SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001
Telephone: (202) 879-1133 • Website: www.dccourts.gov

WILLIAM REDDEN JR
Vs.
DC OFFICE OF THE INSPECTOR GENERAL

C.A. No. 2018 CA 002968 P(MPA)

INITIAL ORDER AND ADDENDUM

Pursuant to D.C. Code § 11-906 and District of Columbia Superior Court Rule of Civil Procedure ("Super. Ct. Civ. R.") 40-I, it is hereby **ORDERED** as follows:

(1) Effective this date, this case has assigned to the individual calendar designated below. All future filings in this case shall bear the calendar number and the judge's name beneath the case number in the caption. On filing any motion or paper related thereto, one copy (for the judge) must be delivered to the Clerk along with the original.

(2) Within 60 days of the filing of the complaint, plaintiff must file proof of serving on each defendant: copies of the summons, the complaint, and this Initial Order and Addendum. As to any defendant for whom such proof of service has not been filed, the Complaint will be dismissed without prejudice for want of prosecution unless the time for serving the defendant has been extended as provided in Super. Ct. Civ. R. 4(m).

(3) Within 21 days of service as described above, except as otherwise noted in Super. Ct. Civ. R. 12, each defendant must respond to the complaint by filing an answer or other responsive pleading. As to the defendant who has failed to respond, a default and judgment will be entered unless the time to respond has been extended as provided in Super. Ct. Civ. R. 55(a).

(4) At the time and place noted below, all counsel and unrepresented parties shall appear before the assigned judge at an initial scheduling and settlement conference to discuss the possibilities of settlement and to establish a schedule for the completion of all proceedings, including, normally, either mediation, case evaluation, or arbitration. Counsel shall discuss with their clients **prior** to the conference whether the clients are agreeable to binding or non-binding arbitration. **This order is the only notice that parties and counsel will receive concerning this Conference.**

(5) Upon advice that the date noted below is inconvenient for any party or counsel, the Quality Review Branch (202) 879-1750 may continue the Conference **once**, with the consent of all parties, to either of the two succeeding Fridays. Request must be made not less than seven business days before the scheduling conference date.
No other continuance of the conference will be granted except upon motion for good cause shown.

(6) Parties are responsible for obtaining and complying with all requirements of the General Order for Civil cases, each judge's Supplement to the General Order and the General Mediation Order. Copies of these orders are available in the Courtroom and on the Court's website http://www.dccourts.gov/.

Chief Judge Robert E. Morin

Case Assigned to: Judge JOHN M CAMPBELL
Date: May 2, 2018
Initial Conference: 9:30 am, Friday, August 03, 2018
Location: Courtroom 519
500 Indiana Avenue N.W.
WASHINGTON, DC 20001

ADDENDUM TO INITIAL ORDER AFFECTING ALL MEDICAL MALPRACTICE CASES

In accordance with the Medical Malpractice Proceedings Act of 2006, D.C. Code § 16-2801, et seq. (2007 Winter Supp.), "[a]fter an action is filed in the court against a healthcare provider alleging medical malpractice, the court shall require the parties to enter into mediation, without discovery or, if all parties agree[,] with only limited discovery that will not interfere with the completion of mediation within 30 days of the Initial Scheduling and Settlement Conference ("ISSC"), prior to any further litigation in an effort to reach a settlement agreement. The early mediation schedule shall be included in the Scheduling Order following the ISSC. Unless all parties agree, the stay of discovery shall not be more than 30 days after the ISSC." D.C. Code § 16-2821.

To ensure compliance with this legislation, on or before the date of the ISSC, the Court will notify all attorneys and *pro se* parties of the date and time of the early mediation session and the name of the assigned mediator. Information about the early mediation date also is available over the internet at https://www:dccourts.gov/pa/. To facilitate this process, all counsel and *pro se* parties in every medical malpractice case are required to confer, jointly complete and sign an EARLY MEDIATION FORM, which must be filed no later than ten (10) calendar days prior to the ISSC. D.C. Code § 16-2825 Two separate Early Mediation Forms are available. Both forms may be obtained at www.dccourts.gov/medmalmediation. One form is to be used for early mediation with a mediator from the multi-door medical malpractice mediator roster; the second form is to be used for early mediation with a private mediator. Both forms also are available in the Multi-Door Dispute Resolution Office, Suite 2900, 410 E Street, N.W. Plaintiff's counsel is responsible for eFiling the form and is required to e-mail a courtesy copy to earlymedmal@dcsc.gov. *Pro se* Plaintiffs who elect not to eFile may file by hand in the Multi-Door Dispute Resolution Office.

A roster of medical malpractice mediators available through the Court's Multi-Door Dispute Resolution Division, with biographical information about each mediator, can be found at www.dccourts.gov/medmalmediation/mediatorprofiles. All individuals on the roster are judges or lawyers with at least 10 years of significant experience in medical malpractice litigation. D.C. Code § 16-2823(a). If the parties cannot agree on a mediator, the Court will appoint one. D.C. Code § 16-2823(b).

The following persons are required by statute to attend personally the Early Mediation Conference: (1) all parties; (2) for parties that are not individuals, a representative with settlement authority; (3) in cases involving an insurance company, a representative of the company with settlement authority; and (4) attorneys representing each party with primary responsibility for the case. D.C. Code § 16-2824.

No later than ten (10) days after the early mediation session has terminated, Plaintiff must eFile with the Court a report prepared by the mediator, including a private mediator, regarding: (1) attendance; (2) whether a settlement was reached; or, (3) if a settlement was not reached, any agreements to narrow the scope of the dispute, limit discovery, facilitate future settlement, hold another mediation session, or otherwise reduce the cost and time of trial preparation. D.C. Code§ 16-2826. Any Plaintiff who is *pro se* may elect to file the report by hand with the Civil Actions Branch. The forms to be used for early mediation reports are available at www.dccourts.gov/medmalmediation.

Chief Judge Robert E. Morin

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
Civil Division

WILLIAM REDDEN, JR.
Petitioner(s)

v.

MPA NO. _____

18-0002968

D.C. OFFICE OF THE INSPECTOR GENERAL
Respondent(s)

PETITION FOR REVIEW OF AGENCY DECISION

A. **Notice is hereby given that** WILLIAM REDDEN **appeals to the Superior Court of the District of Columbia from the order of** OFFICE OF EMPLOYEE APPEALS **(agency or official's name), issued on the** 24th **day of** APRIL, 20 18. **A copy of that order or decision is attached to this petition.**
Description of Judgment or Order: OPINION AND ORDER ON PETITION FOR REVIEW

A concise statement of the Agency proceedings and the decision as to which review is sought and the nature of the relief requested by petitioner: AGENY WRONGFULLY TERMINATED ME BY KNOWINGLY SUBMITTING A FALSE DOUGLAS FACTOR WORKSHEET #11 AWARE I WAS UNDER PSYCHIATRIC TREATMENT

B. **Address of Respondent, Agency or Official:** 717 14th St, NW, WASHINGTON D.C. 20005

C. **Names and addresses of all other parties to the Agency's proceeding:** _____

D. **Names and address of parties or attorneys to be served:**

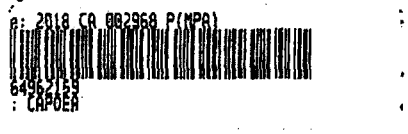
NAME	ADDRESS
1. JANEA HAWKINS	441 4th St NW
2. _____	SUITE 1180N
3. _____	WASHINGTON D.C.
4. _____	_____

E. **A copy of the Agency's decision or Order sought to be reviewed is attached.**

PRO BONO WILLIAM REDDEN
Print name of petitioner's attorney

William Redden
Signature of petitioner's counsel or petitioner's signature

Address: 1 LAUREL HILL RD UNIT A GREENBELT MD 20770
Bar No. _____ **Telephone No.** 240-676-4876



THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
WILLIAM REDDEN, JR., Employee	OEA Matter No. 1601-0021-17
v.	Date of Issuance: April 24, 2018
OFFICE OF THE INSPECTOR GENERAL, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

William Redden, Jr. ("Employee") worked as an Investigator with the Office of the Inspector General ("Agency"). On November 8, 2016, Agency issued a Proposed Notice of Separation, charging Employee with "conduct prejudicial to the District government: unauthorized disclosure of information protected by statute." The charge stemmed from an August 31, 2016 incident wherein Employee faxed a hotline complaint from a prisoner to the same Federal Prison Camp that was the subject matter of the complaint.[1] According to Agency, Employee sent the fax without authorization, in violation of D.C. Official Code § 1-301-115a (b-1). On December 21, 2016, Employee was issued a Final Agency Decision. The effective date of

[1] Agency's hotline program is a mechanism which permits members of the public to anonymously report waste, fraud, abuse, or mismanagement to the Office of the Inspector General. Complaints may be called in or reported by way of a "Hotline Online Complaint Form."

Employee's termination was December 30, 2016.

Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA") on January 6, 2017. In his appeal, Employee argued that termination was unduly harsh and that Agency discriminated against him. Employee also stated that he had no previous disciplinary actions during his tenure. Thus, he opined that Agency's termination action was callous, cynical, and administratively improper. Consequently, Employee asked to be reinstated with back pay and benefits.[2]

Agency filed an Answer to Employee's Petition for Appeal on February 8, 2017. It asserted that Employee admittedly failed to follow procedures and policies by releasing a prisoner complaint to a federal prison without authorization. In addition, Agency provided that Employee was not terminated for discriminatory reasons. Accordingly, it requested that the termination action be upheld.[3]

An OEA Administrative Judge ("AJ") was assigned to the matter in June of 2017. On August 9, 2017, the AJ issued an Order Rescheduling a Prehearing Conference for August 23, 2017.[4] After the conference, the parties were ordered to submit briefs addressing whether Agency engaged in progressive discipline; whether termination was appropriate under District law and the Table of Appropriate Penalties; and whether Agency properly considered the *Douglas* factors in imposing its adverse action against Employee.[5]

In its brief, Agency stated that Employee attended a "Hotline Program Team Meeting" during which Employee was issued a Risk Assessments and Future Plans ("RAFP") handbook.[6]

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[2] *Petition for Appeal* (January 6, 2017).
[3] *Agency Answer to Employee's Petition for Appeal* (February 8, 2017).
[4] *Order Rescheduling Prehearing Conference* (August 9, 2017).
[5] *Post-Status Conference/Prehearing Order* (August 28, 2017).
[6] The RAFP Handbook, General Guidelines and Procedures, included the process for assessing hotline complaints referred to as "DART" or "Dismiss, Assist, Refer, Transfer." The handbook contained instructions for completing Complaint Analysis Forms, which hotline personnel were required to submit to RAFP management for

Agency explained that on April 5, 2016, Employee was provided with step-by-step instructions for processing complaints from federal prisoners, including completing and submitting Complaint Analysis ("CA") forms; submitting fax template forms for approval; and faxing approved complaints to the Department of Justice ("DOJ") hotline for investigation. According to Agency, on August 23, 2016, it received a complaint from an inmate at Alderson Federal Prison Camp, alleging retaliation by facility staff. The complaint was subsequently assigned to Employee, who met with RAFP Program Manager, Brandy Cramer, on August 31, 2016. During the meeting, Employee and Cramer discussed the Alderson complaint for possible referral to the DOJ. However, Agency stated that less than an hour later, Employee faxed the inmate's complaint directly to the prison camp from which it originated. Employee subsequently emailed Cramer to inform her of his actions. Thus, Agency argued that Employee's termination was taken for cause because his actions violated its policy regarding referrals of inmate complaints and unauthorized disclosure of confidential information. Agency further contended that it engaged in progressive discipline prior to removing Employee because he was given both verbal and written admonitions regarding his performance deficiencies. Lastly, it provided that the *Douglas* factors were properly considered in selecting the penalty of termination. Therefore, Agency requested that the AJ uphold Employee's termination.[7]

In response, Employee argued that Agency failed to engage in progressive discipline and maintained that its actions constituted harassment. Employee also asserted that he was demoted in his duties as an Investigator when Agency changed his position from an investigative nature to one of a data input clerk. While he admitted to faxing a prisoner complaint to the Alderson facility on August 31, 2016, Employee disputed that the act was done intentionally. Additionally,

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consideration and approval. Agency's RAFP employees were told that the handbook would become effective on February 29, 2016.

[7] *Agency's Brief in Support of Employee's Removal* (October 2, 2017).

Employee claimed that Agency should have made an effort to determine the actual consequences of his inadvertent error. In the absence of such, Employee reasoned that Agency could only speculate that an abstract or potential harm occurred to the complainant. With respect to the penalty, Employee submitted that Agency did not accurately consider the *Douglas* factors when instituting its termination action. He further stated that Agency discriminated against him, citing to an active case that he filed with the D.C. Office of Human Rights ("OHR"). As a result, Employee opined that his termination was improper.[8]

The AJ issued an Initial Decision on November 8, 2017. She first highlighted D.C Municipal Regulation ("DCMR") § 1605.2, which provides that a corrective or adverse action against an employee is appropriate when he or she cannot meet identifiable conduct or performance standards which adversely affect the integrity of government operations. The AJ agreed with Employee's argument that he unintentionally faxed an inmate complaint back to the originating prison facility without authorization. However, she noted that Employee still disclosed the identity of the complainant inmate, in violation of D.C. Official Code § 1-301.115. Additionally, the AJ determined that Employee received training on the procedures that were required to process complaints as an Investigator. Consequently, the AJ concluded that Agency established that it had cause to institute an adverse action against Employee.

With respect to Employee's claims of discrimination, the AJ stated that D.C. Official Code § 2-1411.02 specifically reserves complaints of unlawful discrimination to OHR. However, she clarified that OEA may exercise jurisdiction over claims of unlawful discrimination if the aggrieved employee contends that he or she was targeted for certain whistleblowing activities, or if the complaint alleged retaliation in a Reduction-in-Force ("RIF").[9] In reviewing Employee's

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[8] *Employee Brief* (October 4, 2017).
[9] *See El Amin v. District of Columbia Department of Public Works*, 730 A.2d 164 (D.C. 1999).

submissions, the AJ concluded that his claims did not allege any whistleblowing activities, and Agency's termination action was not retaliatory in nature. Therefore, she dismissed Employee's discrimination claims as meritless.

Concerning Employee's contention that he was demoted in his duties, the AJ held that complaints of this nature were considered grievances which fall outside the scope of OEA's jurisdiction. She further provided that the Omnibus Personnel Reform Act of 1998, D.C. Law 12-124, divested this Office of jurisdiction to adjudicate grievances, effective October 21, 1998. Accordingly, the AJ was unable to address Employee's argument.

With regards to the penalty, the AJ stated that under the holding in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985), OEA was tasked with determining whether the penalty selected was within the range allowed by the Table of Penalties; whether the agency considered all relevant factors; and whether there was a clear error of judgment by agency. In addition, the AJ relied on DCMR §1607.2 (a)(10) in determining that the penalty for a first offense for prejudicial conduct is reprimand to removal. Thus, she opined that Agency did not abuse its discretion in its selection of the penalty of termination. The AJ further concluded that Agency considered the relevant *Douglas* factors, discussed *infra*, in selecting the appropriate penalty.

Lastly, the AJ found Employee's contention that Agency failed to engage in progressive discipline to be unpersuasive. Under DCMR § 1601.5, steps that are typically included in a progressive discipline system include verbal counseling; reprimand; corrective action; and adverse action. However, the AJ noted that under § 1601.6, "[s]trict application of the progressive steps...may not be appropriate in every situation...." Therefore, she determined that Agency's management retained the right to evaluate each situation on its own merits, and it was permitted skip any or all of the progressive steps. Based on the foregoing, the AJ concluded that

Employee's termination should be upheld.[10]

Employee disagreed and filed a Petition for Review with OEA's Board on December 5, 2017. He asserts that the AJ's decision was not based on substantial evidence and that the Initial Decision failed to address each issue of law and fact properly raised on appeal. Specifically, Employee reiterates his version of events leading up to his termination, stating that he was incorrectly assigned in his position with RAFP. Employee also claims that the AJ was not able to make a fair decision regarding his termination without conducting an evidentiary hearing. He suggests that Agency engaged in a pattern of terminating an "abnormally high number of [a]t-[w]ill employees, some of considerable stature and tenure." Additionally, Employee disputes the AJ's reliance on Agency's assessment of the *Douglas* factors because his personal and stress-related programs were not adequately considered. While Employee states that he fully comprehends that his termination was based on the unauthorized disclosure of confidential information that did not require intent, he clarifies that the occurrence was a "single, unintentional incident after almost fifteen years [of] District government service." Employee also requests that this Board remand the matter to the AJ for the purpose of determining why Agency failed to place him on a Performance Improvement Plan ("PIP") prior to terminating him. He also requests that the OHR offer its legal opinion on the merits of this case.[11]

Agency filed a Response to Employee's Petition for Review on February 12, 2018. It argues that since there are no genuine issues of material fact, the AJ's decision to not hold an evidentiary hearing was warranted. Agency also maintains that OEA lacks jurisdiction to address Employee's claims of discrimination because OHR is the proper venue for adjudicating such matters. As such, it contends that the matter need not be remanded to the AJ, and asks this Board

[10] *Initial Decision* (November 8, 2017).
[11] *Petition for Review* (December 5, 2017).

to uphold the Initial Decision.[12]

Substantial Evidence

OEA Rule 628.2, 59 DCR 2129 (March 16, 2012), provides that Agency has the burden of proving by a preponderance of the evidence that the proposed disciplinary action was taken for cause. Further, District Personnel Manual ("DPM") § 1603.2 states that disciplinary actions against an employee may only be taken for cause. On Petition for Review, this Board must determine whether the AJ's findings were based on substantial evidence in the record. The Court of Appeals in *Baumgartner v. Police and Firemen's Retirement and Relief Board*, 527 A.2d 313 (D.C. 1987), held that if administrative findings are supported by substantial evidence, then it must be accepted even if there is substantial evidence in the record to support a contrary finding. Substantial evidence is defined as evidence that a reasonable mind could accept as adequate to support a conclusion.[13]

Evidentiary Hearing

Employee asks this Board to remand this matter to the AJ for the purpose of addressing his alleged misclassification as an Investigator. Employee also requests a hearing to provide proof that Agency was "using the ruse of offering [Employee] medical assistance...as a means of wrongfully terminating me."[14] Under OEA Rule 624.1, a party may request the opportunity for

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[12] *Agency's Answer to Petition for Review* (February 12, 2018).
[13] *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).
[14] Employee states that he provided information to the AJ regarding a meeting with Principal Deputy Inspector General, Marie Hart, to request the possibility of being transferred to the Investigations Unit. However, Employee's assertion that he was misclassified at the time of removal has no bearing on whether he committed the misconduct outlined in Agency's Proposed Notice of Termination. Further, this claim is classified as a grievance outside the purview of OEA's jurisdiction. Employee also cites to his recollection of events in relation to a November 18, 2015 incident wherein he was asked by Hart if he would be willing to undergo a psychiatric fitness for duty exam and was advised that members of the Metropolitan Police Department and D.C. Fire and Emergency Medical Services were on site, waiting to escort Employee from the premises. Employee states that Hart inquired about his employment status with Agency. According to Employee, Hart suggested that he should voluntarily resign in order to access his retirement funds. However, Employee offers only a recitation of alleged events, but provides no legal basis for establishing a nexus between Hart's statement and the misconduct for which he was terminated. Likewise,

an evidentiary hearing to adduce testimony to support or refute any fact alleged in a pleading. However, OEA Rule 615.1, "[i]f, upon examination of the record in an appeal, it appears to the Administrative Judge that there are no material and genuine issues of fact, that a party is entitled to a decision as a matter of law...the Administrative Judge may, after notifying the parties and giving them an opportunity to submit additional evidence or legal argument, render a summary disposition of the matter without further proceedings."

Here, the AJ determined that there were no genuine issues of fact that would warrant an evidentiary hearing. In his Petition for Review, Employee explicitly states that his "termination was based upon my unauthorized disclosure of confidential information that did not require intent." Thus, it is uncontroverted that Employee committed misconduct in violation of D.C. Official Code § 1-301.115a (b-1), and the AJ was given the discretion to rely on the documents of record in rendering his decision in this case. Further, he correctly concluded that Employee's claims relevant to discrimination were required to be adjudicated before OHR. Consequently, this Board finds Employee's argument to be unpersuasive.

Progressive Discipline

Employee argues that he should have been placed on a PIP prior to being terminated by Agency. Conversely, Agency provides that Employee was given "constant admonition and counseling, both verbal and written, in an attempt to correct Employee's deficiencies in performance."[15] DCMR § 1601.5 provides the steps that are typically included in a progressive discipline system. The steps include verbal counseling; reprimand; corrective action; and adverse action(s). DCMR § 1601.6 states that "[s]trict application of the progressive steps in §§ 1601.5 and 1610 may not be appropriate in every situation. Therefore, management retains the right to

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Employee's other assertions regarding his belief that Agency engaged in a scheme to terminate at-will employees are not relevant to this appeal, as Employee was in Career Service status at the time of his termination.

[15] *Agency's Brief in Support of Employee's Removal* at p. 5.

evaluate each situation on its own merits and may skip any or all of the progressive steps. However, deviation from the progressive disciplinary system is only appropriate when consistent with DCMR §§ 1606 and 1607."

Based on the foregoing, Agency was not required to place Employee on a PIP prior to instituting its termination action if it established the requisite cause for taking the adverse action and if the selection of the penalty was permitted under the applicable Table of Illustrative Penalties.

Cause

Employee was charged with violating D.C. Official Code § 1-301.115a (b-1), which states the following in pertinent part:

> The Inspector General shall not disclose the identity of any person who brings a complaint or provides information to the Inspector General, without the person's consent, unless the Inspector General determines that disclosure is unavoidable or necessary to further the ends of an investigation.

Additionally, 6B DCMR § 1607.2 (a)(10) provides the following:

> 1607.2 The illustrative actions in the following table are not exhaustive and shall only be used as a guide to assist managers in determining the appropriate agency action. Balancing the totality of the relevant factors established in § 1606.2 can justify an action that deviates from the penalties outlined in the table.
>
> (a) Conduct Prejudicial to the District Government
>
> (10) Unauthorized disclosure or use of (or failure to safeguard) information protected by statute or regulation or other official, sensitive or confidential information.

In his Petition for Review, Employee states that "I fully comprehend that my termination was based upon my authorized disclosure of confidential information that did not require intent...." Moreover, Agency has established by a preponderance of the evidence that Employee

violated D.C. Official Code § 1-301.115a (b-1) and 6B DCMR § 1607.2 when he faxed a federal inmate's anonymous complaint directly to the prison facility from which it originated. This conduct compromised the anonymity of Agency's process for receiving and processing complaints based on allegations of waste, fraud, and abuse. Employee also placed the aggrieved inmate at risk of retaliation, adversely affecting Agency's mission. Employee did not receive consent from Agency to disclose the inmate's complaint to the prison. Further, Employee has not claimed that disclosure was deemed unavoidable or necessary to further the ends of an investigation. Both Agency and Employee concede that intent is not required to prove a violation of § 1-301.115a. Employee's conduct violated statutory confidentiality rules and undermined the protection and anonymity of incarcerated complainants. Accordingly, this Board finds that there is substantial evidence in the record to support finding that Agency's adverse action was taken for cause.

Douglas Factors and Selection of Penalty

Employee argues that Agency did not accurately consider the *Douglas* factors when selecting the penalty of termination. Employee believes that the *Douglas* factor worksheet failed to note that he was having personal problems and was suffering from stress.[16] In *Douglas v. Veterans Administration*,[17] 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:

> 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;

[16] *Petition for Review* at p. 2.
[17] 5 M.S.P.R. 280, 305-306 (1981).

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 Board finds that Agency properly considered the *Douglas* factors in selecting the

penalty of termination. In its analysis, Agency classified three factors—mitigating circumstances, past corrective or adverse actions, and Employee's work record—as either neutral or mitigating.[18] Conversely, Agency found the remaining nine factors to be aggravating. While Employee disagrees with the assessment of the *Douglas* factors, this Board can find no credible evidence indicating that Agency abused its discretion. Likewise, Agency provided a lengthy explanation of *Douglas* factor number 11 (mitigating circumstances) in its analysis, ultimately deeming it a neutral factor.[19] Therefore, we will not disturb the AJ's ruling regarding such.

With respect to Agency's decision to terminate Employee, any review by this Office of the agency decision selecting an adverse action penalty must begin with the recognition that the primary responsibility for managing and disciplining an agency's work force is a matter entrusted to the agency, not this Office.[20] Therefore, when assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but simply to ensure that "managerial discretion has been legitimately invoked and properly exercised."[21] When the charge is upheld, this Office has held that it will leave Agency's penalty "undisturbed" when "the penalty is within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment."[22]

The Table of Illustrative Actions, found in 6B, Section 1607 of the DCMR, provides general guidelines for imposing disciplinary sanctions when there is a finding of cause. Under § 1607.2(a)(10), the penalty for a first offense for "[u]nauthorized disclosure or use of (or failure to safeguard) information protected by statute or regulation or other official, sensitive or

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[18] *Agency's Answer to Petition for Appeal*, Tab 15.
[19] *Notice of Proposed Termination.*
[20] *See Huntley v. Metropolitan Police Dep't*, OEA Matter No. 1601-0111-91, Opinion and Order on Petition for Review (March18, 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).
[21] *Stokes v. District of Columbia*, 502 A.2d 1006, 1009 (D.C. 1985).
[22] *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

confidential information" is counseling to removal. As previously stated, Employee violated D.C. Official Code § 1-301.115 by releasing a hotline complaint to a federal prison facility without authorization. While this Board agrees that Employee's misconduct was not intentional or done with malice, we cannot ignore violations of District laws, rules, and regulations. Thus, the AJ correctly determined that penalty of termination was within the range allowed under the DCMR.

Conclusion

This Board finds that the Initial Decision was based on substantial evidence in the record. Agency has met its burden of proof in establishing that it had cause to charge Employee with "conduct prejudicial to the District government; unauthorized disclosure of information protected by statute." There is also substantial evidence in the record to support a finding that Agency properly considered the *Douglas* factors and selected a penalty allowable under the Table of Illustrative Penalties. While this Board agrees that Employee committed an isolated, unintentional act of misconduct, we must nonetheless leave Agency's selection of penalty undisturbed in the absence of a finding of abuse of discretion. Consequently, Employee's Petition for Review must be denied.

ORDER

Accordingly, it is hereby **ORDERED** that Employee's Petition for Review is **DENIED.**

FOR THE BOARD:

Sheree L. Price, Chair

Vera M. Abbott

Patricia Hobson Wilson

Jelani Freeman

Either party may appeal this decision on Petition for Review to the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

CERTIFICATE OF SERVICE

I certify that the attached **OPINION AND ORDER** was sent by regular mail on this day to:

William Redden, Jr.
1 A Laurel Hill Road
Greenbelt, MD 20770

Janea Hawkins, Esq.
441 4th St., NW
Suite 1180N
Washington, DC 20001

Katrina Hill
Clerk

April 24, 2018
Date

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

REPLY TO:
955 L'Enfant Plaza, S.W.
Suite 2500
Washington, DC 20024
(202)727-0004
FAX (202)727-5631

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

WILLIAM REDDEN, JR. Petitioner v. D.C. OFFICE OF THE INSPECTOR GENERAL, Respondent.	Case No. 2018 CA 002968 P(MPA) Judge John Campbell

MOTION TO SEAL RECORD

Superior Court Rule 5-III(a)(1) provides that "[a]bsent statutory authority, no case or document may be sealed without a written court order. Any document filed with the intention of being sealed must be accompanied by a motion to seal or an existing written order." Moreover, pursuant to Superior Court Civil Rule 5(e)(2), a party wishing to file a document containing the unredacted personal identifiers may submit a motion to file an unredacted document under seal.

In accordance with Agency Rule 1(e), Respondent D.C. Office of Employee Appeals is required to file with the Clerk the entire agency record, including all original papers comprising that record. The original record contains documents that were submitted by the D.C. Office of the Inspector General and William Redden, Jr. which include medical evaluations, the social security number, and date of birth for Mr. Redden, Jr. In an effort to maintain the record in its original form and to protect the privacy of those involved, we humbly request that you grant our motion to seal the record to prevent it from being viewed by the public via the court's electronic

filing system. Petitioner and Counsel for Respondent D.C. Office of the Inspector General do not object to this motion.

Respectfully submitted,

Lasheka Brown Bassey

Lasheka Brown Bassey
D.C. Bar # 489370
General Counsel
D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024
202.727.0738
Lasheka.Brown@dc.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2018, the forgoing Respondent D.C. Office of Employee Appeals' Motion to Seal Record was served via the Court's electronic filing system, CaseFileXpress.com to the following:

Connor Finch
Andrea Comentale
Counsels for D.C. Office of the Inspector General

I also hereby certify that on this 11th day of September, 2018, the forgoing Respondent D.C. Office of Employee Appeals' Motion to Seal Record was served via first class mail, postage prepaid to:

William Redden, Jr.
1 Laurel Hill Road
Unit A
Greenbelt, MD 20770

LashekaBrownBassey

Lasheka Brown Bassey
D.C. Bar # 489370
General Counsel
D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
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202.727.0738
Lasheka.Brown@dc.gov

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

RECEIVED
Civil Clerk's Office
SEP 2 5 2018
Superior Court of the
District of Columbia
Washington, D.C.

REPLY TO:
955 L'Enfant Plaza, S.W.
Suite 2500
Washington, DC 20024
(202)727-0004
FAX (202)727-5631

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

WILLIAM REDDEN, JR., Petitioner, v. D.C. OFFICE OF THE INSPECTOR GENERAL, Respondent.	Case No. 2018 CA 002968 P(MPA) Judge John Campbell

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *William Redden, Jr. v. D.C. Office of the Inspector General*, OEA Matter No.1601-0021-17. The record consists of two volumes containing twenty-seven (27) tabs.

Wynter Clarke
Wynter Clarke
Paralegal Specialist

LASHEKA BROWN BASSEY NOTARY PUBLIC MY COMMISSION EXPIRES 6/14/2021 DISTRICT OF COLUMBIA

District of Columbia: SS
Subscribed and Sworn to before me
this 25th day of September, 2018

Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION
Civil Actions Branch
500 Indiana Avenue, N.W., Suite 5000, Washington, D.C. 20001
Telephone: (202) 879-1133 • Website: www.dccourts.gov

ABRAHAM EVANS
Vs.
DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPPEALS et al

C.A. No. 2018 CA 004909 P(MPA)

INITIAL ORDER AND ADDENDUM

Pursuant to D.C. Code § 11-906 and District of Columbia Superior Court Rule of Civil Procedure ("Super. Ct. Civ. R.") 40-I, it is hereby **ORDERED** as follows:

(1) Effective this date, this case has assigned to the individual calendar designated below. All future filings in this case shall bear the calendar number and the judge's name beneath the case number in the caption. On filing any motion or paper related thereto, one copy (for the judge) must be delivered to the Clerk along with the original.

(2) Within 60 days of the filing of the complaint, plaintiff must file proof of serving on each defendant: copies of the summons, the complaint, and this Initial Order and Addendum. As to any defendant for whom such proof of service has not been filed, the Complaint will be dismissed without prejudice for want of prosecution unless the time for serving the defendant has been extended as provided in Super. Ct. Civ. R. 4(m).

(3) Within 21 days of service as described above, except as otherwise noted in Super. Ct. Civ. R. 12, each defendant must respond to the complaint by filing an answer or other responsive pleading. As to the defendant who has failed to respond, a default and judgment will be entered unless the time to respond has been extended as provided in Super. Ct. Civ. R. 55(a).

(4) At the time and place noted below, all counsel and unrepresented parties shall appear before the assigned judge at an initial scheduling and settlement conference to discuss the possibilities of settlement and to establish a schedule for the completion of all proceedings, including, normally, either mediation, case evaluation, or arbitration. Counsel shall discuss with their clients **prior** to the conference whether the clients are agreeable to binding or non-binding arbitration. **This order is the only notice that parties and counsel will receive concerning this Conference.**

(5) Upon advice that the date noted below is inconvenient for any party or counsel, the Quality Review Branch (202) 879-1750 may continue the Conference **once**, with the consent of all parties, to either of the two succeeding Fridays. Request must be made not less than seven business days before the scheduling conference date.
No other continuance of the conference will be granted except upon motion for good cause shown.

(6) Parties are responsible for obtaining and complying with all requirements of the General Order for Civil cases, each judge's Supplement to the General Order and the General Mediation Order. Copies of these orders are available in the Courtroom and on the Court's website http://www.dccourts.gov/.

Chief Judge Robert E. Morin

Case Assigned to: Judge ELIZABETH WINGO
Date: July 11, 2018
Initial Conference: 9:30 am, Friday, October 12, 2018
Location: Courtroom A-47
515 5th Street NW
WASHINGTON, DC 20001

ADDENDUM TO INITIAL ORDER AFFECTING ALL MEDICAL MALPRACTICE CASES

In accordance with the Medical Malpractice Proceedings Act of 2006, D.C. Code § 16-2801, et seq. (2007 Winter Supp.), "[a]fter an action is filed in the court against a healthcare provider alleging medical malpractice, the court shall require the parties to enter into mediation, without discovery or, if all parties agree[,] with only limited discovery that will not interfere with the completion of mediation within 30 days of the Initial Scheduling and Settlement Conference ("ISSC"), prior to any further litigation in an effort to reach a settlement agreement. The early mediation schedule shall be included in the Scheduling Order following the ISSC. Unless all parties agree, the stay of discovery shall not be more than 30 days after the ISSC." D.C. Code § 16-2821.

To ensure compliance with this legislation, on or before the date of the ISSC, the Court will notify all attorneys and *pro se* parties of the date and time of the early mediation session and the name of the assigned mediator. Information about the early mediation date also is available over the internet at https://www:dccourts.gov/pa/. To facilitate this process, all counsel and *pro se* parties in every medical malpractice case are required to confer, jointly complete and sign an EARLY MEDIATION FORM, which must be filed no later than ten (10) calendar days prior to the ISSC. D.C. Code § 16-2825 Two separate Early Mediation Forms are available. Both forms may be obtained at www.dccourts.gov/medmalmediation. One form is to be used for early mediation with a mediator from the multi-door medical malpractice mediator roster; the second form is to be used for early mediation with a private mediator. Both forms also are available in the Multi-Door Dispute Resolution Office, Suite 2900, 410 E Street, N.W. Plaintiff's counsel is responsible for eFiling the form and is required to e-mail a courtesy copy to earlymedmal@dcsc.gov. *Pro se* Plaintiffs who elect not to eFile may file by hand in the Multi-Door Dispute Resolution Office.

A roster of medical malpractice mediators available through the Court's Multi-Door Dispute Resolution Division, with biographical information about each mediator, can be found at www.dccourts.gov/medmalmediation/mediatorprofiles. All individuals on the roster are judges or lawyers with at least 10 years of significant experience in medical malpractice litigation. D.C. Code § 16-2823(a). If the parties cannot agree on a mediator, the Court will appoint one. D.C. Code § 16-2823(b).

The following persons are required by statute to attend personally the Early Mediation Conference: (1) all parties; (2) for parties that are not individuals, a representative with settlement authority; (3) in cases involving an insurance company, a representative of the company with settlement authority; and (4) attorneys representing each party with primary responsibility for the case. D.C. Code § 16-2824.

No later than ten (10) days after the early mediation session has terminated, Plaintiff must eFile with the Court a report prepared by the mediator, including a private mediator, regarding: (1) attendance; (2) whether a settlement was reached; or, (3) if a settlement was not reached, any agreements to narrow the scope of the dispute, limit discovery, facilitate future settlement, hold another mediation session, or otherwise reduce the cost and time of trial preparation. D.C. Code§ 16-2826. Any Plaintiff who is *pro se* may elect to file the report by hand with the Civil Actions Branch. The forms to be used for early mediation reports are available at www.dccourts.gov/medmalmediation.

Chief Judge Robert E. Morin

Abraham Evans, *PRO SE*
3390 Waterloo Way
White Plains, MD 20695

Petitioner,

v.

THE DISTRICT OF COLUMBIA
OFFICE OF EMPLOYEE APPEALS
1100 4TH Street, SW, Suite 620E
Washington, DC 20024

No. 18-0004909

And

METROPOLITAN POLICE DEPARTMENT
c/o Office of the Attorney General for
THE DISTRICT OF COLUMBIA
441 4th Street, NW, Suite 1180 North
Washington, DC 20001

Respondents.

PETITION FOR REVIEW OF AGENCY DECISION

A. Notice is hereby given that Abraham Evans (hereinafter, "Petitioner") appeals to the Superior Court of the District of Columbia from the Opinion and Order on Remand of the District of Columbia Office of Employee Appeals and Metropolitan Police Department (hereinafter, "OEA" "MPD" or "Respondents") dated June 29, 2018 and all rulings encompassed therein, in the matter of Abraham Evans v. Metropolitan Police Department, OEA Matter No. 1601-0081-13R18. A copy of OEA's Opinion and Order on Remand is attached to this Petition as Exhibit 1. A copy of OEA's Initial

Decision is attached to this Petition as Exhibit 2. The Petitioner seeks to have the Opinion and Order on Remand reversed and the final agency decision to remove Abraham Evans ("Employee") reversed and that the petitioner is reinstated to the Metropolitan Police Department with all back pay and benefits loss as a result of the termination.

On June 26, 2012, Petitioner was issued a Notice of Proposed Adverse Action outlining the three Charges he was facing by MPD for misconduct. On January 17, 2013 the Agency held a hearing before the Adverse Action Panel pursuant to the amended Notice of Adverse Action served to the employee. The employee entered a plea of "Not Guilty" to all charges. On March 1, 2013, employee was notified of the Panel's Recommendations by a Final Agency Decision and was subsequently terminated on April 13, 2013.The Petitioner filed a timely appeal to OEA on April 24, 2013. Following the submission of briefs on the issues of 1) whether MPD violated the 90 Day Rule; 2) Agency's Decision was not supported by substantial evidence on alleged charges. Administrative Judge ("AJ") issued an Initial Decision dated April 6, 2015 in which he reversed MPD's removal of the Petitioner. The Agency filed an appeal to the Full Board of OEA. The Board granted the Agency's appeal and Remanded the matter back to the AJ on September 13, 2016. The AJ Issued his Initial Decision on Remand on June 29, 2018 in which he upheld the removal of the Petitioner based on the merits of the case. It is from that decision that this appeal is being made.

B. Address of Respondents Agency:

District of Columbia Office of Employee Appeals
1100 4th Street, SW, Suite 620E
Washington, DC 20024

Serve on: Lasheka Brown Bassey, Esq.
General Counsel
1100 4th Street, SW, Suite 620E
Washington, DC 20024

Metropolitan Police Department
c/o Office of the Attorney General
for The District of Columbia
441 4th Street, NW, Suite 1180 North

Washington, DC 20001

C. Names and Addresses of Parties or Attorneys to be Served:

Name	Address
1. Office of Employee Appeals (Respondent)	Lasheka Brown Bassey, Esquire General Counsel 1100 4th Street, SW, Suite 620E Washington, DC 20024
2. Metropolitan Police Department	c/o Office of the Attorney General 441 4th Street, NW, Suite 1180 North Washington, DC 20001

Date: July 11, 2018

Respectfully Submitted,

Abraham Evans, *Pro Se*
3390 Waterloo Way
White Plains, MD 20695
Phone: (202) 320-2001
E-mail: abemevans@gmail.com

Exhibit 1

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
Abraham Evans	) OEA Matter No. 1601-0081-13R18
Employee	)
	) Date of Issuance: June 29, 2018
v.	)
	) Joseph E. Lim, Esq.
Metropolitan Police Department	) Senior Administrative Judge
Agency	)

Donna Rucker, Esq., Employee Representative
Sonia Weil, Esq., Agency Representative

2nd INITIAL DECISION ON REMAND

PROCEDURAL BACKGROUND

On April 24, 2013, Abraham Evans ("Employee"), a Police Officer with the Metropolitan Police Department (the "Agency" or "MPD") filed a Petition for Appeal with the Office of Employee Appeals ("OEA") pursuant to *D.C. Official Code* § 1-606.03(a) (2001), appealing Agency's action terminating his employment for "Failure to Obey Orders and Directives and Untruthful Statements." The charges that generated Employee's adverse action was a finding as a result of an evidentiary hearing conducted on January 17, 2013, by the Adverse Action Hearing Panel ("Panel").

On April 6, 2015, I issued an Initial Decision ("ID") overturning Agency's removal of Employee on the ground that it violated the mandatory 90-day rule embodied in D.C. Code §5-1031(a). Agency appealed, and on September 13, 2016, the OEA Board reversed the ID on the ground that the 90-day rule was not violated, and remanded the matter back to the undersigned with instructions to review the issue of whether there was substantial evidence to support Agency's action.[1] After Employee indicated that she had appealed the matter to the District of Columbia Superior Court ("D.C. Superior Court") on October 19, 2016, I issued the first ID on Remand dismissing the appeal as moot on December 20, 2016.[2]

On October 13, 2017, the D.C. Superior Court remanded this matter back to the undersigned after the parties filed a consent motion to remand the matter back to OEA.[3] I held a

1 *Evans v. MPD*, OEA Matter No. 1601-0081-13, *Opinion and Order on Petition for Review* (September 13, 2016).

2 *Evans v. MPD*, OEA Matter No. 1601-0081-13R16 (December 20, 2016).

3 *Abraham Evans v. D.C. Office of Employee Appeals, et. al. & D.C. Metropolitan Police Department*, 2016 CA

status conference on December 19, 2017, and ordered the submission of legal briefs. When Employee failed to comply, I issued an Order for Good Cause, and on May 15, 2018, Employee responded. I again ordered the submission of legal briefs and closed the record after receiving legal briefs and final arguments from the parties.

JURISDICTION

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

ISSUE

Whether Agency's decision to terminate Employee, based on the Adverse Action Hearing Panel's recommendation, was supported by substantial evidence.

Agency's Position:

On June 26, 2012, MPD issued a Notice of Proposed Adverse Action to Employee numbered DRB# 338-12, IS# 09-001645. MPD personally served Employee with the Notice of Proposed Action, which outlined the three charges he was facing. *Id.* Agency alleged that Employee disobeyed Police Orders and Directives by engaging in outside employment without proper authorization from his Assistant Chief/Senior Executive Director and accepting gifts or business favors such as discounts, services, or other considerations of monetary value while on duty with MPD. Agency also alleges that Employee "willfully and knowingly made an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Department Officer to, or in the presence of, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing" when he denied being paid for providing security services at Calvert Woodley Liquor Store.[4]

Agency argues that an Adverse Action Hearing Panel ("Panel"), which consisted of three senior MPD officials, unanimously found Employee guilty of all charges and specifications in an Evidentiary Hearing on January 17, 2013. Agency submits that the evidence supported the charges and that the recommended penalty was appropriate.

Employee's Position:

Employee asserts that Agency's decision was not supported by substantial evidence on Charges 1, 2, and 3.

FINDING OF FACTS

Uncontested Material Facts:[5]

007680 (D.C. Super. Ct. Oct. 13, 2017).

4 *Id.*

5 Agency and Employee Briefs and their respective attachments. Where one party makes factual assertions and the opposing party does not dispute them, the asserted statements are taken as fact. Thus, they are taken as conceded.

1. Employee, a member of the Fraternal Order of Police (the "Union"), was employed as a Police Officer by Agency for 6 years.

2. Employee's discipline arose out of misconduct initially reported to MPD's Office of Internal Affairs ("IAD") in December 2008 by Lillian Colter while she was being interviewed on an unrelated matter.

3. Based on this information, between December 15, 2008 and January 6, 2009, IAD agents conducted a preliminary surveillance of the Calvert Woodley Liquors Store ("CWL"). The investigation revealed that three officers, one of whom was identified as Employee, were providing security for the store during closing time.

4. On January 13, 2009, Agent Robert Merrick met with Assistant United States Attorney ("AUSA") Steven Durham and briefed him regarding the criminal allegations against Employee and the other two officers, Nathaniel Anderson and Malcolm Rhinehart. AUSA Durham assigned the criminal investigation to AUSA Michael Atkinson. Meanwhile, surveillance of the store continued until May 9, 2009.

5. In March 18, 2010, the Federal Bureau of Investigation ("FBI") and Agency's internal affairs interviewed Employee.

6. On November 21, 2010, Officer Anderson pled guilty to a charge of illegal supplementation of salary and agreed to debrief as part of his plea agreement.

7. On January 21, 2011, the United States Attorney's Office indicted Employee and Officer Rhinehart in the U.S. District Court for the District of Columbia on charges of receipt of illegal gratuities and illegal supplementation of salary. Officer Rhinehart was subsequently terminated on an unrelated matter.

8. On November 29, 2011, the United States District Court for the District of Columbia Judge Reggie B. Walton signed an Order dismissing the Indictment against Employee.

9. An undated MPD Internal Affairs Memorandum changed Employee's duty status from Suspension Without Pay ("SWOP") to Full Duty after an investigation was issued. (Employee Exhibit 3). On January 4, 2012, a signed MPD Human Resource Management Memorandum formalized Employee's change of duty status from Indefinite Suspension Without Pay ("SWOP") to Full Duty based on the recommendation of the Internal Affairs Division. (Employee Exhibit 4).

10. On January 4, 2012, Employee returned to work.

11. On February 12, 2012, Employee was again interviewed by Internal Affairs.

12. On February 17, 2012, AUSA Durham issued a Letter of Declination for Employee, stating that Employee appeared to be on his lunch break during the times he was providing security for the store.

13. On June 14, 2012, IAD completed its investigatory report and recommended that the charges against Employee be sustained.

14. Agency issued Employee a Notice of Proposed Adverse Action on June 26, 2012, charging Employee with the following Charges and its respective Specifications:[6]

Charge No. 1: Violation of General Order Series 120.21, Part A-16, which states: "Failure to Obey Orders and Directives Issued by the Chief of Police." This misconduct is further defined in General Order Series 201.17, Part IV, which states: "Members shall not engage in outside employment without proper authorization from their Assistant Chief/Senior Executive Director." Further, Part V, G, 2, (b), which states: No member shall engage in outside employment if the "second job" would interfere with the member's scheduled tour of duty on the Department." Part V, G, 4, which states: "Members shall not accept any compensation for services rendered while on duty."

Specification No. 1: In that, between December 15, 2008, and May 4, 2009, you worked outside employment without authorization, providing security for Calvert Woodley Liquor Store, while on duty with the Metropolitan Police Department. Further, you were paid by a store employee on approximately 30 separate occasions for providing security for the liquor store.

Charge No. 2: Violation of General Order Series 120.21, Part A-16, which states: "Failure to Obey Orders and Directives Issued by the Chief of Police." This misconduct is further defined in General Order Series 201.26, B-24, which states in part, "A member shall not accept a gift, or gratuities from organizations, business concerns, or individuals, with whom he/she has, or reasonably could be expected to have official relationship on business of the District Government. Similarly, members are prohibited from accepting personal or business favors such as social courtesies, loans, discounts, services, or other considerations of monetary value..."

Specification No. 1: In that, on February 12, 2012, you admitted during your interview with the Internal Affairs Division, that you received discounts from the Calvert Woodley Liquor Store and purchased wine, while on duty with MPD.

Charge No. 3: Violation of General Order 120.21, Attachment A, Part A-6, which states: "Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her

6 Agency Tab 2.

official duties as a Metropolitan Police Department Officer to, or in the presence of, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing." As further specified in General Order Series 201, Number 26, which states in part, "...Additionally during the course of an investigation, all members shall respond truthfully to questions by an agent or official of the Internal Affairs Division (IAD)..."

Specification No. 1: In that, on February 22, 2012, during an interview with the Internal Affairs Division (IAD), you denied being paid for providing security services at Calvert Woodley Liquor Store. You made this statement knowing it to be untrue. However, during an IAD interview with Kevin Ehrman, store manager, of Calvert Woodley Liquor Store, he stated that he has paid you in cash, approximately 20 to 30 times.

15. On charges that Employee disobeyed several longstanding orders, Employee appeared before the Adverse Action Hearing Panel on January 17, 2013, for an administrative hearing. Agency submitted a complete transcript of the hearing. (Agency Tab 3) Employee was represented by Attorney Donna Rucker.

16. The Hearing Panel sustained all of the specifications of the three charges and recommended termination. Specifically, the Hearing Panel recommended that Employee be found guilty of Charge 1, Specification 1, Charge 2, Specification 1, and Charge 3, Specification 1. The Hearing Panel recommended that Employee be removed for being found guilty of all Charges. (Agency Tab 5.) The Hearing Panel's Findings and Recommendations recited that the selection of the proposed penalties was made after considering the "Douglas Factors" and Employee's past record.

17. Employee was notified of the Panel Recommendations by a Final Agency Decision document dated March 1, 2013. (Agency Tab 6).

18. Employee appealed to the police chief in a letter dated March 11, 2013. (Agency Tab 7).

19. The Findings and Recommendations were accepted as Agency's Final Decision on March 22, 2013, by Cathy Lanier, Police Chief for Agency. (Agency Tab 8).

SUMMARY OF TESTIMONY

On January 17, 2013, Agency held a hearing before the Adverse Action Panel pursuant to the amended Notice of Adverse Action served upon Employee. He entered a plea of "Not Guilty" to all of the charges. The following represents a summary of the relevant testimony given during the hearing as provided in the transcript (hereinafter denoted as "Tr.") which was submitted by the parties. Both Agency and Employee presented documentary and testimonial evidence during the course of the hearing to support their position.

Testimony of Mark Rudden ("Rudden")

Rudden was a manager at Calvert Woodley Liquors Store ("CWL") from 2009 to 2012. Rudden testified that, during his tenure at CWL, he knew Employee as one of several officers that provided security during the 8:30 p.m. store closing. The store kept a lot of cash on the premises, and had been robbed previously.

Rudden testified that, about three nights a week, a police officer would arrive at the store about five to ten minutes before closing, walk around the store, and assist the employees in getting out of the store safely. He saw Officers Anderson and Rhinehart regularly, but that he only occasionally saw Employee. Rudden was aware of Anderson and Rhinehart being paid for security services, but that he never saw Employee being paid by CWL. Rudden said that, when he paid the officers, he would meet them behind the store and hand them $25 in cash. He did not know who made the arrangements for the officers to provide security for the store.

Rudden testified that, when Employee was present at the liquor store, he did not know whether he was there as an employee of the store or if he was there to perform his duties as a police officer, nor was Employee ever at the store without other officers. He also testified that he never saw Employee at CWL out of uniform. Rudden would not give discounts to civilians, but he would give them to all police officers, firefighters, and veterans because they put their lives on the line.

Testimony of Agent Jeffery Williams ("Williams")

Williams testified that he was employed by the Agency as an Internal Affairs ("IAD") employee but was on detail to the Federal Bureau of Investigation ("FBI") Public Corruption Unit. Agent Williams testified he took over the investigation from Sergeant Bonner of the FBI Public Corruption Task Force after Bonner retired. He was not present for the majority of the investigative interviews, but he conducted the interview with Employee.

Williams testified that Employee was investigated because IAD received an allegation that MPD officers were engaging in unauthorized outside employment by providing security services to CWL. Agency had received reports that police officers were arriving at the store just before closing to provide security and being paid for providing this service.

Williams stated that IAD agents surveilled CWL and observed Employee enter CWL during closing time, receive a white envelope from the manager named Kevin Ehrman, and leave after the store was closed. He further stated that the store manager later stated that the envelope given to Employee contained $20-$25. The money was concealed in an envelope so the other employees would not know that the payments were being made. Williams said that, during his investigative interview, Employee admitted that he received discounts on bottles of wine that he purchased from CWL while he was on duty.

Williams testified that the FBI was involved in the case because it was a criminal investigation of MPD officers which falls under the purview of the FBI. Williams also stated that though the case was charged federally by the U.S. Attorney's Office, prosecution was declined

because they determined that Employee was only in CWL during his lunch break, a period of time for which he was not paid, and therefore could not be charged with supplemental income. Except for a guilty plea from one officer, the charges against all officers were dismissed because the officers may have provided the security services during their lunch breaks, when they are not paid.

Testimony of Kevin Ehrman ("Ehrman")

Ehrman was a manager of CWL from 2006 to 2009 who came to know Employee as one of the officers providing security at the store. Ehrman testified that he was robbed at gun point one night while closing the store. While the store had an alarm system in case someone broke in, there was no security or a panic button. This lack of security concerned all of the managers, and nobody wanted to work closing hours.

Ehrman testified that after the store managers expressed their concerns at a meeting with the store's owners, they determined that a private security service was too expensive. Someone indicated that he might be able to make an arrangement with a few police officers with whom he was acquainted to provide security while off-duty. Thus the store's ownership agreed to pay police officers $25 in cash to show up 15 minutes prior to closing to make sure the managers could get to their cars safely. Ehrman believed that the officers were providing the security services during their break time.

The officers that appeared varied from night to night and there were approximately four or five total; however, only one officer would be compensated each night. Ehrman testified that he would pay the officers out of petty cash by putting the money in an envelope and handing it to them. He testified that the police officer providing security would wait while the manager locked the doors, finished his paperwork, and closed up the safe. Then the officer would escort the manager to his car.

Ehrman testified that Employee provided the security service about once or twice a week for at least a year and a half. Ehrman paid Employee $25 in cash each time he provided the service. Ehrman testified that he would document the payments by placing a receipt in the cash register drawer; however, there was no name indicating who received the payment. Ehrman testified that he believed that the arrangement was legal.

Ehrman indicated that there was no written record of any agreement by Employee or any other officer to provide security to CWL and that the only record of payments was handwritten receipts for $25 he made which did not indicate who was paid out of petty cash or what they were for. Ehrman testified that the payments to the officers were not "advertised," and as far as he knew, the other employees were not aware of the payments.

Ehrman testified that his employment ended with CWL when he was replaced by the son of the owner's best friend and denied any allegations of improprieties on his part regarding the use of CWL's petty cash. Ehrman testified that Rudden was the person who replaced him as store manager.

Testimony of Captain Melvin Gresham ("Gresham")

Gresham testified that he met Employee when they worked together on the 2nd District's 3rd watch in 2008. Based on his observations, he believed that Employee is a trustworthy and dependable officer of the District of Columbia. Gresham said that the charges against Employee did not change his opinion and that Employee deserved a chance at redemption. Gresham claimed that he knew of other officers with similar charges against them who were not removed.

Gresham admitted that unauthorized work outside of employment is a serious offense, but he believed that Employee should have a chance to redeem himself. He admitted that the first step to redemption is for the person to admit the wrongful act; however, he also believes that even if the person denies their wrongful act they can still redeem themselves.

Gresham testified that CWL was in his patrol service area and that he was aware of robberies in the area but not specifically at CWL. He said that he did not recall receiving citizen complaints about officers lingering in the area around CWL.

Testimony of Lieutenant Eric L. Hayes ("Hayes")

Hayes testified that he met Employee in 2008 at the 2nd District. He described Employee as a very conscientious, hard worker. In his 33 years at the Metropolitan Police Department, Hayes saw other officers who were involved in similar misconduct but kept their jobs. He testified that, if he found out that an officer worked and received unauthorized outside payment while on duty, he would have that officer investigated because those are serious allegations. However, he believed that the allegations do not warrant termination because mitigating circumstances may push an officer to violate MPD's General Orders.

Hayes testified that he was not familiar with the liquor store, and that the store did not come to his attention for any crimes or any citizen complaints.

Testimony of Captain Juanita Mitchell ("Mitchell")

Mitchell testified that she knew Employee from her time at the 2nd District as a Captain of the midnight tour of duty, where she served from June 2008 to January 2010. She described Employee as a very pleasant officer, helpful with citizens. Hayes testified that even knowing the charges against Employee, she would recommend that the Chief of Police retain him as an officer after disciplining him so that he might learn from the experience and do better in the future. Mitchell admitted that accepting gratuities reflects poorly on the officer's ethics and integrity.

Testimony of Lt. Antonio Charland ("Charland")

Charland testified that he knew Employee through working with him at night in the 2nd District. He recalled an incident in which Employee comforted and assisted his brother during a

medical emergency. Charland said that Employee displayed compassion and empathy for a citizen's tragic circumstance even though Employee did not know at the time that the citizen was related to a senior police officer. Charland felt proud to have an officer like Employee in his division.

Charland said he was aware of the general order prohibiting the acceptance of gratuities by officers and explained that it exists because officers are supposed to be public servants who get paychecks for their service. He also testified that if proven, the acceptance of a gratuity would call into question the integrity of an officer. Charland stated that even if found guilty of the charges, he believed that Employee should be retained if at all possible because he is an asset to the Agency.

Testimony of Officer Abraham Evans (Employee)

Employee testified that after his indictment due to this incident, MPD placed him on suspension for approximately one year. He returned to regular duty for approximately five months when criminal charges were dropped. Employee denied providing security to CWL and denied being paid any money for providing such services. He admitted that he was often present during the closing hours, but he asserted that he was present to perform his duties as a police officer.

Employee testified that his Patrol Service lieutenant, Lieutenant Houser, instructed officers to go to the store to establish a presence because of the robbery. He insisted that he was not paid by any manager. He did not notify Lieutenant Houser of the charges and allegations despite the fact that the charges relate to conduct he claimed she ordered him to carry out.

Employee testified that he would check in on CWL throughout his shifts from time to time, sometimes entering the store, and sometimes just viewing it from the outside to make sure things were ok. He denied all allegations, but admitted that he received wine discounts from the store while on duty. Employee testified that he witnessed other frequent customers receiving discounts too. He testified that he never went on break to provide security for the store. He testified that there were no other officers present while he was inside the liquor store.

Employee said that he went to CWL once a week, and that he went to the store throughout his tour and not just during closing hours. Sometimes he would sit in front of the store; and other times, he would go into the store. Employee testified that sometimes he did not document these visits as business checks despite the fact that he was required to do so.

Employee admitted that he accepted gratuities in the form of discounts from CWL despite knowing that accepting gratuities was a violation of the Agency's general orders, but that he did so because he did not think that the discount was being given to him because of his status as a law enforcement officer since he had seen other regular customers receive discounts as well. Employee testified that he was not aware that other officers were receiving money to provide security to CWL. He conceded that violating General Orders compromises an employee's

integrity and ethics.

Employee testified that he knew other offices were being paid. He said that if he could change anything, he would not take discounts. Employee testified that he was aware that other officers throughout the Metropolitan Police Department were disciplined in the past for unauthorized outside employment.

Employee testified that he knew Ehrman from going to CWL but knew of no reason why Ehrman would lie about paying him for providing security services. Employee testified that he felt insulted by Ehrman's allegations. Employee testified that he believed that Ehrman had money issues, and that he may have taken money from the petty cash.

Employee testified that he loves his job more than anything else. Employee testified that at no time did he make any statements to Internal Affairs that he believed to be untruthful.

Testimony of Robert Starr ("Starr")

Starr, a manager of CWL, testified that after CWL was robbed, they sought to enhance security by asking officers to come into the store during their shift so that there would be a police presence around the building. Several officers agreed to arrive ten to fifteen minutes prior to closing to provide the requested security services for a payment of $25 in cash.

Starr identified Employee as one of the officers who provided the security service for the store and he remembered Employee accepting the $25 payment. Starr testified that he personally paid Employee, but could not remember how many times he did so. Starr testified that any officer that arrived at closing time would be offered the payment and some officers declined to accept it. Starr testified that he did not recall any instances when Employee refused the payment.

Starr testified that Employee was not present for the meeting between management and ownership about security for the store and he never had any conversation with Employee in which it was indicated that Employee was security for the store.

He testified that the arrangement was done with the owner's knowledge and approval. Starr testified that they kept a receipt for each $25 payment and that the payments were recorded on handwritten receipts kept in the petty cash drawer but that no officer names were on those receipts. Starr further testified that at no time did CWL draw up any paperwork to indicate that the officers were employees of CWL. He testified that he was not aware of any records being provided to the Internal Revenue Service regarding the payments to the officers.

Starr testified that he could not remember any officers being involved in any of the discussions regarding the arrangement for security. Starr said that, when Employee provided the security, he would generally stay in his car. Starr would close the store and offer Employee the payment while Employee remained in his vehicle.

Starr testified that he was not aware of Ehrman having any financial issues or stealing from the store. Starr testified that he would be very surprised if that were true. Starr admitted that when he was first interviewed much closer in time to the events in question and was asked to identify Employee, he was unable to do so. He is not sure if other managers were giving money to officers for security as they did not discuss it.

LEGAL ANALYSIS, AND CONCLUSIONS OF LAW

Employee is a member of the Fraternal Order of Police (the "Union"), and is covered by a provision of the Collective Bargaining Agreement (the "Agreement") that specifically restricts the scope of this Office's review in adverse actions to the record previously established in the Adverse Action Hearing Panel's administrative hearing.

In *D.C. Metropolitan Police Department v. Pinkard,* 801 A.2d, 86, the District of Columbia 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* hearings in all matters before it. According to the Court:

> On this appeal from the Superior Court, the MPD contends (1) that an evidentiary hearing before the OEA administrative judge was precluded by a collective bargaining agreement between the MPD and the Fraternal Order of Police, a labor union to which Pinkard belongs, [and] (2) that the OEA administrative judge abused her discretion in ordering a second [and *de novo*] evidentiary hearing. . . .
>
> As a general rule, this court owes deference to an agency's interpretation of the statute under which it acts. There is, however, an exception to this general rule, which is that we will not defer to an agency's interpretation if it is inconsistent with the plain language of the statute itself. This case falls within the exception because the OEA's reading of the [Comprehensive Merit Personnel Act or CMPA] is contrary to its plain language and inconsistent with it. We therefore hold that, under the statute, the collective bargaining agreement controls and supersedes otherwise applicable OEA procedures, and consequently, that the OEA administrative judge erred in conducting a second hearing.
>
> 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.
>
> The MPD contends, however, that this seemingly broad power of the OEA to establish its own 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]. . . .

It is of course correct that a collective bargaining agreement, standing alone, cannot dictate OEA procedures. 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 (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 the 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 procedures outlined in the collective bargaining agreement, namely, that the appeal to the OEA "shall be based solely on the record established in the [trial board] hearing", controls in Pinkard's case.

The OEA may not substitute its judgment for that of an agency. Its review of the agency decision in this case, the decision of the trial board 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, 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 trial board.

See *Pinkard* at 90-92. (citations omitted).

Thus, pursuant to *Pinkard*, an AJ of this Office may not conduct a *de novo* hearing in an appeal before the Office, but must rather base the decision solely on the record below, when all of the following conditions are met:

> 1. The appellant (Employee) is an employee of either 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] 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 a Trial Board that conducted an Evidentiary Hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action (employee's removal, suspension, demotion, or personal performance rating) or a reduction-in-force.

All of these conditions are met in this matter. Thus, according to *Pinkard*, my review of the final Agency decision to terminate Employee is limited "to a determination of whether [the final Agency decision] was supported by substantial evidence,[7] whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations."[8] Further, I "must generally defer to the agency's credibility determinations."[9] My review is restricted to "the record made before the trial board."[10]

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[7] According to OEA Rule 628.3, 59 D.C. Reg. 2129 (2012), an agency has the burden of proof in adverse action appeals. Pursuant to OEA Rule 628.1, *id.*, that burden is by "a preponderance of the evidence", which is defined as "[t]hat 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." In *Pinkard*-type cases previously decided by this Office (including the initial decision in *Pinkard* itself that resulted from the remand), we have held that there must be substantial evidence to meet the agency's preponderance burden. *See, e.g.; Hibben, supra; Davidson, supra; Kelly, supra; Pinkard v. Metropolitan Police Department*, OEA Matter No. 1601-0155-87R02 (December 20, 2002); *Bailey v. Metropolitan Police Department*, OEA Matter No. 1601-0145-00 (March 20, 2003).

[8] See *D.C. Metropolitan Police v. Pinkard*, 801 A.2d 86, at 91.

[9] *Id.*

[10] *Id.* at 92.

In my April 6, 2015, ID, I had addressed the issues of whether there was harmful procedural error, or whether it was in accordance with law or applicable regulations.[11] The remand specifically instructed me to address only the issue of whether Agency's action was supported by substantial evidence.12

Whether the Adverse Action Hearing Panel's findings were supported by substantial evidence.

The Panel's decision consists of about 36 pages and listed its findings of fact and conclusions of law in exhaustive detail. The Panel found Employee guilty of all charges and specifications by a preponderance of the evidence.

In Employee's brief, he asserts that Agency's decision was not supported by substantial evidence on Charges 1, 2, and 3. Charge 1 alleges that Employee engaged in unauthorized outside employment by providing security services for CWL for pay. Charge 2 alleges that Employee knowingly accepted discounts from CWL. Charge 3 alleges that Employee lied to management when he denied providing security services to CWL for pay.

The Panel based their guilty finding on the testimony of the managers and former managers of CWL as well as a surveillance video which showed Employee receiving a white envelope from a CWL manager after providing security services. The testimonies from CWL managers indicated that the envelope contained payment for Employee's services. They also accepted Employee's admission that he knowingly received gratuities/discounts from CWL.

Employee's assertion that the Panel's findings were not supported by substantial evidence rests on his disagreement with their credibility determinations regarding the witnesses and the video evidence.

According to *Pinkard*, I must determine whether the Adverse Action Hearing 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."[13] Further, "[i]f 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."[14]

As noted earlier, *Pinkard* counsels me, as the "reviewing authority", to "generally defer to the agency's credibility determinations." Based on my own review of the several witnesses' testimony, I can find no reason to disturb the Adverse Action Hearing Panel's credibility determinations. As to the Adverse Action Hearing Panel's findings regarding the charge brought

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[11] *Evans v. MPD*, OEA Matter No. 1601-0081-13R16 (December 20, 2016).

12 *Evans v. MPD*, OEA Matter No. 1601-0081-13, *Opinion and Order on Petition for Review* (September 13, 2016).

[13] *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*, 657 A.2d 310, 312 (D.C. 1995)).

[14] *Metropolitan Police Department v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989).

against Employee, my review shows that there was certainly substantial evidence to support those findings. I note that the Adverse Action Hearing Panel also relied on Employee's own admission of not following Agency's general orders to convict him. Thus, there is no reason to overturn them.

ORDER

It is hereby ORDERED that Agency's decision to remove Employee for cause is UPHELD.

FOR THE OFFICE:

JOSEPH E. LIM, ESQ.
Senior Administrative Judge

Exhibit 2

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)
	)
Abraham Evans	) OEA Matter No. 1601-0081-13
Employee	)
	) Date of Issuance: April 6, 2015
v.	)
	) Joseph E. Lim, Esq.
Metropolitan Police Department	) Senior Administrative Judge
Agency	)

Donna Rucker, Esq., Employee Representative
Sonia Weil, Esq., Agency Representative

INITIAL DECISION

PROCEDURAL BACKGROUND

On April 24, 2013, Abraham Evans ("Employee"), a Police Officer with the Metropolitan Police Department (the "Agency" or "MPD") filed a Petition for Appeal with the Office of Employee Appeals (the "Office") pursuant to *D.C. Official Code* § 1-606.03(a) (2001), appealing Agency's action terminating his employment for "Failure to Obey Orders and Directives and Untruthful Statements." The charges that generated Employee's adverse action was a finding as a result of an evidentiary hearing conducted on January 17, 2013, by the Adverse Action Hearing Panel (the "Panel").

Agency was served with a copy of Employee's Petition for Appeal on April 29, 2013, and filed a comprehensive reply document. Agency's response contained nine tabs as attachments, including the complete transcript of the Panel hearing and all of the underlying documents which Agency maintained were supportive of the charges and its election to take action against Employee. The matter was assigned to the undersigned administrative judge (the "AJ"), on February 25, 2014. I held a Prehearing Conference on May 12, 2014. On the parties' request, an amended briefing schedule was issued on July 16, 2014. Agency failed to submit its brief by the deadline but subsequently showed good cause for its failure on December 31, 2014. I closed the record after receiving legal briefs and final arguments from the parties.

JURISDICTION

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

ISSUES

Whether Agency's decision to terminate Employee, based on the Trial Board's recommendation, was supported by substantial evidence; b) Whether Agency committed harmful procedural error; and c) Whether the decision was in accordance with law or applicable regulations, specifically, D.C. Official Code § 5-1031 (a) (2001), otherwise known as the "90-day rule."

Agency's Position:

On June 26, 2012, MPD issued a Notice of Proposed Adverse Action to Employee numbered DRB# 338-12, IS# 09-001645.[1] MPD personally served Employee with the Notice of Proposed Action, which outlined the three charges he was facing. *Id.* Agency alleged that Employee disobeyed Police Orders and Directives by engaging in outside employment without proper authorization from their Assistant Chief/Senior Executive Director and accepting gifts or business favors such as discounts, services, or other considerations of monetary value while on duty with MPD. Agency also alleges that Employee "willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Department Officer to, or in the presence of, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing" when he denied being paid for providing security services at Calvert Woodley Liquor Store.[2]

Agency argues that an Adverse Action Hearing Panel ("Panel"), which consisted of three senior MPD officials, unanimously found Employee guilty of all charges and specifications in an Evidentiary Hearing on January 17, 2013. Agency submits that the evidence supported the charges and that the recommended penalty was appropriate. However, Agency's January 23, 2015, brief ignores the 90-day issue raised by Employee in his August 12, 2014, brief.

Employee's Position:

Employee bases his appeal on four arguments:

1. Agency violated the 90-day rule of D.C. Code §5-1031(a).

2. Agency's decision was not supported by substantial evidence on Charge 1.

3. Agency's decision was not supported by substantial evidence on Charge 2.

4. Agency's decision was not supported by substantial evidence on Charge 3.

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1 Agency Tab 2.
2 *Id.*

FINDING OF FACTS

Uncontested Material Facts:[3]

1. Employee, a member of the Fraternal Order of Police (the "Union"), was employed as a Police Officer by Agency for 6 years.

2. Employee's discipline arose out of misconduct initially reported to MPD's Office of Internal Affairs ("IAD") in December 2008 by Lillian Colter while she was being interviewed on an unrelated matter.

3. Based on this information, between December 15, 2008 and January 6, 2009, IAD agents conducted a preliminary surveillance of the Calvert Woodley Liquor Store. The investigation revealed that three officers, one of whom was identified as Employee, were providing security for the store during closing time.

4. On January 13, 2009, Agent Robert Merrick met with Assistant United States Attorney ("AUSA") Steven Durham and briefed him regarding the criminal allegations against Employee and the other two officers, Nathaniel Anderson and Malcolm Rhinehart. AUSA Durham assigned the criminal investigation to AUSA Michael Atkinson. Meanwhile, surveillance of the store continued until May 9, 2009.

5. In March 18, 2010, the Federal Bureau of Investigation ("FBI") and Agency's internal affairs interviewed Employee.

6. On November 21, 2010, Officer Anderson pled guilty to a charge of illegal supplementation of salary and agreed to debrief as part of his plea agreement.

7. On January 21, 2011, the United States Attorney's Office indicted Employee and Officer Rhinehart in the U.S. District Court for the District of Columbia on charges of receipt of illegal gratuities and illegal supplementation of salary. Officer Rhinehart was subsequently terminated on an unrelated matter.

8. On November 29, 2011, the United States District Court for the District of Columbia Judge Reggie B. Walton signed an Order dismissing the Indictment against Employee. (Employee Exhibit 2)

9. An undated MPD Internal Affairs Memorandum changed Employee's duty status from Suspension Without Pay ("SWOP") to Full Duty after an investigation was issued. (Employee Exhibit 3). On January 4, 2012, a signed MPD Human Resource Management Memorandum formalized Employee's change of duty status from Indefinite

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3 Agency and Employee Briefs and their respective attachments. Where one party makes factual assertions and the opposing party does not dispute them, the asserted statements are taken as fact. Thus, they are taken as conceded.

Suspension Without Pay ("SWOP") to Full Duty based on the recommendation of the Internal Affairs Division. (Employee Exhibit 4).

10. On January 4, 2012, Employee returned to work.

11. On February 12, 2012, Employee was again interviewed by Internal Affairs.

12. On February 17, 2012, AUSA Durham issued a Letter of Declination for Employee, stating that Employee appeared to be on his lunch break during the times he was providing security for the store.

13. On June 14, 2012, IAD completed its investigatory report and recommended that the charges against Employee be sustained.

14. Agency issued Employee a Notice of Proposed Adverse Action on June 26, 2012, charging Employee with the following Charges and its respective Specifications:[4]

Charge No. 1: Violation of General Order Series 120.21, Part A-16, which states: "Failure to Obey Orders and Directives Issued by the Chief of Police." This misconduct is further defined in General Order Series 201.17, Part IV, which states: "Members shall not engage in outside employment without proper authorization from their Assistant Chief/Senior Executive Director." Further, Part V, G, 2, (b), which states: No member shall engage in outside employment if the "second job" would interfere with the member's scheduled tour of duty on the Department." Part V, G, 4, which states: "Members shall not accept any compensation for services rendered while on duty."

Specification No. 1: In that, between December 15, 2008, and May 4, 2009, you worked outside employment without authorization, providing security for Calvert Woodley Liquor Store, while on duty with the Metropolitan Police Department. Further, you were paid by a store employee on approximately 30 separate occasions for providing security for the liquor store.

Charge No. 2: Violation of General Order Series 120.21, Part A-16, which states: "Failure to Obey Orders and Directives Issued by the Chief of Police." This misconduct is further defined in General Order Series 201.26, B-24, which states in part, "A member shall not accept a gift, or gratuities from organizations, business concerns, or individuals, with whom he/she has, or reasonably could be expected to have official relationship on business of the District Government. Similarly, members are prohibited from accepting personal or business favors such as social courtesies, loans,

4 Agency Tab 2.

discounts, services, or other considerations of monetary value..."

Specification No. 1: In that, on February 12, 2012, you admitted during your interview with the Internal Affairs Division, that you received discounts from the Calvert Woodley Liquor Store and purchased wine, while on duty with MPD.

Charge No. 3: Violation of General Order 120.21, Attachment A, Part A-6, which states: "Willfully and knowingly making an untruthful statement of any kind in any verbal or written report pertaining to his/her official duties as a Metropolitan Police Department Officer to, or in the presence of, or intended for the information of any superior officer, or making an untruthful statement before any court or any hearing." As further specified in General Order Series 201, Number 26, which states in part, "...Additionally during the course of an investigation, all members shall respond truthfully to questions by an agent or official of the Internal Affairs Division (IAD)..."

Specification No. 1: In that, on February 22, 2012, during an interview with the Internal Affairs Division (IAD), you denied being paid for providing security services at Calvert Woodley Liquor Store. You made this statement knowing it to be untrue. However, during an IAD interview with Mr. Kevin Ehrman, store manager, of Calvert Woodley Liquor Store, he stated that he has paid you in cash, approximately 20 to 30 times.

15. On charges that Employee disobeyed several longstanding orders, Employee appeared before the Adverse Action Hearing Panel on January 17, 2013, for an administrative hearing. Agency submitted a complete transcript of the hearing. (Agency Tab 3) Employee was represented by Attorney Donna Rucker.

16. The Hearing Panel sustained all of the specifications of the three charges and recommended termination. Specifically, the Hearing Panel recommended that Employee be found guilty of Charge 1, Specification 1, Charge 2, Specification 1, and Charge 3, Specification 1. The Hearing Panel recommended that Employee be removed for being found guilty of all Charges. (Agency Tab 5.) The Hearing Panel's Findings and Recommendations recited that the selection of the proposed penalties was made after considering the "Douglas Factors" and Employee's past record.

17. Employee was notified of the Panel Recommendations by a Final Agency Decision document dated March 1, 2013. (Agency Tab 6).

18. Employee appealed to the police chief in a letter dated March 11, 2013. (Agency Tab 7).

19. The Findings and Recommendations were accepted as Agency's Final Decision on March 22, 2013, by Cathy Lanier, Police Chief for Agency. (Agency Tab 8).

Based on the above uncontested facts, I find that January 21, 2011, at the latest, is the date that Agency knew or should have known of Employee's act or occurrence allegedly constituting cause for his termination. Since January 21, 2011, was the date Employee was indicted in U.S. District Court for receipt of illegal gratuities and illegal supplementation of salary after months of investigation by Agency's Internal Affairs Division and the FBI. At that point in time, the tolling of the ninety day rule of D.C. Code §5-1031(b), would have ended as the investigation of Employee had ended.

Based on the language of D.C. Code §5-1031(a), the ninety days from January 21, 2011, not including Saturdays, Sundays, or legal holidays of Washington's birthday in February, DC Emancipation Day in April, and Memorial Day in May, would have been June 3, 2011. This would have been the deadline for Agency to initiate adverse action against Employee.

LEGAL ANALYSIS AND CONCLUSIONS OF LAW

Employee is a member of the Fraternal Order of Police (the "Union"), and is covered by a provision of the Collective Bargaining Agreement (the "Agreement") that specifically restricts the scope of this Office's review in adverse actions to the record previously established in the Trial Board's administrative hearing.

In *D.C. Metropolitan Police Department v. Pinkard*, 801 A.2d, 86, the District of Columbia 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* hearings in all matters before it. Although the *Pinkard* case was initiated by the Metropolitan Police Department, because there is a precluding Collective Bargaining Agreement negotiated between Employee's union and Agency, the holding likewise applies to Fire Trial Board proceedings. According to the Court:

> On this appeal from the Superior Court, the MPD contends (1) that an evidentiary hearing before the OEA administrative judge was precluded by a collective bargaining agreement between the MPD and the Fraternal Order of Police, a labor union to which Pinkard belongs, [and] (2) that the OEA administrative judge abused her discretion in ordering a second [and *de novo*] evidentiary hearing. . .
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> As a general rule, this court owes deference to an agency's interpretation of the statute under which it acts. There is, however, an exception to this general rule, which is that we will not defer to an agency's interpretation if it is inconsistent with the plain language of the statute itself. This case falls within the exception because the OEA's reading of the [Comprehensive Merit Personnel Act or CMPA] is contrary to its plain language and inconsistent with it. We therefore hold that, under the statute, the collective

bargaining agreement controls and supersedes otherwise applicable OEA procedures, and consequently, that the OEA administrative judge erred in conducting a second hearing.

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.

The MPD contends, however, that this seemingly broad power of the OEA to establish its own 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]. . . .

It is of course correct that a collective bargaining agreement, standing alone, cannot dictate OEA procedures. 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 (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 the 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 procedures outlined in the collective bargaining agreement, namely, that the appeal to the OEA "shall be based solely on the record established in the [trial board] hearing", controls in Pinkard's case.

The OEA may not substitute its judgment for that of an agency. Its review of the agency decision in this case, the decision of the trial

> board 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, 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 trial board.

See *Pinkard* at 90-92. (citations omitted).

Thus, pursuant to *Pinkard*, an AJ of this Office may not conduct a *de novo* hearing in an appeal before the Office, but must rather base the decision solely on the record below, when all of the following conditions are met:

> 1. The appellant (Employee) is an employee of either the Metropolitan Police Department, or the D.C. Fire & Emergency Medical Services Department;
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> 2. The employee has been subjected to an adverse action;
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> 3. The employee is a member of a bargaining unit covered by a Collective Bargaining Agreement;
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> 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] has been held, any further appeal shall be based solely on the record established in the Departmental hearing"; and
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> 5. At the agency level, Employee appeared before a Trial Board that conducted an Evidentiary Hearing, made findings of fact and conclusions of law, and recommended a course of action to the deciding official that resulted in an adverse action (employee's removal, suspension, demotion, or personal performance rating) or a reduction-in-force.

All of these conditions are met in this matter. Thus, according to *Pinkard*, my review of the final Agency decision to terminate Employee is limited "to a determination of whether [the final Agency decision] was supported by substantial evidence,[5] whether there was harmful

[5] According to OEA Rule 628.3, 59 D.C. Reg. 2129 (2012), an agency has the burden of proof in adverse action appeals. Pursuant to OEA Rule 623.1, *id.*, that burden is by "a preponderance of the evidence", which is defined as "[t]hat 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." In

procedural error, or whether it was in accordance with law or applicable regulations."[6] Further, I "must generally defer to the agency's credibility determinations."[7] My review is restricted to "the record made before the trial board."[8]

Whether Agency committed harmful procedural error; and Whether Agency violated D.C. Official Code § 5-1031 (a) (2001), otherwise known as the "90-day rule" in suspending Employee.

The first challenge raised by Employee is that Agency violated D.C. Code Section 5-1031(a), which requires Agency to initiate an adverse action against a sworn member of the police force no later than 90 days from the date Agency "knew or should have known of the act or occurrence allegedly constituting cause." Employee argues that the matter should be dismissed because MPD failed to propose his termination in a timely manner, in that it failed to propose the adverse action within 90 days of when it knew or should have known of the charged conduct. MPD contends that it did act within the 90 day period as its own Internal Affairs investigation ended on June 14, 2012. Less than 90 days later on June 26, 2012, MPD served Employee with a Notice of Proposed Adverse Action.

D.C. Code § 5-1031. Commencement of corrective or adverse action states as follows:

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

In *D.C. Fire and Medical Services Department vs. D.C. Office of Employee Appeals*, 986

Pinkard-type cases previously decided by this Office (including the initial decision in *Pinkard* itself that resulted from the remand), we have held that there must be substantial evidence to meet the agency's preponderance burden. *See, e.g.; Hibben, supra; Davidson, supra; Kelly, supra; Pinkard v. Metropolitan Police Department*, OEA Matter No. 1601-0155-87R02 (December 20, 2002); *Bailey v. Metropolitan Police Department*, OEA Matter No. 1601-0145-00 (March 20, 2003).

[6] See *D.C. Metropolitan Police v. Pinkard*, 801 A.2d 86, at 91.

[7] *Id.*

[8] *Id.* at 92.

A.2d 419 (January 7, 2010), the D.C. Court of Appeals held that 90-day period for Agency to propose removal of technician began to run on the date that a panel of Agency leaders interviewed technician in an investigation of the incident.

In this instance, it is undisputed that Employee initially aroused Agency's suspicions in December 2008 after receiving allegations of misconduct from a Ms. Colter. Agency's Internal Affairs Division initiated surveillance of Employee and two other officers around December 15, 2008. After Agency briefed the United States Attorney's Office regarding its surveillance on January 13, 2009, the FBI also began an investigation of Employee.

Two years later, this investigation culminated in Employee's indictment on January 21, 2011, by the United States Attorney's Office in the U.S. District Court for the District of Columbia on charges of receipt of illegal gratuities and illegal supplementation of salary. Thus, the investigation had ended by this point and the 90-day period began.[9]

Around nine months later on November 29, 2011, the United States District Court for the District of Columbia dismissed the Indictment against Employee. On January 4, 2012, Agency formalized Employee's change of duty status from Indefinite Suspension without Pay to Full Duty based on the recommendation of its Internal Affairs Division. Employee returned to work the same day.

A little more than a month later on February 12, 2012, Agency's Internal Affairs decided to reopen its investigation of Employee.[10] Five months later on June 14, 2012, Internal Affairs completed its investigatory report and recommended that the charges against Employee be sustained. Agency issued Employee a Notice of Proposed Adverse Action on June 26, 2012.

Based on the above facts, it is evident that Agency knew or should have known of Employee's act or occurrence allegedly constituting cause for his termination at the very latest on January 21, 2011, the date Employee was indicted in U.S. District Court for receipt of illegal gratuities and illegal supplementation of salary. After all, it was Agency who started the investigation in 2008 and briefed the U.S. Attorney's Office regarding its allegations.

Yet it was not until roughly a year and a half later on June 26, 2012, that Agency initiated its adverse action against Employee. This is way past the 90-day deadline dictated by D.C. Code § 5-1031. The D.C. Court of Appeals has held that compliance with this code is mandatory, thereby requiring reversal of Agency's adverse action when it is violated.[11]

I therefore conclude that Agency committed a harmful procedural error and violated D.C. Official Code § 5-1031 (a) (2001). Considering this conclusion, I need not address the merits of the findings made by the Panel.

---

9 At that point in time, the tolling of the ninety day rule of D.C. Code §5-1031(a), would have ended as the investigation of Employee had ended.

10 Ironically, the U.S. Attorney's Office issued a Letter of Declination for Employee the same month.

11 *Supra, D.C. Fire and Medical Services Department*, 986 A.2d 419.

ORDER

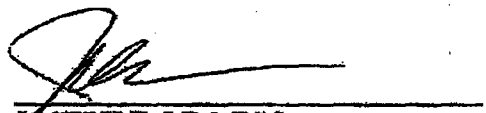
It is hereby ORDERED that:

1. Agency's decision to remove Employee from his position is REVERSED.

2. Agency is directed to reinstate Employee, issue the back pay to which he is entitled and restore any benefits lost as a result of the removal, no later than 30 calendar days from the date of issuance of this Decision.

3. Agency is directed to file with this Office documents within 45 calendar days to reflect its compliance with the directives of this Decision.

FOR THE OFFICE:



JOSEPH E. LIM, ESQ.
Senior Administrative Judge

GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

REPLY TO:
955 L'Enfant Plaza, S.W.
Suite 2500
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(202)727-0004
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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

ABRAHAM EVANS, Petitioner v. D.C. OFFICE OF EMPLOYEE APPEALS et al., Respondent.	Case No. 2018 CA 004909 P(MPA) Judge Elizabeth Wingo

MOTION TO SEAL RECORD

Superior Court Rule 5-III(a)(1) provides that "[a]bsent statutory authority, no case or document may be sealed without a written court order. Any document filed with the intention of being sealed must be accompanied by a motion to seal or an existing written order." Moreover, pursuant to Superior Court Civil Rule 5(e)(2), a party wishing to file a document containing the unredacted personal identifiers may submit a motion to file an unredacted document under seal. In accordance with Agency Rule 1(e), Respondent D.C. Office of Employee Appeals is required to file with the Clerk the entire agency record, including all of the original papers comprising that record. The original record contains documents that were submitted by the District of Columbia Metropolitan Police Department and Abraham Evans which include the names, addresses, telephone numbers, social security numbers, and dates of birth for Mr. Evans and several witnesses in this matter. In an effort to maintain the record in its original form and to protect the privacy of those involved, we humbly request that you grant our motion to seal the

record to prevent it from being viewed by the public via the court's electronic filing system. Counsels for Petitioner and Respondent Metropolitan Police Department do not object to this motion.

Respectfully submitted,

Lasheka Brown Bassey
Lasheka Brown Bassey
D.C. Bar # 489370
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D.C. Office of Employee Appeals
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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of August, 2018, the forgoing Respondent D.C. Office of Employee Appeals' Motion to Seal Record was served via the Court's electronic filing system, CaseFileXpress.com to the following:

Ted Williams
Counsel for Petitioner

Andrea Comentale
Counsel for Metropolitan Police Department

Lasheka Brown Bassey

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GOVERNMENT OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS

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SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

ABRAHAM EVANS, Petitioner, v. DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS et al., Respondents.	Case No. 2018 CA 004909 P(MPA) Judge Elizabeth Wingo

CERTIFICATE OF FILING

I hereby certify that this is the true and correct official case file in the matter of *Abraham Evans v. Metropolitan Police Department,* OEA Matter No. 1601-0081-13R16R18. The record consists of two volumes containing tabs one through forty (1-40).

Wynter Clarke
Wynter Clarke
Paralegal Specialist

LASHEKA BROWN BASSEY NOTARY PUBLIC MY COMMISSION EXPIRES 6/14/2021 DISTRICT OF COLUMBIA

District of Columbia: SS
Subscribed and Sworn to before me
this 28th day of September, 2018
Lasheka Brown Bassey
Lasheka Brown Bassey, Notary Public, D.C.
My commission expires June 14, 2021

2018 D.C. Court of Appeals' Lawsuits

District of Columbia
Court of Appeals

No. 14-CV-632

LATISHA PORTER,

Appellant,

CAP5681-10

v.

DC OFFICE OF EMPLOYEE APPEALS, *et al.*,

Appellees.

ORDER

It appearing that the complete record on appeal has been filed with this court, it is

ORDERED that appellant's brief and the appendix including the documents required by D.C. App. R. 30 (a)(1), shall be filed within 40 days from the date of this order, and appellees' briefs shall be filed within 30 days thereafter. *See* D.C. App. R. 31.

Copies to:

FOR THE COURT
Julio A. Castillo
JULIO A. CASTILLO
CLERK OF THE COURT

Frederic W. Schwartz, Jr., Esquire
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Washington, DC 20001

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1100 4th Street SW Suite 620E
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Todd S. Kim, Esquire
Solicitor General for DC

elp

District of Columbia
Court of Appeals

Administrative Order 4 -11

ORDER
(FILED - November 30, 2011)

Whereas this court continues to investigate procedures that will permit the court to manage its caseload more efficiently and effectively, and

Whereas this court has implemented a new case management system that maintains both the docket and case files in an electronic format, it is

ORDERED that in addition to the procedures and filing requirements of D.C. App. R. 28, parties represented by counsel are required to transmit copies of their briefs in PDF format to briefs@dcappeals.gov within 24 hours of filing their briefs. Parties not represented by attorneys (*pro se*) may but are not required to transmit briefs in an electronic format. The subject line of the email should include the appeal number, the case caption, and the type of brief. The parties' contact information should be provided in the body of the email. It is

FURTHER ORDERED that this Administrative Order shall become effective immediately.

BY THE COURT:

ERIC T. WASHINGTON
Chief Judge

DISTRICT OF COLUMBIA COURT OF APPEALS

LaTisha Porter, Appellant, v. D.C. Office of Employee Appeals, et al., Appellees.	)	Case No. 17-CV-1273

APELLEE OFFICE OF EMPLOYEE APPEALS' STATEMENT IN LIEU OF BRIEF

Pursuant to the Order that was entered on March 8, 2018, Appellee Office of Employee Appeals submits that it relies on the final decision of this office in the matter of *LaTisha Porter v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No.1601-0115-07R12 (February 7, 2013), as its statement in lieu of brief. The final decision is attached hereto as Exhibit #1.

Respectfully submitted,

LashekaBrown Bassey

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CERTIFICATE OF SERVICE

I hereby certify that the forgoing Appellee Office of Employee Appeals' Statement in Lieu of Brief was served via the Court's electronic filing system to the following on this 24th day of April, 2018:

Frederic W. Schwartz, Jr., Esquire

Loren L. AliKhan, Esquire

Respectfully submitted,

LashekaBrown Bassey

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Exhibit 1

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
LaTisha Porter Employee	OEA Matter No. 1601-0115-07R12
v.	Date of Issuance: February 7, 2013
District of Columbia Fire and Emergency Medical Services Department Agency	Joseph E. Lim, Esq. Senior Administrative Judge

Ross Buchholz, Esq., Agency representative
Frederick Schwartz, Jr., Esq., Employee representative

INITIAL DECISION ON REMAND

INTRODUCTION AND STATEMENT OF FACTS

Employee filed a Petition for Appeal with the Office of Employee Appeals (OEA) on September 4, 2007, appealing Agency's final decision to remove her from her position of Advanced Emergency Medical Technician, effective August 3, 2007. At the time of the adverse action, Employee was in permanent career status.

This matter was assigned to me on or about November 19, 2007. After several postponements requested by the parties, I held a prehearing conference on December 14, 2007. The parties then entered into discussions on a stipulation of facts. The matter proceeded to a hearing on April 7, 2010. At the hearing, the parties were given full opportunity to, and did in fact, present testimonial and documentary evidence. On May 28, 2010, I issued an Initial Decision (I.D.) upholding Agency's removal of Employee.

Thereafter, Employee filed an appeal with the D.C. Superior Court on July 28, 2010. On January 24, 2012, the Superior Court remanded this matter for further findings on the three issues discussed below. As per the Superior Court's order, I held another hearing on April 25, 2012. The record is closed.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code §1-606.3 (2001).

ISSUES

1. Did Employee ask OUC to take her off the run.
2. Does OUC have the power to reassign Employee to another run notwithstanding Lt. Farley's instructions to the contrary?
3. Did OUC give such an order to reassign Employee to another run despite Lt. Farley's instructions to Employee?

FINDINGS OF FACT, ANALYSIS AND CONCLUSIONS

Undisputed Facts

In addition to fighting fires, Agency provides ambulance services to District residents. Agency personnel who provide emergency medical assistance are trained Emergency Medical Technicians (EMT) and Paramedics. Its ambulance units are composed of Advance Life Support Units (ALSU) and Basic Life Support Units (BLSU). ALSU providers have more extensive medical training than BLSU providers and can thus provide services such as delivery of drugs intravenously that BLSU cannot. Further, a basic ambulance is not equipped with a cardiac monitor.

Calls for ambulance service come into the Office of Unified Communications (OUC) from the public and Agency personnel. Depending on the description of the patient's medical condition, the OUC operator makes an initial decision on sending either a ALSU or BLSU. The OUC uses the Automatic Vehicle Locating (AVL) system to dispatch the ambulance unit closest to the patient. The role of the OUC is to take calls and then determine which units to assign to a particular emergency, depending on the type of emergency, and the distance of the available units to the scene, and then dispatch these units or unit to the scene.

Only the OUC can make decisions as to which units to dispatch on pre-arrival assignments. But once they arrive on the scene, the ambulance crew member in charge of a unit or the highest ranking trained medical personnel can evaluate the patient and decide whether the unit can provide the medical assistance needed or whether they should notify OUC that the patient should be reassigned to another unit. Employee Exhibit #5, General Patient Care Protocals: Patient Care, deals with employees assessing patients at the scene.

Employee LaTisha Porter is an Emergency Medical Technician (EMT) who joined the D.C. Fire and Emergency Medical Services Department on March 26, 2001. On November 27, 2006, Employee and EMT LaDonnya Stroman were staffing Ambulance 25, a BLSU. Both Employee and Stroman were advanced EMT trained. At 14:56 hours, they received a dispatch from the Communications Operator to respond to the quarters of Engine Company 26 for a walk-in patient.

The patient had walked into Engine Company 26 approximately 10 minutes earlier having been referred by a local medical clinic after complaining of dizziness and asking that his blood pressure be taken. He stated that he had not had any medical problems during the past year, but

that he had not taken his medication for a few days. Firefighter Stanley Hicks (Hicks), an EMT, took the patient's vital signs noting that his blood pressure was 200/110 with a radial pulse rate of 80 and that he was otherwise asymptomatic. Hicks informed the patient that his blood pressure was abnormal and they agreed to transport the patient to the closest medical facility by ambulance.

After receiving the dispatch order, Employee telephoned Engine Company 26 to inquire about the patient's condition. During the telephone conversation with Hicks, Employee repeatedly insisted that the patient needed an advanced transport unit. Hicks transferred Employee's call to Lieutenant Gerald Fraley (Fraley) at which time Employee stated that if the patient's blood pressure is 200/110, then the patient needs a medic unit, and they are not able to start an IV line because they are not advanced trained. Fraley disagreed with the evaluation of Employee and told her that the patient was in no distress and that he would discuss the situation with her when she arrived at the station.

Following the telephone conversation with Fraley, Employee called the OUC and reported she was still en route, but recommended that they dispatch the next available paramedic engine company or medic unit to respond ahead of Ambulance 25. EMS Dispatch Policy Changes (Employee Exhibit #3) mandates that the closest transport unit be dispatched. Employee then requested to be placed in service to take another call after being advised that OUC dispatched Medic 4 to Engine Company 26.

Medic 4 arrived at Engine Company 26 while Employee and her Ambulance 25 did not report to Engine 26. Medic 4 personnel evaluated the patient and transported the patient to Howard University Hospital for further evaluation due to an elevated blood pressure.

Article 17, Section 29 of the DC Fire & EMS Order Book states that as to Medical Local Responses, EMS units may be canceled by Firefighter/EMT's only under the following circumstances: [1] There is no patient (unable to locate, gone on arrival, false alarm); [2] No EMS service is required (no illness or injury, PDOA); [3] Patient refuses all services - units may be canceled only after a complete physical assessment and counseling of the patient and /or responsible person. It states further that BLS units, ALS units, and /or EMS supervisors on the scene may cancel other responding units when, after complete physical assessment and review of all circumstances, (mechanism of injury) there is no apparent need for further intervention.

Section 29-2 Medical Local Responses states: BLS units, ALS units and/or EMS Supervisors on the scene may cancel other responding units when, after a complete physical assessment and review of all circumstances, (mechanism of injury), there is no apparent need for further intervention. (Employee Exhibit #8).

On March 12, 2007, Agency served Employee with an Advanced Notice of Proposed Removal for the cause of "[f]ailure to respond on an assigned medical dispatched [sic] after requesting a medic unit." Specifically, the notice charged Employee with failing to respond on a medical dispatch and improperly canceling her dispatch to Engine No. 26. The other EMT in Ambulance 4, LaDonnya Stroman, was not charged in the incident.

Employee filed a response and had an administrative review by a Hearing Officer (HO). The HO's written decision was issued on July 2007, finding, *inter alia,* that Agency's penalty complies with Chapter 16 of the District personnel manual and the "Douglas Factors" have been properly weighed. The HO noted that Employee had three previous disciplinary infractions within the past three years. The HO reasoned that given Employee's 10 day suspension in September 2006 for failure to perform assigned duties and failure to follow orders, the instant offense constituted a second like offense within two months. On June 24, 2005, the Employee was reprimanded for "discourteous treatment and unprofessional treatment towards your co-worker." On January 26, 2006, the Employee was suspended for three days without pay for "failure to carry in your possession the required employee identification card while on duty." On August 21, 2006, the Employee was suspended for 10 days without pay for "failure to perform your assigned duties" and for "failure to follow orders." On September 11, 2006, the Employee was suspended for 5 days without pay for discourteous treatment and unprofessional treatment towards your co-worker."

On July 16, 2007, Agency issued its Final Agency Decision finding that the cause cited in the Notice was supported by a preponderance of the evidence and warranted removal, effective August 3, 2007.

Positions of the Parties

Agency's position is that Employee was insubordinate when she failed to follow a direct dispatch order from OUC and from her supervisor Lt. Fraley to report to Engine 26 quarters. Employee asserts that: 1) Lt. Fraley was not her supervisor and thus had no authority to command her; 2) she correctly assessed that an ALSU was better suited to assist the patient; 3) the other unit was closer to the patient than her unit was; and 4) she did not disobey the dispatch order since OUC had reassigned her to another run.

Recap of Summary of Evidence presented at the 4/7/2010 hearing

Then Fire Chief Dennis Rubin, a former fire chief of three other jurisdictions, testified (4/7/2010 Tr. Pages 9- 62) that in determining the proper penalty for Employee, he looked at the Douglas factors and determined that termination was the best choice based on Employee's serious offense of not responding to an ambulance call and her four prior offenses. He stressed the importance of Agency employees obeying immediately a dispatch order without question. Rubin said that this is the rule for all fire departments in the country and that no one, not even the fire chief, has the authority to cancel a dispatcher's order except the dispatcher himself. He also testified that under the National Incident Management (NIMS 100) model which has been in use for the past 50 years, Lieutenant Fraley in his role as incident commander, is Employee's direct supervisor in that situation. Rubin stressed over and over that Employee had no authority to avoid going on an ambulance even if she thought another unit should take the dispatch instead.

Battalion Fire Chief Jerome Stack of EMS Operations (4/7/2010 Tr. Pages 62-88) testified that he was the investigating official in this matter. He stated that the incident commander, not Employee, had the authority to cancel a run. He thought that the non-appearance of Employee's basic ambulance unit seriously jeopardized Agency's mission of providing on-site emergency care

to District residents. He emphasized that Employee could only accurately assess the needs of a patient if she was on the scene and that it was inappropriate for Employee to diagnose the patient's medical needs away from the scene.

Lieutenant Gerald Fraley, (4/7/2010 Tr. Pages 88-108) the ranking supervisor in charge of all Agency personnel at Engine 26, Truck Company 15, testified that on November 27, 2006, a patient came into the station asking to have his blood pressure checked. When they found his blood pressure to be high, the patient asked to be transported by ambulance to the nearest hospital. Fraley ordered OUC to dispatch a BLSU to Engine 26 Quarters. He then received a cell phone call from Employee who began asking about the patient's condition. Fraley said that protocol dictated that Employee use the radio from OUC to communicate with him. In addition, it is not protocol for Employee to be attempting to get more details about the patient's condition without being on the scene. His impression was that Employee was trying to avoid taking the run. Fraley ordered Employee to report to the scene, regardless of whether her unit was a basic or advanced unit.

Assistant Fire Chief of Operations Lawrence Schultz, a 25-year veteran firefighter, (Tr. Pages 108-160) testified that he was the proposing official in terminating Employee. After listening to the audio tapes recorded of the incident, and reading all the other reports, he determined that termination was the appropriate penalty. In emphasizing the importance of prompt obedience to dispatch orders, he explains that they are a paramilitary unit in that they constantly deal with emergencies and prompt obedience to dispatch orders is essential.

La Donnya Stroman (4/7/2010 Tr. Pages 168-182) testified that she was the driver in Employee's ambulance. She recalled Employee's cell phone calls to Lt. Fraley and the OUC dispatcher. Initially, Stroman said the Communications placed them back in service; but when an audio recording of the conversation was replayed, she agreed that it was Employee who declared their unit to be back in service.

Jasper Sterling, an EMT-paramedic with the advanced life support unit and a union official, (4/7/2010 Tr. Pages 183-235) elaborated on the medical complications that could occur in a patient with high blood pressure. Paramedics sometimes used their cell phones when the ambulance radio hit a dead zone and thus cannot get a radio signal. After much hedging, Sterling admitted that a dispatch by the OUC was an order that must be followed by a paramedic or EMT.

Employee, an EMT basic with Agency, (4/7/2010 Tr. Pages 235-281) testified that on November 27, 2006, her unit was dispatched by OUC to report to Engine 26 quarters. Using her cell phone, Employee called Engine 26 to ascertain the patient's condition. After speaking with Sandy Hicks about the patient's condition, Employee determined that a medic unit should be sent instead. Hicks put Lt. Fraley on the line. Fraley instructed Employee to report, saying of her concerns, "We'll discuss it when you get here." (Tr. Page 240) Employee called OUC to suggest sending a medic unit.

Later, after hearing a dispatch of Medic 4, Employee called OUC again and claimed that they were placed back in service and thus did not have to report to Engine 26. OUC subsequently sent them on another run. Employee asserts that Fraley's request for her to show up at Engine 26 to discuss the matter was not an order.

Summary of Evidence presented at the 4/25/2012 hearing

1. Did Employee ask OUC to take her off the run.

Testimony of Demetrius Vlassopoulus (4/25/2012 Transcript pgs.10-115):

Vlassopoulus testified in his capacity as Deputy Fire Chief of Operations employed by DC Fire and Emergency Medical Services ("D.C. FEMS"). At the time of the incident, he was employed as the Battalion Fire Chief and was a liaison to the OUC. On or about January 2007, he was asked to prepare a memorandum regarding the incident. He was responsible for obtaining wave files from OUC and transcribing the information regarding the incident. Based on the recording of the incident, Vlassopoulus stated that Employee did not ask OUC to take her off the ambulance run. However, they did make themselves available for service, meaning that they placed themselves off the run.

Testimony of Ingrid Bucksell (4/25/2012 Transcript pgs. 117-170):

At the time of the incident, Bucksell was the Section Supervisor at OUC. She testified that OUC is responsible for managing their D.C. FEMS resources, which is the apparatus that they have - fire trucks, ambulances and Medic Units – to respond to calls for medical assistance from both the firefighters and the police. All calls that come into OUC are recorded and these records are kept for three years so that they can be used for any needed legal or administrative proceedings. Based on the audio recording of November 27, 2006, Bucksell testified that Ambulance 25 was responding to the Engine 26 firehouse when they requested a Medic Unit to go ahead of them on that call. The OUC lead dispatcher did not question why they needed a Medic Unit; the dispatcher simply asked what Ambulance 25 needed. Ambulance 25 said they needed a Medic Unit ahead of them but that they were still responding to the scene. And then I heard Ambulance 25 put itself in service. They advised communication that they were available after Medic Unit was dispatched. Bucksell responded that Employee did not ask OUC to be taken off the run. Employee simply told them that Ambulance 25 was ready for service and the dispatcher put her in service.

Testimony of Clark Allen Higgs (4/25/2012 Transcript pgs. 171-205):

Higgs testified in his capacity as Watch Commander for the OUC. He explained that calls from a firehouse are considered calls for service. He notes that it is a common occurrence for incidents to be re-assigned from one ambulance to another. The object of dispatching is to send the closest unit available at the time. If by some chance a dispatcher is watching their monitors and another unit comes in that is closer, OUC will send the closest unit in regard for the citizen. This is because there is a limited number of units out there and lots of citizens in the city.

An EMT cannot cancel a dispatch. EMT cannot order that he be reassigned to a different call. Based on transcript of radio transmissions involving Ambulance 25 on November 27, 2006, (Agency Exhibit 26), Employee put Ambulance 25 in service. According to Agency Exhibit 26, he did not see where anyone from OUC told them to go in service. It just says Ambulance 25 is

advising OUC that they are ready for service.

Testimony of Jasper Williams Sterling (4/25/2012 Transcript pgs. 205-235):

Sterling testified in his capacity as a paramedic with D.C. FEMS, and also as the Executive Vice President of Union. Sterling said he has accepted reassignment of a run. Not then (at the time of the incident) nor is it now unusual to return a unit to service, if another unit was reassigned to the run. They would be placed back in service and made available for another call. For example, when they leave the hospital, they place themselves out of service until they get back to their area. There is a certain point where they go in service and there's times when they will send a unit from Northwest because they are out of service. And if they are going east out of Anacostia, and he is closer, he will call OUC and tell them he is in route, and to place him on that call and they (OUC) will place the other unit back in service. Employee did not ask permission to be taken off the run. When she said, "A25 ready for service," she placed herself in service.

Testimony of Bryan Lee, (4/25/2012 Transcript pgs. 262- 361):

Chief Lee testified in the capacity of the active professional standards officer with D.C. FEMS. Employee was given an order to respond to the firehouse. OUC serves to amplify the orders given by FEMS. So literally they dispatch based on Agency's orders. Employee did not ask OUC to take her off the run. She did cause OUC to take her off the run.

Testimony of Employee Latisha Porter (4/25/2012 Transcript pgs. 364-389):

Employee testified that she did not ask the dispatcher to take her off the run but that OUC did take her off the run. When she asked was she still responding or in service, the dispatcher said, "Ambulance 25, per the lead, you are in service." Once the dispatcher places you in service, then you are available.

Employee reiterates that she did not ask to be taken off the run and that the dispatcher placed her in service prior to her hitting the deck system. Employee admitted that she cannot tell or request the dispatcher to take her off a run.

Testimony of Ladonna Stroman (4/25/2012 Transcript pgs. 391-400):

Stroman testified in the capacity of an Emergency Medical Technician for D.C. FEMS. At the time of the incident, she was the Employee's partner and confirmed that at some point they were taken off the run. Her memory of the incident is hazy and thus she could not confirm anything other than that Employee did make a call to OUC on her cell phone inquiring about the patient's blood pressure.

Finding of Fact on Whether Employee asked OUC to take her off the run.

On this issue, I based my finding of fact on my own listening to the recording of the relevant OUC radio transmission augmented by the interpretation of the witnesses who have an intimate workman's knowledge and understanding of all the terminology and terms used by OUC

dispatchers and EMTs in their communications. All the witnesses, including Employee, were unanimous in stating that Employee did not explicitly ask OUC to take Ambulance 25 off the run. I therefore find that Employee did not ask OUC to take her off the run.

2. **Does OUC have the power to reassign Employee to another run notwithstanding Lt. Farley's instructions to the contrary?**

Testimony of Demetrius Vlassopoulus (4/25/2012 Transcript pgs.10-115):

Vlassopoulus stated that OUC does not have the power to reassign an employee to another run, because the resource was already dedicated to that incident. OUC would have had to clear it with the incident commander, Lieutenant Fraley, before they randomly reassigned any unit. Further, OUC did not give the order.

Testimony of Ingrid Bucksell (4/25/2012 Transcript pgs. 117-170):

OUC receives orders for medical assistance and dispatches resources accordingly. With regards to the request from Lt. Fraley, Bucksell said OUC is only responsible for dispatching resources. If the officer in charge told the person to come in, then they are supposed to come according to their chain of command. And if the officer on the scene is in charge, OUC does whatever the officer in charge at the scene tell them to do.

Testimony of Clark Allen Higgs (4/25/2012 Transcript pgs. 171-205):

Higgs testified that depending on the circumstances, OUC has the discretion to assign and reassign apparatus. The incident commander (in this case, Lt. Fraley) is in charge of the incident. Fraley would be the officer in charge at the firehouse. So if Fraley orders an ambulance to come to the firehouse, they would have to obey that order. Now if Fraley called and said, "Have Ambulance 25 come to the firehouse." Then OUC would have complied. OUC would have asked if Fraley was placing them out of service. Then we would have placed Ambulance 25 out of service per Lt. Fraley, and told them to report to Truck 15. However, they would not be on the run, because Medic 4 has the run.

The dispatcher has the authority to tell the EMT not to go on that run and to reassign them to a different run. The FEMS orders have nothing to do with OUC communications. He would have placed Employee out of service and told her that the officer has ordered her to come to Engine 26. If that was the case then Employee would be directed by her superior.

A dispatcher is not Employee's supervisor. What Lt. Fraley may or may not have said does not really have any bearing on how we dispatch. As far as OUC is concerned, we could have placed an ambulance unit in service to take the next run because our concern is the citizen, not anything that is going on within the firehouse.

Testimony of Jasper Williams Sterling (4/25/2012 Transcript pgs. 205-235):

There are times when the Paramedic Engine Company is dispatched with an ambulance.

In his firehouse, there is an ambulance and a Medic Unit. The engine officer will see the Medic Unit and tell communications he wants the Medic Unit to be placed on a call with him, and sometimes it happens and sometimes it does not happen. OUC will tell them no, take the basic life support unit. So ultimately who says who goes where, falls under OUC. He has witnessed OUC both usurp and validate the chain of command. If a call is requesting advanced life support because the Paramedic Engine Company has a paramedic on it, the engine officer will sometimes tell OUC to put the Medic Unit on call. Sometimes they do and sometimes they do not. He has witnessed both where the OUC has denied the order request from the incident commander to place the advanced life support on a call. Even if both units are sitting in the same firehouse and are equal distance, but the original dispatch has a basic life support unit, they send the basic life support unit. He is not sure if there is authority, but it does happen.

Testimony of Brian Lee,[1] (4/25/2012 Transcript pgs. 262- 361):

Chief Lee testified that based upon FEMS' policies, rules, and regulations. OUC did not have the authority to change Lt. Fraley's order. He referred to several general orders, chain of command and supervisory control, operational guidelines for EMS and what is supposed to occur. (See Agency exhibits 22, 23, 25). OUC cannot place an ambulance in service without contacting the EMS supervisor company commander or an incident commander. OUC is an extension of an arm dispatching, per the FEMS protocols because they are not the operational experts. It is coordinated with FEMS chain of command. OUC does not have the authority to reassign the employee to another run due to the chain of command. An EMS supervisor can reassign units that have been dispatched.

Testimony of Employee Latisha Porter (4/25/2012 Transcript pgs. 364-389):

Employee testified that on the EMS side of the Fire Department (FD), when an officer gives you an order or for it to be an order he has to place the unit out of service, or if he wanted me to continue into the firehouse, he would have had to call OUC. They would have then notified Employee to report to Engine 26 and at that time she would have reported to Engine 26. That's normally how it goes. Dispatchers have the authority to assign units. It is her understanding that she is to follow whatever OUC tells her to do. And if there's a discrepancy, the FD interns take that up with communications. OUC has the authority to place you back on a run. It is common practice.

Finding of Fact on Whether OUC has the power to reassign Employee to another run notwithstanding Lt. Farley's instructions to the contrary.

Apart from Employee, all the witnesses are unanimous in stating that OUC does not have authority to reassign an EMT in direct contravention to the orders of an officer in charge at the scene, which in this case was Lt. Fraley. What is more compelling is that, this assertion is in line with the general orders and operational manuals submitted by Agency as exhibits. Sterling testified that these orders are not always followed; but that does not negate the validity or legality

[1] The transcript spelled his first name as Bryan. However, his resume (Agency Exhibit 33) spells his name correctly as Brian.

of the orders. I find these witnesses to be more credible than Employee and Sterling, as they are backed up by Agency's written policies. The OUC witnesses are unanimous in stating that had they been made aware of Lt. Fraley's order, Employee would not have been reassigned to another run. I therefore find that OUC has no authority to reassign Employee in defiance of an officer in charge's order.

3. **Did OUC give such an order to reassign Employee to another run despite Lt. Farley's instructions to Employee?**

Testimony of Demetrius Vlassopoulus (4/25/2012 Transcript pgs.10-115):

Vlassopoulus asserted that based on the recorded transcript of the relevant transmission that day, OUC did not give such an order. Deputy Chief asserted that it appears unequivocally that Ambulance 25 (A25), Employee's vehicle, placed themselves in service. Vlassopoulus further testified that it is quite common and authorized for ambulances to say, "We're ready for service."

Vlassopoulus maintained that OUC complied with the request of A25, which was to dispatch a Medic Unit to the call while they were still in route. He believes it was improper because A25 was committed to a response and they usurped the chain of command by requesting an additional resource without the approval of the incident commander. Vlassopoulus acknowledged that the lead approved the Medic Unit because the lead dispatched it.

Testimony of Ingrid Bucksell (4/25/2012 Transcript pgs. 117-170):

Bucksell also said that there is no basis for her to answer regarding OUC reassigning Employee, notwithstanding Lt. Farley's order because we did not know that she had an order. If there was an order then Employee would still have to respond. A request from a member of the Fire Department (FD) that our office receives is an order. We just use whatever they tell us and code it correctly and we send what they need based on the information they give us.

Testimony of Clark Allen Higgs (4/25/2012 Transcript pgs. 171-205):

Higgs testified that if he was aware of an officer's contravening order, he would have placed Employee out of service and told her that the officer has ordered you to come to Engine 26. He stressed that Employee would be directed by her superior.

Testimony of Employee Latisha Porter (4/25/2012 Transcript pgs. 364-389):

Employee insisted that OUC reassigned her unit to another run and that it is a common practice. She stated that she had a cell phone conversation with OUC where she inquired from OUC if she was still on the run. Employee insisted that Lt. Fraley is not her commander and she insisted that Lt. Fraley did not order her to report to Engine 26. She also said she had more medical training than Lt. Fraley and that OUC has the authority to place her back on a run. Employee admits that she cannot tell or request the dispatcher to take her off a run.

Finding of Fact on Whether OUC give such an order to reassign Employee to another run despite Lt. Farley's instructions to Employee

OUC did reassign Employee to another run but what is also expressly clear from all the testimony presented in this matter is that Employee never informed OUC that she was under orders from Lt. Fraley to report to Engine 26. Employee simply stated to OUC that her unit was back in service. It is clear from the evidence presented that OUC then assumed that Employee's unit had been cleared to go on another run and thus they did just that. I also find these witnesses to be much more credible than Employee. I therefore find that Employee mislead the OUC dispatchers into reassigning her on another run, thereby allowing her to disobey Lt. Fraley's direct order.

Analysis, Findings and Conclusions

This Office has jurisdiction to hear this matter pursuant to Section 101(d) of the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124. D.C. Official Code § 1-616.51 (2001) (Code herein) provides that the Mayor "issue rules and regulations to establish a disciplinary system that includes...1) a provision that disciplinary actions may be taken for cause... [and]... 2) A definition of the causes for which a disciplinary action may be taken" for those employees of agencies for whom the Mayor is the personnel authority. Agency is under the Mayor's personnel authority. In this instance, Employee is charged with insubordination or failure to follow a direct dispatch order. Insubordination is included as "cause" for which an employee can be disciplined. *See,* Section 1603.3, 46 D.C. Reg. 7096.

Employee does not deny that she did not report to Engine 26 as per the OUC dispatch order and Lt. Fraley's expressed order. Employee's contention that Lt. Fraley is not her direct supervisor is incorrect. According to the credible and repeated testimony of Agency's witnesses, Lt. Fraley in his role as incident commander, is Employee's direct supervisor and thus, I find that Lt. Fraley has the authority to command Employee to report to Engine 26 quarters. This is also borne out by Agency's general orders and procedure manual. (*See* Agency exhibits 22, 23, 25). Employee's assertion that Lt. Fraley's request for her to show up at Engine 26 to discuss the matter was not an order but a mere request that she can blithely ignore strains credulity. Agency's medical emergency unit has an organizational structure that enables its employees to respond promptly to medical emergencies. As witnesses have testified, its command structure is paramilitary whereby employees are expected to obey a superior's command without question or procrastination. Based on the evidence presented, I find that Employee deliberately ignored Lt. Fraley's command.

Employee's second defense, that she correctly assessed that the patient needed an ALSU, not her BLSU, is also erroneous and irrelevant to the charge of insubordination against her. She has to be on the scene to assess the patient and make this determination. Section 29-2 Medical Local Responses states: "BLS units, ALS units and/or EMS Supervisors *on the scene* may cancel other responding units when, after a complete physical assessment and review of all circumstances, (mechanism of injury), there is no apparent need for further intervention." (Employee exhibit 8) (Emphasis placed.) Employee is not free to disobey a superior's order simply because she believes her medical judgment is superior to his.

Employee's third defense, that she correctly assessed that her BLSU was not the right unit to assist the patient or that another unit is closer to the patient, is again irrelevant to the charge of insubordination. She was disciplined for disobeying a dispatch order, not for assessing the patient's medical condition off-site. I also find credible Agency witnesses's testimony that Agency is a paramilitary organization where prompt and unquestioned obedience to orders is essential to its mission.

Employee's last defense, that it was OUC who reassigned her to another run and therefore she was not insubordinate, is also unavailing. Employee admits that she has no authority to ask OUC to take her off the run to Engine 26. Indeed, none of Agency's orders and regulations permit an ambulance crewmember to ask to be taken off a run. What Employee neglects to say is that she never informed OUC that she had an outstanding order from Lt. Fraley to report to Engine 26. Instead, she simply informed the OUC dispatcher that her unit was available for service. I find that the OUC dispatcher, busy with fielding calls all day, simply assumed that Employee was indeed free for service, and thus, dispatched her on another run.

The Code does not provide a definition of insubordination, therefore the common law meaning applies. *See, Davis v. District of Columbia Fire Department, MPA* 94-0015 (D.C. Super. Ct. September 26, 1995). Black's Law Dictionary (5th Ed., 1979) defines insubordination, in pertinent part, as the "[r]efusal to obey some order which a superior officer is entitled to give and have obeyed. The term imports a *willful or intentional disregard* of the lawful and reasonable instructions of the employer". (emphasis added).

The undersigned concludes that Employee refused to obey a lawful and reasonable dispatch order from supervisory staff and the OUC to respond to a patient. Her actions were intentional and willful. The Administrative Judge concludes that Agency met its burden of proof that Employee's conduct constituted insubordination.

Agency has the primary responsibility for managing its employees. Part of that responsibility is determining the appropriate discipline to impose. *See, e.g., Huntley v. Metropolitan Police Department,* OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994). This Office will not substitute its judgment for that of an agency when determining if a penalty should be sustained. Rather this Office limits its review to determining if "managerial discretion has been legitimately invoked and properly exercised." *Stokes v. District of Columbia,* 502 A.2d 1006, 1009 (D.C. 1985). A penalty will not be disturbed if it comes "within the range allowed by law, regulation, or guidelines and is clearly not an error of judgment". *Employee v. Agency,* OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review,* 32 D.C.Reg. 2915 (1985). Agency established that it considered relevant factors in determining the penalty and that the penalty was within the range of appropriate penalties under the circumstances presented. In addition, Employee's many prior disciplinary actions show that Agency has used progressive discipline in its attempt to reform Employee's actions.

Based on a careful review of the testimonial and documentary evidence and on the findings and conclusions as discussed herein, the undersigned concludes that Agency met its burden of proof in this matter and that Agency's action of removing Employee should be upheld.

ORDER

It is hereby

ORDERED: Agency's action of removing Employee from service is UPHELD.

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge

NOTICE OF APPEAL RIGHTS

This is an Initial Decision that will become a final decision of the Office of Employee Appeals unless either party to this proceeding files a Petition for Review with the Office. A Petition for Review must be filed within thirty-five (35) calendar days, including holidays and weekends, of the issuance date of the Initial Decision in the case.

All petitions for review must set forth objections to the Initial Decision and establish that:

1. New and material evidence is available that, despite due diligence, was not available when the record was closed;

2. The decision of the presiding official is based on an erroneous interpretation of statute, regulation or policy;

3. The findings of the presiding official are not based on substantial evidence; or

4. The Initial Decision did not address all the issues of law and fact properly raised in the appeal.

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with the General Counsel's office, D.C. Office of Employee Appeals, 1100 4th St., SW (East Building), Suite 620E, Washington, DC 20024. Three (3) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review must file their response not later than thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review

Instead of filing a Petition for Review with the Office, either party may file a Petition for Review in the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

CERTIFICATE OF SERVICE

I certify that the attached **INITIAL DECISION ON REMAND** was sent by regular mail this day to:

LaTisha Porter
4304 South Capitol Street, S.E.
#3
Washington, DC 20032

Ross Buchholz, Esq.
Office of the Attorney General
For the District of Columbia
441 4th St., N.W.
Suite 1180N
Washington, DC 20001

Frederic W. Schwartz, Esq.
1055 Thomas Jefferson St., NW
Suite M-100
Washington, DC 20006

Katrina Hill
Clerk

February 7, 2013
Date

J. 0293-10

District of Columbia
Court of Appeals

No. 13-CV-45

EYTTICE BOONE,
Appellant,

CAP1784-11

v.

DC OFFICE OF EMPLOYEE APPEALS,
Appellee.

ORDER

On consideration of the notice of appeal filed in this case on January 15, 2013, and it appearing that no transcript is needed for this appeal, it is

ORDERED that a briefing order will be issued upon the filing in this court, by the Clerk of the Superior Court, of the record index in accordance with D.C. App. R. 11 (b)(3)(A).

FOR THE COURT
Julio A. Castillo
JULIO A. CASTILLO
CLERK OF THE COURT

Copies to:

Clerk, Superior Court

Dalton J. Howard, Esquire
Brooks & Howard
6701 16th Street NW
Washington, DC 20012

Sheila G. Barfield, Esquire
Office of Employee Appeals
1100 4th Street SW Suite 620E
Washington, DC 20024

elp

District of Columbia
Court of Appeals

No. 13-CV-45

LYTTICE BOONE,

Appellant,

CAP1784-11

v.

DC OFFICE OF EMPLOYEE APPEALS,

Appellee.

ORDER

It appearing that the complete record on appeal has been filed with this court, it is

ORDERED that appellant's brief and the appendix including the documents required by D.C. App. R. 30 (a)(1), shall be filed within 40 days from the date of this order, and appellee's brief shall be filed within 30 days thereafter. *See* D.C. App. R. 31.

FOR THE COURT
Julio A. Castillo
JULIO A. CASTILLO
CLERK OF THE COURT

Copies to:

Dalton J. Howard, Esquire
Brooks & Howard
6701 16th Street NW
Washington, DC 20012

Sheila G. Barfield, Esquire
Office of Employee Appeals
1100 4th Street SW Suite 620E
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elp

District of Columbia
Court of Appeals

Administrative Order 4 -11

ORDER
(FILED - November 30, 2011)

Whereas this court continues to investigate procedures that will permit the court to manage its caseload more efficiently and effectively, and

Whereas this court has implemented a new case management system that maintains both the docket and case files in an electronic format, it is

ORDERED that in addition to the procedures and filing requirements of D.C. App. R. 28, parties represented by counsel are required to transmit copies of their briefs in PDF format to briefs@dcappeals.gov within 24 hours of filing their briefs. Parties not represented by attorneys (*pro se*) may but are not required to transmit briefs in an electronic format. The subject line of the email should include the appeal number, the case caption, and the type of brief. The parties' contact information should be provided in the body of the email. It is

FURTHER ORDERED that this Administrative Order shall become effective immediately.

BY THE COURT:

ERIC T. WASHINGTON
Chief Judge

DISTRICT OF COLUMBIA COURT OF APPEALS

Littyce Boone, Appellant, v. D.C. Office of Employee Appeals, Appellee.	)	Case No. 13-CV-45

APELLEE OFFICE OF EMPLOYEE APPEALS' STATEMENT IN LIEU OF BRIEF

Pursuant to the Order that was entered on April 10, 2018, Appellee Office of Employee Appeals submits that it relies on the final decision of this office in the matter of *Littyce Boone v. D.C. Public Schools*, OEA Matter No. J-0293-10 (January 10, 2011), as its statement in lieu of brief. The final decision is attached hereto as Exhibit #1.

Respectfully submitted,

Lasheka Brown Bassey

Lasheka Brown Bassey
D.C. Bar # 489370
General Counsel
D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024
202.727.0738
Lasheka.Brown@dc.gov

CERTIFICATE OF SERVICE

I hereby certify that the forgoing Appellee Office of Employee Appeals' Statement in Lieu of Brief was served via the Court's electronic filing system to the following on this 24th day of April, 2018:

Dalton J. Howard, Esquire

Loren L. AliKhan, Esquire

Respectfully submitted,

Lasheka Brown Bassey

Lasheka Brown Bassey
D.C. Bar # 489370
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Exhibit 1

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
LITTYCE BOONE, Employee	OEA Matter No.: J-0293-10
v.	Date of Issuance: January 10, 2011
D.C. PUBLIC SCHOOLS, Agency	Sommer J. Murphy, Esq. Administrative Judge

Dalton Howard, Esq., Employee Representative
Bobbie L. Hoye, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

On April 14, 2010, Littyce Boone ("Employee") filed a petition for appeal with the Office of Employee Appeals ("OEA") contesting the D.C. Public School's ("Agency") decision to terminate her. Agency's notice informed Employee that she was being separated from service because she received unsatisfactory ratings under her Professional Performance Evaluation Process ("PPEP"). Employee's termination was effective on August 15, 2009.

This matter was assigned to me on or around August 10, 2010. I issued an Order on September 10, 2010, directing Employee to present legal and factual arguments to support her argument that this Office has jurisdiction over her appeal. Employee was advised that she had the burden of proof with regard to the issue of jurisdiction. Employee was also notified that the appeal would be dismissed if she failed to respond to the Order by September 20, 2010. Employee submitted a response to the Order on September 21, 2010. After reviewing the documents of record, I have determined that a hearing is not warranted in this case. The record is now closed.

JURISDICTION

As will be explained below the Jurisdiction of this Office has not been established.

ISSUE

Whether OEA has jurisdiction over this matter.

FINDINGS OF FACTS AND CONCLUSIONS OF LAW

According to a letter from Agency to Employee dated June 15, 2009 ("Termination Letter"), she was informed that the effective date for her separation from service was August 15, 2009. The termination letter stated in pertinent part:

> You may elect to file an appeal to this termination in one of the following ways, **not both:**
>
> 1. You may elect to file an appeal with the D.C. Office of Employee Appeals....That appeal must be filed within thirty (30) calendar days of the effective date of your termination...**or"**
>
> 2. You may elect to file a grievance pursuant to Article VI of the Collective Bargaining Agreement by and between the District of Columbia Board of Education and the Washington Teacher's Union...

OEA Rule 629.2, 46 D.C. Reg. 9317 (1999), states that "the employee shall have the burden of proof as to issues of jurisdiction, including timeliness of filing." OEA Rule 629.1, states that 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: "[t]hat 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."

Effective October 21, 1998, the Omnibus Personnel Reform Amendment Act of 1998 (OPRAA), D.C. Law 12-124, amended certain sections of the Comprehensive Merit Personnel Act ("CMPA") pertaining to this Office. Amended D.C. Code §1-606.3(a) states: "Any appeal [to this Office] shall be filed within 30 days of the effective date of the appealed agency action."

The District of Columbia Court of Appeals has held that the time limit for filing an appeal with an administrative adjudicatory agency such as this Office is mandatory

and jurisdictional in nature.[1] In *McLeod v. D.C. Public Schools,* this Office held that the only situation in which an agency may not "benefit from the [30-day] jurisdictional bar" is when the agency fails to give the employee "adequate notice of its decision and the right to contest the decision through an appeal."[2]

Employee, through counsel, argues that she filed her appeal with this Office only after the Washington Teachers Union "(Union)" filed a class grievance on behalf of Employee and other similarly situated teachers. Employee further asserts that she did not receive notice regarding the ramifications of her appeal rights if she chose not to accept the terms of Agency's Notice of Settlement. Employee therefore argues that she should be allowed to file an appeal with this Office.[3]

As previously mentioned, Employee was removed from service with an effective date of August 15, 2009. However, she did not file her petition for appeal until April 14, 2010, approximately eight months after the effective date of her termination. This is well past the 30 day filing deadline as discussed *supra*. Employee was given proper notice regarding her options to file an appeal in response to her termination. The options discussed in the termination letter required employee to make an election of remedies. Employee made the decision to allow her Union to file a class grievance on her behalf. Because she failed to file her petition for appeal within the 30 day deadline, I find that Employee is precluded from pursuing this appeal before this forum.

Employee has therefore failed to meet her burden of proof regarding jurisdiction. Based on the foregoing reasons, this matter must be dismissed.

ORDER

It is hereby ORDERED that this matter be DISMISSED for lack of jurisdiction.

FOR THE OFFICE:

Sommer J. Murphy, Esq.
Administrative Judge

[1] *See, e.g., District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641, 643 (D.C. 1991); *Thomas v. District of Columbia Department of Employment Services*, 490 A.2d 1162, 1164 (D.C. 1985); *District of Columbia Public Employee Relations Board v. District of Columbia Metropolitan Police Department*, 593 A.2d 641 (D.C. 1991); *White v. D.C. Fire Department*, OEA Matter No. 1601-0149-91, *Opinion and Order on Petition for Review* (September 2, 1994), __ D.C. Reg. __( ).

[2] OEA Matter No. J-0024-00 (May 5, 2003), __ D.C. Reg. __( ).

[3] *See* Employee's Brief at 2 (September 21, 2010).

NOTICE OF APPEAL RIGHTS

This is an initial decision that will become a final decision of the Office of Employee Appeals unless either party to this proceeding files a **petition for review** with the Office. A **petition for review** must be filed within thirty-five (35) calendar days, including holidays and weekends, of the issuance date of the initial decision in this case.

All petitions for review must set forth objections to the initial decision and establish that:

1. New and material evidence is available that, despite due diligence, was not available when the record was closed;
2. The decision of the presiding official is based on an erroneous interpretation of statute, regulation or policy;
3. The findings of the presiding official are not based on substantial evidence; or
4. The initial decision did not address all the issues of law and fact properly raised in the appeal.

All petitions for review should be supported by references to applicable laws or regulations and make specific reference to the record. The petition for review, containing a certificate of service, must be filed with the Administrative Assistant, D.C. Office of Employee Appeals, 717- 14th Street, N.W., 3rd Floor, Washington, D.C. 20005. Four (4) copies of the petition for review must be filed.

Parties wishing to respond to a petition for review must file their response not later than thirty-five (35) calendar days, including holidays and weekends, after the filing of the petition for review.

Instead of filing a petition for review with the Office, either party may file a petition for review in the Superior Court of the District of Columbia within 30 days after service of formal notice of the final decision to be reviewed or within 30 days after the decision to be reviewed becomes a final decision under applicable statute or agency rules, whichever is later. To file a petition for review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

CERTIFICATE OF SERVICE

I certify that the attached **INITIAL DECISION** was sent by regular mail this day to:

Littyce Boone
853 Barnaby St., SE
Washington, DC 20032

Dalton Howard, Esq.
6701 16th St., NW
Washington, DC 20012

Bobbie Hoye, Esq.
Office of General Counsel
1200 First St., NE
10th Floor
Washington, DC 20002

Katrina Hill
Clerk

January 10, 2011
Date

District of Columbia
Court of Appeals

No. 17-CV-253

HAROLD DARGAN,

Appellant,

v. **CAP8873-15**

D.C. OFFICE OF EMPLOYEE APPEALS, *et al.*,

Appellees.

ORDER

On consideration of appellant's consent motion for leave to file the lodged brief and appendix, it is

ORDERED that appellant's motion is granted and appellant's lodged brief and appendix are filed. It is

FURTHER ORDERED that appellees' briefs shall be filed on or before June 14, 2018. *See* D.C. App. R. 31.

FOR THE COURT
Julio A. Castillo
JULIO A. CASTILLO
CLERK OF THE COURT

Copies e-served to:

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No. 17-CV-253

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Washington, DC 20024

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Washington, DC 20024

elp

DISTRICT OF COLUMBIA COURT OF APPEALS

Harold Dargan, Appellant,	)	Case No. 17-CV-253
v.	)	
D.C. Office of Employee Appeals, *et al.*, Appellees.	)	

APELLEE OFFICE OF EMPLOYEE APPEALS' STATEMENT IN LIEU OF BRIEF

Pursuant to the Order that was entered on May 15, 2018, Appellee Office of Employee Appeals submits that it relies on the final decision of this office in the matter of *Harold Dargan v. D.C. Fire and Emergency Medical Services*, OEA Matter No. 1601-0091-13 (October 20, 2015). The final decision is attached hereto as Exhibit #1.

Respectfully submitted,

LashekaBrown Bassey

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CERTIFICATE OF SERVICE

I hereby certify that the forgoing Appellee Office of Employee Appeals' Statement in Lieu of Brief was served via the Court's electronic filing system to the following on this 11th day of June, 2018:

Frederic W. Schwartz, Jr., Esquire

Loren L. AliKhan, Esquire

Respectfully submitted,

LashekaBrown Bassey

Lasheka Brown Bassey
D.C. Bar # 489370
General Counsel
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Exhibit 1

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
Harold Dargan, Employee	OEA Matter No. 1601-0091-13
v.	Date of Issuance: October 20, 2015
D.C. Fire & Emergency Medical Services, Agency	Joseph E. Lim, Esq. Senior Administrative Judge

Frederic Schwartz, Esq., Employee Representative
Andrea Comentale, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND PROCEDURAL BACKGROUND

Harold Dargan ("Employee") was an Emergency Medical Technician ("EMT") – Intermediate for the D.C. Fire & Emergency Medical Services ("FEMS" or "Agency"). He was removed from Agency on May 3, 2013, for failing to maintain his D.C. Department of Health ("DOH") certification.

Employee timely filed an appeal with the Office of Employee Appeals ("OEA" or "the Office") on May 13, 2013. On February 25, 2014, this matter was assigned to the undersigned. I held several conferences with the parties from May 21, 2014, to February 11, 2015. The parties have submitted Motions for Summary Dispositions and their respective responses to each other's briefs. After reviewing the record, I have determined that no further proceedings in this matter are warranted. The record is now closed.

JURISDICTION

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

ISSUES

1. Whether Agency violated D.C. Official Code § 5-1031 (a) (2001), otherwise known as

the "90-day rule" in removing Employee; and

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

FINDINGS OF FACT[1]

1. Employee is a Basic Paramedic for the Agency. Employee was converted from an Emergency Medical Technician ("EMT") to a Basic Paramedic, DS-0699-08, effective October 2, 2005.

2. Employee held certifications that designated him as an EMT-Intermediate/99 ("EMT I/99"), which, in Employee's case, was equivalent to his job title as a Basic Paramedic.

3. Employee possessed a Department of Health card valid from June 18, 2010 to June 30, 2012, that designated him as "qualified to serve in the District of Columbia as an EMT-Intermediate, Active."

4. D.C. Official Code §7-2341.15(b)(2) gives the Mayor or his designee the power to deny issuance of, deny renewal of, suspend, or revoke a certification to perform the duties of emergency medical services personnel or of an emergency medical services instructor to an individual who is found to have failed to comply with any other federal or District law applicable to the duties of emergency medical services personnel.

5. The February 3, 2010 Agency Bulletin No. 83 outlined Agency's policy for required certification of EMTs by the National Registry of EMTs ("NREMT"). This policy applied to all those, like the Employee, who provided medical assistance, medical treatment, first aid, or lifesaving interventions, on the scene of an emergency or in transit from the scene of an emergency to a health care facility or other treatment facility, to a person who is ill, injured, wounded, or otherwise incapacitated. This policy states that, "[a]ll DC Fire & EMS Department employees will be required to complete the National Registry certification process at their respective certification level (EMT-B, EMT-I/99, or EMT-P) and maintain both National Registry certification and District of Columbia (D.C. Department of Health) certification."

6. Bulletin No. 83 stated that the certification exam consisted of two parts: the psychomotor (practical skills) examination and the cognitive (written) examination.

7. Regarding the psychomotor (practical skills) examination, Bulletin No. 83 established the following policy for those at the EMT-Intermediate/99 level:

> Psychomotor (Practical Skills) Examination Policies: EMT-Intermediate/99
>
> EMT-Intermediate/99 candidates are allowed three (3) full attempts to

[1] Parties' Joint Statement of Facts and documentary evidence of record.

pass the psychomotor examination (one "full attempt" is defined as completing all eleven (11) skills and two retesting opportunities if so entitled).

Candidates who fail a full attempt or any portion of a second retest must submit official documentation of remedial training over all skills before starting the next full attempt of the psychomotor examination and re-examining over all eleven (11) skills, provided all other requirements for National Certification are fulfilled. This official documentation must be signed by the EMT Training Program Director or Physician Medical Director of training/operations that verifies remedial training over all skills has occurred since the last unsuccessful attempt and the candidate has demonstrated competence in all skills.

DC Fire & EMS Department Employees who fail the third full and final attempt of the National Registry EMT-Intermediate/99 psychomotor examination will be subject to adverse action.

8. On June 14, 2011, while assigned to Medic No. 27, Employee and his unit responded to a call for an unconscious 32-year old female. The patient died.

9. Medical Director David Miramontes, M.D., concluded there were errors in the performance of the responding Emergency Medical Services ("EMS") team and that Employee failed in his paramedic duties.

10. As a result, Employee was removed from his EMT job duties by the Office of the Medical Director on June 14, 2011.

11. Employee was given a Critical Remediation Action Plan and assigned to the FEMS Training Academy ("TA") for remedial training.

12. Employee completed his classroom training in mid-July 2011.

13. Employee was then assigned to obtain Advanced Life Support ("ALS") field evaluations with another EMT-Paramedic, beginning on July 17, 2011, and tentatively completing on July 27, 2011.

14. On September 28, 2011, the Medical Director evaluated Employee. The Medical Director checked the box "Return to Mentor," noting "Close eval[uation] of ability to function in field. Need FISDAP[2] for full release. Re-assessment. (sic) Will always be ACA[3] only under new paramedic partner."

15. On October 6, 2011, Employee was assigned to obtain ALS field evaluations under mentor Paramedic Preceptor Sgt. Bachelder.

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[2] "Field Internship Student Data Acquisition Project, also name of EMS test"
[3] "Ambulance Crew Assistant"

16. On October 7, 2011, Ms. Massengale e-mailed Employee: "I wanted to reach out and let you know that the CQI[4] department wants to assist you in maintaining the level of excellence you have demonstrated during the past few weeks at TA."

17. On January 2, 2012, Sgt. Bachelder wrote the Medical Director, noting:

> [Employee] has improved and progressed from needing an occasional prompting to needing very few prompts during patient care. He has become a better provider for his patients and the agency. [Employee] has easily accepted the roll (sic) of a team member and works well with other unit members providing care. [Employee] is very knowledgeable in patient care and protocols. In my opinion [Employee] is ready to resume his role as an ACA.

18. On February 2, 2012, Medical Director Miramontes tested Employee's skills as an Advanced Life Support ("ALS") provider. Employee's performance when given a practical skills (psychomotor) scenario was deemed inadequate by the Medical Director. Thus the Medical Director rescinded Employee's I/99 certification, but allowed Employee to continue as an EMT-Advanced.

19. Dr. Miramontes told Employee that he lacked "maturity" and did not have the "cognitive and psycho-motor skills to practice as [a paramedic]," that he would not sponsor his recertification, and that he would so advise the Department of Health.

20. On February 3, 2012, Captain James Follin wrote the Medical Director for a status update. He inquired. "[Employee] is due to report to M-30-2[5] on Wednesday per his telestaff. Due to current circumstances do you want him removed from operations? He can report to the TA on a 40 hour work week until the administrative actions are completed."

21. On February 3, 2012, the Medical Director responded to Captain Follin and other senior FEMS officials:

> [Employee] is officially removed from operations. He needs a new certification card. I offered him an option, He chose another path. He can go into light duty/no patient care process on day work or as assigned until he has a certification. His EMT-I-99 will be pulled. He has no training requirements so assigning him to training makes no sense.

22. On February 3, 2012, Chief Gerald Coles responded to the e-mailed group, noting "Please refer to the email below. Accordingly, [Employee] is hereby detailed to the [Training Academy] until he has been afforded an opportunity to obtain certification."

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[4] "Continuous Quality Improvement"
[5] M-30-2 or Medic-30-2 is an ambulance unit.

23. On February 14, 2012, Medical Director Dr. Miramontes again tested Employee's skills as an ALS provider, noting that Employee received twelve days of extensive training at the Training Academy. Employee's performance in response to a practical skills (psychomotor) scenario was again deemed inadequate by Dr. Miramontes. Consequently, Dr. Miramontes did not reinstate Employee's I/99 status noting that he did not "have confidence in [Employee's] skills as [an] ALS provider."

24. On February 14, 2012, Dr. Miramontes wrote a letter to Dr. Brian Amy of DOH. The subject was "Request downgrade of [Employee's] Certification after Quality Review." He noted:

> My assessment reveals that he does not demonstrate the cognitive nor psycho-motor skills that are required for him to function safely as an independent EMT–I-99 advanced life support provider. His technical skills were poor on my last assessment using a patient simulator with megacode session held on 2 February 2012 and again on 14 February 2012.
>
> Basic Paramedic skills such as medication administration, EKG rhythm recognition, and ACLS[6] protocol compliance were not to an acceptable standard.
>
> I have offered him a BLS[7] level of certification as an EMT-Advanced but cannot support him functioning as an EMT I-99 "paramedic" until such time as he completes a fully accredited Paramedic Course, gains NREMT-Paramedic certification, and completes an assessment by this agency.
>
> Summary of past interventions listed below when taken in context to my recent assessment supports such a decision. He also has been in training since removal from operations on 6/14/2011 after a very concerning complaint of poor performance during Cardiac Arrest run.

25. The February 14, 2012 letter concluded with Dr. Miramontes asking that Employee's DOH certification be dropped to EMT-Advanced. It further noted that he could not authorize re-certification of Employee's NREMT I-99 certification at that time.

26. Dr. Miramontes terminated Employee's remedial training necessary to satisfy his Critical Remedial Action Plan in February 2012.

27. Dr. Miramontes declined to sign Employee's May 30, 2012 DOH certification application to be an EMT I/99 under his supervision.

28. On June 25, 2012, Dr. Miramontes wrote a letter to Dr. Brian Amy of DOH, requesting revocation of Employee's certification after clinical review. He noted:

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[6] Advanced Cardiac Life Support
[7] Basic Life Support

> I have completed a CQI[8] review for [Employee] EMT I-99 (Basic Paramedic) and have noted he has had a serious CQI interaction regarding poor performance during a cardiac arrest. [Employee] has been detailed to DCFEMS' Training Academy and was re-trained by a field mentorship provider. Shortly thereafter, I personally tested [Employee] on two occasions with a patient simulator and found him to be incompetent despite retraining. I believe [Employee] lacks the maturity, cognitive knowledge and skills to perform as an ALS provider.

29. The June 25, 2012 letter stated that there were past CQI concerns with Employee, stating that Employee received extensive retraining and extended field mentoring. The letter noted "On two separate occasions EMT I-99 [Employee] failed to perform at an acceptable level in patient simulation and multiple cognitive, medication administration and protocol errors were noted despite re-training."

30. The June 25, 2012 letter concluded that: "In light of the documented adverse events and previous remediation attempts, I cannot allow this provider to practice under my license and am hereby requesting that DOH decertify EMT [Employee] as an ALS EMS provider. I cannot authorize re-certification of his NREMT EMT I-99 certification at this time and will not sponsor him at the ALS scope of practice."

31. Thus, Employee's DOH certification expired on June 30, 2012.

32. On July 3, 2012, Mr. Robert W. Austin, through Dr. Brian Amy of DOH, wrote a Memorandum to Dr. Miramontes, noting receipt of Dr. Miramontes' letter, memorializing that Employee's District EMT-Intermediate certification (Cert # I-132) expired at midnight on June 30, 2012, with no application of renewal pending at DOH.

33. As a result, Employee was no longer eligible to continue in his duties with Agency under Bulletin No. 83. Employee was then referred to the Office of Compliance for termination.

34. Employee was offered the opportunity to apply for EMT-Advanced level certification. In an October 1, 2012 e-mail to Agency, Dr. Miramontes reported that Employee declined.

35. Based on this, by letter dated October 31, 2012, the Agency issued to Employee an advance written notice proposing removal of Employee from his position as Basic Paramedic, DS-699, Grade 8. The notice charged Employee with:

> Charge No. 1: Violation of the D.C. Fire and EMS Bulletin No. 83 which reads in relevant part: General Policy "All D.C. Fire and EMS Department employees will be required to complete the National Registry certification process at their respective certification level (EMT-B, EMT-I[/99], or

[8] "Continuous Quality Improvement"

EMT-P) and maintain both National Registry certification and District of Columbia (D.C. Department of Health) certification."

This misconduct is defined as case in Article VII, Section 2 (f) (5) of the D.C. Fire and EMS Department Order Book, which states in part: "Any on duty or employment related act or omission that interferes with the efficiency or integrity of government operations, to wit[:] Incompetence and in 16 D.P.M. § 1603.3 (f)(5) (March 4, 2008).

Specification No. 1: In order to practice as a Paramedic or EMT, an employee must maintain D.C. Department of Health (DOH) certification. Your DOH certification expired on June 30, 2012.

On June 14, 2011, while assigned to Medic No. 27, with your partner Paramedic Channel Jones, your unit responded for an unconscious 32-year old female. You failed to adequately prepare all necessary equipment before initiating a critical skill. You deviated from standard practice by placing an endotracheal tube into the patient's airway and placing a non re-breather mask over the tube. You failed to oxygenate the patient before intubation and suctioning. You further failed to initiate ventilations for one minute with the proper use of a bag-valve mask device, and you left the patient's airway unattended while you left to retrieve additional equipment. As it turns out, the bag-valve device was inside the bag adjacent to the patient. The patient did not survive.

On June 14, 2011, at 1530 hours, the Office of the Medical Director immediately removed you from your assigned Medic Unit No. 27, and reassigned you to the Department's Training Academy. You were placed in a critical remediation action plan until further notice.

On February 2, 2012, Medical Director David A. Miramontes, M.D. interviewed your skills as an Advance Life Support (ALS) provider. You were given a medical scenario of a 64-year old patient with a history of chest pain that became unresponsive with a heart rhythm of ventricular fibrillation. You neither recognized the rhythm, nor did you recognize the asystole rhythm placing the patient in cardiac arrest. In light of your inadequate performance, Dr. Miramontes informed you that he would no longer sponsor you to practice as a Basic Paramedic under his medical license, but would allow you to practice as an Advance Level EMT.

On February 14, 2012, Medical Director Miramontes again interviewed your skills as an Advance Life Support provider. You were given another medical scenario of a patient having chest pain with a blood pressure of 204/106, and a pulse rate of 120. You stumbled with your medications and dosages. Dr. Miramontes informed you that he lacked confidence in your skills as an ALS provider, but suggested that you could work as a basic

life support provider.

Thus, after having lengthy remediation and numerous evaluations, you continued to demonstrate a lack of maturity, and a deficiency in cognitive psycho-motor skills to practice as a Basic Paramedic. Accordingly, Dr. Miramontes submitted documentation to DOH communicating his decision to withdraw his sponsorship of you to practice as an ALS provider with the Department.

Your position of record is a Basic Paramedic. Accordingly, you are required to maintain all certification requirements associated with your position. Your DOH certification expired on June 30, 2012. Your inability to meet the requirements of this position renders you incompetent to render services as a Basic Paramedic.

Your lack of certification further places both you and the citizens of the District of Columbia in danger and, therefore, interferes with the efficiency and integrity of government operations.

Because you have failed to maintain your DOH certification, you are precluded from performing the duties of Basic Paramedic in the District of Columbia, as outlined in Bulletin No. 83 "National Registry of EMT's (NREMT) Certification Policy EMT." Accordingly, this action is proposed.

36. Employee was advised of his rights to review material upon which the proposed action was based, to respond in writing within six (6) days of receipt of the Notice, and to an administrative review by a hearing officer.

37. Employee submitted an undated response through counsel.

38. The hearing officer's written decision, issued on April 5, 2013, found that Agency had cause to remove Employee and sustained the recommended proposed removal action.

39. On April 24, 2013[9], Agency's Chief Kenneth B. Ellerbe issued the final decision sustaining the removal. The Chief expressly noted his consideration of D.C. Official Code § 7-2341.15 (d), which prohibits the Agency from employing persons who no longer possess the requisite certifications.

40. Employee's ACLS certification expired in May 2013.

41. Employee's employment with Agency was terminated effective May 3, 2013.

[9] The Final Decision letter was misdated March 24, 2013.

42. Employee's Cardio Pulmonary Resuscitation (course C) certification expired in July 2013.

43. Employee's EMT I/99 certification from the National Registry of Emergency Medical Technicians expired on March 31, 2014.

ANALYSIS AND CONCLUSION

Whether Agency violated D.C. Official Code § 5-1031 (a) (2001), otherwise known as the "90-day rule" in removing Employee.

The first challenge raised by Employee is that Agency violated D.C. Code Section 5-1031(a), which requires Agency to initiate an adverse action against a sworn member of the police force no later than 90 days from the date Agency "knew or should have known of the act or occurrence allegedly constituting cause." Employee argues that the matter should be dismissed because Agency failed to propose his termination in a timely manner, in that it failed to propose the adverse action within 90 days of when it knew or should have known of the charged conduct. Agency contends that it did act within the 90 day period.

§ 5-1031. Commencement of corrective or adverse action states as follows:

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

Employee argues that Agency knew or should have known of the act or occurrence allegedly constituting cause on June 14, 2011, when a 32-year-old female patient died. This argument can be disposed of in short order. As Agency points out, Employee was removed from his position not because his negligence contributed to the death of a patient, but for failing to maintain the required DOH certification to do his job.

Employee then argues that the second potential date that Agency knew or should have known of the act or occurrence allegedly constituting cause occurred on February 14, 2012, when Employee failed the tests on his skills as an independent EMT – 1-99 advanced life support provider. Again, this argument fails as the "cause" – the loss of his DOH certification had not yet occurred then.

Finally, Employee argues that the final potential date that Agency knew or should have known of the act or occurrence allegedly constituting cause is the expiration of Employee's DOH certification on June 30, 2012.

In accordance with D.C. Official Code § 5-1031 (a) (2001) cited above, ninety days from June 30, 2012, 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, specifically the expiration of Employee's DOH certification, is November 1, 2012. Since Agency issued its advance notice of adverse action on October 31, 2012, Agency was still within the ninety day rule when it commenced adverse action against Employee.

After carefully reviewing the record and the arguments of the parties, the Administrative Judge concludes that Agency did initiate the adverse action in a timely manner. Thus, I find that Employee's argument is without merit.

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

Agency Bulletin No. 83 cited in the above findings of facts outlined the Agency's requirement that all its EMTs maintain their certification by the National Registry of EMTs. The certification exam required passing both the psychomotor (practical skills) examination and the cognitive or written examination. EMT-Intermediate/99 candidates are allowed three full attempts to pass the psychomotor examination.

Employee had trouble passing the psychomotor (practical skills) examination and indeed, failed it three times: September 28, 2011; February 2, 2012; February 14, 2012.

Employee challenges the Medical Director's decision because it was "contrary to the other record evidence." *Employee's Motion at 19.* To buttress his argument, Employee asserts that he has maintained a number of prior certifications and had completed the courses necessary for certification. Then, Employee concludes that, "[t]hus, the failure was not [Employee's], but rather that of the Medical Director."[10]

This reasoning is faulty. A person who got a medical skills certification years before can, and do, fail to recertify by failing to maintain the standards required for recertification. A prior certification does not preclude a subsequent failure at re-certification.

Finally, Employee argues that Medical Director Dr. Miramontes violated his due process right by denying him more opportunities to attempt to pass his psychomotor examination. Employee asserts that he "was not even permitted [to] complete one full attempt to pass his psychomotor examination, much less the three full attempts required under [Agency] Bulletin No. 83."[11]

[10] Employee's Motion for Summary Disposition at 17-18.
[11] Employee's Motion for Summary Disposition at 21.

In order to establish the veracity of this argument, it is necessary to restate the salient, undisputed facts in this matter. The undisputed facts establish that as a result of Employee's failure to follow established medical protocol in dealing with a patient on June 14, 2011, a patient died. Acting within his authority, Medical Director Dr. Miramontes removed Employee from further contact with future patients and placed Employee in a critical remediation action plan. This consisted of Employee being placed at the Training Academy for intensive retraining. Employee completed his classroom training in mid-July 2011. For the remainder of the month, Employee was then assigned to another EMT-Paramedic for Advanced Life Support ("ALS") field evaluations.

On September 28, 2011, the Medical Director evaluated Employee and found Employee still lacking in the skills required to re-assign him back to full duty. Thus, on October 6, 2011, Employee was assigned to Paramedic Preceptor Sgt. Bachelder for further ALS field evaluation training.

Based on Sgt. Bachelder's January 2, 2012, letter stating that Employee has improved, Medical Director Dr. Miramontes tested Employee's skills as an ALS provider on February 2, 2012, and again found his performance inadequate. The next day, Captain Follin asked Dr. Miramontes for an update on Employee's status and was informed that Employee could not work as an ALS provider. Although Dr. Miramontes opined that it made no sense, Captain Follin nonetheless put Employee back to the Training Academy for 12 days of extensive training.

On February 14, 2012, Medical Director Dr. Miramontes again tested Employee's skills as an ALS provider and again found Employee's performance inadequate. At this point, Dr. Miramontes asked DOH to downgrade Employee's certification from ALS to EMT-Advanced, explaining his basis in a detailed letter on February 14, 2012.

On June 25, 2012, Dr. Miramontes wrote a letter to DOH requesting revocation of Employee's certification after clinical review, and again detailed his rationale for the request. Medical Director Dr. Miramontes stated that he would not sign Employee's May 30, 2012, DOH certification application to be an EMT I/99 under his supervision.

Dr. Miramontes offered Employee the opportunity to apply for EMT-Advanced level certification instead, but Employee declined.

Thus, the facts belied Employee's claim of not being allowed to complete one full attempt to pass his psychomotor examination.

Bulletin No. 83's established policy for those at the EMT-Intermediate/99 level states that "EMT-Intermediate/99 candidates are allowed (3) full attempts to pass the psychomotor examination (one "full attempt" is defined as completing all eleven (11) skills and two retesting opportunities *if so entitled*). Emphasis supplied.

While Bulletin No. 83 allows for three testing opportunities, the clause "if so entitled" clearly reflects that a total of three tests is not *mandatory*, just that three testing opportunities is

the *maximum* number of tests that can be taken before adverse action is required. Thus, the three full attempts to pass is not mandated. It is given only if the candidate is entitled to another attempt. It is clear from Bulletin No. 83 that the Medical Director must verify that the candidate "has demonstrated competence in all skills" in order to sign off on official documentation before retesting can occur.

Here, the Medical Director allowed for a full attempt, and then for a second attempt once Employee had undergone retraining. After the second failed attempt, the Medical Director, within his discretion, lawfully declined to find that Employee had demonstrated "competence in all skills." He was not required, under Bulletin No. 83, to allow the Employee another retest. He offered Employee the opportunity to work at a lower level of care, and Employee refused.

Indeed, the record shows that Employee got the three attempts that Bulletin No. 83 provides for. The record evidence does not support that the procedures in Bulletin No. 83 were ignored. I therefore conclude that Employee is not entitled to more than what he was afforded.

In essence, Employee disagrees with the Medical Director's assessment of his psychomotor skills. One must keep in mind that lives of potential patients are at stake. It is within the legal framework that the Medical Director tests the skills of EMT-Intermediate/99 candidates and uses his medical expertise and judgment to ascertain that EMT-Intermediate/99 candidates are qualified to perform their medical duties.

Appropriateness of the Penalty

When assessing the appropriateness of a penalty, this Office is not to substitute its judgment for that of the Agency, but it should ensure that "managerial discretion has been legitimately invoked and properly exercised."[12] OEA has previously held that the primary responsibility for managing and disciplining Agency's work force is a matter entrusted to the Agency, not this Office.[13] When an Agency's charge is upheld, this Office has held that it will leave the agency's penalty undisturbed when the penalty is within the range allowed by law, regulation or guidelines, is based on consideration of the relevant factors and is clearly not an error of judgment.[14] As provided in *Love v. Department of Corrections*, OEA Matter No. 1601-0034-08R11 (August 10, 2011), selection of a penalty is a management prerogative, not subject to the exercise of discretionary disagreement by this Office.[15]

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[12] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985).

[13] *Huntley v. Metropolitan Police Department*, OEA Matter No. 1601-0111-91, *Opinion and Order on Petition for Review* (March 18, 1994); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Butler v. Department of Motor Vehicles*, OEA Matter No. 1601-0199-09 (February 10, 2011); and *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011).

[14] *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (D.C. 1985); *Hutchinson v. District of Columbia Fire Department and Emergency Medical Services*, OEA Matter No. 1601-0119-90, *Opinion and Order on Petition for Review* (July 2, 1994); *Holland v. D.C. Department of Corrections*, OEA Matter No. 1601-0062-08 (April 25, 2011); *Link v. Department of Corrections*, OEA Matter No. 1601-0079-92R95 (February 1, 1996); and *Powell v. Office of the Secretary, Council of the District of Columbia*, OEA Matter No. 1601-0343-94 (September 21, 1995).

[15] *Love* also provided that

> [OEA's] role in this process is not to insist that the balance be struck precisely where the [OEA] would choose to strike it if the [OEA] were in the agency's shoes in the first instance;

An Agency's decision will not be reversed unless it failed to consider relevant factors or the imposed penalty constitutes an abuse of discretion.[16] The evidence did not establish that the penalty of termination for failure to maintain the statutorily required medical certification constituted an abuse of discretion.

Based on the aforementioned, there is no clear error in judgment by Agency. Termination was a valid penalty under the circumstances, and indeed, is mandated under medical regulations. Based on a preponderance of the evidence, I conclude that given the aforementioned findings of facts and conclusions of law, Agency's action of terminating Employee from service should be upheld.

ORDER

Based on the foregoing, it is hereby **ORDERED** that Agency's action of terminating Employee from service is **UPHELD.**

FOR THE OFFICE:

Joseph E. Lim, Esq.
Senior Administrative Judge

such an approach would fail to accord proper deference to the agency's primary discretion in managing its workforce. Rather, the [OEA's] review of an agency-imposed penalty is essentially to assure that the agency did conscientiously consider the relevant factors and did strike a responsible balance within tolerable limits of reasonableness. Only if the [OEA] finds that the agency failed to weigh the relevant factors, or that the agency's judgment clearly exceeded the limits of reasonableness, is it appropriate for the [OEA] then to specify how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness.
citing *Douglas v. Veterans Administration,* 5 M.S.P.R. 313, 5 M.S.P.R. 280 (1981).

[16] *Butler v. Department of Motor Vehicles,* OEA Matter No. 1601-0199-09 (February 10, 2011) citing *Employee v. Agency,* OEA Matter No. 1601-0012-82, *Opinion and Order on Petition for Review*, 30 D.C.Reg. 352 (1985).

NOTICE OF APPEALS RIGHTS

This is an Initial Decision that will become a final decision of the Office of Employee Appeals unless either party to this proceeding files a Petition for Review with the office. A Petition for Review must be filed within thirty-five (35) calendar days, including holidays and weekends, of the issuance date of the Initial Decision in the case.

All Petitions for Review must set forth objections to the Initial Decision and establish that:

1. New and material evidence is available that, despite due diligence, was not available when the record was closed;

2. The decision of the presiding official is based on an erroneous interpretation of statute, regulation, or policy;

3. The finding of the presiding official are not based on substantial evidence; or

4. The Initial Decision did not address all the issues of law and fact properly raised in the appeal.

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with Administrative Assistant, D.C. Office of Employee Appeals, 1100 4th St., SW., Suite 620E, Washington, D.C. 20024. Four (4) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review may file their response within thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review.

Instead of filing a Petition for Review with the Office, either party may file a Petition for Review in the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

CERTIFICATE OF SERVICE

I certify that the attached **ORDER** was sent by regular mail on this day to:

Harold Dargan
1502 Opus Avenue
Capitol Heights, MD 20743

Frederic W. Schwartz, Esq.
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Section Chief
Personnel and Labor Relations Section
441 4th St., NW Suite 1180N
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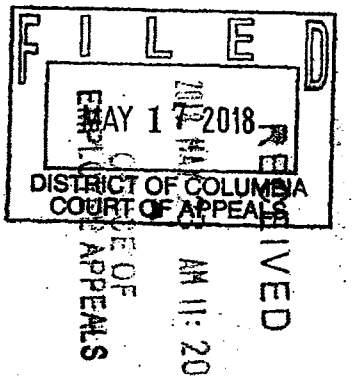
Katrina Hill
Clerk

October, 20 2015
Date

District of Columbia
Court of Appeals



No. 18-CV-468

ROBERT JOHNSON,

Appellant,

v. **CAP9257-16**

D.C. OFFICE OF EMPLOYEE APPEALS, *et al.*,

Appellees.

ORDER

On consideration of the notice of appeal, and it appearing that this appeal falls within the class of appeals that are eligible for inclusion in the appellate mediation program, and it further appearing the appellant has failed to file the required mediation screening statement, *see* Amended Admin. Order 4-16 (January 9, 2017), it is

ORDERED that appellant shall, within 10 days from the date of this order, file the required mediation screening form and a certificate of service to all other parties in the proceeding. *See* D.C. App. R. 25 (d). The mediation screening form is available at: https://www.dccourts.gov/sites/default/files/ss-civil.doc. Failure to comply with this order will result in the dismissal of this appeal without further notice.

FOR THE COURT
Julio A. Castillo
JULIO A. CASTILLO
CLERK OF THE COURT

Copies e-served to:

Frederic W. Schwartz, Jr., Esquire
1701 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006

No. 18-CV-468

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District of Columbia
Court of Appeals

No. 18-CV-468

ROBERT JOHNSON,

Appellant,

v.

CAP9257-16

D.C. OFFICE OF EMPLOYEE APPEALS, *et al.*,

Appellees.

ORDER

On consideration of the notice of appeal and mediation screening statement, it has been determined that this case is not appropriate for appellate mediation, and it appearing that no transcript is needed for the appeal, and it further appearing that the complete record on appeal has been filed with this court, it is

ORDERED that appellant's brief and appendix including the documents required by D.C. App. R. 30 (a)(1), shall be filed within 40 days from the date of this order, and appellee's brief shall be filed within 30 days thereafter. *See* D.C. App. R. 31.

FOR THE COURT
Julio A. Castillo
JULIO A. CASTILLO
CLERK OF THE COURT

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DISTRICT OF COLUMBIA COURT OF APPEALS

Robert Johnson, Appellant, v. D.C. Office of Employee Appeals, *et al.*, Appellees.	)	Case No. 18-CV-468

APELLEE OFFICE OF EMPLOYEE APPEALS' STATEMENT IN LIEU OF BRIEF

Pursuant to the Scheduling Order that was entered on June 8, 2018, Appellee Office of Employee Appeals submits that it relies on the final decision of this office in the matter of *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06AF09R15AF17 (November 6, 2017). The final decision is attached hereto as Exhibit #1.

Respectfully submitted,

Lasheka Brown Bassey

Lasheka Brown Bassey
D.C. Bar # 489370
General Counsel
D.C. Office of Employee Appeals
955 L'Enfant Plaza, SW, Suite 2500
Washington, DC 20024
202.727.0738
Lasheka.Brown@dc.gov

CERTIFICATE OF SERVICE

I hereby certify that the forgoing Appellee Office of Employee Appeals' Statement in Lieu of Brief was served via the Court's electronic filing system to the following on this 16th day of July, 2018:

Frederic W. Schwartz, Jr., Esquire

Loren L. AliKhan, Esquire

Respectfully submitted,

Lasheka Brown Bassey

Lasheka Brown Bassey
D.C. Bar # 489370
General Counsel
D.C. Office of Employee Appeals
1100 4th Street, SW, Suite 620E
Washington, DC 20024
202.727.0738
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Exhibit 1

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ROBERT JOHNSON Employee	OEA Matter No. 1601-0016-A09R15A17
v.	Date of Issuance: November 6, 2017
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT Agency	Lois Hochhauser, Esq. Administrative Judge

Andrea Comantale, Esq., Agency Representative
Frederic Schwartz, Jr., Esq., Employee Representative

CORRECTED[1] ADDENDUM DECISION ON ATTORNEY FEES POST-REMAND

PROCEDURAL BACKGROUND AND CHRONOLOGY

Robert Johnson, Employee, filed a petition with the Office of Employee Appeals (OEA) on November 28, 2005, appealing the decision of the D.C. Fire and Emergency Medical Services Department, Agency, to suspend him for 20 days without pay. The matter was assigned to this Administrative Judge (AJ) on January 26, 2006. The parties were given an extensive period of time to negotiate a resolution, but were unsuccessful. The evidentiary hearing took place on June 2 and July 5, 2006.

In the *Initial Decision* (ID), issued on February 12, 2007, the AJ reversed the adverse action and directed Agency to restore to Employee all salary and benefits lost as a result of the suspension. Agency's petition for review was denied by this Board on May 6, 2009. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06, *Opinion and Order on Petition for Review* (May 6, 2009).

Frederic Schwartz, Jr., Esq. entered his appearance as Employee representative on or about November 22, 2006, replacing Clarissa Edwards, Esq., who had represented Employee until that

[1] The only correction to the October 26, 2017 *Decision*, is in the "Order" section on page 7, where the amount of the award was incorrect due to a typographical error. It was corrected and is now consistent with the sum stated in the line preceding the "Order" section. In addition, some superfluous language was deleted at the end of the "Order" section.

time. On June 1, 2009, Mr. Schwartz[2] filed a motion, seeking an award of $16,065.00 in legal fees based on 37.8 hours and an hourly rate of $425. Ms. Edwards subsequently moved for an award of fees. Agency filed objections only to Mr. Schwartz's request.

In October 2009, this matter was reassigned to Senior Administrative Judge Joseph Lim,[3] who considered the fee requests. On February 16, 2010,[4] Judge Lim issued an *Addendum Decision* in which he determined that Employee was the prevailing party and that an award of legal fees was in the interest of justice. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Addendum Decision on Attorney's Fees* (February 16, 2010). Judge Lim found that Mr. Schwartz merited the hourly rate of $425, then the maximum hourly rate on the Laffey Matrix,[5] and awarded to attorneys in practice for more than 31 years who had substantial expertise and experience. He also considered Mr. Schwartz's explanations of how his time was expended to be sufficient.

Judge Lim concluded, however, that Mr. Schwartz's claim of 37.8 hours was "excessive for the degree of difficulty and the amount of legal service time required," pointing out that an attorney awarded the highest hourly rate is presumed to have the "prior experience and expertise" in the area and should expend less time than an attorney with less experience and expertise. He noted that Mr. Schwartz had, "handled numerous appeals before [OEA]." Judge Lim explained that reached this decision by comparing Mr. Schwartz's request with requests filed with this Office by attorneys with "comparable experience" the degree of legal complexity presented in the matter, and also Judge Lim's "years of experience as a plaintiff's attorney." He reduced the hours to 12.1 hours, which resulted an award of $5,142.50 in fees.[6]

Mr. Schwartz filed a *Petition for Review* with the District of Columbia Superior Court on March 17, 2010, claiming that Judge Lim's decision should be reversed because counsel was entitled to the hour claimed and fees sought. He contended that the matter should be considered "under the more stringent *de novo* standard," arguing that he was entitled to a *de novo* review since Judge Lim had not presided over the evidentiary hearing and therefore was not in a position to decide on his fees. In his July 5, 2015 *Order*, the Honorable Erik Christian rejected counsel's arguments, concluding that counsel was not entitled to a *de novo* review. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, Case No. 2010 CA 001732 P(MPA (July 6, 2015). He determined that although Judge Lim did not preside over the evidentiary hearing, his decision was entitled to "deference," because OEA Judges are "in the best position to determine the reasonableness of the ... attorney hours spent on a case, not the reviewing Court."[7] Judge Christian

---

[2] In this *Decision*, for the sake of clarity and expediency, the AJ will again digress from the protocol of identifying Employee as the party or movant, but rather will instead refer to Mr. Schwartz as the movant when referring to attorney fees matters. Unless otherwise stated, "counsel" and "attorney," refer to Mr. Schwartz.

[3] The reassignment was a result of this AJ's decision to recuse herself from all matters in which Agency was a party, following her appointment to chair a Board in which Agency participated.

[4] The *Corrected Addendum Decision* was issued on February 19, 2010. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09, *Corrected Addendum Decision* (February 19, 2010).

[5] *Laffey v. Northwest Airlines, Inc.*, 572 F. Supp. 354 (D.D.C. 1983), *aff'd in part, rev'd in part on other grounds*, 746 F.2d 4(D.C. Cir. 1984), *cert den.* 472 U.S. 1021 (1985).

[6] Ms. Edwards also sought an award of attorney fees. Agency did not object to her request. Judge Lim approved the time and hourly rate sought, and awarded her the sum of $5,532.14, as requested.

[7] He noted, however, that "the presiding official ...is more intimately familiar with the circumstances of the appeal, and may be in the best position to determine the reasonableness of the attorney's fee request."

stated, however, that he could not review the matter because there was insufficient support provided for Judge Lim's decision. The Court remanded the matter to OEA for "the limited purpose" of obtaining "substantial evidence" from the AJ to support any reduction of time, stating that the record could be reopened if needed. He stated that the AJ could still conclude that the hours claimed by Mr. Schwartz were "unreasonable," and could leave the award unchanged.

This AJ was again available to hear this matter when it was remanded to this Office. Based in part on the Court's comment that the AJ who presided at the evidentiary hearing may be in the best position to rule on fee requests, and in part on other demands on Judge Lim's time, the remand was reassigned to her on August 12, 2015. By Order dated September 11, 2015, she advised the parties that the matter was reassigned to her and that she would need time to review the entire record in order to determine how to proceed. She directed the parties to use the intervening time to engage in settlement negotiations. Settlement efforts continued over an extended period of time, but proved unsuccessful; and oral argument was scheduled for September 21 2016.

At the September 21, 2016 proceeding, the parties presented oral argument. In addition, the AJ discussed a number of matters with the parties to ensure they were all in accord. Wither regard to the scope of her review, the AJ determined, and the parties agreed, that given the limited nature of the remand, she would abide by the decisions reached by Judge Lim, and accepted by Judge Christian, *i.e.*, that Employee was the prevailing party and was entitled to an award of attorney fees in the interest of justice, that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix, and that counsel's explanations of his work were sufficient.[8] She also determined, and the parties agreed, that her review was limited to the fees that were the subject of the remand.[9] Mr. Schwartz, who had filed additional fee requests, confirmed that he had withdrawn the request related to work performed before the D.C. Superior Court. He then withdrew the request for fees regarding legal work before OEA postdating the fees that were the subject of the remand. The AJ stated that Mr. Schwartz could file a request for an award for fees after this matter was concluded.

In the *Addendum Decision on Attorney Fees on Remand* (ADR), issued on October 26, 2016, this AJ, for reasons discussed in the ADR, did not award Mr. Schwartz the 37.8 hours claimed, but increased the time awarded from 12.1 to 27 hours. The fees awarded was not $16,512.05, as sought by Mr. Schwartz, but did increase from $5,142.50 as awarded by Judge Lim to $12,015, 00. *Robert Johnson v. D.C. Fire and Emergency Medical Services Department*, OEA Matter No. 1601-0016-06A09R15, *Addendum Decision on Attorney's Fees on Remand* (February 16, 2010).

On December 22, 2016, Mr. Schwartz filed a motion for an award of fees, seeking $8,520.00 in fees based on 15 hours of legal work performed between October 6, 2015 and September 21, 2016, at an hourly rate of $568.00. Agency filed objections on January 21, 2017. The matter was referred, with the consent of the parties, to mediation in March 2017. When mediation proved unsuccessful, the AJ issued an Order, directing the parties to advise her by July 11, 2017, if they wanted to present oral argument and/or file supplemental pleadings on the matter; and that if they did not, the record would close. Both parties responded in the negative to both options, and the record closed on July 11, 2017

[8] The AJ informed the parties that although she might not agree with all of the determinations, she was bound by them, since, given of the limited nature of the remand, they were not subject to review.
[9] The AJ determined, and the parties agreed, that she could review the entire fee request, not just the time reduced since the hours claimed for work performed on one day might relate to a claim on another day.

JURISDICTION

The Office has jurisdiction in this matter pursuant to D.C. Official Code § 1-606.08 (2001).

ISSUES

Is Mr. Schwartz entitled to an award of fees? If so, what is the appropriate amount?

ANALYSIS, FINDINGS AND CONCLUSIONS

The decisions made by Judge Lim and accepted by Judge Christian, *i.e.*, that Employee was the prevailing party in the matter before OEA, that an award of legal fees was in the interest of justice, and that Mr. Schwartz merited the highest hourly rate on the Laffey Matrix were not part of the Court's remand and were not reviewed. Agency did not object to the hourly rate sought by Mr. Schwartz of $568.00, which represents the highest rate on the Laffey Matrix for work performed in 2015 and 2016. Mr. Schwartz is awarded the hourly rate of $568.00.

Agency argued that since Mr. Schwartz did not receive the full relief sought before Judge Christian or this AJ, he cannot be considered the prevailing party. Mr. Schwartz disagreed, citing *Settlemire v. District of Columbia*, 898 A2d 902 (D.C. 2006), and *Buchkannon Bd. and Care Home v. West Virginia Department of Health & Human Res.* 532 U.S. 598 (3002), for the proposition that he is entitled to "prevailing party" status since he was successful in some of his arguments.

Judge Christian did not reverse Judge Lim's decision. He denied counsel the *de novo* review that he sought and rejected his argument that Judge Lim could not award fees. The Court stated that Judge Lim's decision was entitled to "deference." Judge Christian ordered a limited remand, directing only that sufficient reasons be given by the AJ to support his decisions to enable the Court to conduct its review. Indeed, the Court stated that the AJ could reach the same decision and leave the fee award unchanged.[10] If Judge Lim had heard the matter on remand, he could have provided the additional explanations sought by the Court, left the award unchanged. However, this AJ could not provide the rationale for another AJ's decisions, and had to undertake her own assessment. Although this resulted in an increased award, this certainly did mean that this AJ determined the remanded award was incorrect. A third AJ could reach yet another decision, since fee awards are not based on a mathematical formula. AJs must adhere to guidance and standards articulated in such cases as *Hensley v. Eckerhart*, 461 U.S. 424 (1983), and *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission*, 123 A.3d 170 (2015), there is still adequate room for different results, since the decisions reflect the experience and expertise of the individual AJ.[11]

---

[10] Counsel's contention that Judge Lim could not assess fees because he had not presided over the hearing was unconvincing for an additional reason. Mr. Schwartz entered his appearance after the evidentiary hearing, but was responsible for the closing brief. He claimed that he was able to thoroughly familiarize himself with the record and prepare the brief in about 12 hours. Since Mr. Schwartz was able to fully familiarize himself with the underlying record and legal issues, which in this matter was neither complex nor lengthy, it is difficult to understand why he was certain that Judge Lim, who has decades of experience and expertise in this area and is a respected Senior Administrative Judge, having presided over countless evidentiary hearings and fee petitions during his tenure at OEA, would be unable to achieve the same result.

[11] The AJ will not review her experience and expertise in analyzing fee requests since she did so in the ADR.

A separate analysis regarding a claim for the award of attorney fees is required when the "degree of success...obtained on [an] attorney fee motion is not the same as the degree of success...obtained on the underlying appeal." *Guy v. Department of Army*, 2012 MSPB 54 (2012). In this matter, Employee was successful in his appeal, and was awarded all of the relief sought, in the *Initial Decision*. As noted above, Mr. Schwartz did not achieve the same level of success either before Judge Christian or before this AJ. He did, however, achieve "a significant part" of the relief sought in both matters, and is therefore entitled to an award of fees. After completing this "separate analysis" the AJ can either reduce the amount of the award by the number of issues on which counsel did not prevail; or can award the amount she considers to be a "fair result," without reducing the award based on the number of issues on which the claimant was not successful, in whole or in part. *Farrar v. Hobby*, 113 S. Ct. 566 (1973). The AJ has chosen this second option.

The determination of the reasonableness of fees is a balancing act. Although the movant is not required to detail the precise time spent on a matter or even the precise activity, the attorney must provide sufficient detail to allow an informed assessment to be made. In *Hensley v. Eckerhart*, 461 U.S. 424, 434 (1983), the Supreme Court directed attorneys to exercise "billing judgment" and stated that fees would not be awarded for time found to be "excessive, redundant or otherwise unnecessary." *See also*, *Henderson v. District of Columbia*, 493 A.2d 982 (D.C. 1985). In addition, the Laffey Matrix increases the hourly rate awarded based on the attorney's experience and expertise based on the assumption it will take that attorney less time to complete a task than the attorney with less expertise and experience, who is awarded a lower hourly rate.

In *Tenants of 710 Jefferson Street, N.W. v. District of Columbia Rental Housing Commission*, 123 A.3d 170 (2015), the District of Columbia Court of Appeals articulated the standard of determining reasonableness of fees, citing a long line of cases beginning with *Hensley*, and including *Hampton Court*, 599 A.2d, 1116 and *Copeland v. Marshall*, 641 F2d 880 (D.D.Cir. 1980). The movant has the burden of establishing the reasonableness of the fees sought, and must submit evidence supporting the claim of hours worked, and excluding unnecessary time... *Casali v. Department of Treasury*, 81 MSPR 237 (1999). The AJ must identify hours that were rejected and "articulate the reasons for their elimination. *Rumsey, v. Department of Justice*, 2016 MSPB 28 (2016). The "application must be sufficiently detailed to permit the [AJ] to make an independent determination whether or not the hours claimed are justified, but also, that "it was not necessary to know the exact number of minutes spent nor the precise activity to which each hour was devoted." *Copeland*, 63 F.2d at 891.

D.C. Municipal Regulations, Title 6, Section 634.3, places the burden of production on the claimant, who must "submit reasonable evidence or documentation to support the number of hours expended by the attorney on the appeal." During oral argument, the AJ reviewed Mr. Schwartz's fee request with him, explaining why she did not consider it adequate, and advising him of the additional information that would be required if he filed another fee. Despite her directive, the fee request now under consideration mirrored the prior submission, lacking sufficient information. The AJ offered counsel the opportunity to supplement his submission either in writing or at oral argument, but counsel declined both options. *Rumsey v. Department of Justice*, 2016 MSPB 28 (2016). Therefore, the AJ based on her decision on the request which is presented *verbatim* below:

Date	Activity	Hours
10/6, 10/8/2015	Research, draft Post-Remand Memo	3.1
4/6-7/2016	Research Legis. Hist.	3.9
4/23, 4/25/16	Research, draft submission	4.1
9/13/16	Research, draft Responses to ALJ Order	2.4
9/21/16	Prepare for, attend Hearing	1.5

Agency argued that Mr. Schwartz should not be compensated for work related to his Superior Court appeal, since that fee request was withdrawn, and that some of the time claimed "was unreasonable due to their length and [the] fact that they were unnecessary." Finally it contended that the 2.4 hours billed by Mr. Schwartz on September 13, 2016 was "unnecessary and therefore unreasonable," since he submitted "a 14 page document with factual and procedural information despite the fact" that he was only asked to submit the August 22 Order to which he was responding only directed the parties to "outlines of their arguments." Mr. Schwartz maintained that the research and drafting of his October 23 submission was necessary, since "a full review of recent cases in the area especially *Tenants of 701 Jefferson Street, NW v. District of Columbia"* was required.

In reviewing the fee request, the AJ assessed whether counsel met the burden of establishing that the hours claimed were reasonable and whether the work performed was necessary. DCMR, Title 6, Section 634.3 requires attorneys seeking fees to submit "reasonable evidence or documentation to support the number of hours expended." *See, e.g., Hampton Courts Tenants Association v. D.C. Rental Housing Commission*, 599 A.2d 1113 (D.C. 1991). An AJ must "identify" hours that were reduced based on inadequate documentation, and "articulate the reasons for their elimination." *Crumbaker v. Merit Systems Protection Board*, 781 F.2d 191, 195 (Fed. Cir 1986), modified on other grounds, 827 F.2d 761 (Fed Cir. 1987).

3.1 hours (10/6, 10/8/15) "Research, draft Post-Remand Memo": Mr. Schwartz claimed this time was spent researching and drafting a memorandum which the AJ assumes was the one filed on October 13, 2015. However, in her Order of September 11, 2015, the AJ advised the parties that she had been reassigned the matter and that she would need time to review the record in order to determine how to proceed. She directed the parties to use the intervening time to try to resolve the matter. She did not request that any submissions be filed, stating specifically, that she needed to review the record before deciding how to proceed. The submission was not relevant and was not considered. In addition, it included a request for additional fees, although the only fees considered on remand were those reviewed by Judge Lim. Mr. Schwartz subsequently withdrew the fee request, but even if he had not, it would not have been considered. In sum, the work was unnecessary and submitted despite the AJ's directive to await her instructions after she completed her review. For these reasons, the claim of 3.1 hours is denied.

3.9 hours (4/6-4/7/2016) "Research Legis. Hist:" Mr. Schwartz did not explain the legislative history he was researching, and why the research was necessary. Assuming the research was needed to prepare his April 25 submission, then it appears to be duplicative, since the submission below also claims time for research, and there was no evidence of extensive research. Counsel is required to explain what was researched and its relevance. For these reasons, the AJ concludes that he failed to meet his burden of production because he did not provide "reasonable evidence or documentation to support the number of hours expended" as required by DCMR, Title 6, Section 634.3. For these reasons, the claim for 3.9 hours is denied.

4.1 hours (4/23, 4/25/16) Research, draft submission: This submission focused on three issues: OEA's authority to award fees for work done before the Superior Court, Employee's status as prevailing party, and reasons that an award of fees was warranted in the interest of justice. However, as already discussed, the remand did not include additional fees, and the other two issues had already been resolved. Arguments regarding work performed before the Superior Court were irrelevant, since the remand did not include those fees. However, counsel did reference *Tenants of 710 Street N.W. v. District of Columbia Rental Housing Commission*, which was issued in August 2015. *Infra* at 5. The discussion of this decision was not the primary focus of the submission, and the AJ determines about no more than one-third of the total expended should be awarded for work that was relevant to this matter. For these reasons, she awards 1.4 hours.

2.4 hours (9/13/16) Research, draft Responses to ALJ Order: This submission was in response to the August 22, 2016 Order which directed the parties to "submit outlines" of the arguments that they would present at oral argument. The AJ finds that the submission was responsive, addressing the challenged items and summarizing the arguments counsel would raise. The AJ concludes that the claim for 2.4 hours should be awarded in full.

1.5 hours (9/21/16) prepare for, attend Hearing: The AJ finds that the time claimed to prepare for and attend the September 21, 2016 proceeding was reasonable. She concludes that the 1.5 hours sought should be awarded.

Based on this analysis, counsel will be compensated for 5.3 hours at an hourly rate of $568, for a total award of $3,010.40.[12]

ORDER

It is hereby

ORDERED: Agency pay Employee, within 45 calendar days from the date of issuance of this Addendum Decision, the sum of $3,010.40 for legal fees payable to Frederick Schwartz, Jr..

FOR THE OFFICE:

Lois Hochhauser, Esq.
Administrative Judge

[12] The AJ will not reduce the award, since she "has discretion to make an equitable judgment as to what reduction is appropriate. *Hensley* at 436-37. The award "does not so shock the conscience" and any further reduction would not "fairly reflect [counsel's] "degree of success." *Rumsey* at 20.

CERTIFICATE OF SERVICE

I certify that the attached **CORRECTED ADDENDUM DECISIONON ATTORNEY FEES POST-REMAND** was sent by regular mail on this day to:

Robert Johnson
1826 4th Street NW
Washington, DC 20001

Andrea Comentale, Esq.
Section Chief
Personnel and Labor Relations Section
441 4th St., NW Suite 1180N
Washington, DC 20001

Frederic W. Schwartz, Esq.
1701 Pennsylvania Ave, NW
Suite 200
Washington, DC 20006

Katrina Hill
Clerk

November 6, 2017
Date

District of Columbia
Court of Appeals

No. 17-CV-1123

JUDY COFIELD, *et al.*,

Appellants,

v. **CAP6119-16**

OFFICE OF EMPLOYEE APPEALS, *et al.*,

Appellees.

ORDER

On consideration of appellee Office of Contracting and Procurement's motion for an extension of time within which to file the brief, and the opposition thereto, and it appearing that appellee Office of Employee Appeals' brief was due to be filed with this court on or before March 22, 2018, and the brief has not been filed, it is

ORDERED that appellee Office of Contracting and Procurement's motion is granted and appellee Office of Contracting and Procurement's brief shall be filed on or before September 18, 2018. Any further requests for extensions of time will be looked upon with disfavor and granted only upon a showing of good cause. It is

FURTHER ORDERED that appellee Office of Employee Appeals shall, within 15 days from the date of this order, submit the brief or a statement that the party will not be filing a brief, accompanied by a motion for leave to file out of time. The motion should set forth good cause for the failure to timely file the brief or statement. Failure to comply with this order shall subject this appeal to being scheduled for consideration on the record and appellate briefs on file. It is

No. 17-CV-1123

FURTHER ORDERED that Sheila G. Barfield, Esquire, shall register for the Court's mandatory e-filing pursuant to Administrative Order 1-18 forthwith.

BY THE COURT:

Stephen H. Glickman

STEPHEN H. GLICKMAN
Acting Chief Judge

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elp

No. 17-CV-1123

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

SARINITA BEALE AND JUDY COFIELD,
APPELLANTS,

V.

DISTRICT OF COLUMBIA OFFICE OF CONTRACTING AND PROCUREMENT
AND DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS,
APPELLEES,

ON APPEAL FROM AN ORDER OF THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA

OFFICE OF EMPLOYEE APPEALS' MOTION FOR LEAVE TO FILE OUT OF TIME

Pursuant to the Order that was entered on July 17, 2018, Appellee Office of Employee Appeals submits its Motion for Leave to File out of Time. This motion is unopposed by Counsels Stephen Leckar and Loren L. AliKhan. Appellee Office of Employee Appeals did not hear from Counsel David M. Wachtel before the motion was filed.

The Motion for Leave to File out of Time is supported by cause. Appellee Office of Employee Appeals was not in receipt of the Court's January 9, 2018 Order Denying Appellant's Motion for Summary Reversal which apparently requested that Appellee Office of Employee Appeals file a brief. The order was not received electronically or via mail. Although Appellee Office of Employee Appeals has properly changed its address from 1100 4th Street, SW, Suite 620E, Washington D.C. 20024 to 955 L'Enfant Plaza Suite 2500, SW, Washington D.C. 20024 with the Court of Appeals' Clerk and within the Court's electronic filing system, some orders are still being mailed to our old address. Despite our filed request with the United States Postal

Service to forward mail to our new address, there are instances when we do not receive our mail at all or it is severely delayed. Accordingly, we request that the Court grant this Office's motion. Appellee Office of Employee Appeals is simultaneously filing our Statement in Lieu of Brief with the Court today.

Respectfully submitted,

Lasheka Brown Bassey

Lasheka Brown Bassey
D.C. Bar # 489370
General Counsel
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Lasheka.Brown@dc.gov

CERTIFICATE OF SERVICE

I hereby certify that the forgoing Appellee Office of Employee Appeals' Motion for Leave to File out of Time was served via the Court's electronic filing system to the following on this 1st day of August, 2018:

Stephen C. Leckar, Esquire

David M. Wachtel, Esquire

Loren L. AliKhan, Esquire

Respectfully submitted,

LashekaBrown Bassey

Lasheka Brown Bassey
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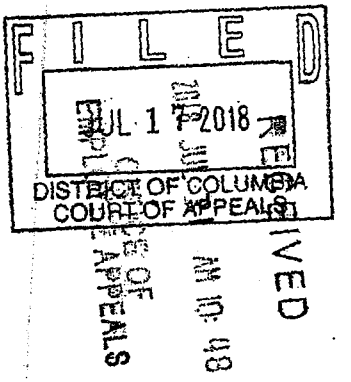
District of Columbia
Court of Appeals



No. 17-CV-1123

JUDY COFIELD, *et al.*,

Appellants,

v. **CAP6119-16**

OFFICE OF EMPLOYEE APPEALS, *et al.*,

Appellees.

ORDER

On consideration of appellee Office of Contracting and Procurement's motion for an extension of time within which to file the brief, and the opposition thereto, and it appearing that appellee Office of Employee Appeals' brief was due to be filed with this court on or before March 22, 2018, and the brief has not been filed, it is

ORDERED that appellee Office of Contracting and Procurement's motion is granted and appellee Office of Contracting and Procurement's brief shall be filed on or before September 18, 2018. Any further requests for extensions of time will be looked upon with disfavor and granted only upon a showing of good cause. It is

FURTHER ORDERED that appellee Office of Employee Appeals shall, within 15 days from the date of this order, submit the brief or a statement that the party will not be filing a brief, accompanied by a motion for leave to file out of time. The motion should set forth good cause for the failure to timely file the brief or statement. Failure to comply with this order shall subject this appeal to being scheduled for consideration on the record and appellate briefs on file. It is

No. 17-CV-1123

FURTHER ORDERED that Sheila G. Barfield, Esquire, shall register for the Court's mandatory e-filing pursuant to Administrative Order 1-18 forthwith.

BY THE COURT:

Stephen H. Glickman

STEPHEN H. GLICKMAN
Acting Chief Judge

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No. 17-CV-1123

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elp

DISTRICT OF COLUMBIA COURT OF APPEALS

Judy Cofield, *et al.*, Appellants,	)	
v.	)	Case No. 17-CV-1123
Office of Employee Appeals, *et al.*, Appellees.	)	

APPELLEE OFFICE OF EMPLOYEE APPEALS' STATEMENT IN LIEU OF BRIEF

Pursuant to the Order that was entered on July 17, 2018, Appellee Office of Employee Appeals submits that it relies on the final decision of this office in the matters of *Judy Cofield* and *Sarinita Beale v. Office of Contracting and Procurement*, OEA Matter Nos. 2401-0134-09-R14 and 2401-0136-09-R14 (July 8, 2016), as its statement in lieu of brief. The final decision is attached hereto as Exhibit #1.

Respectfully submitted,

LashekaBrown Bassey

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CERTIFICATE OF SERVICE

I hereby certify that the forgoing Appellee Office of Employee Appeals' Statement in Lieu of Brief was served via the Court's electronic filing system to the following on this 1st day of August, 2018:

Stephen C. Leckar, Esquire

David M. Wachtel, Esquire

Loren L. AliKhan, Esquire

Respectfully submitted,

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Exhibit 1

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
JUDY COFIELD,	)	OEA Matter No. 2401-0134-09-R-14
SARINITA BEALE,	)	OEA Matter No. 2401-0136-09-R-14
Employees	)	
	)	
v.	)	Date of Issuance: July 8, 2016
	)	
OFFICE OF CONTRACTING &	)	
PROCUREMENT,	)	
Agency	)	ERIC T. ROBINSON, Esq.
	)	Senior Administrative Judge
	)	

Stephen Leckar, Esq., Employee Representative
David Wachtel, Esq., Employee Representative
Frank McDougald, Esq., Agency Representative

INITIAL DECISION ON REMAND

INTRODUCTION AND PROCEDURAL BACKGROUND

On June 19, 2009, Judy Cofield ("Employee" or "Cofield") and Sarinita Beale, ("Employee" or "Beale") filed separate petitions for appeal with the Office of Employee Appeals contesting the Office of Contracting and Procurement ("OCP" or "the Agency") action of abolishing their last positions of record through a Reduction-In-Force ("RIF"). Cofield's last position of record was Staff Assistant in the competitive area of OCP - Office of the Assistant Director for Procurement. Beale's last position of record was Program Analyst in the competitive area of OCP – Office of Procurement Support. For both matters, the effective date of the RIF was May 22, 2009. Both of the Employees herein were the only person in their respective competitive level and area when the instant RIF was effectuated. On or about November 30, 2009, both matters were initially assigned to Administrative Judge Sheryl Sears. On or around April 2010, due to Administrative Judge Sears' retirement, both of these matters were then reassigned to Senior Administrative Judge Rohulamin Quander. On or around June 2011, due to Senior Administrative Judge Quander's retirement, these matters were then reassigned to Senior Administrative Judge Joseph Lim. On or around October 2011, these matters were then reassigned to the undersigned Senior Administrative Judge for adjudication.

Thereafter, the parties were present for multiple status conferences. Beale and Cofield originally alleged that the Agency did not adhere to all of the requirements of D.C. Official Code § 1-624.02. Moreover, they contended that their positions were eliminated so that other persons could illegally take their former positions of record. OCP disagreed with the Employees' position and contended that the RIF of their respective positions were done in accordance with applicable law, rule and regulation. Taking into account the strikingly similar issues that was brought to bear in prosecution of both Cofield's and Beale's appeal, I found that these matters should be joined for adjudication.[1]

An evidentiary hearing was held in these matters on May 7, 8, 9, and 31, 2012. Afterwards, the parties were required to submit written closing arguments in support of their positions. After granting extensions of time in which to file their closing arguments, both parties complied with this order by submitting their closing arguments in or around September 2012. Thereafter, I issued an Initial Decision ("ID") in this matter on February 8, 2013. In the ID, I found in favor of the Agency and upheld its RIF action against both Employees. Employees appealed the ID to the District of Columbia Superior Court. The Superior Court of the District of Columbia issued its first Opinion in these matters on August 26, 2014. This Opinion was the original Opinion that brought this matter back under the Undersigned's purview. Subsequently, the Court issued an Amended Opinion which superseded the Court's August 26, 2014, Order. On January 12, 2016, the Honorable John M. Mott issued the Amended Opinion on these matters on appeal wherein he held the following:

> The court affirms OEA's determination that § 1-624.08 applied to the RIF because the conclusion is supported by substantial evidence in the record. The court likewise affirms OEA's determination that it lacked jurisdiction to consider petitioners' reemployment rights. The court finds that OEA's conclusion that the RIF was executed in accordance with the relevant laws and regulations is not supported by substantial evidence and remands this case to OEA for further proceedings.[2]

The Amended Opinion granted District of Columbia's motion for reconsideration (before the Superior Court). The issues that were remanded to the undersigned were lessened pursuant to the Amended Opinion. When this matter was initially remanded to the Undersigned, the parties were under a dual track of presenting competing briefs that addressed the issues that the Honorable John M. Mott presented as part of the original remand. The parties also attempted to mediate their differences under the auspice of the OEA's Mediation Department. Regrettably, the parties protracted attempts to settle these matters failed. After considering the breadth of the parties' submissions, the undersigned has determined that no further proceedings are warranted. The record is now closed.

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[1] *See* OEA Rule 611, 59 DCR 2129 (March 16, 2012).
[2] Sarinita Beale *et al* Civil Case No. 2012 CA 003434 B at 2 (January 12, 2016).

JURISDICTION

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

ISSUE

Whether Agency's action of separating Employees herein from service pursuant to a RIF was done in accordance with all applicable laws, rules, or regulations.

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.

FINDINGS OF FACTS, ANALYSIS AND CONCLUSIONS OF LAW

As the Court noted in its Amended Opinion and as was stated previously in the ID, Employees herein are only able to contest whether they "receive[d] written notice thirty (30) days prior to the effective date of their separation from service; and/or [whether they were] afforded one round of lateral competition within their competitive level. In an appeal before this Office, I cannot consider the one round of lateral competition issue if I determine that Employees Beale and Cofield were properly placed in a single person competitive level or if the entire competitive level was abolished."[3] However, the Court noted the following:

> Here, the court is unable to determine from the record if petitioners were properly separated from their respective position of record, as both were reassigned in the months preceding the RIF. Beale was reassigned to a Program Analyst position on February 1, 2009, whereas Cofield was assigned to the "Goods Unit" in January 2009, before being shifted back

[3] *See* ID at 17.

> to her original position on March 15, 2009. Beale's "Form 50" identifies her February 2009 reassignment to OCP as a whole, without identifying any particular subdivision. However, the justification documents used by DCHR in creating the lesser competitive area identified Beale's position as being located in the "Procurement Support" subdivision of OCP. Similarly, Beale's RIF notice identifies "Procurement Support" as her position's competitive area. (internal citations omitted).[4]

Agency's Position[5]

Agency contends that the removal of Employees herein via RIF was lawful. In support of this contention, and in response to the Courts remand of this matter, Agency buttresses this argument by noting that both Employees Beale and Cofield were receiving pay for the positions noted in their RIF Notices. In further support, Agency submitted copies of both Employees pay stubs for the months preceding their separation from service. According to those pay stubs Employee Cofield's job title was Staff Assistant[6] and Employee Beale's job title was Program Analyst.[7] In doing so, Agency notes that [a]n employee's position of record is defined in the District of Columbia Regulations (DCMR) Title 6B § 2410.3 as "the position for which the employee receives pay or the position from which the employee has been temporarily reassigned or promoted on a temporary or term basis."[8] In reliance on same, OCP further contends that these documents are sufficient justification of Employees position of record at the time of the RIF.

The Agency distinguishes these matters from *Armeta Ross v. Office of Contracting and Procurement.*[9][10] Agency argues that *Ross* is distinguishable from the instant matters in that *Ross* dealt with whether a memorandum was sufficient for effecting a reassignment (for the purposes of conducting a RIF) whereas in the instant matters the Undersigned must grapple with official position of record of Employees herein at the moment of the RIF in adherence with DCMR 6B § 2410.3. Agency further contends that this matter is more in line with *Leon Graves v. Department of Youth Rehabilitation Services*[11] wherein the AJ held that DPM § 2410.3 provides that the position for which the employee receives pay is that employee's position of record with respect to determining whether an employee occupies a position that is being

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[4] Sarinita Beale *et al* Civil Case No. 2012 CA 003434 B at 10 (January 12, 2016).
[5] OCP also made other arguments in support of its post RIF actions with respect to Priority Reemployment for Employees herein. However, this issue was addressed in the ID and affirmed by the Court in its Amended Opinion. Accordingly, this issue will not be readdressed in this Initial Decision on Remand.
[6] *See* Agency's Response to Order at attachment 10 (April 24, 2015).
[7] *Id.* at attachment 6.
[8] *See* Agency's Response to Order at 3 (April 24, 2015).
[9] OEA Matter No.: 2401-0133-09R11 (April 8, 2013).
[10] In *Ross*, OCP's RIF separation of an employee was reversed because the agency was unable to demonstrate that the employee had been properly separated from her position of record. In that matter, OCP was unable to produce a form 50 that accurately reflected Ross' reassignment to a new position of record that was later slated for abolishment via RIF. In support of its RIF action, the agency in *Ross* submitted a memorandum that purported to effectuate her reassignment. The Administrative Judge found that this memorandum, without other supporting documentation (e.g. form 50), was insufficient for the purpose of sustaining Ross' removal via RIF.
[11] OEA Matter No. 2401-0018-14 (March 25, 2015).

abolished via RIF. [12] Agency strongly contends that the facts in these matters are similar and that this provides proper justification for the instant RIF actions against Employees herein.

Employees Position[13]

Employees do not deny that the pay stubs cited in footnotes 6 and 7 are accurate. Employees strenuously assert that they were not separated from service from their official positions of record. To substantiate this assertion, they contend that the Form SF-50's that are a part of the record are not authentic (they lack signatures). Employees further contend the Form SF-50 is generally understood to be an official classification of an employee's position that requires a degree of formality to create. Moreover, this is the reason why this document has been overwhelmingly used to verify positions of record in matters such as this. Employees allege that they should prevail since this document does not accurately reflect Employees positions of record. Employees also contend that their inclusion in lesser competitive areas was essentially a ruse in order to effectuate their respective removals more efficiently. Employees cite the *Ross* matter as persuasive authority buttressing their contentions.[14] Employee also cites the matter of *Carolyn Williams v. District of Columbia Public Schools*, [15] where Employee matter was reversed due to the Agency improperly removing Employee from service via RIF. Like the matters at hand, the agency in *Williams* did not have a Form SF-50 that properly denoted her position of record for the RIF. However, in that matter, the evidence provided by agency to buttress its failing argument was *Williams'* performance evaluations. In *Williams*, the Board noted that performance evaluations are not "official personnel documents"[16].

Analysis

Employees are correct in noting that historically, the OEA has relied almost exclusively on Form SF-50 in helping to making an accurate determination of an employee's last position of record. Typically, this document, when it has been properly generated and executed, is a reliable record, kept in the ordinary course of business, reflecting changes in an employee's employment classification. The changes could be as mundane as a change of address for an employee or as important as an employee's change in job title, pay, grade, step, etc. However, OCP has credibly countered that assertion with excerpts from the District Municipal Regulations ("DCMR") which plainly note the following:

[12] *Id.* at 8.
[13] Employees also made other arguments in prosecution of Agency's post RIF actions with respect to Priority Reemployment for Employees herein. However, this issue was addressed in the ID and affirmed by the Court in its Amended Opinion. Accordingly, this issue will not be readdressed in this Initial Decision on Remand.

[14] *See* footnote 8.
[15] Opinion and Order on Petition for Review, OEA Matter No. 2401-0124-10-R13 (February 16, 2016).

[16] *Id.* at 6.

2410 COMPETITIVE LEVELS

2410.1 Each personnel authority shall determine the positions which comprise the competitive level in which employees shall compete with each other for retention.

2410.2 Assignment to a competitive level shall be based upon the employee's position of record.

2410.3 An employee's position of record is the position for which the employee receives pay or the position from which the employee has been temporarily reassigned or promoted on a temporary or term basis.

I also note that given the current circumstances, I am required to follow the course of review prescribed by the Court. The undersigned was tasked by the Court to determine whether "petitioners were properly separated from their respective position of record"[17] via the instant RIF. In remanding this matter, the Court affirmed the ID's determination that D.C. Code § 1-624.08[18] was the relevant RIF provision. Employees contend that they should not have been in included in the lesser competitive areas. They further allege that doing so allowed OCP to improperly remove Employees without having to undergo lateral competition for positions that survived the instant RIF. With respect to Employee Beale, the executed Administrative Order ("AO") dated March 23, 2009[19] lists her position as "Program Analyst" and her position number as 00026621. Her unexecuted Form SF-50 has the same position title and number noting her

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[17] *See* footnote 4.

[18] (a) ***Notwithstanding*** *any other provision of law, regulation, or collective bargaining agreement either in effect or to be negotiated while this legislation is in effect* for the fiscal year ending September 30, 2000, and *each subsequent fiscal year*, each agency head is authorized, within the agency head's discretion, to identify positions for abolishment (emphasis added).

(b) Prior to February 1 of each fiscal year, each personnel authority (other than a personnel authority of an agency which is subject to a management reform plan under subtitle B of title XI of the Balanced Budget Act of 1997) shall make a final determination that a position within the personnel authority is to be abolished.

(c) ***Notwithstanding*** *any rights or procedures established by any other provision of this subchapter*, any District government employee, regardless of date of hire, who encumbers a position identified for abolishment shall be separated without competition or assignment rights, except as provided in this section (emphasis added).

(d) An employee affected by the abolishment of a position pursuant to this section who, but for this section would be entitled to compete for retention, shall be entitled to one round of lateral competition pursuant to Chapter 24 of the District of Columbia Personnel Manual, which shall be limited to positions in the employee's competitive level.

(e) Each employee selected for separation pursuant to this section shall be given written notice of at least 30 days before the effective date of his or her separation.

[19] See Agency's Response to Order at Attachment 2 (April 24, 2015).

removal. Similarly, with respect to Employee Cofield the executed AO lists her last position of record as "Staff Assistant" and her position number as 00010757. Her unexecuted Form SF-50 has the same position title and number noting her removal.

Usually, the Undersigned would rely on the Form SF-50 to make a reliable determination as to the last position of record for employees. However, since both documents for Employees herein are unexecuted, I must take into account that Employees do not dispute the veracity of the aforementioned pay stubs[20] nor do they provide any mandatory law, rule or regulations that would contradict (or give context) to DCMR 2410.3. The positions listed in the pays stubs for both Employees are identical to the positions authorized for abolishment through the AO. I also note that Employees did not dispute their position title (or pay) prior to their removal. In making this determination, I opt to follow the holding in *Graves* where another OEA Administrative Judge relied on this same section of the DPM in order to make a credible determination of an employee's last position of record when the record lacked a credible Form SF-50. I further find that *Williams* is inapplicable to this matter due to the fact that in *Williams*, the documentation provided by the agency was performance evaluations (not official pay stubs that clearly denoted the positions listed in the AO). And, the Board in *Williams* did not discuss the applicability of DCMR 2410.3. Left with this, I find that OCP has met its burden with respect to establishing that Employees positions of record at the moment of the RIF were Program Analyst (Beale) and Staff Assistant (Cofield). I further find that Employees Beale and Cofield occupied the positions identified in the AO that were slated for abolishment via RIF.

In an appeal before this Office, I cannot consider the one round of lateral competition issue if I determine that Beale and Cofield were properly placed in a single person competitive level or if the entire competitive level was abolished. In the matters at hand, I further find that the entire units in which Beale and Cofield respective positions were located were abolished after a RIF had been properly implemented. I find that the Employees herein were properly placed in their respective competitive levels when the instant RIF occurred; therefore "the statutory provision affording them one round of lateral competition is inapplicable.

Conclusion

I find that Employees herein have failed to proffer any credible argument(s) or evidence that would indicate that the RIF was improperly conducted and implemented.[21] I further find that the Agency's action of abolishing Employees Beale and Cofield positions were done in accordance with D.C. Official Code § 1-624.08 and the Reduction-in-Force which resulted in their removal is upheld.[22]

[20] *See* footnotes 6 and 7.
[21] The parties agree that Employees Beale and Cofield received their RIF notice at least 30 days from their removal.
[22] Although I may not discuss every aspect of the evidence in the analysis of this case, I have carefully considered the entire record. *See Antelope Coal Co./Rio Tino Energy America v. Goodin*, 743 F.3d 1331, 1350 (10th Cir. 2014) (citing *Clifton v. Chater*, 79 F.3d 1007, 1009-10 (10th Cir. 1996)) ("The record must demonstrate that the ALJ considered all of the evidence, but an ALJ is not required to discuss every piece of evidence").

ORDER

Based on the foregoing, it is hereby ORDERED that Agency's action of abolishing Employees Beale and Cofield positions through a Reduction-In-Force pursuant to D.C. Official Code § 1-624.08 is UPHELD.

FOR THE OFFICE:

ERIC T. ROBINSON, ESQ.
SENIOR ADMINISTRATIVE JUDGE

NOTICE OF APPEALS RIGHTS

This is an Initial Decision that will become a final decision of the Office of Employee Appeals unless either party to this proceeding files a Petition for Review with the office. A Petition for Review must be filed within thirty-five (35) calendar days, including holidays and weekends, of the issuance date of the Initial Decision in the case.

All Petitions for Review must set forth objections to the Initial Decision and establish that:

1. New and material evidence is available that, despite due diligence, was not available when the record was closed;

2. The decision of the presiding official is based on an erroneous interpretation of statute, regulation, or policy;

3. The finding of the presiding official are not based on substantial evidence; or

4. The Initial Decision did not address all the issues of law and fact properly raised in the appeal.

All Petitions for Review should be supported by references to applicable laws or regulations and make specific reference to the record. The Petition for Review, containing a certificate of service, must be filed with Administrative Assistant, D.C. Office of Employee Appeals, 1100 4th St., SW., Suite 620E, Washington, D.C. 20024. Four (4) copies of the Petition for Review must be filed. Parties wishing to respond to a Petition for Review may file their response within thirty-five (35) calendar days, including holidays and weekends, after the filing of the Petition for Review.

Instead of filing a Petition for Review with the Office, either party may file a Petition for Review in the Superior Court of the District of Columbia. To file a Petition for Review with the Superior Court, the petitioning party should consult Superior Court Civil Procedure Rules, XV. Agency Review, Rule 1.

CERTIFICATE OF SERVICE

I certify that the attached **INITIAL DECISION** was sent by regular mail on this day to:

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Katrina Hill
Clerk

July 8, 2016
Date