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THE DISTRICT OF COLUMBIA
BEFORE
THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:)
)
MARKUS JAHR)
Employee)
)
)
v.)
)
D.C. FIRE AND EMERGENCY)
MEDICAL SERVICES)
DEPARTMENT)
Agency)
_____)

OEA Matter No. 1601-0098-98

Date of Issuance: November 12, 2003

OPINION AND ORDER
ON
PETITION FOR REVIEW

Employee began work with Agency as an Emergency Medical Technician (EMT) in 1985. After completing the requisite course work and training, Employee was promoted to the position of EMT/Paramedic (EMT/P) in January 1994. Sometime in December 1995 Employee sustained a job related injury that left him unable to perform the EMT/P duties. The Paramedic Review Board, an advisory body to the Department of Health, notified

Employee in a March 21, 1996, letter that his Paramedic certification had been suspended due to the fact that he had been on medical leave for more than 90 days.¹ The letter stated that Employee was to provide certain documentation to the review board once he was able to return to work so that the review board could reinstate his EMT/P certification. Once a paramedic returns to duty from a medical suspension, he or she is placed in a provisional status until the paramedic regains full paramedic certification. During this interim period, the provisional paramedic is allowed to ride along on an ambulance unit to serve as a third person. This means that the provisional paramedic may perform his or her duties but only under the supervision of a certified paramedic. Further, a provisional paramedic would receive his or her regular salary but would not be eligible to work overtime. As a result of the suspension and until reinstatement of the EMT/P certification, Employee was prohibited from providing direct patient care as either an EMT or Paramedic.

Knowing that he would soon be fit to return to work and admitting that he did not want to be deprived of the ability to earn overtime while awaiting Paramedic re-certification, Employee submitted an application on May 29, 1996, to the Department of Health to obtain reciprocal EMT certification in the District of Columbia. Employee used his valid Virginia

¹ The Department of Health (DOH) is responsible for certifying paramedics and EMT's in the District of Columbia. Paramedics and EMT's must be re-certified every two years. The re-certification process involves completing continuation education courses after which Agency forwards the employee's records to the DOH for review. DOH approves the petition and then issues the two-year certification card to the proper Agency official who, in turn, distributes the cards to the appropriate employee. This procedure is memorialized in Agency's operations manual. Because of the difference in the type of work that a paramedic and an EMT performs, a paramedic card supersedes an EMT card. No one has both cards.

Emergency Medical Technician card to obtain the reciprocal certification. The reciprocity application contained a section that listed three different levels of EMT training and had spaces on which the applicant could write the date, and the institution at which, the EMT training was completed. Also in this same section was a category for Paramedic training and corresponding spaces on which the applicant could write the date, and the institution at which, the Paramedic training was completed. The instructions under that section stated "check all that apply." Employee correctly listed all of his EMT training and certifications but failed to list any of his Paramedic training and certifications. The bottom of the application warned applicants of the consequences of giving false information which included having the applicable certification revoked. Thereafter, Employee was issued an EMT reciprocal certification card.

On June 22, 1996, Employee returned to work with his EMT reciprocal certification card. At some point after this Employee presented the card to his supervisor. Realizing that the card looked "different," Employee's supervisor notified Agency's Chief Training Officer who, in turn, contacted the appropriate officials at the Department of Health. Subsequently in a July 23, 1996, letter a Department of Health official notified Employee that the Paramedic Review Board had found the reciprocal certification to be invalid and ordered that the card be returned immediately. The letter went on to note that Employee had failed to document the fact that he was currently a paramedic with Agency when he filled out the reciprocity application and that the card had been issued in error. According to a DOH official who

testified at the hearing in this appeal, had Employee listed his paramedic training and had DOH known at the time that Employee was on a medical suspension, DOH would not have issued the EMT reciprocal certification card. The letter concluded with a request that Employee meet with the review board to explain his actions.

Based on these events, in an advance notice dated September 13, 1996, Agency charged Employee with fraud in securing appointment or falsification of official records; to wit: other falsification of material facts by omission, or by making a false entry, in official documents or records where property or funds are not misused. Agency proposed a 15-day suspension for Employee's actions. On October 25, 1996, Agency issued its final notice of adverse action, and the suspension took effect on April 13, 1998.²

Employee appealed Agency's action to this Office. Finding that none of the foregoing facts were in dispute and finding that Agency had met its burden of proof, the Administrative Judge upheld the suspension in an Initial Decision issued January 27, 2003. Employee has since filed a timely Petition for Review.

In his Petition for Review Employee makes four arguments that he believes warrant reversal of the Initial Decision. Employee's first argument is that "Agency improperly amended the charges against him during the appellate process." *Employee's Petition for Review* at 5. This improper action, according to Employee, deprived him of a "meaningful

² The suspension did not take effect earlier because Employee was in a leave without pay status until April 13, 1998.

opportunity to be heard.” *Id.* at 7. We find no merit in this argument. According to the record, Agency’s September 13, 1996, notice of proposed adverse action charged Employee with “fraud in securing appointment or falsification of official records; to wit: Other falsification of material facts by omission, or by making a false entry, in official documents or records where property or funds are not misused.” Within this notice Agency provided a chronology of the events that culminated with the charge that was brought against Employee. This chronology set forth the actions Employee took to secure the EMT reciprocity card. Moreover in Agency’s October 25, 1996, final notice of adverse action, Agency again recites the same charge and refers Employee to the September 13, 1996, proposed notice for a detailed explanation of Employee’s actions that led to the suspension. Further, the charge upon which Agency based the suspension has always involved the same set of circumstances. Therefore, we do not believe that Agency amended the charge brought against Employee.

Employee next argues that the reciprocity application that he filled out was not an official document. It does not appear, based on any of the pleadings contained within the record, that Employee raised this argument during the trial of this appeal. According to OEA Rule 634.4 “[a]ny . . . legal arguments which could have been raised before the Administrative Judge, but were not, may be considered waived by the Board.” 46 D.C. Reg. 9297, 9320 (1999). Because the record does not contain any evidence that this argument was first raised before the Administrative Judge, though it could have been, we find that Employee waived this argument.

Employee's third argument is that the Administrative Judge applied an incorrect standard with respect to the burden of proof. According to Employee the Administrative Judge should have required that Agency prove its case by "clear and convincing evidence" rather than by a "preponderance of the evidence." We find no merit in this argument. OEA Rule 629.1 clearly provides that "[t]he burden of proof with regard to material issues of fact shall be by a preponderance of the evidence." 46 D.C. Reg. at 9317. In that Agency's action was upheld, the Administrative Judge necessarily concluded that Agency had proven its case by a preponderance of the evidence. This was the correct standard of proof to be applied. Therefore, the Administrative Judge did not err in this regard.

Lastly, Employee argues that the Administrative Judge erred when he found that Employee's actions constituted fraud. According to Employee the "check all that apply" language on the reciprocal certification application rendered that document ambiguous. As such, Employee asserts, there was no basis upon which to find that his actions constituted fraud. We believe this argument lacks merit.

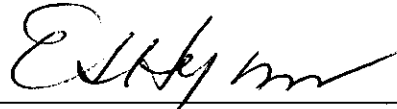
Agency based its charge against Employee upon the fact that Employee fraudulently obtained work as an EMT by omitting information regarding his paramedic training on the reciprocity application. In the Initial Decision the Administrative Judge stated that in order for Agency to meet its burden of proof, it must show that Employee intended to deceive or mislead Agency. Employee has not disputed the fact that he omitted the information pertaining to his paramedic training and certification on the reciprocity application. Instead

Employee argued before the Administrative Judge that he believed the “check all that apply” language meant that he should list only his EMT training and not all of his medical training. The Administrative Judge was not persuaded by this argument. The Administrative Judge held that because Employee was a ten year veteran of the department and had gone through the re-certification process as both an EMT and a Paramedic several times, he knew or should have known of the procedures he needed to follow for obtaining re-certification as a Paramedic once he returned to work from the medical suspension. Further, according to the Administrative Judge, the reciprocity application put Employee on notice of the consequences of supplying false or misleading information. Additionally, the Administrative Judge found that Employee knew that, once he returned to full duty after the medical suspension, he would first have to receive a provisional certification while he was awaiting to be re-certified as a Paramedic. As has been mentioned, this provisional certification would have permitted Employee to ride as a third member on an ambulance unit and thus would not have allowed him the opportunity to work overtime. The Administrative Judge found that Employee stated that he would not have been able to fulfill his financial obligations if he had not been allowed to work overtime. “Employee then admitted that he filed for reciprocity to sidestep this problem.” *Initial Decision* at 10. Thus the Administrative Judge held that Employee’s actions constituted fraud. We believe there is substantial evidence in the record to uphold this finding. Therefore, we sustain the Initial Decision and deny Employee’s Petition for Review.

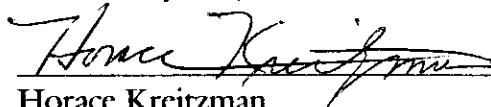
ORDER

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

FOR THE BOARD:



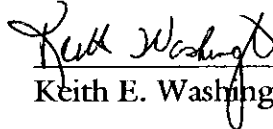
Erias A. Hyman, Chair



Horace Kreitzman



Brian Lederer



Keith E. Washington

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.