THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
ROBERT ALVARADO,	)	
Employee	)	OEA Matter No. 1601-0173-12
	)	
v.	)	Date of Issuance: February 2, 2015
	)	
D.C. FIRE & EMERGENCY MEDICAL SERVICES DEPARTMENT,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Senior Administrative Judge
	)	

Megan K. Mechak, Esq., Employee Representative
Kevin J. Turner, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

The District of Columbia Fire and Emergency Medical Department ("FEMS" or "the Agency") hired Robert Alvarado ("Employee") in April 2000. Employee was promoted to Sergeant in 2008 and, ultimately, to Lieutenant. After his promotion, FEMS assigned then-Lieutenant Alvarado to Truck 13. On January 4, 2012, then-Lieutenant Alvarado provided an interview to Paul Wagner, a reporter for WTTG (Washington's Fox 5 News). The purpose of this interview was so that Employee could provide his viewpoint on a prior interview given by then FEMS Chief Ellerbe regarding a recent change to the Agency's uniform policy. During Employee's interview, a patient arrived at the firehouse needing immediate medical assistance. Employee immediately delivered care to the patient. However, a portion of the care that was provided was recorded by Fox 5 and later broadcast in a news segment. As a result of this incident, FEMS charged Employee with Neglect of Duty for violating the patient's right to privacy.[1] Shortly thereafter on February 21,2012, Employee was assisting a colleague outside of the FEMS Training Academy when he was approached by Battalion Fire Chief ("BFC") Mark J.

[1] This was the basis for Case No. U-12-073. Employee was suspended for 240 duty hours pursuant to this charge and at its specification.

Wynn who noted in a special report that Employee was wearing logo noncompliant gear. BFC Wynn then ordered Employee to change into gear that was compliant. Employee noted that he did not have compliant gear that was weather appropriate and accordingly refused the order. As a result of this incident, FEMS charged Employee with Insubordination.[2]

The Agency conducted a Fire Trial Board for both cases on May 16, 2012. As a result of these proceedings the Trial Board recommended that Employee be demoted from the rank of Lieutenant to Sergeant and that he be suspended for a combined two hundred and sixty four (264) duty hours. FEMS then-Chief Ellerbe accepted the recommendation in full. On July 31, 0212, Employee appealed Agency's adverse action to the Office of Employee Appeals ("OEA" or 'the Office"). Thereafter, the parties attended a Status Conference wherein it was determined that this matter would be adjudicated based on the standard outlined in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). Accordingly, the parties were provided with a briefing schedule in which they would be able to address the merits of this matter and respond to the opposing parties' arguments. Both parties have complied with this briefing schedule. The record is now closed.

JURISDICTION

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

BURDEN OF PROOF

OEA Rule 628.1, 59 DCR 2129 (March 16, 2012) 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 628.2 *id.* states:

> The employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing. The agency shall have the burden of proof as to all other issues.

ISSUES

Whether the Trial Board's decision was supported by substantial evidence, whether there was harmful procedural error, or whether Agency's action was done in accordance with

[2] This was the basis for Case No. U-12-077. Employee was suspended for 24 duty hours and he was demoted from the rank of Lieutenant to Sergeant pursuant to this charge and its specifications.

applicable laws or regulations.

STATEMENT OF THE CHARGES

Employee's appeal involves two separate adverse actions: Case No: U-12-073 and Case No: U-12-077. The charges and specifications, in pertinent part, are reprinted as follows:

Case No: U-12-073

Charge No. 1: Violation of [FEMS] Rules and Regulations, Article VI, Section 2 (*Rules of Conduct*), which states, "Members shall devote proper attention to the service, exert their greatest energy and full ability in the performance of their duties, not perform their duties in a spiritless, lax, surly, or careless manner, not neglect nor fail to perform any portion of their duties required by rule, regulation, order, common practice, or the necessities of the situation involved; … be efficient; exercise poor judgment in the performance of their duties." This misconduct is further defined in the DC Fire & EMS Bulletin No. 3 (March 2011), *Patient Bill of Rights*, which states in relevant part: "You may expect [t]hat your privacy, modesty and comfort will be our concern." This misconduct is defined as cause to wit: "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity of government operations, to include Neglect of Duty…"

Specification No. 1: On or about January 4, 2012, you contacted a reporter with [Fox 5 news], and agreed to an interview in front of the quarters of Engine 10 and Truck 13. During the interview a D.C. WASA employee requested medical care. The Fox 5 news crew filmed the medical care provided to this patient in violation of D.C. Fire and EMS Patient Bill of Rights. You had a responsibility before patient care began to protect the privacy rights of the patient.

Case No. U-12-077

Charge No. 1: Violation of D.C. Fire & EMS Rules and Regulations, Article VI, Section 4, (*Rules of Conduct*), which reads in relevant part, "Members shall refrain from conduct prejudicial to Departmental reputation, order or discipline…" This misconduct is further defined in D.C. Fire and EMS Order Book, Article XXI, Section 23 and Special Order, Series 2011, No. 44 (December 28, 2011), *Dress and Work Uniform*. This misconduct is defined as cause to wit: "Any on-duty or employment-related act or omission that interferes with the efficiency and integrity operations, to include: Insubordination …"

Specification No. 1: In accordance with the February 21, 2012, Special Report of Battalion Fire Chief (BFC) Mark J. Wynn, you reported to the Training Academy on February 21, 2012, in outerwear which was non-compliant with D.C. Fire & EMS Order Book, Article XXI, Section 23 and Special Order, Series 2011, No. 44.

Specification No. 2: On February 21, 2012, BFC Mark Wynn observed you at the Training Academy in outerwear which was non-complaint with the D.C. Fire and EMS Order Book… Chief Wynn informed you of same and directed you to come into compliance, by removing the non-compliant outerwear. According to your February 21, 2012 Special Report, you stated that you would not come into compliance with Department Orders, and you were relieved from duty.

ANALYSIS AND CONCLUSIONS

This Office's review of this matter is limited pursuant to the D.C. Court of Appeals holding in *Elton Pinkard v. D.C. Metropolitan Police Department*, 801 A.2d 86 (D.C. 2002). In that case, the D.C. Court of Appeals overturned a decision of the D.C. Superior Court that held, *inter alia*, that this Office had the authority to conduct *de novo* evidentiary hearings in all matters before it. According to the D.C. Court of Appeals:

> The OEA generally has jurisdiction over employee appeals from final agency decisions involving adverse actions under the CMPA. The statute gives the OEA broad discretion to decide its own procedures for handling such appeals and to conduct evidentiary hearings. *See* D.C. Code §§ 1-606.2 (a)(2), 1-606.3 (a), (c); 1-606.4 (1999), recodified as D.C. Code §§ 1-606.02 (a)(2), 1-606.03 (a), (c), 1-606.04 (2001); *see also* 6 DCMR § 625 (1999).
>
> The MPD contends, however, that this seemingly broad power of the OEA to establish its own appellate procedures is limited by the collective bargaining agreement in effect at the time of Pinkard's appeal. The relevant portion of the collective bargaining agreement reads as follows:
>
> [An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing has been held, *any further appeal shall be based solely on the record established in the Departmental hearing.* [Emphasis added.]
>
> Pinkard maintains that this provision in the collective bargaining agreement, which appears to bar any further evidentiary hearings, is effectively nullified by the provisions in the CMPA which grant the OEA broad power to determine its own appellate procedures. A collective bargaining agreement, Pinkard asserts, cannot strip the OEA of its statutorily conferred powers. His argument is essentially a restatement of the administrative judge's conclusions with respect to this issue.
>
> It is of course correct that a collective bargaining agreement, standing alone, cannot dictate OEA procedure. But in this instance the collective bargaining agreement does not stand alone. The CMPA itself explicitly provides that systems for review of adverse actions set forth in a collective

> bargaining agreement must take precedence over standard OEA procedures. D.C. Code § 1-606.2 (b) (1999) (now § 1-606.02 (b) (2001)) states that "any performance rating, grievance, adverse action, or reduction-in-force review, which has been included within a collective bargaining agreement . . . *shall not be subject to the provisions of this subchapter*" (emphasis added). The subchapter to which this language refers, subchapter VI, contains the statutory provisions governing appellate proceedings before the OEA. *See* D.C. Code § 1-606.3 (1999) (now § 1-606.03 (2001)). Since section 1-606.2 (b) specifically provides that a collective bargaining agreement must take precedence over the provisions of subchapter VI, we hold that the procedure outlined in the collective bargaining agreement -- namely, that any appeal to the OEA "shall be based solely on the record established in the [Adverse Action Panel] hearing" -- controls in Pinkard's case.
>
> The OEA may not substitute its judgment for that of an agency. Its review of an agency decision -- in this case, the decision of the Adverse Action Panel in the MPD's favor -- is limited to a determination of whether it was supported by substantial evidence, whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations. The OEA, as a reviewing authority, also must generally defer to the agency's credibility determinations. Mindful of these principles, we remand this case to the OEA to review once again the MPD's decision to terminate Pinkard, and we instruct the OEA, as the collective bargaining agreement requires, to limit its review to the record made before the Adverse Action Panel.[3]

Thus, pursuant to *Pinkard*, 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, when all of the following conditions are met:

> 1. The appellant (Employee) is an employee of the Metropolitan Police Department or the D.C. Fire & Emergency Medical Services Department;
>
> 2. The employee has been subjected to an adverse action;
>
> 3. The employee is a member of a bargaining unit covered by a collective bargaining agreement;
>
> 4. The collective bargaining agreement contains language essentially the same as that found in *Pinkard*, *i.e.*: "[An] employee may appeal his adverse action to the Office of Employee Appeals. In cases where a Departmental hearing [*i.e.*, Adverse Action Panel] has been held, any further appeal shall be based solely on the record established in the

[3] *Id.* at 90-92. (citations omitted).

> 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.

Based on the documents of records and the position of the parties as stated during the 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 Issue section of this Initial Decision *supra*. Further, according to *Pinkard*, I must generally defer to [the Fire Trial Board's] credibility determinations when making my decision. *Id.*

Whether the Adverse Action Panel's decision was supported by substantial evidence.

According to *Pinkard*, I must determine whether the Adverse Action Panel's findings were supported by substantial evidence. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[4] Further, "[i]f the [Fire 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." [5]

Case No: U-12-073

According the transcript created during the aforementioned Trial Board, on January 4, 2012, Employee provided an interview to Paul Wagner, a reporter for WTTG (Washington's Fox 5 News). Employee asserts that he contacted Fox 5 because he wanted to discuss Fire Chief Kenneth Ellerbe's January 3, 2012 interview with Fox 5. Alvarado granted the interview to respond to Chief Ellerbe's comments to Fox 5 relating to Special Order 2011-44 (December 28, 2011), which was effective January 1, 2012, and prohibited FEMS members from wearing clothing with the "DCFD" logo on it.

During the interview, Employee responded to Chief Ellerbe's assertion that FEMS provides the bulk of FEMS members' outerwear and that the order only applied to sweatshirts, t-shirts and the like. During this interview, Employee asserted that the Agency provides structural firefighting gear, and *not* regular outerwear. Employee testified that the aforementioned interview was conducted on the front ramp (a public sidewalk) outside of his assigned firehouse.

Prior to the start of the recording of this interview, Employee explained that the wires for the microphone he was wearing were threaded under his shirt and affixed to his lapel. During the interview, a truck for the DC Water and Sewer Authority ("WASA") drove to the firehouse and requested medical assistance. It would seem that the WASA employee was suffering from an apparent heart attack and needed prompt medical attention. Employee immediately rendered aid to the patient as he had been trained to do as a member of FEMS. In his haste, Employee

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[4] *Davis-Dodson v. D.C. Department of Employment Services*, 697 A.2d 1214, 1218 (D.C. 1997) (citing *Ferreira v. D.C. Department of Employment Services*, 667 A.2d 310, 312 (D.C. 1995)).
[5] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).

was unable to remove the microphone from his lapel. The aid that was rendered by Employee and his colleagues were recorded by the Fox 5 news crew. Agency asserts that the patients' privacy was unnecessarily compromised. Agency asserts that Employee violated Agency's Bulletin No. 3, the *Patient Bill of Rights* because a portion of the care that was rendered by Employee was recorded thereby allegedly violating the patients expectation of privacy.

Employee contends that the Trial Board lacked substantial evidence to sustain this charge. Employee posits that the patient's expectation of privacy lies solely with the patient. Moreover, Employee argues the following:

> DCFEMS presented *no* evidence that the *patient* believed that then-Lieutenant Alvarado's actions violated his expectations "[t]hat your privacy, modesty and comfort will be [DCFEMS'] concern," as alleged in Charge No. 1 in Case No. U-12-073. Absent evidence that the *patient* believed his rights had been violated, there is no substantial evidence that then-Lieutenant Alvarado's violated DCFEMS' Patient Bill of Rights because those rights belong to the *patient*.
>
> Second, the Information and Privacy Officer's findings make clear that:
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> > [T]he Department has no legal obligation to prevent the media from recording images or other information concerning patients in the public space. For example, if an auto accident occurred at a street corner and media was present to record Department activities, under the law, the Department would NOT be required, nor are we empowered to ask the media to stop such recordings. Treatment of patients during such events should proceed according to medical protocol and to the point necessary to stabilize patient condition…
>
> DCFEMS Information and Privacy Officer Andrew Beaton confirmed that the Agency cannot stop a news crew from filming in a public space. Tr. 39:2-5. The Agency's decision that then-Lieutenant Alvarado violated the patient's rights pursuant to DCFEMS' Patient Bill of Rights stems from its conclusion that Alvarado summoned the Fox5 news crew, or caused the Fox5 news crew to be summoned, to his station. This "summoner" distinction is not, however, contained in DCFEMS' Patient Bill of Rights…
>
> DCFEMS' Patient Bill of Rights does not detail employees' obligations to ensure, and does not address, patient privacy when emergency medical services are provided in public spaces.[6]

Both FEMS and Employee agree that Employee did not have the authority to control the actions of the Fox 5 news crew in a public space and that Fox 5 is not bound by the Patient Bill of Rights and therefore had no prescribed limitation on its action of recording a news event that

[6] Employee's Brief in Opposing Discipline Imposed in DCFEMS Case Nos. U-12-073 and U-12-077 at 7 - 8.

occurs in a public space. Employee contends that given the exigent circumstances that occurred that he was unable to take the time to ask the news crew to stop recording before he started rendering emergency medical aid to the D.C. WASA employee.

During the Trial Board, Dr. David Miramontes ("Dr. Miramontes") testified on behalf of the Agency that he is an Assistant Fire Chief with FEMS and in said role operates as the Agency's Medical Director. Dr. Miramontes testified that FEMS members work in "odd" situations that may make it impossible to fully protect a patient's right o privacy. Regarding the alleged violation of the patient's privacy, Dr. Miramontes indicated that Employee could have taken additional steps in an attempt to protect the patient's privacy including verbally requesting that the Fox 5 news crew cease recording. Seemingly, this minor act would have prevented the Agency from imposing this charge and specification.

The seminal question with respect to whether there was substantial evidence to sustain this particular charge and specification lies with whether the Agency on its own can ascertain and then decide when a patients right to privacy, relative to the aforementioned patient bill of rights, has been violated. It is uncontroverted that the WASA employee's medical emergency was filmed by the Fox 5 news crew. What is in question is whether the Agency, given the instant circumstances, may assert the right of privacy on the patient's behalf without ever ascertaining from the patient whether or not he had taken issue with his treatment being filmed. Of note, it is uncontroverted that Employee rendered medical care in a public space. I also take note that Fox 5 news more than likely would not have been present to record this incident if Employee had not first acquiesced to an interview. Moreover, Fox 5 news, as a news reporting entity, has an unfettered right to report and/or film events of journalistic value that occur in a public space. Such was the case in the instant matter. Fox 5 news is not encumbered by the so-called Patient Bill of Rights. I am also taking into consideration that Employee immediately responded to a person in need of medical attention, that this prompt medical attention possibly resulted in a life saved versus a life lost, and that to my knowledge the patient in this matter has not complained about the care that he received nor did he complain about the lack of privacy associated with said care. This was a case of first impression for the Trial Board as noted in its consideration of Douglas Factor No. 6.[7] I also note that the Patient Bill of Rights states in pertinent part as follows:

> As our patient, you have the right to expect competent and compassionate service from us. *If you have any questions, comments, compliments, or complaints about our service you are encouraged to call the Office of the Fire Chief at 202-673-3320 or email us at director.fems@dc.gov.* (*Emphasis added*).

I find that given the breadth of the parties' arguments in this matter that the Agency does not have the right to assert an adverse action against Employee herein for a violation of privacy rights absent a complaint from an aggrieved patient. Since FEMS opted not to present evidence that the patient complained or at the least commented about his privacy was violated, FEMS cannot now assume that this patients' rights were violated. After reviewing the charge that was levied against Employee, I further find that the Agency did not have substantial evidence to

[7] See DC Fire and EMS Trial Board Findings of Fact, Conclusions and Recommendation, Case No. U-12-073 at 4.

make a finding of guilt in Case No. U-12-073.

Case No: U-12-077

During the Trial Board proceeding with respect to Case No. U-12-077, Employee admitted that he was aware of a then-recently enacted change to the Agency's uniform policy; that he was wearing gear that had a non-compliant logo; and, that he disobeyed an order to take off said gear when he was confronted by Battalion Fire Chief Wynn. I note that this policy was announced on January 1, 2012. However, Employee contends that the Agency did not immediately make logo compliant gear available to its members. Employee's explanation relative to this charge was that Chief Ellerbe had presented conflicting points of view regarding member's uniform when interviewed by a local news media outlet. Employee also asserted that Chief Ellerbe had noted that during this interview that members would not face corrective or adverse action for wearing newly non-compliant gear until compliant gear had been made available for mass distribution. Employee also notes that when his superior ordered him to change or take off the non-compliant gear, they were outdoors in mid-February and that he did not have in his possession compliant gear that would adequately protect him from the elements. Accordingly, Employee's refused to immediately comply with the order to change his gear.

After reviewing the Trial Board transcript provided to the OEA, I find that the facts that underlie this cause of action were given short shrift and were not addressed. For the most part, Employee's own testimony regarding why he was wearing non-compliant logo gear was the most relevant testimony with respect to this charge and its attendant specifications. According to the Trial Board transcript submitted to the OEA by FEMS, none of the witnesses called by the Agency directly testified about this particular case. Dr. Miramontes and Andrew Beaton testimonies were focused solely on Case No. U-12-073. Aside from Employee, all of the remaining witnesses that testified were character witnesses (who all thought highly of Employee's work ethic and leadership capabilities). According to the record filed with the OEA, BFC Wynn, the complaining eyewitness, did not provide any sworn testimony in this matter. Put another way, all of FEMS' witnesses testimony centered on the Agency's interpretation of the Fox 5 news segment and the allegations surrounding the alleged breach of the patient privacy, which was the basis for Case No. U-12-073. Barely any mention was made to the incident that underlies Case No. U-12-077, except by Employee's own testimony. Notwithstanding Agency's arguments and evidence to the contrary, I find that that the Trial Board did not have substantial evidence to make a finding of guilt in Case No. U-12-077.

Whether there was harmful procedural error and whether Agency's action was done in accordance with applicable laws or regulations.

As was mentioned *supra*, the Trial Board did not present evidence or testimony in order to determine whether or not the patient believed his privacy rights were violated.[8] In its reply brief, Agency defends its adverse action on this point by arguing that it should not have to wait for a patient to complain. As part of this argument, FEMS proffered hypothetical scenarios of being unable to ascertain a patient's belief that their rights were violated when the patient is

[8] Relative to Case No. U-12-073.

unconscious or has passed away. However, the Undersigned is not empowered to rule on hypothetical situations, but rather, I may only decide on the situation at hand. Herein, the patient was alive, conscious, and seemingly in possession of his mental and physical faculties. Moreover, there is no evidence in the record to note whether the patient did or did not complain regarding his privacy rights. Given the instant circumstances, I find that the Trial Board erred when it failed to allow Employee's representative to ask an Agency sponsored witnesses whether they had received any complaint or notification from the instant patient regarding his belief that his privacy had been violated. I further find that this failure constituted harmful procedural error.

The primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office. *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Dep't*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994). Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but is simply to ensure that "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985). However, based on the preceding I find that FEMS abused its discretion in both cases. I further find that Employee's suspensions and demotion should be reversed.

ORDER

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

1. Agency's action of demoting Employee from Lieutenant to Sergeant is **REVERSED**; and

2. Agency's action of suspending Employee for two hundred sixty four (264) duty hours is **REVERSED**; and

3. The Agency shall reimburse Employee all back-pay and benefits lost as a result of his suspension and demotion; and

4. The 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:

_____

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE