THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
ROBERT ARONSON, Employee	OEA Matter No. 1601-0128-99
v.	Date of Issuance: January 26, 2007
D.C. FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT, Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Robert Aronson ("Employee") worked as an Emergency Medical Technician ("EMT")/Paramedic for the D.C. Fire and Emergency Medical Services Department ("Agency"). On January 1, 1999, while still on-duty, Employee drove his District Medic vehicle to a shopping center in Alexandria, Virginia to pick up a personal prescription. A private citizen saw the vehicle and called Agency officials. Employee admitted to Agency that he ran a personal errand while on duty. As a result, Agency issued a notice of proposal to terminate him from his position on January 3, 1999. The notice outlined that the charges against Employee were misuse of District property and failure to satisfy

one or more of his major duties.[1]

On February 12, 1999, the notice was withdrawn but was reinstated on February 16, 1999.[2] The amended notice of proposal provided that the new charges against Employee were misuse of District property and inexcusable neglect of duty.[3] Agency provided that Employee violated Special Order Numbers 19 and 12 by running personal errands.[4] Soon after, a final Agency decision was issued, and Employee was removed on May 8, 1999.

On May 28, 1999, Employee filed a Petition for Appeal with the Office of Employee Appeals ("OEA"). He argued that the first notice of proposal for removal was withdrawn because it was apparent that Agency could not prove the adverse action charges that it contained. He claimed that the new proposal of removal was issued for Agency to gain a tactical advantage by using information it learned during the hearing pertaining to the first notice. Employee also provided that the penalty of removal was disparate in comparison to what other employees received who were found guilty of committing similar, identical, or more severe misconduct.[5]

Agency filed its response to Employee's Petition for Appeal on March 10, 2000. It alleged that the first notice of proposal to remove was withdrawn to correct typographical errors. Agency also provided that when determining the appropriateness of

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[1] *Respondent's Responses to the Appellant's Petition for Appeal,* Tab # 9 (March 10, 2000).
[2] *Id.* at Tab # 10.
[3] *Id.* at Tab # 11.
[4] Special Order 19 required "all units to immediately return to their respective quarters by the most direct route as soon as they have cleared their assigned response." Special Order Number 12 provided that employees should focus their efforts on "reducing response time on all medical calls."
[5] *Petition for Appeal,* p. 3 (May 28, 1999).

the penalty for Employee, it used the Douglas factors.[6] As for the issue of disparate treatment, Agency provided that Employee had the burden to prove a prima facie case showing that Agency treated him differently from others similarly situated. Furthermore, Agency argued that because removal was within the penalty for the offenses, OEA should not disturb its ruling.[7]

No hearing was held in this matter. Instead, both parties submitted final briefs. Agency provided the same arguments outlined in its Response to Employee's Petition for Appeal.[8] Employee offered evidence showing that four other employees engaged in strikingly similar behavior to his but received less harsh penalties.[9]

On August 17, 2004, the Administrative Judge ("AJ") issued her Initial Decision. She found that Employee used a government vehicle for purposes other than official business, therefore, Agency met its burden of proving that Employee misused a government vehicle. As for the second charge, the AJ provided that Agency had to prove that Employee had a duty, that he neglected his duty, and that his neglect was inexcusable. The AJ held that Employee had a duty to immediately return to his quarters by the most direct route as soon as his assigned response was cleared. She held that Employee neglected this duty when he drove to the pharmacy to fill his prescription. As a result of Employee's unavailability to properly respond to another call and his inability to state any reasons to justify his actions, his actions were, therefore, inexcusable.[10]

The AJ then determined if the penalty imposed by Agency was appropriate. She

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[6] *Douglas v. Veterans Administration*, 5 M.S.P.R. 280 (1981).
[7] *Respondent's Responses to the Appellant's Petition for Appeal*, p. 2-5 (March 10, 2000).
[8] *Agency's Brief in Opposition to the Petition for [Appeal]* (April 30, 2003).
[9] *Employee's Motion to Supplement the Record* (June 17, 2003).
[10] *Initial Decision*, p. 6 (August 17, 2004).

applied the *Douglas* factors to the case and found that although removal was within the range of penalties for either of the offenses for which Employee was charged, the penalty imposed by Agency was unduly harsh.[11] She held that it was extreme to remove Employee when he possessed ten years of service with Agency; he had no prior adverse actions filed against him; and when Agency admitted that other employees received less serious penalties for driving District government vehicles outside of D.C.

The AJ provided that, like Employee, each of the comparison employees were to report to the Director of Emergency Medical Services Bureau. Likewise, they were all in the EMT/Paramedic division within Agency. Therefore, those similarities were sufficient to justify the expectation of similar penalties. Furthermore, as a result of Agency's failure to provide an argument to justify the disparity, the AJ overruled its decision to terminate Employee. [12] Additionally, she reduced the penalty from removal to a sixty-day suspension.[13]

Agency disagreed with the AJ's ruling and filed a Petition for Review on September 21, 2004. Agency's petition provided that the AJ's decision to modify Employee's penalty was based on an erroneous interpretation of the regulation. It argued that the other employees to whom Employee compared himself, were not charged with the same offenses as Employee.[14] Agency also provided that the comparison employees

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[11] The AJ relied on a similar ruling that the Merit Systems Protection Board issued in *Charles P. Scherer v. Department of the Treasury*, 12 M.S.P.R. 476 (July 16, 1982).
[12] *Initial Decision,* p. 10 (August 17, 2004).
[13] The AJ relied on D.C. Official Code section 1-606.03(b) to modify Employee's penalty. Section 1-606.03(b) provides that "in any appeal taken pursuant to this section, the Office shall review the record and uphold, reverse, or modify the decision of the agency. . . ."
[14] Agency asserted that the comparison employees were found to have engaged in one of the charges that Employee faced, not both. Therefore, they were not similarly situated.

did not work within the same organizational unit nor did they have the same supervisor as Employee.[15] Agency's final argument was that the AJ's modified penalty was not comparable to those penalties imposed on the other employees.[16] Therefore, Agency requested that the Initial Decision be reversed because Employee was not similarly situated, removal was within the penalty for the charges, and the AJ erred when modifying the penalty.[17]

On October 29, 2004, Employee filed an Opposition to Agency's Petition for Review. In his response, Employee argued that no other employee was terminated for driving a departmental vehicle outside of D.C. regardless of how many charges were brought against them. According to Employee, other similarly situated employees received only de minimis sanctions compared to him. He also argued that the AJ correctly found there to be disparate treatment and Agency's arguments were meritless at best.[18]

This Board recognizes, as it was discussed in *Douglas*, that there is a fine line between modifying an imposed penalty and intruding on an agency's managerial functions. We recognize that the appropriateness of a penalty "involves not only an ascertainment of factual circumstances surrounding the violation but also the application

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[15] Agency provided that the AJ was incorrect in assuming that because all employees worked in the same bureau that they all had the same supervisor. It goes on to state that some employees were in Platoon 4 while others were in Platoon 1, and as a result, they had different supervisors.
[16] It was Agency's position that if those comparison employees received penalties of twelve-hour and three-day suspensions, then Employee should have received a similar penalty and not the sixty-day suspension that AJ assessed.
[17] *Petition for Review*, p. 3-10 (September 21, 2004).
[18] *Employee's Opposition to Agency's Petition for Review*, p. 4-9 (October 29, 2004).

of administrative judgment and discernment."[19] Therefore, this Board relies on the scope of review outlined in *Stokes v. District of* Columbia, 502 A.2d 1006 (D.C. 1985), when considering the appropriateness of a penalty. The factors that we must consider are whether the penalty was within the range allowed by law, regulation, and any applicable table of penalties; whether the penalty is based on a consideration of the relevant factors; and whether there is a clear error of judgment by agency.

Agency clearly provides, and the AJ agreed, that removal was within the range of penalty in this matter. The maximum penalty for either of the two charges filed against Employee was termination. Because Employee admits to driving his government vehicle to Virginia, he is guilty of misusing District property. Therefore, termination was clearly within the scope of penalties.

Moreover, the Agency seemed to consider all relevant factors as evidenced in its reference to the *Douglas* factors in the Agency final report.[20] The *Douglas* factors provide that an agency should consider the following when determining the penalty of adverse action matters:

> (1) the nature and seriousness of the offense, and it's relation to the employee's duties, position, and responsibilities including whether the offense was intentional or technical or inadvertent, or was committed maliciously or for gain, or was frequently repeated;
> (2) the employee's job level and type of employment, including supervisory or fiduciary role, contacts with the public, and prominence of the position;
> (3) the employee's past disciplinary record;
> (4) the employee's past work record, including length of service, performance on the job, ability to get along with fellow workers, and dependability;
> (5) the effect of the offense upon the employee's ability to perform at a satisfactory level and its effect upon supervisors' confidence in employee's ability to perform assigned duties;

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[19] *Beall Construction Company v. OSHRC*, 507 F.2d 1041 (8th Cir. 1974).
[20] *Respondent's Responses to the Appellant's Petition for Appeal*, Tab # 15 (March 10, 2000).

(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.

As the AJ highlighted, it is extremely important for an EMT to be available to receive calls for emergencies when they are on duty. This Board must also note that it is the public who depend on EMTs for assistance; so one of Employee's main duties was to be in direct contact with the public. Furthermore, response time was an issue within Agency which is why they required employees to return to their post on the most direct route after responding to an emergency. Employee was aware of this problem and was on notice. Moreover, this incident could have had a serious impact on Agency's reputation.

However, there are also some mitigating circumstances to consider in assessing Employee's penalty. Employee did not have any past disciplinary action taken against him. He was employed with Agency for ten years before he was removed. Furthermore, Agency admitted that no other employee was subjected to removal for similar offenses committed by Employee. Therefore, the penalty did not seem consistent. Additionally, there was a strong potential for Employee's rehabilitation had a lesser penalty been imposed. It may have been adequate for Agency to sanction Employee as it did others to deter such conduct in the future.

Based on the aforementioned, this Board believes that there was a clear error in the judgment reached by Agency. It remains unclear why Agency determined that two charges were warranted for Employee while other employees in similar situations received only one charge. Furthermore, Agency offers no reason why it charged Employee differently from others when it appears that they all engaged in the same activity of driving a government vehicle outside of the District. Because of the stark similarities among this case and those of comparison employees, the charges against Employee seem arbitrary and the penalty falls outside of the scope of Agency's practice.

We agree with the AJ's assessment that Employee's penalty was too harsh and not in accordance with Agency's practice in similar situations. Although termination was within the range of penalty for the offense, we believe that in light of the mitigating factors and Agency's past practice, the sixty-day suspension is a more appropriate penalty. This suspension will send a clear signal to other Agency employees that driving a government vehicle outside of D.C. is a serious offense for which you will be penalized. Moreover, the sixty-day suspension more closely follows the other past penalties imposed on other employees for the same offense. Furthermore, Employee does not oppose the AJ's sixty-day modification penalty. Therefore, we uphold the AJ's decision.

ORDER

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

FOR THE BOARD:

Brian Lederer, Chair

Horace Kreitzman

Keith E. Washington

Barbara D. Morgan

The Initial Decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance date of this order. An appeal from a final decision of the Office of Employee Appeals may be taken to the Superior Court of the District of Columbia within 30 days after formal notice of the decision or order sought to be reviewed.