Regulations Before Electing Termination

On March 19, 2007⁶, Employee reported to the PFC for a fitness for duty examination, and was evaluated by Jacqueline Jackson, Ph.D., who upon completion of the fitness for duty evaluation, placed Employee into a limited duty work status. Employee argues that, based upon having been put into this work category, Agency and the PFC should have then implemented the existing regulations that address handling employees who have been put into a limited duty category.

Agency counters this argument, noting that the limited duty regulations are inapplicable to both the facts and circumstances here. The terms of the negotiated LCA, regardless of which document is used, or even the FTB's recommendation that might accommodate the creation of a LCA, all clearly contemplate that Employee must be fit for *full* (emphasis added) duty, as described in the *Fire and EMS Department Order Book*, Part II., § 10 which states:

In order to be certified for full duty status, uniformed employees must be able to safely perform a range of physically rigorous activities such as; prolonged walking, bending, standing, climbing, riding in vehicles, and prolonged exposure to severe weather conditions including extreme cold and heat. It should be noted that although an employee's current duty assignment may be sedentary or administrative, there is no assurance that the employee will remain in that duty assignment.

I find that, although Employee never argued that he was necessarily fit for full duty, his assertion that he should have been placed on limited duty as a component of coming back to full working capacity, is without merit, contrary to both the LCA and any recommendation that the FTB might have contemplated. Employee's position on this matter must be rejected. It is clear from these facts that Employee simply failed to satisfy the terms of the LCA, and likewise the terms of the FTB's recommendation. The language is clear, mandating that Employee, if he is ever to be reinstated as a firefight/wagon driver, a sensitive job which placed the lives of other

⁶ The date of the initial fitness for duty examination with Dr. Jackson is variously listed as March 12, and March 19, 2007, but is not material to the outcome of this matter.

people in his trust and hands, he must first pass a fitness for full duty physical examination, of which the mental evaluation was an integral and necessary component.

Although Employee claims in this appeal that he was not allowed to review the results of his fitness for duty examination, there is nothing in the record to indicate that, prior to noting this appeal, that he ever asked for access to said records or a consultation with the PFC staff, to determine the basis for their two conclusions (Dr. Matera and Dr. Jackson) that Employee was not fit to return to a full duty status. While the rules that govern Freedom of Information requests are not before me in this current matter, had Employee filed a request under that guideline for his own medical information, and provided that there were no other legal bars to providing the medical information sought, there is a great likelihood that he would have been provided the full medical documentation that underpinned Dr. Matera's and Dr. Jackson's separate, but coinciding conclusions.

Settlement Agreement

Employee also asserts that his termination should be reversed because he and Agency entered a negotiated settlement agreement (a/k/a, the negotiated "LCA"), the terms of which provided for his return to work as a firefighter and wagon driver. He chided Agency for renegeing on the agreement, asserting a material breach of what the parties had negotiated, and likewise ignoring the process by which the parties negotiated and finalized the terms of the settlement in late November 2006. Employee further argues that although there was a FTB proceeding, which included a full evidentiary hearing, the eventual recommended decision of the FTB, issued on December 19, 2006, which provided for a possible 1,068 duty hour suspension and the execution of a LCA, in lieu of outright termination, was not the basis for his proposed reinstatement.

Rather, his reinstatement was supposed to be initiated pursuant to discussions of November 29, 2006, and the subsequent negotiated agreement between Employee and Agency, the terms of which were finalized before the FTB's December 19, 2006, issuance of its recommendations. The final version of the settlement agreement was sent to Employee's counsel on or about December 27, 2006, eight days after the FTB's Recommended Decision was issued.⁷ Employee argues that, considering the circumstances, everything that occurred subsequently, including reliance upon both the incorrect draft, and then the final version of the Settlement Agreement, should be governed by the logical progression from the Settlement Agreement, including Employee's reinstatement.

It is not denied by either party that the proposed LCA document that was sent by Agency to Employee for signature, was apparently not the final version of the negotiated agreement. However, both versions mandated that Employee must pass a fitness for duty examination prior to the proposed reinstatement. Agency also maintained that Employee's thinking is convoluted, illogical, and does not flow from the fact that there was an executed LCA, negotiated openly and over a significant amount of time, and that he enjoyed access to both union and legal counsel

⁷ From the record before me, I am unable to determine whether the FTB was aware of the ongoing settlement negotiations, and further, whether awareness would have played any role in their electing to issue their Recommended Decision on or about December 19, 2006, which recommendation for a possible 1,068 duty hour suspension in lieu of termination, also acknowledged the possibility of creating an LCA.

prior to his decision to execute the document, which bore an acceptance date of February 1, 2007.

The Last Chance Agreement

Employee asserts that the correct negotiated settlement, reduced in written form to the LCA was never executed, implemented, or honored, and that any other purported LCA must, of necessity, be null and void. The effect of nullification would, by suggestion, give a revived consideration to the FTB's recommendation of a possible 1,068 duty hour suspension, followed by reinstatement to his job as a firefighter. Agency totally discounts Employee's position, arguing that the facts simply do not support Employee's Argument. As noted above, regardless of the circumstances of whether an earlier version of the LCA was presented, the document was evaluated, was subjected to Employee's every consideration, including the advice of union and legal representation, and was knowingly executed, with the date of February 1, 2007, appearing as the date of acceptance.

Agency further argues that there are three potential options, and that under each of the possible scenarios, Employee's argument regarding the alleged nullity of the LCA must fail. First and second, consider the differences between the signed LCA of February 1, 2007, and the alleged corrected, but unsigned LCA.⁸ The differences between the two documents were minor, not material enough to impose the effect of voiding the LCA. See *Mersman v. Werges, et. al*, 112 U.S. 139 (1884). Both the executed LCA and the proffered alternative have identical language, at Paragraph #4, regarding being fit for duty, to wit, "Employee agrees that his return to his position is conditioned on his successfully passing a fitness for duty physical returning him to full duty."

Paragraph #6 of the executed LCA states, "[i]f employee fails to pass the fitness for duty physical . . . the Trial Board order in Case U-06-152 recommending termination will be reinstated and executed." Although the two words, "recommending termination" have been crossed out from paragraph #6 of the alleged corrected, but unexecuted copy of the LCA, there is nothing in the record to reflect that the parties actually intended to remove termination as a possible available option, should Employee fail to pass his fitness for duty physical examination. Rather, both documents specifically mandate at paragraph #4, in identical language, that Employee must pass the fitness for duty physical before he can be reinstated for full duty.

I find that, if either Option One or Option Two, above, fails, the consequence of failing to pass the fitness for duty physical is the implementation of Option Three, i.e., that the FTB order issued in Case U-06-152, dated December 19, 2006, would be reinstated and executed upon. Most importantly, all three documents - the executed LCA; the alleged corrected, but unexecuted copy of the LCA; and the FTB's Recommended Decision in Case No. U-06-152, state that Employee **must** pass a complete return to duty physical. Regardless of which document Employee relies upon, he was required to pass a fitness for duty examination as a condition of his employment.

⁸ "Option One" represents the executed LCA, dated February 1, 2007, which included the words, "recommending termination" as a component of Item #6 in the LCA. "Option Two" represents the unexecuted, undated LCA, in which the words "recommending termination," also at Item #6, was crossed through.

I find that, presented with an LCA document for formal consideration, Employee, who had received both union and legal counsel, knowingly executed the LCA. Regardless of which LCA document might have been in play, it is disingenuous to now seek to void the executed document in favor of an FTB alternative recommendation, which if accepted would impose a 1,068 duty hour suspension, but also mandated that Employee pass the fitness for duty examination before reinstatement. Under no noted FTB option that was considered would Employee have been returned to work without passing the examination. Further, it is inconceivable to this AJ that either the FTB would recommend, or that Agency would accept and implement a 1,068 duty hour suspension for such egregious offenses that found Employee guilty on all three charges, that also did not include the requirement that Employee must enter into an LCA, which clearly recited Agency's terms and conditions before allowing Employee to return to duty. I find that Employee's termination as a firefighter must be upheld based upon Employee failing to satisfy the conditions of the LCA.

OEA Rule 632.4, addresses the question of Harmless Error, i.e., the alleged inadvertent substitution of an executed LCA draft for the final LCA document, when both documents mandated passing a fit for duty examination, and states in pertinent part that:

[T]he 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: 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 take the action.

I conclude, after evaluating the entire situation and circumstances set forth before me, that Employee failed to satisfy the very specific requirements and conditions as enumerated in the Last Chance Agreement, and that apparent clerical error of presenting him with the penultimate draft, which did not have the words "recommending termination" crossed through, was harmless error. The passing of the fitness for full duty examination was the basis for reinstatement in all three of the possible options set before me. Therefore, the execution of a possibly not fully accurate document was harmless error.

Having evaluated the evidence as presented by the parties, I conclude as a matter of law that Agency's decision, terminating Employee from his position as a firefighter, is supported by substantial evidence, is likewise in accordance with the law, and therefore must be affirmed for the reasons as set forth herein.

Douglas Factors

I find that Employee's argument that the Douglas Factors were not considered is without merit.⁹ The LCA, at Item #6, reflects that the FTB Order in Case U-06-152, was an integral

⁹ In *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-306 (1981), the Merit Systems Protection Board, this Office's federal counterpart, set forth "a number of factors that are relevant for consideration in determining the appropriateness of a penalty." Although not an exhaustive list, the factors are as follows:

component of this case's consideration. As well, the Douglas Factors were a cornerstone component of the FTB panel's deliberations, with the elements of those factors, including the possibility of Employee's being redeemed and a recognition of him as a valued employee, among other considerations, all factored into the considerations that contributed to their eventual recommendation that a duty hour suspension and LCA be considered, in lieu of termination. The FTB's recommendations specifically enumerated Douglas Factors #1, #3, #6, #9, #10, and #11, all related to mitigation and the possibility that Employee might be redeemed, as elements which contributed to the recommendation for consideration of the 1,068 duty hour suspension and adoption of an LCA, in lieu of termination. I find that the Douglas Factors were given full consideration, and conclude that the FTB's recommendations were made, based upon an attempt to consider the redemptive components of Employee's sustained career and valued status as a firefighter with Agency.

ORDER

- 1) The nature and seriousness of the offense, and its relation to the employee's duties, including whether the offense was intentional or technical or inadvertent, or was committed intentionally or maliciously or for gain, or was frequently repeated;
- 2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
- 3) the employee's past disciplinary record;
- 4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
- 5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in the employee's ability to perform assigned duties;
- 6) consistency of the penalty with those imposed upon other employees for the same or similar offenses;
- 7) consistency of the penalty with any applicable agency table of penalties;
- 8) the notoriety of the offense or its impact upon the reputation of the agency;
- 9) the clarity with which the employee was on notice of any rules that were violated in committing the offense, or had been warned about the conduct in question;
- 10) potential for the employee's rehabilitation;
- 11) mitigating circumstances surrounding the offense such as unusual job tensions, personality problems, mental impairment, harassment, or bad faith, malice or provocation on the part of others involved in the matter; and
- 12) the adequacy and effectiveness of alternative sanctions to deter such conduct in the future by the employee or others.

This matter having been fully considered, it is hereby ORDERED that Agency's action of terminating Employee is UPHeld, and that Employee's Petition for Appeal is DISMISSED.

FOR THE OFFICE:

ROHULAMIN QUANDER, Esq.
Senior Administrative Judge