

THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

_____)	
In the Matter of:)	
)	
ANTHONY BOUGHKNIGHT)	OEA Matter No. 1601-0055-07
Employee)	
)	Date of Issuance: January 8, 2009
v.)	
)	Sheryl Sears, Esq.
)	Administrative Judge
D.C. FIRE AND EMERGENCY)	
MEDICAL SERVICES)	
Agency)	

Anthony Boughknight, Employee, *Pro Se*
Thelma Chichester-Brown, Esq., Agency Representative

INITIAL DECISION

INTRODUCTION AND UNDISPUTED FACTS

The undisputed facts of this matter are as follows: Anthony Boughknight (“Employee”) was a Paramedic, DS-0699-09, with the D.C. Fire and Emergency Medical Services (“EMS” or “Agency”). On July 10, 2006, Employee and his partner, Lamont Veney, a Firefighter EMT, DS-0081-01, were assigned to Medic 29, an emergency services vehicle. Mr. Veney was driving. Employee, who was the Ambulance Crewmember in Charge, was riding on the passenger side.

At approximately 2:06 p.m., Medic 29 was dispatched, by radio call, to 901 G Street, N.W. to attend to a man having multiple seizures. In accordance with Ambulance Bureau Protocols, Section A-15, “Adult Patient Transport Categorization,” calls are classified according to the severity of the medical condition reported. This call was a Priority Code I, the highest level of medically unstable patients.

Medic 29 was in upper N.W. Washington, D.C. when the call came in. According to Mr. Veney’s report, the vehicle was at 4811 McArthur Boulevard. However the agency’s locator system showed Medic 29 at 3800 Reservoir Road. Despite the difference, this is not a matter of dispute between the parties. According to a search of the online mapping device, “Mapquest.com,” conducted by Lieutenant Stephen V. Scelzo, a supervisor who reviewed the adverse action in the proposal stage, the unit could have been driven to the assigned destination in eleven to thirteen (11 – 13) minutes from either location. However, Mr. Veney started out driving in the wrong direction.

Employee, who had been completing paperwork, looked up and discovered that the unit was headed toward N.E. D.C. rather than N.W. He corrected Veney, who changed direction. Medic 29 arrived at 2:29 p.m., twenty-three (23) minutes after the dispatch.

Employee and Veney were both asked to present reports about the incident. Based upon their reports and other information about the events of the date in question, Agency officials initiated action against both of them. Several supervisors in the line of authority above Employee made input into the decision to take action against him. Lieutenant Scelzo presented a letter of endorsement in which he charged that Employee also violated Article XVII, Section 7b. It requires that, "in responding to . . . alarms . . . apparatus shall be driven over the shortest available routes." He also cited Article VII, Section 2.2 of the Order Book which prohibits any on-duty omission that interferes with the efficiency of governmental operations. Scelzo proposed an official reprimand as a penalty. Captain Patrick C. Smith endorsed Scelzo's proposal of an official reprimand. Jerome Stack, Battalion Chief, in his letter of endorsement, opined that "the crew of Medic 29 intentionally took an exaggerated route of travel with the hopes of being cancelled."

By letter dated November 7, 2006, Chief Stack notified Employee of a proposal to suspend him for fifteen (15) calendar days for "failure to respond to an emergency response in a timely manner." He charged Employee with violating Article XXIV, Section 8 of the D.C. Fire and EMS Department Rules and Regulations. It states, in relevant portion, "If unsure of the location of address of incident or unsure of the appropriate running route ACIC shall immediately request clarification from the OUC [Office of Unified Communications]."

On December 13, 2006, Gregory Blalock, Deputy Chief of Operations, notified Employee of Agency's final decision to suspend him for fourteen (14) calendar days (a one day reduction from the proposal). The suspension was effective from 7:00 on January 25, 2007, until 7:00 on February 8, 2007. Employee was prohibited from working overtime during the suspension.¹ Based upon the scheduling of their twelve hour work shifts, Employee's 14 calendar day suspension resulted in his loss of pay for eight (8) work days (ninety-six (96) hours).

Veney was also suspended. The notice issued to him did not list the number of calendar days for his suspension. However, Veney was suspended for three (3) work days (thirty-six (36) hours).

On February 23, 2007, Employee filed an appeal with the Office of Employee Appeals. The parties convened for a pre-hearing conference on November 7, 2007. At the pre-hearing, the parties agreed that there were no factual disputes about the incident that would require a hearing. On November 8, 2007, this Judge set a deadline for the parties' submission of briefs on questions regarding the penalty. Both parties presented position statements and requested a hearing on the penalty. A hearing on the penalty was convened on April 9, 2008. This decision is based upon the record of testimonial and

documentary evidence adduced at the hearing along with the written and oral legal arguments of the parties. The record is closed.

POSITIONS OF THE PARTIES

It is undisputed that Employee and his partner were late responding to the call because they started out in the wrong direction. The question presented by this appeal is whether Agency reasonably and lawfully suspended Employee for his role in that error. Agency contends that Employee, as the Ambulance Crewmember in Charge (ACIC) was responsible for overseeing the correct navigation of the vehicle. Agency further maintains that, due to his level of responsibility and his prior record of adverse action, the penalty imposed was reasonable.

Employee maintains that there is no official agency protocol for the ACIC as relevant to navigating the vehicle. Employee maintains that his responsibility was only greater as it applied to patient care and medical treatment and some administrative duties. Employee argues that he could not navigate the vehicle from the passenger seat and that Agency wrongly inferred that he and his partner sought to avoid taking the call by heading in the wrong direction. Employee challenges the penalty as unfair and disparate because his partner received a lesser penalty than he did.

JURISDICTION

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

ISSUES

- I. Whether the penalty imposed upon Employee was commensurate with the offense.
 - A. Whether Employee's violation was *de minimus*.
 - B. Whether the penalty imposed upon Employee was disparate from that given to his partner.
 - C. Whether Agency abused its discretion in selecting the penalty.

BURDEN OF PROOF

OEA Rule 629.3, 46 D.C. Reg. 9317 (1999) provides that “[f]or appeals filed on or after October 21, 1998, the agency shall have the burden of proof, except for issues of jurisdiction.” Accordingly, the agency has the burden of proof in this matter. Pursuant to OEA Rule 629.1, *id.*, the applicable standard of proof is a “preponderance of the evidence.” OEA Rule 629.1 defines a preponderance of the evidence 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.” It is undisputed that Employee committed the acts in question or that they constitute cause for adverse action. However, Agency must prove, by a preponderance of the evidence, that the fourteen (14) calendar day suspension was a reasonable penalty.

SUMMARY OF TESTIMONY, ANALYSIS AND CONCLUSIONS

Summary of Testimony of Agency’s Witnesses

Carmen Ealey-Tate, Management Liaison Officer

Ms. Ealey-Tate is a Human Resources Officer with a total of ten (10) years of experience. Agency introduced the position descriptions of Employee and his partner Mr. Veney, through the witness. Employee, a Paramedic, was appointed to his position on October 17, 1990. A Paramedic is trained for the single role of providing health support to citizens in need. Mr. Veney started as a Firefighter, EMT on July 23, 2006. A Firefighter, EMT primarily fights fires and is trained to provide basic health care.

Chief Kenneth Jackson, Deputy Fire Chief of the D.C. Fire and EMS Department

At the time of the hearing, Chief Jackson had served for two (2) years as an executive officer to the Fire Chief. As the labor liaison, he negotiates contracts and settled grievances for Firefighters (Local 36) and members of the Emergency Medical Services Department (Local 3721). He outlined the levels of authority among Firefighters as follows:

Fire Chief
/
Assistant Fire Chief
/
Deputy Fire Chief
/
Battalion Fire Chief
/
Captain
/
Lieutenant
/
Sergeant
/
Entry Level Firefighter

The endorsement process, prescribed by both collective bargaining agreements, requires that proposed adverse actions move up the line of authority until the Chief is reached.

At the time of the events that gave rise to this matter, Mr. Veney was a probationary Firefighter. He said that he believed that there is a written description for the functions of the position of Ambulance Crewmember in Charge held by Employee. However, none was presented.

Gregory Blalock, Deputy Chief Responsible for EMS Operations, D.C. Fire and EMS Department

As the third level in command, he is just below the Assistant Fire Chief. At the time of the hearing, he was one month shy of thirty years of service with Agency. Deputy Chief Blalock made the final decision on the adverse action.

He described the three basic certifications within the District of Columbia EMS personnel. An Emergency Medical Technician (EMT) is responsible for providing basic first aid. That includes the application of basic techniques, delivery of oxygen, CPR, driving an ambulance and assisting the Paramedic as necessary. The EMT Intermediate has a few more advanced skills than the basic EMT. The Paramedic is at the top tier of providers and can deliver a full set of advanced life support skills. Those include drug administration, advanced airway techniques and taking orders from physicians. Paramedics have a broader and higher knowledge of medical terminology, pharmacology and cardiology. Mr. Boughknight is a Paramedic provider. As such, he is responsible for all aspects of patient care, the operation of the vehicle and decision-making when giving treatment to a patient. Employee has a higher certification level than Mr. Veney.

Chief Blalock reviewed the printout of radio transmissions and recounted the following: On July 10, there was a call for help from the Martin Luther King, Jr. Library at 901 G Street, N.W., Washington, D.C. Calls are dispatched at various levels including “Alpha, Bravo, Charlie and Delta.” “Delta” is the most serious level of call. The complaint was continuous and multiple seizures. When a patient is having seizures, they are not breathing. That is why it is a critical response call.

Engine 2, the closest unit with an EMT who could give oxygen to the patient, was dispatched at 2:06 pm. Medic 29, which is equipped to provide advanced life support, was also dispatched at 2:06 p.m. Ambulance 33 was dispatched as well. At 2:10, Medic 29 indicated that the unit was *en route*. However, according to the “I-tracker” with which every unit is equipped, Medic 29 first headed uptown rather than toward downtown. Engine 2 was the first responder at 2:11 p.m.

The Fire and Emergency Medical Services order book sets out administrative and operations rules and regulations for all employees. Article 24, at Section 2, Paragraph 4 describes the chain of command on board the vehicle as follows “[T]he EMS provider with the highest certification” (in this case Employee) “will be designated as the ACIC [Ambulance Crewmember in Charge]. . .” “When both persons have equal certification, the member possessing a greatest seniority at that time of certification will be designated the ACIC.” Article 17, Section (b), requires that, “in responding to alarms” responding vehicles “shall be driven over the shortest available route to the emergency.”

After reviewing the documents generated by the response to the call and the endorsements from the officials from those in the chain of command below him, he decided to reduce Employee's proposed suspension from 15 to 14 days. He considered Employee's failure to navigate the vehicle in the right direction to be a serious transgression. He did not, however, give any credit to that part of Jerome Stack's endorsement that conjectured that Employee was trying, by his actions, to avoid a call. Deputy Chief Blalock said, "Every dispatch, every call regardless of how it is coded and taken by the call taker is an emergency response. And, again, the emergency response, it is our responsibility to take the shortest and quickest route to that emergency safely." (*Transcript (Tr.)*, Page 78, Lines 17 – 20). The patient, due to his stopped breathing during the seizures, could have had a cardiac arrest. Although he acknowledged that the ACIC cannot control all of the actions of a driver (such as running a red light), ACIC can control the direction the vehicle goes by telling the driver to change his course or ordering him to leave the driver's seat so the ACIC can drive.

Employee queried the witness about how he should know which route to take. It is undisputed that while firetruck drivers have a "running route" (a specified route to take to a destination based upon their need to use certain apparatus), ambulance drivers do not. Blalock suggested such alternatives as reviewing a map of the city or making a call to communications.

Blalock also considered that, in an earlier incident, Employee was suspended for failure to follow protocols. He said that "[v]iolations of protocols, not traveling the quickest route . . . impacts Agency's ability to complete its mission and erodes public confidence." (*Tr.*, Page 78, Lines 2-6). Blalock conceded that he did not take Employee's justification for the events into account at all. While acknowledging that the paperwork requires a great deal of precision, he said "[t]here's ample time to complete paperwork especially after the patient is presented to the hospital. It is very critical to document the patient care delivered to the patient prior to the hospital, signing the document that's been presented to that hospital. That is medically legally required." (*Tr.*, Page 111, Lines 13 – 17). On a scale of 1 – 10, he deemed Employee's behavior to be an 8 in seriousness.

Summary of Testimony of Employee's Witnesses

Calvin Haupt, Emergency Technician/Paramedic

Mr. Haupt testified about his experience of 27 years with Agency and, in particular, about the disciplinary process. His familiarity is borne of his work as a former union Vice-President for members of Emergency Medical Services and current Vice President of Administrative Services. During his tenure as a union official, he has represented about two-hundred (200) employees in adverse action appeals.

According to Haupt, the position of ACIC was developed in about the late 60's or early 70s. There is no position description for the designation. He expressed the opinion

that the driver is responsible for navigating the vehicle properly to the site and the ACIC is responsible for leading the team when medical services are provided. However, he acknowledged that they both have responsibility for ensuring that the vehicle responds in a timely manner. He said that the ACIC is responsible for giving instructions to the driver and querying him if he does not seem to be proceeding on the most efficient route. While there are distractions for the non-driver ACIC, e.g. transmissions from the radio or the mobile data screen, the ACIC still has a “proportional responsibility” *Tr., Page 138, Lines 11 – 12*) for navigating the vehicle. It depends on what else is going on and what else the ACIC has to figure out in order to provide services.

As a union official, he has observed that penalties depend on the applicable guidelines and may vary based upon who is making the charge. He noted that is unlawful for an employer to impose different penalties upon two similarly situated employees when there is discrimination involved.

Anthony Boughknight, Employee

Employee looked up about five (5) minutes into the call and saw that Veney was driving the wrong way. He explained, “You have other responsibilities in your mind and in the paperwork and that five minutes is not an unusual amount of time to prepare for a call that you’re on.” (*Tr., Page 141, Lines 10-12*). Although Chief Blalock indicated that the ACIC can complete paperwork back at the firehouse, sometimes you have 10 or 11 calls in memory. So it’s best to make notes when you can. Moreover, the majority of responsibility for navigating the vehicle is on the driver.

In his opinion, the penalty was unfair. Chief Stack did not conduct a thorough investigation because he did not interview Employee or Mr. Veney. Blalock did not consider his explanation for what happened. Blalock also wrongly treated this as a second offense because the earlier matter is on appeal before the Superior Court. What happened was an accident and amounted to a *de minimus* violation.

Analysis and Conclusions

Employee was the Ambulance Crewmember in Charge on the date in question. Under his supervision, Veney headed Medic 29 in the wrong direction to deliver services to a patient categorized at the highest level of a medical emergency. While Employee did not direct him to do so, he did not stop him in time to avoid delay of their arrival. There is nothing in the evidence that indicates that Employee was deliberately trying to avoid the call or that he intended to be late. He has explained that he was doing required paperwork. Other officials acknowledge that this was his responsibility.

While Employee was performing legitimate duties, the choice he made (concentrating on the paperwork to the exclusion of navigation), was, in part, the reason that Medic 29 was delayed. There is simply no logic by which it was reasonable for Employee to prioritize completing the paperwork over navigating the unit to a patient in distress. Employee’s decision put a patient’s life at risk. D.C. Office of Personnel

(DCOP) Rule 1603.5, 47 D.C. Reg. 7094, provides as follows, “No employee may be subject to a corrective or adverse action under this chapter for a *de minimus* violation of the cause standard contained in this section. Black’s Law Dictionary defines a *de minimus* matter as a small or as a trifling or small matter. This was, however, no minor matter.

Employee has argued that, as the ACIC, he had no greater responsibility for the navigation of the vehicle than his partner. He has even argued that, as the non-driver, he had less. It is true that Employee was not at the wheel and can only be partially responsible for what the driver did. But Employee is not excused from responsibility for navigation just because he was not driving. Employee was bound, by common sense and Agency directive, to take the most direct route to answer the call. By failure of his attention, he did not.

Employee protests that it was wrong for Agency to take his prior history of an adverse action into account. While the earlier suspension may have been on appeal at the time, it had not been reversed. Thus, it was legitimate for Agency to refer to it as a part of his employment record. And because of their differing disciplinary histories, Employee and his partner, Veney, were not similarly situated. Veney was a probationary employee whose prior disciplinary record included an official reprimand. The suspension imposed upon Veney, was a progressive penalty from his earlier one. Employee was previously suspended for nine (9) calendar days for the same offense, failure to follow Agency protocol. This suspension of fourteen (14) days was a progressive one for Employee. These employees were not similarly situated.

The legal standard for the appropriateness of a penalty was established by the Merit Systems Protection Board in *Douglas v. Veterans Administration*, 5 MSPB 313 (1981). In *Douglas* the MSPB set forth a list of factors to be considered when assessing the appropriateness of a penalty. *Douglas*, at 331-332. The reasoning and factors established in *Douglas* have been adopted by the District of Columbia Court of Appeals in *Stokes v. District of Columbia*, 502 A.2d 1006 (D.C. 1985). The Court in *Stokes* stated:

Review of an Agency imposed penalty is to assure that the Agency has considered the relevant factors and has acted reasonably. Only if the Agency failed to weigh the relevant factors or the Agency’s judgment clearly exceeded the limits of reasonableness, is it appropriate . . . to specify how the Agency’s penalty should be amended. *Stokes*, at 1010.

The role of this Office, when reviewing the penalty imposed by an agency is to ensure that “managerial authority has been legitimately invoked and properly exercised.” See *Stokes v. District of Columbia*, 502 A.2d 1006, 1010 (DC 1985), and *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915 (1985). Only in the case of an abuse of that discretion would modification or reversal of an agency imposed penalty be warranted. The penalty must

be based upon a consideration of relevant factors. *See Employee v. Agency*, OEA Matter No. 1601-0012-82, 30 D.C. Reg. 352 (1983). This Office will leave an 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." *Employee v. Agency*, OEA Matter No. 1601-0158-81, *Opinion and Order on Petition for Review*, 32 D.C. Reg. 2915, 2916 (1985).

Agency considered every relevant factor in determining the penalty. The decision to impose a fourteen (14) calendar day suspension upon Employee was neither arbitrary nor capricious and therefore, will not be disturbed.

ORDER

It is hereby ORDERED that Employee's suspension is UPHELD.

FOR THE OFFICE:

SHERYL SEARS, ESQ.
ADMINISTRATIVE JUDGE