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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)	
)	OEA Matter No.: 1601-0195-11
SHALONDA SMITH,)	
Employee)	
)	Date of Issuance: November 27, 2013
v.)	
)	
D.C. FIRE & EMERGENCY MEDICAL)	
SERVICES DEPARTMENT,)	
Agency)	
)	
)	Arien P. Cannon, Esq.
)	Administrative Judge

Shalonda Smith, Employee, *Pro se*
Kevin Turner, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Shalonda Smith (“Employee”) filed a Petition for Appeal with the Office of Employee Appeals (“OEA” or “Office”) on August 25, 2011, challenging the D.C. Fire & Emergency Medical Services Department’s (“Agency”) decision to suspend her for 168 hours. Agency filed its Answer on September 30, 2011. Employee’s position of record is a Firefighter. This matter was assigned to me on June 18, 2013.

A Prehearing Conference was held on July 23, 2013, at which time Agency raised the issue of jurisdiction, which was also addressed in its Answer. A subsequent Order on Jurisdiction was issued on July 23, 2013, requiring Employee to submit a statement as to why she believes this Office may exercise jurisdiction over her appeal. Employee submitted her response to the Order on Jurisdiction on August 14, 2013. The undersigned determined in a September 17, 2013 Order that OEA has jurisdiction over this appeal. Accordingly, a Post Prehearing Order was issued. On the due date of Agency’s brief, Agency’s Representative requested that a telephone conference be held with Employee to clarify the issues and the order in which the parties were to respond to the Post Prehearing Brief. This telephone conference was convened on October 7, 2013. Subsequently, an Amended Post Prehearing Order was issued the

same day. It was determined that this matter should be reviewed under the analysis set forth in *Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002), in accordance with the collective bargaining agreement between the two parties. Agency's brief was due on or before October 15, 2013. However, because Agency failed to respond to the Amended Post Prehearing Order, a Show Cause Order was issued on October 21, 2013. Agency responded to the Show Cause Order and submitted its response to the Amended Post Prehearing Order on October 29, 2013. Employee submitted her brief accordingly. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether the Fire Trial Board's decision was supported by substantial evidence;
2. Whether there was harmful procedural error; or
3. Whether Agency's action was done in accordance with applicable laws or regulations.

UNDISPUTED FACTS

On March 30, 2010, Employee and her partner, Firefighter Donald Steele, were assigned to Ambulance 32 ("A-32") located at Engine 32 ("E-32"). Around 7:00 p.m. A-32 dropped off a patient at Howard University Hospital (HUH).¹ After A-32 dropped off the patient at HUH, they went to the McDonald's on Georgia Avenue which is located in close proximity to the hospital. When A-32 left HUH, it was in delayed response status as required by Agency's Special Order Number 20, Series 2009. In order to improve ambulance response times in certain areas of the District, Agency implemented the "Delayed Response Program" which allows select units to go into a "delayed response" mode after dropping patients off at a hospital and returning to their local alarm district. Many of the hospitals where these selected units must travel are outside of their local alarm district. Often times, before an ambulance can return to their local alarm district, they are dispatched on other emergency calls which result in a longer wait time for patients located in the selected unit's local alarm district. Under the program, once the units reach the boundary of the Anacostia River (also the boundary of their local alarm district) they are to update their status to "available." A-32 was one of the selected units for the "Delayed Response Program."

On the evening of March 30, 2010, A-32 was being driven by Employee. After leaving McDonald's, A-32 was headed back to their local alarm area and took a route which led them across the South Capitol Street Bridge. At 7:32 p.m., Agency's Communications Division dispatched units to the 4000 block of South Capitol Street, S.E., to respond to a scene where

¹ Throughout this decision, Ambulance 32 generally refers to both Employee and Firefighter Donald Steele since they were the crew members on this particular unit at the pertinent times in this case.

multiple people had been shot.² At 7:33 p.m., Agency's I-Tracker device, which is a computer system that shows where units are located throughout the city, placed A-32 on or at the South Capitol Street Bridge. The South Capitol Street Bridge crosses over the Anacostia River, into the boundaries of A-32's local alarm area. A-32 was still in "delayed response" mode at this time. Special Order 20 provides that when selected units reach the boundary of the Anacostia River, they should update their unit status to "available."

Due to traffic congestion on Suitland Parkway, A-32 opted to take an alternate route and go south on Interstate 295 and then to Malcolm X Avenue, S.E. to return to the station quarters. While en route to quarters, there are some discrepancies as to where A-32 was located during an approximately 20 minute time frame. However, it is undisputed that Ambulance 32 indicated that they were going to get fuel at one point, but were told not to do so by the Communications Division since the city was busy and needed all units to be available in service.

Employee was charged with four counts of misfeasance and one count of insubordination of duty. The following charges were levied against employee:

Charge 1: Violation of Article VII, Section 2 of the D.C. Fire and EMS Order Book, which states in part; "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations." This misconduct is further defined in D.C. Fire and EMS' Special Order 20, Series 2009, when **she failed to status her unit in service when she and her partner, Donald Steele, reached their service area.** This misconduct is defined as cause to wit: "Misfeasance" in 6 DCMR § 1603.3(6), 55 DCR 1775 (February 22, 2008).

Specification 1 On March 30, 2010, while assigned to Ambulance 32, Firefighter Stroman failed to status her unit in service when she reached her service area. The I-Tracker shows that Ambulance 32 crossed the Anacostia River at 19:34 hours, was at Oakwood Street and Malcolm X Avenue at 19:37 hours, and arrived in the 200 block of Newcomb Street, SE, at 19:40 hours. She and Firefighter Steele remained in the 200 block of Newcomb Street approximately 15 minutes. She went into service at 19:47 hours. At 19:49, she placed Ambulance 32 out of service to refuel.

Charge 2: Violation of Article VII, Section 2.2 of the D.C. Fire and EMS Order Book, which states in part; "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations." This misconduct is further defined in the Fire and EMS Rules and Regulations' Article VI, Section 8, which states: "Members shall refrain from . . . deception; violation or evasion

² The time is referenced on a 24 hour clock throughout the record; however, a 12 hour clock will be used throughout this decision when referencing a particular time.

of law or official rule, regulation, or order; and from false statements.” This misconduct is defined as cause, to wit: “Misfeasance” in 6 DCMR § 1603.3(6), 55 DCR 1775 (February 22, 2008).

- Specification 1: In Firefighter Stroman’s March 31, 2010, Special Report entitled “Destination from Howard University”, Firefighter Stroman wrote that Ambulance 32 went in service at 19:47 hours on Malcolm X Avenue. However, the I-Tracker records show Ambulance 32 in the 200 block of Newcomb Street, S.E. at 19:40 hours and remained at that location until 19:55 hours. **She provided misleading information to the Department regarding the true status and location of Ambulance 32.**
- Charge 3: Violation of Article VII, Section 2 of the District of Columbia Fire and EMS Department’s Order Book which states in part, “Any on-duty act or omission that interferes with the efficiency or integrity of government operations.” Article XXIV, Section 6, which states “...3) Vehicles. Refueling of units will be done during off peak of 01:00—09:00 hours. This misconduct is defined as cause to wit: “Misfeasance” in 6 D.C.M.R. § 1603.3(6), 55 DCR 1775 (February 22, 2008).
- Specification 1: Despite the fact that re-fueling ambulances are done when the fuel gauge indicator is at or below $\frac{1}{2}$ tank and that refueling units are done during off peak hours of 01:00—09:00 hours, Firefighter Stroman attempted to place Ambulance 32 out of service for fuel at 19:49 hours when it had over $\frac{3}{4}$ tank of fuel. During this time, the Department was engaged in a mass casualty incident.
- Charge 4: Violation of Article VII, Section 2 of the District of Columbia Fire and EMS Department’s Order Book which states in part, “Any on-duty act or omission that interferes with the efficiency or integrity of government operations.” This misconduct is further defined in D.C. Fire and EMS’ Order Book, Article XXIV, Section 8(4), which states in part: “Units will return to their respective quarters by the most direct route following the completed disposition of the assigned response. This misconduct is defined as cause to wit: “Misfeasance” in 6 D.C.M.R. § 1603.3(6), 55 DCR 1775 (February 22, 2008).
- Specification 1: On March 30, 2010, while assigned to Ambulance 32, Firefighter Stroman failed to return to quarters by the most direct route from Howard University Hospital.
- Charge 5: Violation of Article VII, Section 2 of the District of Columbia Fire and EMS Department’s Order Book which states in part, “Any on-

duty act or omission that interferes with the efficiency or integrity of government operations.” This misconduct is further defined in Fire and EMS Department Rules and Regulations’, Article VI, Section 5, which states in relevant part: “Members shall...be respectful and obedient to their superior officers.” This misconduct is defined as cause to wit: “Insubordination of Duty” in 6 D.C.M.R. § 1603.3(f)(4), 54 DCR 12043 (December 14, 2007).

Specification 1: On March 30, 2010, while assigned to Ambulance 32, Firefighter Stroman disobeyed Deputy Fire Chief Michael Reilley’s Order to place Ambulance 32 in service at 19:49 hours. She did not immediately status her unit in service.

Employee was found “guilty” of charges 1 and 2 only and was issued a 168-hour suspension of duty. She was found “not guilty” on charges 3, 4, and 5. Therefore, only charges 1 and 2 are being appealed by Employee and charges 3, 4, and 5 will not be addressed.

SUMMARY OF TESTIMONY

On October 7, 2010, Agency held a Trial Board Disciplinary 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 Employee’s proceeding. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their position.

Agency’s Case in Chief

Lieutenant Keith Nickens (“Nickens”) Tr. 17-48.

Nickens testified in relevant part that: on March 30, 2010, he was directed by Battalion Fire Chief Paul Schaeffer to investigate the details of Ambulance 32’s out-of-state-service time from HUH to Engine 32 headquarters. In his investigation of Employee and her partner’s return from HUH, Nickens stated that the documents he reviewed in his investigation only included ambulance and firehouse journals. Nickens also testified that Special Order No. 20 specifically states that even if an ambulance is in delayed response mode, Communications may override that status and dispatch a unit. Nickens was aware that Ambulance 32 was never dispatched to the shooting incident on South Capitol Street. When Ambulance 32 was told by the Emergency Liaison Officer (“ELO”) that they were being placed “in-service,” they immediately responded, “okay.” Nickens determined, based on his interviews with Employee and Firefighter Steele that A-32 failed to update its status to “available” when they crossed the boundary of the Anacostia River.

Nickens stated that until Ambulance 32 crossed the Anacostia River (South Capitol Street Bridge) it would be appropriate for the ambulance to have been in a delayed response status. When questioned about whether he was aware of there being numerous occasions when

members who were assigned to A-32 did not status the unit as “available” from the moment they crossed the Anacostia River, Nickens stated that he had no knowledge of this practice.

Nickens estimated that it would take approximately five minutes for a unit to reach Engine 32’s quarters, traveling in a non-responding fashion, from the time they crossed the Anacostia River. Nickens also acknowledged that if a unit updated its status to “available” and then less than a minute later the unit’s status was listed as “at quarters” that means they were close to, or at Engine 32’s quarters at the time it changed its status to “available.”

Nickens also stated that he would not be surprised if there were 49 separate instances from January 2010 to March 2010 where a unit listed its status as available at or near Engine 32’s headquarters.³ Nickens testified that aside from Employee and Firefighter Steele, he has never charged anyone with failing to update their status to “available” the moment they crossed the Anacostia River. He also testified that he has never verbally advised anyone that they were doing something wrong because they did not update their status to “available” as soon as they reached the boundaries of the Anacostia River. Nickens further testified that Newcomb Street is nowhere near the normal route from Howard University Hospital back to Engine Company 32.

Deputy Chief Michael Reilly (“Reilly”) Tr. 51-129

Reilly testified that he was monitoring the I-Tracker system, which shows ambulance locations throughout the city, between 7:00 p.m. and 8:00 p.m. on March 30, 2010. He was also monitoring Ambulance 32 which appeared on the I-Tracker system.

Reilly testified that Special Order No. 20 details the Delayed Response Program that was implemented by Agency. This program was implemented because Agency was having issues with coverage in its “outlying geographical areas.” The program was established to give ambulances the opportunity to be in delayed response status when leaving a hospital until reaching their local alarm districts before changing their status to “available.” This was done in an attempt to try and have adequate transport coverage throughout the city.

Reilly testified about the special report Firefighter Steele prepared regarding A-32’s status and whereabouts on March 30, 2010, after leaving HUH. The special report stated that once Ambulance 32 left HUH it went out of service so that it could return to the local alarm district, or the vicinity of Engine 32’s firehouse.

Based on Reilly’s reading and understanding of Firefighter Steele’s special report, Ambulance 32 went into delayed status to get fuel at 7:49 p.m. The special report also states that at 7:47 p.m., Ambulance 32’s status showed that it was in service and available. At 7:49 p.m., Ambulance 32 places itself out of service and shows “en route to get fuel.” Based on Reilly’s reading and understanding, Ambulance 32 made itself available again at 8:01 pm.

³ During Nickens testimony, Fire Trial Board member Chief Donlon was hesitant to listen to testimony about how other members were treated regarding similar circumstances in which employee was charged.

Reilly testified about Agency's I-Tracker system. I-Tracker is what Reilly describes as the "big eye in the sky." It is a computer system that shows where units are located throughout the city in 500 foot increments in an effort to dispatch the closest available unit in a timely manner. Reilly states that he has used the I-Tracker ever since the Agency got it, but was unable to say for certain how long that has been. He also testified that he believed the I-Tracker is a reliable tool. He further testified that "it's one of those things when it is working, it appears to be very efficient and very reliable...if it is out of service, then it is out of service, but when it works,...it's pretty reliable and it's pretty efficient." Reilly admitted that the I-Tracker does go down, although it is very rare. When it does go down it will just stop tracking units and units will not appear on the screen to show where they are located.

Chief Vlassopoulos ("Vlassopoulos") provided some clarification on some of the terminology used during Reilly's testimony regarding the use of the I-Tracker. Vlassopoulos described the process for when a unit goes in and out of service (making it available) and the other types of statuses that may be used to help identify whether a unit is available for emergency calls. Vlassopoulos also described what was seen on the computer screen as they tracked A-32: at 7:02 p.m. Ambulance 32 was at Howard University Hospital in "TA" status, which means "transport arrived" at the hospital. At 7:08 p.m. the system observes them again at HUH, in the same vicinity as several minutes before. In the next poll of Ambulance 32, their status went from "TA" to "AM," available mobile, which means they were available for calls. One minute later the unit went out of service in accordance with the guidance and procedures in the delayed response protocol and order (Special Order No. 20). According to Special Order 20, units must clear themselves from the call associated with transporting a patient to the hospital before going in an "out of service" status. Specifically, one cannot go from "transport arrive" status to "out of service" status. Thus, a unit must go from "transport arrive" to "available" and then to "out of service" status. Vlassopoulos described Ambulance 32's movement via the I-Tracker interface and at 7:38 p.m., the tracker had Ambulance 32 between Oakwood Street, SE and Newcomb Street, SE. At 7:39 the unit was in the middle of Newcomb Street, between 4th and 5th Street. At 7:40 p.m., it was on Newcomb Street between 2nd and 4th Street. Based on enlarged images, Vlassopoulos says it looked like Ambulance 32 was between 257 and 261 Newcomb Street.

Reilly further testified that to his knowledge, Firefighter Steele's address on record with Agency is 261 Newcomb Street. Between 7:40 and 7:54, the I-Tracker had A-32 placed on Newcomb Street without any movement. At 7:54, there was movement and the unit was still in "out of service." At 8:01 p.m., A-32's status went from out of service to available for emergency response. According to the I-Tracker, A-32 reached Engine 32's headquarters at 8:05 p.m. Vlassopoulos testified that there was no connection problem with the I-Tracker at the time he was tracking A-32. If there was a connection problem, the system would not have been able to track A-32 at all.

I-Mobile was described as the device inside of the ambulance for crew members to update the ambulance's status to one of the various options such as en route, available, or transporting a patient. Reilly further testified that there were some problems with the I-Mobile on March 30, 2010, but none with the I-Tracker, which tracks the location of the units. Reilly stated that he verbally instructed the Emergency Liaison Officer ("ELO") to place A-32 in

service because he observed them driving around on the I-Tracker system and listed as “out of service.”

Reilly stated that A-32 was the closest resource unit to the incident that did not respond to the scene. Reilly also testified that in a perfect world, units would update their status to available as soon as they crossed the boundaries to the Anacostia River.

Employee’s Case in Chief

Lawanda Calloway (“Calloway”) Tr. 130-139

Calloway previously worked for Office of Unified Communications (“OUC”) and D.C. Fire and Communications for 31 years. She testified that the Communications Department for Agency has the ability to place a unit in service. She stated that it was as simple as using the mouse on the computer to click “unit in service” and the unit would go in service. Calloway stated that if Communications tells an ambulance unit that they are manually being placed in service then the lead Communications operator of that radio would assume the responsibility for placing the unit in service.

During cross examination, Calloway stated that she left the Office of Communications in October of 2007. Although she was not on duty the day of the incident, she states that she still has friends who talk about orders within the department and she has some familiarity with Special Order 20.

Captain Juan Carter (“Carter”) Tr. 139-147

Carter described Employee as “reliable and dependable.” Carter was told that one of the theories that served as the basis of the charges against Employee was that she purposefully remained out of service to avoid being dispatched and helping out with the mass casualty shooting on the evening of the incident. Carter stated that this theory was not consistent with the behavior that he knew of Employee. He also stated that while Employee was under his supervision, she was always diligent in her duties and responsibilities and that he did not have any complications with her.

Carter testified that he would not have a problem working with someone who failed to service their unit in service in a timely manner. In summation, Carter stated that this incident does not leave him with a negative impression of Employee.

Deputy Fire Chief Cornelius Campbell (“Campbell”) Tr. 161-181

Campbell testified that he has been with the Agency for over 23 years and had served as Deputy Fire Chief for two years at the time of the hearing. He testified that he is only aware of one case that was similar to the charges before Employee in this case. Specifically, the other case Campbell referenced was when charges were proffered against two members of the Fire Department who were riding in Ambulance 10 and they intentionally took the ambulance to an area outside of the District and sat there for approximately 5 to 6 hours. During this time, those

members did not take any calls in their service area. Campbell stated that he believes there is a big distinction between the instant case and the case he described where two members were out of service for 5-6 hours and did not take any calls in their service area. Campbell further stated that although a Fire Trial Board was held in that case, neither of the members was terminated.

Battalion Fire Chief Edward Pearson (“Pearson”) Tr. 182-196

Pearson testified that Employee was “very conscientious” and really cared about her job and provided quality service to the Department. He also testified that the theory that Employee purposefully kept her unit out of service in order to avoid being dispatched to the mass casualty incident seems very uncharacteristic of her. Pearson also said it is not uncommon to take alternate routes to get back to headquarters because of traffic.

Captain Patrick Banks (“Banks”) Tr. 197-208

Banks testified to the character of Employee and stated that she never worked directly under his supervision. Other than training Employee, he has not really kept up with her.

Firefighter Donald Steele (“Steele”) Tr. 209-265

Steele testified, in relevant part, that: he acknowledged that A-32 did not put their unit in service once they got to the Anacostia River as required by Special Order No. 20.

When asked about how he came up with the times he provided in his special report, Steele stated that he consulted the computer on A-32. In his special report, Steele wrote that A-32 put their unit in service at 7:47 p.m. and then at 7:49 p.m. Steele’s special report reads as follows:

On March 30, 2010 after leaving hospital 5. A-32 went out of service to return to our first due area. Once we got off of 295 at Malcom (sic) X avenue exit we went in service at 1947 hours, and at 1949 hours we decided to go get fuel we status in delayed to go get fuel. Immediately afterwards a DFC came on the radio telling us we where (sic) the only ambulance in the city and we could get fuel later. He then said we were in service, we then advised. We returned to quarters and we then received a run at 2018 at 2700 Jasper St. SE.

To further help explain exactly what he meant when he stated that “...we then advised,” Steele says that he meant A-32 acknowledged over the radio that they were being placed in service by Communications.

Steele also testified that he has encountered problems with I-Mobile on previous occasions. Specifically, the I-Mobile will show that the ambulance is still on the scene of an emergency call when in actuality they are at the hospital. He also stated that there have been times when they have tried to press the button to status the unit in a particular status, but the

status of the unit would not change on the monitor screen. He also testified that there have been occasions when the unit was in out of service or in delayed response and Communications still dispatched them on an emergency call and they would respond to the scene. On March 30, 2010, Steele says they were not dispatched on a run during the time frame in question nor were they ever asked if they could respond to the South Capitol Street shooting incident.

Steele testified on cross-examination that A-32 was never parked on the 200 block of Newcomb Street on March 30, 2010. Steele stated that it was their policy to update their status to “available” once they got to Suitland Parkway, although it was inconsistent with Special Order No. 20. He further stated that A-32 stopped at the bus stop near the intersection of Martin Luther King Jr. Avenue and Newcomb Street so that Employee could talk to Communications.

Firefighter Shalonda Stroman Smith (“Employee”) Tr. 265-332

Employee testified, in relevant part, that: she has never been brought up on charges prior to this incident. Employee acknowledged that as she was coming down South Capitol Street that their unit was still in delayed response status. She also acknowledged that Special Order No. 20 says it should go into service soon as they get to the Anacostia River Boundaries. Employee stated that she intended to go in service once she got on Suitland Parkway but because she ended up taking a different route down South Capitol Street because of heavy traffic on Suitland Parkway, it slipped her mind to press the in service button. She realized that she had forgotten to do so and put A-32 in service once they turned onto Malcolm X Ave, SE. She also testified that as long as she’s been with A-32, it was normal practice to put the unit in service once they reached Suitland Parkway.

Once Employee put A-32 in service after turning onto Malcolm X Avenue, she stated that they decided to fill up on fuel. Rather than making a U-turn on Malcolm X Avenue, she made a left onto Oakwood Street, which is one street over from Newcomb Street. Because Employee was not familiar with the area, she heeded the directions of her partner, Firefighter Steele. Employee states that she was trying to get back to Malcolm X Avenue so she could make a right turn and then make a left turn back onto South Capitol Street and proceed to Blue Plains to get fuel. However, prior to getting fuel, she heard Chief Reilly contact the ELO and direct A-32 to stay in service and not get fuel since the city was dealing with a mass casualty shooting. Soon thereafter, ELO contacted A-32 directly and told them that the city was too busy to get fuel and that they were being placed in service. Employee stated that she pulled over to talk to the ELO during this conversation because she does not like to talk on her radio while driving. After this conversation with the ELO, Employee proceeded to drive to the headquarters of Engine 32. She states that at no time was A-32 stopped at 261 Newcomb Street. She also was not aware that her partner Steele lived in the Newcomb Street area until after the fact.

Employee testified that when the ELO came over the radio and said that A-32 was being placed in service, she did not press the button on the I-Mobile because she was being told by the ELO that they would place A-32 in service themselves. Employee also testified that at some point after the conversation with the ELO, they realized that the I-Mobile still did not have them listed as in service. She then started clicking the button in an attempt to change A-32’s status to

available, but it would not change. She states that Steele also tried to change their status on the I-Mobile to in service, but it still would not change.

Once they finally arrived at quarters, they changed their status to “at quarters,” which indicated they were at the headquarters for Engine 32. About ten minutes after being at quarters they were placed on an emergency run which was across the street and in close proximity to the station. After the emergency call across the street, they received a second call which resulted in them transporting a patient to the hospital. As they were sitting in the ambulance at the hospital, an ELO told them to call a land line at which time Employee complied. During the conversation while on the land line phone, she was told to place A-32 out of service and head back to quarters. Once they got back to quarters, they were informed by Lieutenant Delahaney that the deputy fire chief ordered that Employee and Steele prepare special reports concerning their whereabouts when they left Howard University Hospital and came back to headquarters. Employee’s report reads as follows:

After leaving Hospital 05 at 1909 hours, A-32 proceeded to go out of service to return to first due area. A-32 ran into traffic while proceeding to E-32’s first due area. A-32 went in service at 1947 hours on Malcolm X Ave. The crew members of A-32 then decided we will go get fuel to top off our fuel tank. At 1949 A-32 went out of service to go get fuel. The DFC came over channel 13 and stated to ELO “Have A-32 stay in service, they can get fuel later.” ELO replied ok, ELO then requested A-32 over channel 13. A-32 responded “A-32” and was told by ELO to not go get fuel at the time because we were the only ambulance in the city available and it was too busy, A-32 stated ok. ELO stated A-32 was being placed in service. A-32 stated ok. We then turned from channel 13 to channel 1 to monitor dispatched calls. We then returned to E-32’s Quarters.

In preparing her special report, Employee stated that she estimated the times she provided based on the unit history log. Employee testified that if she could go back to the evening on March 30, 2010, that she would have made A-32 available at the Anacostia River boundaries, as opposed to waiting until she turned onto Malcolm X Avenue. Employee also testified that she was aware that Agency could track the location and time of the location on any ambulance. She further testified that the I-Mobile malfunctioned on March 30, 2010, but did not report it because it was a common occurrence and did not feel the need to report it.

ANALYSIS AND CONCLUSIONS OF LAW

Pursuant to the *Pinkard*⁴ analysis, an Administrative Judge of this Office may not conduct a *de novo* hearing in an appeal before him/her, but must rather base his/her decision solely on the record below at the Fire Trial Board Hearing, when all of the following conditions are met:

⁴ *Metropolitan Police Department v. Pinkard*, 801 A.2d 86 (D.C. 2002).

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 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.⁵

Based on the documents of records and the position of the parties as stated during the Prehearing Conference and Telephone Conference held in this matter, I find that all of the aforementioned criteria are met in the instant matter. Therefore, my review is limited to the issues as set forth in the “Issues” section of this Initial Decision. Further, according to *Pinkard*, I must generally defer to the [Trial Board’s] credibility determinations when making my decision.⁶

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.⁷ If the [Trial Board’s] findings are supported by substantial evidence, I must accept them even if there is substantial evidence in the record to support contrary findings. See *Metropolitan Police Department v. Baker*, 564 A.2d 1155 (D.C. 1989).

Charge 1

Here, Employee admitted that she did not follow Special Order 20 by failing to status A-32 as available once she reached the boundary of the Anacostia River. However, she raises a claim of disparate treatment. In *Jordan v. Metropolitan Police Department*, OEA Matter No. 1601-0285-94, Opinion and Order on Petition for Review (September 29, 1995), this Office’s Board set forth the law regarding a claim of disparate treatment:

⁵ See *Id.*

⁶ *Id.*

⁷ *Black’s Law Dictionary*, Eighth Edition; *Mills v. District of Columbia Department of Employment Services*, 838 A.2d 325 (D.C. 2003); and *Black v. District of Columbia Department of Employment Services*, 801 A.2d 983 (D.C. 2002).

[An Agency must] apply practical realism to each [disciplinary] situation to ensure that employees receive fair and equitable treatment where genuinely similar cases are presented. It is not sufficient for an employee to simply show that other employees engaged in misconduct and that the agency was aware of it, the employee must also show that the circumstances surrounding the misconduct are substantially similar to [her] own. Normally, in order to show disparate treatment, the employee must demonstrate that he or she worked in the same organizational unit as the comparison employees and that they were subject to [disparate] discipline by the same supervisor [for the same offense] within the same general time period.

An employee who raises an issue of disparate treatment bears the burden of making a *prima facie* showing that he or she was treated differently from other similarly-situated employees.⁸ If such a showing is made, then the burden shifts to the agency to produce evidence that establishes a legitimate reason for imposing a different penalty on the employee raising the issue.⁹ “In order to prove a disparate treatment, [Employee] must show that a similarly situated employee received a different penalty.”¹⁰ In determining whether a penalty is reasonable it is appropriate to consider whether the agency has meted out similar penalties for similar offenses. *See Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985).

Employee testified that it was common practice among all four shifts that operate A-32 to status the unit as available once they reached Suitland Parkway or closer to E-32’s quarters. Suitland Parkway is well within the boundaries of the Anacostia River. Employee introduced the Unit History of A-32 from January 2010 through March 2010 to the Trial Board which demonstrated at least 49 different instances where members on all four shifts made A-32 available at or near headquarters after returning from a hospital run. Members on all four shifts who operate A-32 are similarly situated to Employee. It can be determined that those who were assigned to A-32 made the unit available at or near headquarters based on the close proximity in time that the status changed from “Delayed Response” back to “Available Mobile” and then to “At Quarters.”¹¹ Several of the instances in which Employee highlights in the Unit History of A-32, illustrate that members frequently switched from “Delayed Response” status to, “Available Mobile” and then to “At Quarters” within seconds of each other. In several other instances, A-32’s status changed from “Delayed Response” to “Available Mobile” and then “At Quarters” within one or two minutes of each other. This demonstrates that members who operated A-32 regularly changed the status of the unit to “available” at or near Engine 32’s quarters. This establishes a common practice within Agency. To status unit A-32 as available at or near headquarters is in direct contradiction to Special Order 20.

⁸ *See Hutchinson v. D.C. Fire Department*, OEA Matter No. 1601-01190-90, Opinion and Order on Petition for Review (July 22, 1994).

⁹ *Id.*

¹⁰ *Social Sec. Admin. v. Mills*, 73 M.S.P.B. 463 (1991).

¹¹ Ambulance 32’s Unit History abbreviates the pertinent statuses of the unit as follows: Delayed Response= DELAYRSP; Available Mobile= AM; and At Quarters= AQ

Nickens testified that it would take A-32 approximately five minutes to reach Engine 32's quarters, traveling in a non-responding fashion, from the time they crossed the Anacostia River. This indicates that if A-32's status changed from "available mobile" to "at quarters" within seconds or minutes of each other, then the unit was already well within the boundaries of the Anacostia River and not in compliance with Special Order 20. Nickens also testified that aside from Employee and Firefighter Steele, he has never charged anyone because they did not update their unit to "available" the moment they crossed the Anacostia River. He further stated that he has never verbally advised anyone that they were doing something wrong because they did not status the unit as available as soon as they reached the boundaries of the Anacostia River. Based on this testimony, it is clear that Employee has met her burden for establishing disparate treatment. Agency does not offer any reason for imposing a different penalty against Employee for failing to make A-32 "available" soon as she crossed the Anacostia River versus other employees who failed to make A-32 available as soon as they crossed the Anacostia River. As such, the penalty imposed against Employee for charge one must be reversed.

Charge 2

Employee and Firefighter Steele had a consolidated hearing before the Fire Trial Board in which it considered identical charges brought against both employees. The specifications of each charge were also essentially the same. Employee argues that she was subjected to disparate treatment for the charge of providing false and misleading information to Agency regarding the true status and location of Ambulance 32 after returning from HUH on March 30, 2010. Specifically, Employee asserts that her partner, Firefighter Steele, provided the same status, times, and location in his special report that she provided in her special report. However, her partner, Firefighter Steele, was found "not guilty" of providing false and misleading information regarding the status and location of Ambulance 32 after returning to quarters from HUH. Employee was found "guilty" of providing false and misleading information to Agency regarding the status and location of Ambulance 32.

In Employee's special report, she wrote that "A-32 went in service at [7:47 p.m.] on Malcolm X Ave." She further wrote that at "[7:49 p.m.] A-32 went out of service to go get fuel." A-32 returned to Quarters after corresponding with the ELO who advised them not to get fuel and go out of service because the city was "too busy." In Steele's special report, he states that after leaving the hospital, A-32 went out of service to return to their alarm district. Steele also stated that "once we got off of 295 at [Malcolm] X avenue exit we went in service at [7:47 p.m.], and at [7:49 p.m.] we decided to go get fuel we status in delayed to go get fuel (sic)." Steele's report further stated that immediately after putting the unit out of service to go get fuel, they heard the Deputy Fire Chief over the radio saying A-32 was the only available ambulance in the city at the time and that they could get fuel later. Once A-32 was advised they were being put back in service by Communications, they returned to headquarters.

Employee's special report and Steele's special report provide the exact same time for when they placed A-32 in service as available and the same time for when they went out of service to go get fuel. Both Employee's and Steele's testimony given at the Trial Board corroborated what was written in their special reports. Despite providing the same information about the status and location of A-32, the Fire Trial Board found Employee "guilty" on the

charge of providing false and misleading information to the Agency, and found Steele “not guilty” of providing false and misleading information to the Agency. Employee provided a copy of the Final Decision issued to Firefighter Steele in which the Trial Board found him “not guilty” of charge two. A copy of the Final Agency Decision issued to Employee was also provided in the record. Employee has established a *prima facie* argument that Agency treated her differently from her partner, Steele, who is a similarly-situated employee. Agency did not provide any reason as to the different treatment Employee received versus the treatment Steele received in regard to charge two in this case. The inconsistent findings by the Fire Trial Board, as it relates to charge two against Employee and Firefighter Steele, exemplify the disparate treatment Employee received by Agency. Agency does not offer any reason for imposing different penalties for Employee and Firefighter Steele, despite providing the same information regarding the status and location of A-32 on the evening on March 30, 2010. As such, the penalty imposed against Employee for charge two, providing false and misleading information to Agency, must be reversed.

Because I have found that Employee was subjected to disparate treatment by Agency, I will not address issues two and three: whether there was harmful procedural error, or whether the Agency’s action was in accordance with the law and applicable regulations.

ORDER

Accordingly, it is hereby **ORDERED** that:

1. Agency’s 168-hour suspension of Employee is **REVERSED**;
2. Agency shall immediately reimburse Employee all back-pay and benefits lost from her 168-hour suspension; and
3. Agency shall file with this Office, within thirty (30) calendar days from the date on which this decision becomes final, documents evidencing compliance with the terms of this Order.

FOR THE OFFICE:

Arien P. Cannon, Esq.
Administrative Judge