THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	
JAMES FREMEAU Employee	OEA Matter No. 1601-0123-90
v.	Date of Issuance: September 28, 2001
D.C. FIRE DEPARTMENT Agency	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Agency removed Employee from the position of call-taker based on Employee's response to an emergency call received on the evening of April 12, 1990. On that date Employee received a call from a person requesting that an ambulance be sent to assist a man who was down. After properly entering the call into the system and assigning it a Code 3

designation, Employee told the dispatcher that there was a "detox candidate" in need of assistance. The code numbers assigned to a call, ranging from Code 1 to Code 4, indicate the severity of the call. A Code 3 designation, which is not as serious as Codes 1 and 2, means that a person is down. The dispatcher passed this information on to the emergency medical personnel also stating that Employee had said the ambulance was needed for a possible detox candidate. Employee also notified the Metropolitan Police Department that there was a detox candidate in need of assistance. In fact, unbeknownst to Employee, the ambulance was needed for a man who had gone into cardiac arrest and, thus, needed immediate attention. However, because Employee reported a "detox candidate" when the call was received, the ambulance did not arrive on the scene until almost 20 minutes after Employee received the call.

Based on this incident, Agency charged Employee with "Inefficiency: Negligent or careless work performance" and removed him effective June 29, 1990. In its advance notice of proposal to remove Employee, Agency's specific charge was as follows:

> [O]n April 12, 1990, you received a request for an ambulance from a concerned citizen who had observed a man in distress. The caller never reported any symptoms of intoxication, however, you assumed that the man was inebriated. In fact, based on that assumption, your first request was for the MPD detox unit rather than medical units. You sarcastically and unprofessionally requested from MPD, "The same thing we picked up at 1024 9th Street, NW . . . detox. She's waiting there with his bags." In addition, you did not expeditiously queue this call for proper immediate attention.
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> Your presumptuous and careless attitude resulted in an incorrect assessment of the situation. In reality, this sixty-eight year old

> man was suffering from, and indeed, did die from cardiac arrest. Your lackadaisical manner influenced the entire operation; delaying expedient patient care. Lastly, your assumption in this incident reflects an unprofessional disregard and a total lack of compassion for the citizens of this metropolitan vicinity.

In the Initial Decision issued on April 29, 1998, the Administrative Judge sustained Agency's removal action. After thoroughly reviewing the record made in this appeal including the testimony of all of the witnesses, the Administrative Judge found that Employee had properly queued the call and had requested a medical unit before requesting a detox unit.[1] Notwithstanding these findings, the Administrative Judge held that Employee's comment to the Metropolitan Police Department dispatcher – "the same thing we picked up at 1024 9th Street, NW . . . detox. She's waiting there with his bags." – was sarcastic and inappropriate and caused a delay in medical attention. Moreover the Administrative Judge stated that instead of Employee "indicating that the exact nature of the situation was not known," Employee made this misleading comment and classified "the emergency situation as a detox problem." *Initial Decision* at 8. Further, relying on the testimony of one of Agency's Assistant Fire Chiefs, a

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[1] Employee implies in his Petition for Review that the Administrative Judge who decided this appeal was unfamiliar with the record because she was not the Administrative Judge who had conducted the evidentiary hearing. We believe this point is irrelevant in this appeal. In *Ernestine Bannister v. Metropolitan Police Dept*, OEA Matter No. 1601-0008-95, *Opinion and Order on Petition for Review* (Sept. 15, 1999), 47 D.C. Reg. 1799, we addressed the issue of whether an Administrative Judge was under a duty to hold an evidentiary hearing when the record before him or her contained the entire arguments and submissions of the parties. We held that "[t]he fact that the Administrative Judge did not hold an evidentiary hearing in this case, particularly when he had before him all of the evidence Employee claims would have excused her actions, is not grounds for granting Employee's Petition for Review." *Id.* at 1800. Relying on this holding, we believe that the Administrative Judge did not err by not conducting an additional evidentiary hearing in this appeal.

Deputy Fire Chief, and the Communications Operator to whom Employee dispatched the call, the Administrative Judge found that when an ambulance is said to be needed for a "detox candidate," the entire emergency response system is slower. Therefore, Agency's removal of Employee was upheld.

Employee asserts in his Petition for Review that the Administrative Judge lacked substantial evidence to uphold Agency's actions. Specifically, Employee argues that there was not substantial evidence in the record for the Administrative Judge to conclude that Employee's "presumptuous and careless attitude resulted in an incorrect assessment of the situation"; that "Employee's lackadaisical manner influenced the entire operation"; that Employee's "assumption [that the patient was a detox candidate] reflect[ed] an unprofessional disregard and a total lack of compassion for the citizens of this metropolitan area"; and that removal was an appropriate penalty.

Substantial evidence has been defined as "such relevant evidence as a reasonable mind might accept as adequate to accept a conclusion." *Hutchinson v. District of Columbia Office of Employee Appeals*, 710 A.2d 227 (D.C. 1998). "If the administrative findings are supported by substantial evidence, we must accept them even if there is substantial evidence in the record to support contrary findings." *Metro. Police Dep't v. Baker*, 564 A.2d 1155, 1159 (D.C. 1989). Therefore the mere fact that there may be substantial evidence to support a contrary conclusion does not establish that the Administrative Judge's findings of fact were inadequate or erroneous.

The record in this case contains substantial evidence to support the Administrative Judge's findings and conclusions. All of Agency's witnesses testified that when an emergency is said to be for a "detox candidate", the entire emergency response time is slowed. There is no dispute that Employee did not have enough information to classify the call he received as a detox situation; however, he took it upon himself to make that assumption. Further, Employee acknowledged that when he dispatched the call, his tone was sarcastic. As the Administrative Judge found, "[a] sarcastic tone is never appropriate when dealing with emergency situations." *Initial Decision* at 8. Moreover, one of Employee's own witnesses testified that when a call-taker is joking while dispatching a call, such behavior conveys the message that the matter is not as serious as other matters. Lastly, the Administrative Judge found no mitigating circumstances to warrant a lesser penalty. Based on the foregoing, we believe there is substantial evidence in the record to uphold the Initial Decision. Therefore, we deny Employee's Petition for Review.

ORDER

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

FOR THE BOARD:

Keith E. Washington, Chair

Gwendolyn Hemphill

Dissenting Opinion Attached
Michael Wolf, Esq.

The initial decision in this matter shall become a final decision of the Office of Employee Appeals 5 days after the issuance 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.

I respectfully dissent from the majority opinion in this case.

Procedural Background

Employee was employed as a call-taker in the Communication Division of The Fire Department. He responded to in-coming 911 calls for medical services, assigned the calls a priority code, and electronically transmitted the information to a Fire Department dispatcher. On June 12, 1990, the Fire Department served upon the Grievant a proposed removal based upon "Inefficiency." The Notice accused him of "negligent or careless work performance:"

> [O]n April 12, 1990, you received a request for an ambulance from a concerned citizen who had observed a man in distress. The caller never reported any symptoms of intoxication, however, you assumed that the man was inebriated. In fact, based on that assumption, your first request was for the MPD detox unit rather than medical units. You sarcastically and unprofessionally requested from MPD, "The same thing we picked up at 1024 9th Street, NW ... detox. She's waiting there with his bags." In addition, you did not expeditiously queue this call for proper immediate attention.
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> Your presumptuous and careless attitude resulted in an incorrect assessment of the situation. In reality, this sixty eight year-old man was suffering from, and indeed, did die from cardiac arrest. Your lackadaisical manner influenced the entire operation; delaying expedient patient care. Lastly, your assumption in this incident reflects an unprofessional disregard and a total lack of compassion for the citizens of this metropolitan vicinity.

After the Fire Department affirmed the dismissal, Employee timely appealed to the Office of Employee Appeals (OEA) on July 13, 1990. Hearing Examiner George Williams conducted a hearing on March 27, 1991. However, Hearing Examiner Williams left the employ of OEA prior to issuing a decision. The case was then reassigned to another hearing examiner, who also departed OEA without writing a decision. The case then languished for several years until it finally made its way to

another Administrative Judge. That Administrative Judge did not conduct a new evidentiary hearing, but nevertheless issued a decision on April 29, 1998 based on the written record.

Factual Background

On April 12, 1990, the Fire Department received an emergency call relating to someone at 1024 9th Street, N.W. who was apparently in need of detoxification assistance. Approximately thirty minutes later, Employee received a distress call relating to a man at a different location (31st Place and Ft. Lincoln Drive, N.E.). Employee queued the call and transmitted it to a Fire Department dispatcher with a "Code 3," which signifies "a person down." The Employee queued this call at 9:24:21. The ambulance response time for a Code 3 is supposed to be no more than eight minutes.

After entering this information into the Fire Department system, Employee contacted the police dispatcher and stated that the person at 31st and Ft. Lincoln was a detox candidate. Although contacting the Police Department in detox situations is common practice, the communication in this case was inappropriate because there was no information that the person in need of help was inebriated. In fact, as indicated above, the person at 31st and Ft. Lincoln was in cardiac arrest and ultimately died.

The Fire Department dispatcher who received Employee's Code 3, sent the following dispatch message to the ambulance crew:

> OK 19. Its a sick case on the corner of 31st Place and Ft. Lincoln Dr., N.E. -- 31st Place and Ft. Lincoln Dr., N.E. Call taker stated it might be a detox candidate. We are going to go ahead and notify the police with you. Go ahead and respond for now, 31st Place and Ft. Lincoln Dr. N.E, for sickness. Time out: 9:25/Run 60893-60893 and do you copy that the police are going with you.

Ambulance 19 responded: "Ah, ah, ah 31st Pl. and Ft. Lincoln Dr., N.E. for the sicky."

While conveying the above message, the Fire Department dispatcher erroneously changed the call from a Code 3 to a Code 4 (meaning the person is sick). A Code 4 is a lower priority than a Code 3 and therefore requires a slower ambulance response time (no more than 14 minutes, instead of the 8 minutes required for a Code 3). There is no evidence that the Employee was in any way responsible for the mistaken code transmitted by the dispatcher. As it turned out, the ambulance crew did not arrive at the scene until 9:42:36, approximately 18 minutes after Employee queued the call and approximately 17 minutes after the Fire Department dispatcher contacted the ambulance.[1]

After the person died, the man's widow sent a complaint letter stating the following:

> On the day of his death I feel it took the ambulance too long to arrive on the scene. When they arrived they made my husband walk to the ambulance and then they messed around 7 to 10 minutes examining him and I let them know he had had a heart attack.
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> The ambulance paramedics did not perform any type of emergency service on him; only giving him oxygen.
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> I feel in my heart that my husband would have lived a little longer if the paramedics hadn't taken to long. I'm a very upset and angry widow. [Employee Ex. 6.]

After investigation, the Fire Department determined that the emergency medical technician on Ambulance 19 had deviated from standard procedures by making the patient step into the ambulance and by having a 13 minute delay at the scene. The medical technician was given a proposed suspension of 15 days, which was later reduced

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[1] Employee's Exhibit 4 indicates that the response time was actually 19.6 minutes.

to five days. Employee Ex. 9, 10. After a separate investigation of Employee in the instant case, he was given a removal.

Discussion

1. The Administrative Judge Ignored Board and Court of Appeals Precedent Requiring a New Evidentiary Hearing

The Administrative Judge issued her decision without an evidentiary hearing. Instead, she relied solely on the written record created by a prior hearing examiner who had never issued any findings or conclusions. When an Administrative Judge relies on a witness' prior testimony, rather than in-court testimony, the Judge is relying on hearsay. Hutchinson v. District of Columbia, 710 A.2d 227 (D.C. 1998). Of course, hearsay is admissible in administrative proceedings and may even be used to make credibility determinations. Id. However, the use of hearsay in this Board's proceedings is not without limit. In Wisconsin Ave. Nursing Home v. District of Columbia Comm'n on Human Rights, 527 A.2d 282, 288 (D.C. 1987), the Court of Appeals stated the following:

> Among the factors to consider in evaluating the reliability of hearsay evidence are whether the declarant is biased, whether the testimony is corroborated, whether the hearsay statement is contradicted by direct testimony, whether the declarant is available to testify and be cross-examined, and whether the hearsay statements were signed and sworn.

In the instant case, it was impossible for the Administrative Judge to test credibility by examining the demeanor of witnesses. The reason is obvious. All of the evidence in this case was hearsay to the deciding Administrative Judge. While it is well-established that administrative tribunals, including this one, are permitted to accept and consider hearsay evidence, when the only evidence considered is hearsay, the analysis required by Wisconsin Ave. cannot be carried out. I realize that the hearsay in this case

is somewhat different than run-of-the-mill hearsay, since the testimony in issue was taken under oath and was subject to cross-examination in the original proceeding. However, when credibility is central to a decision, it violates due process to rest a decision solely on hearsay, even if it is a "higher class" of hearsay.

This defect in the decision is magnified by the Administrative Judge's failure to address one of the other critical factors identified by the D.C. Court of Appeals in deciding whether it is appropriate to rely on hearsay evidence:

> Hearsay in the form of prior testimony may be admissible in judicial proceedings if the witness is unavailable to testify at the pending proceeding. We assume, without deciding, that unavailability is required for the admission of prior testimony in administrative proceedings.

Hutchinson, 710 A.2d at _____ (citations omitted). See also Wisconsin Ave., 527 A.2d at 288 ("Among the factors to consider in evaluating the reliability of hearsay evidence are whether ... the declarant is available to testify and be cross-examined.")

In Hutchinson, Deputy Fire Chief Matthews (who also testified in the instant case) gave testimony in a prior proceeding regarding Hutchinson's removal. Counsel for the Fire Department represented to the Administrative judge that Matthews was now "unavailable" to testify because of illness. The Court of Appeals held that this representation was sufficient to permit the administrative judge to accept Matthews' hearsay testimony. It came to this conclusion, however, based on the fact that some effort was made to establish whether the witness was unavailable. In the instant case, the Administrative Judge made no effort to determine the availability or unavailability of any of the witnesses. There is no indication that the critical witnesses, especially those who gave conflicting testimony, were unable to provide testimony before the deciding

Administrative Judge. Absent a showing of unavailability in this case, it was error for the Administrative Judge to rely solely upon the prior testimony.

Finally, the Administrative Judge disregarded this Board's own precedent regarding the parties' rights to an evidentiary hearing. In Pinkard v. Metropolitan Police Dep't, OEA Docket No. 1601-0155-87 (1993), this Board held that an Administrative Judge has discretion whether to conduct an evidentiary hearing, but that "[i]f the demeanor of the witness is crucial to making a credibility determination, the A.J. should convene a hearing in order to fully develop the record." Slip Op. at 7.[2]

This rule is, in turn, consistent with the D.C. Court of Appeals' holding in Stevens Chevrolet, Inc. v. Com'n on Human Rights, 498 A.2d 546 (D.C. 1985). In Stevens Chevrolet, a hearing examiner for the Commission on Human Rights conducted an evidentiary hearing, but retired without issuing a decision. The Commission endeavored to issue its own decision without a new hearing, but the complainant objected. After much delay and procedural wrangling, the Commission agreed to hold a limited hearing at which two witnesses would be called and cross-examined; the Commission explicitly stated that this would not be a de novo hearing. The Commission thereupon issued a new decision, over complainant's objection. The Court of Appeals concluded that the failure to conduct a de novo hearing was reversible error, citing the federal Administrative Procedure Act for guidance:

> Under the APA, a hearing examiner who has retired before making a recommended decision is deemed to have become "unavailable," as that term is

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[2] After the remand to the Administrative Judge, this Board affirmed the Administrative Judge's decision. OEA No. 1601-0155-87R93 (1998). That decision, in turn, was affirmed by the Superior Court of the District of Columbia. D.C. Metropolitan Police Department v. Elton L. Pinkard, Case No. 98 M.P.A. 30 (Aug. 6, 1999). An appeal is currently pending before the D.C. Court of Appeals.

> used in 5 U.S.C. §554(d) (1982).... When the examiner has become unavailable, courts have uniformly required a hearing *de novo* whenever the agency's decision depends to any extent on the credibility of witnesses.

498 A.2d at 549. Extending this rule to the regulations governing the Commission on Human Rights, the Court concluded that the Commission must

> hold a new hearing whenever a hearing examiner becomes unavailable without first reporting his or her initial decision back to the agency, unless the agency can demonstrate that the credibility of witnesses plays no part in the agency's decision. The burden of persuading a reviewing court that credibility is not a factor shall remain with the agency at all times. [Id. at 550.]

This Board in Pinkard adopted essentially the same rule for OEA proceedings, yet neither the Administrative Judge nor my colleagues on this Board have complied with the requirements of Pinkard or Stevens Chevrolet.

As in Stevens Chevrolet, this is a case in which a decision cannot be rendered without making credibility determinations. There are numerous contradictions in this record that the Administrative Judge never addressed and could not have resolved without holding an evidentiary hearing. The following are only a few of the contradictions that the decision-maker could not resolve without personally assessing the witnesses' credibility.

a. Employee and the dispatcher directly contradicted each other on the subject of communications between the two men regarding the possible inebriated state of the person in distress. Employee claims that he had no conversation with the dispatcher regarding the person at 31st Place and Ft. Lincoln. The dispatcher asserted the exact opposite, asserting that his knowledge of the person's detox condition was derived from statements made to him by Employee. Employee argues that the dispatcher confused the person at 31st and Ft. Lincoln with the earlier call involving 1024 9th Street.

b. Assistant Chief Kilby wrote a memorandum to Fire Chief Alfred recommending Employee's removal from his job. In that memorandum, Kilby stated that Employee called "MPD instead of immediately placing the call in que [sic] for ambulance response." (Emphasis in original.) That allegation was then incorporated into the advance notice of proposed removal. In his testimony before the original hearing examiner Kilby admitted that this finding was incorrect. Tr. 36. He conceded that Employee had indeed contacted the Fire Department dispatcher prior to placing his call to the Police Department. Moreover, Kilby admitted that the charge that Employee had improperly queued the call was incorrect; he conceded that Employee appropriately queued the call as a Code 3. Tr. 33. Deputy Chief Matthews similarly admitted that his notice of removal was flawed in this respect. Tr. 132-33. Since Kilby's and Matthews' testimony was central to the Agency's claim that the Employee was "inefficient" in carrying out his duties, the belated admission by both men that they had misunderstood critical facts puts into question the credibility and weight to be accorded their other testimony, especially their assertion that Employee's conduct caused the delayed ambulance response to 31st and Ft. Lincoln.

c. Kilby testified that Employee's reference to a detox candidate to the Police Department would have slowed down the entire ambulance service process. Employee Exhibit 1 is a computer printout showing the response times for this particular incident. It shows the following sequence of events:

Call received	9:23:?3
Call queued by Employee	9:24:21
Call dispatched	9:25:49
Ambulance responded	9:26:16
Ambulance arrived	9:42:36
Arrival at hospital	10:?8:25

This document indicates that Employee promptly transmitted the distress call to the Fire Department dispatcher and that the dispatcher promptly transmitted a message to the ambulance. This document would suggest that Employee acted efficiently, rather than inefficiently, at least insofar as entering the Code 3 into the Fire Department's dispatch system.

When questioned about this particular document, Kilby testified as follows:

Q: Now do you see what I am talking about?
A: Again, yes, this is the document that's used at communications.
Q: Okay.
A: I am not that familiar with it, and I would be guessing or assuming.
Q: So in other words this document played no role in your decision.
A: No real role in my decision.
Q: Well, what role did it play?
A: It did not play a role.
Q: Did you ask for any explanation of that document?
A: No, I did not.
Q: Did you wonder why they sent it to you?
A: It was part of the package.

In other words, an Agency document that showed the precise time when everyone took action was neither read nor understood by Kilby. Again, this makes his general conclusions about Employee's inefficiency suspect. The Administrative Judge made no mention of this problem in her decision.

d. The Fire Department dispatcher (Jeffrey Williams) testified that Employee's reference to a "detox candidate" would imply a lesser priority, giving support to the agency's argument that Employee adversely affected the response time. However, neither Kilby nor the Administrative Judge addressed the fact that the dispatcher admitted in his cross-examination that he had incorrectly transmitted the distress call to the ambulance as a Code 4, which required a much slower response time than the Code 3 given to the case

by Employee. This mistake on the part of the Fire Department dispatcher is as likely to have had a direct and immediate adverse impact on the response time as the off-hand comment made by Employee to the Police Department. It is equally obvious that this mistake would have given the dispatcher an incentive to deflect blame away from himself and to Employee. In other words, it was necessary to determine whether the dispatcher's self interest put his credibility into question.

The Administrative Judge did not address any of the foregoing discrepancies. She made only general findings that the Agency had proved its case "by a preponderance of the evidence." It was not only error to ignore these contradictions in the Fire Department's case, but, under the previously discussed case law, she was required to assess credibility in an evidentiary hearing that she actually attended. The fact that a case is embarrassingly old on the OEA docket is not a sufficient reason to engage in procedural short cuts.

The only explanation given by the Administrative Judge for not holding a new hearing was the observation that a hearing was unnecessary because Employee had admitted that he was "sarcastic" in his telephone conversation with the Police Department dispatcher. That observation by the Administrative Judge is a non sequitur. There is virtually no evidence in this record that Employee's sarcasm to the Police Department had any impact on the response time of the ambulance sent out by the Fire Department dispatcher. What little testimony there was on this subject was uttered by witnesses whose credibility, as explained above, had to be fairly and accurately assessed. Also, the Fire Department dispatcher did not testify that he believed Employee was being sarcastic when he referred to the man at 31st and Ft. Lincoln. If he had believed so, he would not

have informed the ambulance that the man in distress was a possible detox candidate. Obviously, the Fire Department dispatcher accepted Employee's comments at face value. In short, Employee's "sarcasm" had no apparent impact on the Fire Department's operations, since there is no evidence that his comments were deemed to be sarcastic by anyone in the Fire Department at the time they were made.

I recognize that the question whether Employee was being sarcastic does not undermine the more important complaint that his reference to a detox candidate at 31st and Ft. Lincoln was erroneous. There does not seem to be any dispute that the Employee was in error. However, the removal was not premised merely on this error; the Fire Department relied on allegations that Employee deviated from other protocols that arguably slowed down the ambulance response time. These latter allegations were later admitted by Kilby and Matthews to be false. For this reason, even if Employee was sarcastic, his tone could not be an excuse by the Administrative Judge to avoid resolving the many other inconsistencies and contradictions found in the testimony of the Fire Department's witnesses.

2. The Majority Has Applied an Erroneous Standard of Review

Deference is normally given to a trial judge's findings of fact when they are based on demeanor and other credibility factors. In that event, this Board uses a substantial evidence standard of review. However, when the Administrative Judge's decision is based solely on a written record and not on in-court credibility assessments, the substantial evidence standard is inappropriate. Therefore, even if this case were not remanded to the Administrative Judge for an evidentiary hearing, the majority's opinion would be in error because of its failure to undertake a de novo review of the record.

If the majority had undertaken a review of the entire record, I believe it would have concluded that the Fire Department failed to prove its case. Its sole charge against Employee is inefficiency, which is in turn premised on the notion that he improperly queued the distress call and that he telephoned the police dispatcher prior to telephoning the Fire Department dispatcher. As indicated above, Kilby and Matthews admitted that these two critical factual allegations against the Grievant were completely false. Even the Administrative Judge found them to be unsupported. What we are left with is an employee removed from his job because he made an erroneous and "sarcastic" telephone call to the Police Department. That sarcasm was directed at another agency and had no provable impact on the operations of the Fire Department. The removal decision was additionally made in complete disregard of documentary evidence tending to show that Employee acted promptly in handling this distress call, in complete disregard of the fact that the dispatcher assigned the wrong code to this distress call, and in complete disregard of the fact that the ambulance crew did not meet the time deadline for either a Code 3 or Code 4. In sum, even if a remand were not mandated, a de novo review should lead to the conclusion that the Fire Department's removal decision in this case was so thoroughly flawed that it cannot be affirmed. The level of appropriate discipline would then have to be determined by a Douglas analysis, as explained below.

3. The Majority and the Administrative Judge Erred by Not Undertaking a Proper Douglas Analysis

Although this Board is not bound by the decision in Douglas v. Veterans Administration, 5 MSPR 280 (1981), this Board has consistently held that agencies and/or this Board should utilize the Douglas factors in deciding the appropriateness of a penalty. See Stokes v. District of Columbia, 502 A.2d 1006 (D.C. 1985). When an

agency fails to undertake a Douglas analysis, then either the Administrative Judge or this Board must do so. See Stevens v. Metropolitan Police Department, Case No. 92-CV-1269 (D.C. 1997).

In the instant case, the Fire Department did not undertake a Douglas analysis. Such analysis is especially important when fewer than all of the charges or allegations against an employee have been proved. Even assuming the Administrative Judge's decision was appropriately premised on the written record, she concluded that several of the most critical factual allegations against Employee were not proved. The most important of the charges -- that Employee queued the call improperly and not in a timely fashion -- were found to be false. Yet, there is insufficient proof that the Fire Department would have imposed removal if Employee's sole transgression had been an erroneous and sarcastic communication to the Police Department that was repeated by the Fire Department dispatcher. In this circumstance, the issue of an appropriate penalty should have either been remanded to the Fire Department or the Administrative Judge should have undertaken such analysis. Compare France v. District of Columbia Gen. Hosp., OEA No. 1601-0282-92 (1997)(remand to agency for Douglas analysis) with Stevens, supra (agency's failure to undertake Douglas analysis can be cured by either the Administrative Judge or this Board). At the very least, this Board must supply the missing Douglas analysis. Stevens, supra.

The Administrative Judge stated that removal was within the range of approved penalties for a first offense of inefficiency. However, given the finding that Employee queued the call timely and appropriately as a Code 3, it is difficult to find any evidence of "inefficiency." More importantly, the Administrative Judge's observation that removal

fell within the acceptable range of penalties was not premised on a consideration of each of the twelve Douglas factors that would be relevant in this case. See Brown v. Metropolitan Police Department, OEA No. 1601-0001-88 (1994).

In Stevens, the Court of Appeals concluded that a defect in an agency's failure to consider Douglas factors can be corrected by either the Administrative Judge or by the full Board. In that case, the Court noted that the "final OEA decision listed all of the Douglas factors, discussed those factors that the examiner had not considered upon the records, noted that some of these factors were not relevant, and concluded '[u]pon consideration of all the circumstances in this case, we find that the mitigating factors raised by Employee simply do not outweigh the seriousness of the sustained charges....'" Slip Op. at 4. The fact that this Board had undertaken a detailed analysis of the Douglas factors was critical to the court's conclusion in Stevens that the penalty of removal could be imposed, even though the hearing examiner found that fewer than all of the charges had been proved. The instant case provides a stark contrast to the circumstances in Stevens. Here, neither the Administrative Judge nor the majority has analyzed the facts of this case in light of each of the relevant Douglas factors.

Some of the relevant Douglas factors that neither the Administrative Judge nor this Board addressed were: the Employee's past disciplinary record, the Employee's past work record, consistency of the penalty with those imposed upon other employees for the same or similar offenses, and potential for the Employee's rehabilitation. Considering that no one else involved in this incident was removed, notwithstanding mistakes made by the dispatcher and notwithstanding the delayed response time by the ambulance, it was incumbent upon the Administrative Judge or this Board to at least consider whether

Employee in this case was the victim of disparate treatment. The person at 31st and Ft. Lincoln unfortunately died as the result of mistakes apparently made by numerous people within the Fire Department. The record in this case cannot leave us with confidence that the Fire Department made a fair and thorough investigation of the events leading to this unfortunate death. The loser in this affair is not merely the Employee, but also the citizens of the city who rely on the Fire Department.

In reaching this conclusion I do not mean to condone Employee's actions. He clearly acted improperly and undoubtedly deserved to be disciplined. Perhaps, removal was appropriate. However, if that is the proper result, it must be reached in compliance with procedures that are designed to ensure due process. I therefore would reverse the Administrative Judge's decision and remand for a new evidentiary hearing, as well as a proper analysis of Douglas.

Michael Wolf