THE DISTRICT OF COLUMBIA

BEFORE

THE OFFICE OF EMPLOYEE APPEALS

In the Matter of:	)	
	)	
MARKUS JAHR,	)	OEA Matter No. 1601-0180-99
Employee	)	
	)	Date of Issuance: February 27, 2007
	)	
	)	
D.C. FIRE AND EMERGENCY	)	
MEDICAL SERVICES DEPARTMENT,	)	
Agency	)	
	)	

OPINION AND ORDER
ON
PETITION FOR REVIEW

Markus Jahr ("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 rode with his partner to pick up a personal prescription in Alexandria, Virginia.[1] A private citizen saw the vehicle and called Agency officials. Agency attempted to locate Employee and his partner several times. On their way back into the District, Employee radioed in to Agency. He requested additional time after he realized that he left his clip board at the hospital. When Agency questioned him about his whereabouts after transporting a

[1] Employee and his partner were in a District medic vehicle that was used to transport patients to hospitals.

patient to the hospital, Employee admitted that he went along with his partner to run a personal errand while on duty. As a result, Agency issued a notice of proposal to terminate him from his position on January 13, 1999. The notice outlined that the charges against Employee were dishonesty and inefficiency.[2]

On February 12, 1999, the notice was withdrawn but was reinstated on February 16, 1999.[3] The amended notice of proposal provided that the new charges against Employee were dishonesty and inexcusable neglect of duty.[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 He argued that the first notice of proposal for removal was withdrawn because it was apparent that Agency could not prove the adverse action charges that it contained.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 It alleged that the first notice of proposal to remove was withdrawn to correct typographical errors.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 provided that Employee violated Special Order Numbers

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[2] *Respondent's Responses to Appellant's Petition for Appeal,* Tab # 10 (March 10, 2000).
[3] *Id.* at Tab # 12.
[4] *Id.* at Tab # 13.
[5] *Petition for Appeal*, p. 3 (May 28, 1999).

19 and 12 by running personal errands.[6] Agency also argued that Employee's petition lacked merit, and he could not show that Agency failed to follow proper termination procedures. As for the issue of disparate treatment, Agency provided that Employee had the burden to prove a prima facie case showing that it 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]

Employee then filed a Motion in Limine that provided that Agency should be precluded from arguing that his termination was justified because of his alleged misconduct. Moreover, Employee requested the admission of evidence concerning his proceeding before the D.C. Office of Unemployment Compensation.[8] It was Employee's position that because the issue of termination was argued before the Office of Unemployment Compensation, OEA was not prohibited from enforcing his *res judicata* or collateral estoppel arguments. Agency responded by arguing that the doctrines of *res judicata* and collateral estoppel do not apply to D.C. Office of Unemployment Compensation.[9]

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[6] 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."

[7] *Respondent's Responses to the Appellant's Petition for Appeal*, p. 4-5 (March 10, 2000).

[8] According to Employee, the Appeals Examiner for the Office of Unemployment Compensation held that the sanction of removal was not consistently enforced and Employee's termination was, therefore, not justified. As a result of those findings, Employee argued that Agency should be precluded from claiming that Employee's termination was indeed justified.

[9] Agency relied on D.C. Official Code § 51-111(j) which provides that

> "any finding of fact or law, determination, judgment, conclusion, or final order made by a claims examiner, hearing officer, appeals examiner, the Director, or any other person having the power to make findings of fact or law in connection with any action or proceeding under this subchapter, shall not be conclusive or binding in any separate or subsequent

The Administrative Judge ("AJ") rejected Employee's argument and a hearing was held on October 31, 2002. It was Employee's position at the hearing that Agency could not prove either of the charges against him. He first argued that his alleged dishonest statements were not designed to avoid his duties. He reasoned that although Special Order 19 imposed a duty to return to service within a specified time, this order applied to the driver of the medic vehicle and not him. He also argued that there were no regulations in place at the time that required him to inform Agency that the driver was in violation of Special Order 19. Therefore, he believed that the sanction could not be sustained.[10] Agency, of course, argued to the contrary.

On May 29, 2003, the AJ issued an Initial Decision on this matter. In addressing the first charge of dishonesty, the AJ found that Agency proved that Employee was dishonest. She found that Employee was dishonest when he requested additional time at the hospital. She also found that he was dishonest when he said that he was in front of the hospital when he was really still moments away from the hospital. His contention that he was "roughly accurate" or that the statement was "literally true", was deemed meritless by the AJ. Additionally, Employee failed to prove that Special Order 19 applied solely to the driver of the medic vehicle and not him. The AJ outlined that the Order stated that all EMS providers were held fully accountable for responsibilities assumed, and therefore, Employee was accountable for assuming the risk of making the call to request additional

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action or proceeding between an individual and his present or prior employer brought before an arbitrator, court or judge of the District of Columbia or the United States, regardless of whether the prior action was between the same or related parties or involved the same facts."

[10] *Brief for Employee,* p. 11-16 (January 13, 2003).

time when the reason for the request was not related to his last completed assignment.[11]

Employee disagreed with the AJ's Initial Decision and filed a Petition for Review on July 3, 2003. He argued that Agency should have been precluded or estopped from alleging that his termination was an appropriate sanction. He also contended that OEA would violate the Constitution if it interpreted the scope of D.C. Official Code § 51-111(j) for the D.C. City Council.[12] Agency brought forth arguments to the contrary in its opposition to Employee's Petition for Review.[13]

This Board views most of Employee's arguments as attempts to muddle the real issues of this case. The real issue is whether Employee was properly terminated by Agency. We believe that the AJ's decision to deny Employee's *res judicata* and collateral estoppel arguments was proper. Another agency's decisions, such as the Office of Unemployment Compensation, cannot prevent this Office from carrying out its statutory duty. As Agency correctly pointed out in its Opposition to Employee's Petition for Review, D.C. Official Code § 51-111 (j) expressly states that a determination made by another body is not binding in a subsequent proceeding between an employee and his

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[11] *Initial Decision*, p. 10-11 (May 29, 2003). The AJ also found that Employee had a duty to adhere to Special Order 19; he neglected that duty by not being available within the District to respond to additional calls once he was placed back in service. The AJ determined that Employee's action of preventing himself from carrying out his assigned duties was inexcusable because it compromised Agency's mission. Accordingly, the AJ found that Employee's penalty was appropriate.

[12] As he provided in his Final Brief, Employee again alleged that his statements were not designed to be dishonest, nor was he responsible for returning the medic unit to service. As a result, the sanctions imposed by Agency should not be sustained. Employee's final argument was that he received disparate treatment in comparison to other employees who also drove their government vehicles outside of the District boundaries. *Employee's Petition for Review*, p. 10-27 (July 3, 2003).

[13] It contended that the AJ validly rejected Employee's Motion in Limine. It also argued that it proved by substantial evidence that Employee was dishonest and inexcusably neglected his duty. Finally, Agency provided that Employee failed to prove his claim of disparate treatment. *Agency's Opposition to the Petition for Review*, p. 3-7 (August 7, 2003).

employer. The goal of the legislation in creating the D.C. Unemployment Office was not so that an employee could take a favorable opinion from that office to be used to prohibit another adjudicatory agency, such as OEA, from carrying out its statutory duty. Accordingly, this Board will not address the *res judicata* and collateral estoppel issues raised by Employee.

We recognize that the appropriateness of a penalty "involves not only an ascertainment of factual circumstances surrounding the violation but also the application of administrative judgment and discernment."[14] Therefore, we rely heavily 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 provided, and this Board agrees, 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.[15] Employee blatantly lied to his superiors when he stated that the medic unit was outside of the hospital. Additionally, his request for more time to retrieve the clip board was misleading. The request for additional time under these circumstances would make one believe that Employee was still tending to the patient at the hospital and needed more than the allotted forty-five minutes. Therefore, we are satisfied with Agency's proof of Employee's dishonesty.

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[14] *Beall Construction Company v. OSHRC*, 507 F.2d 1041 (8th Cir. 1974).
[15] *Initial Decision*, p. 12 (May 29, 2003) *quoting* 34 D.C. Reg. 1862 (1987).

Likewise, Agency proved the inexcusable neglect of duty action taken against Employee. According to Special Order 19, Mr. Jahr had a duty to immediately return to his quarters by the most direct route after he cleared his assigned response. He was also tasked with reducing his response time on all medical calls as outlined in Special Order 12. Furthermore, he had a duty to go back to service once he completed his response. Employee neglected all of these duties, and in doing so he compromised his service to the public. As a result of his dishonesty and inexcusable neglect of duty, Agency was proper in its determination that termination was within the scope of penalties.

Moreover, Agency considered all relevant factors as evidenced in its reference to the *Douglas* factors in the Agency final report.[16] 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;
(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

[16] *Respondent's Responses to the Appellant's Petition for Appeal*, Tab # 15 (March 10, 2000).

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.

Applying the *Douglas* factors to this case, we find several reasons to support Agency's decision to terminate Employee. It is of utmost importance that an EMT be available to receive calls for emergencies when they are on duty. It is the public who depend on EMTs for assistance, therefore, one of Employee's main job functions 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.

Although Employee worked as an EMT for thirteen years, he had past disciplinary action taken against him. Employee was previously suspended for fifteen days for Fraud in Securing Appointment of Falsification of Official Records. In light of this previous adverse action, Agency was justified in believing that there was no strong potential for Employee's rehabilitation had a lesser penalty been imposed.

The only real mitigating factor in this matter that could have supported Employee's arguments was Agency's admission that no other employee was subjected to removal for similar offenses committed by him. Therefore, Employee properly challenged the consistency of the penalty imposed. However, he failed to meet his

burden of proof in establishing a prima facie case. He did not show that he was treated differently than those similarly situated. None of the comparison employees to which Employee attempts to liken himself, had a previous disciplinary action against them in addition to the current adverse actions that he faced. Furthermore, Employee does not establish that he and those comparison employees were under the same supervisor. Therefore, he was not similarly situated to these comparison employees.

Based on the aforementioned, this Board believes that there was no clear error in the judgment reached by Agency. As the AJ provided, we are convinced that Agency's discretion was legitimately invoked and properly exercised. Accordingly, we hereby deny Employee's Petition for Review.

ORDER

Accordingly, it is hereby **ORDERED** that Employee'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.