DISTRICT OF COLUMBIA COURT OF APPEALS

HAROLD DARGAN,

Petitioner

v.

D.C. OFFICE OF EMPLOYEE APPEALS, *et al*.,

Respondent

No. 24-CV-1001

On Appeal From The Superior Court
On Appeal From The D.C. Office Of Employee Appeals
On Appeal From The D.C. Fire and Emergency Medical Services Department

BRIEF OF THE PETITIONER

Frederic W. Schwartz, Jr.
2600 Virginia Ave., NW
Watergate 205
Washington, DC 20037
(202) 463-0880 197137
FWS888@aol.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

ISSUES ON REVIEW

1. Did FEMS fail to prove, by a preponderance of the evidence as it must, that it did not know, or should not have known, of the act or occurrence allegedly constituting cause for its corrective or adverse action more than 90 days, not including Saturdays, Sundays, or legal holidays, prior to its occurrence as required by D.C. Code § 5-1031 and 6 DCMR 629.3?

2. May FEMS under Constitutional, statutory and regulatory constraints refuse to submit Mr. Dargan's Department of Health (DOH) EMT certification renewal form to the DOH and then terminate Mr. Dargan for not having renewed his DOH certification?

3. Can Mr. Dargan be terminated under FEMS Agency Bulletin No. 83 before he is allowed the full extent of testing and training provided for in FEMS Agency Bulletin No. 83 as well as relevant FEMS practices and procedures ?

4. Did the OEA Senior Administrative Judge, with the concurrence of the OEA Appellate Board, violate Mr. Dargan’s Due Process and procedural rights?

STATEMENT OF THE CASE

This matter is before this Court-–again--on the 12-year-old series of appeals by former Fire and Emergency Services (FEMS) EMT Harold Dargan from the decisions of FEMS (4 times), the DC Office of Employee Appeals (OEA) (4 times), and the Superior Court (4 times). It also has been before this Court twice. It was first remanded by this Court to the OEA. Rec. 159 A second appeal of the new OEA decision on subsequent remand was denied by this Court as not ripe for review since the OEA decision was remanded to the OEA at the request of FEMS and OEA over the objection of Mr. Dargan. (2022 CA001072 -P (MPA)

This Court in its only substantive review found the initial decision of the OEA Senior Administrative Judge incomprehensible and remanded with specific instructions as to the remedy. Rec. 1259 The OEA Senior Administrative Judge reconstructed this Court's instructions, however, in a manner which prevented their resolution and guaranteed the same result as before. Rec. 530. 541, *et seq.*, 1319, 1372

One may ask what is the momentous and convoluted remedy Mr. Dargan seeks which has yet to be resolved despite a record exceeding 1600 pages. Simply to be afforded an opportunity to receive the remedial training on a computerized mannequin to which he was entitled and then to follow the proper and customary

path leading to his recertification as an EMT. This process is set out in detail in the relief requested in the Conclusion of this brief.

Throughout Mr. Dargan has asked for this simple and straightforward relief. To avoid confusion it is important to stress what the requested relief is not about. All parties believe that the FEMS Medical Director must have the absolute right—short of discriminatory *animus*--to protect the public by designating which EMTs and Paramedics are to be permitted to practice under his licensure. Similarly the substantive correctness of this determination is likely too sophisticated to be reviewed successfully by those without medical training. This challenge is not to the conclusion of the Medical Director concerning Mr. Dargan's performance in February 2012, but rather the steps the newly hired Medical Director took after the February 2012 tests--even to the extent of dishonesty--- to ensure that his initial conclusion would not be contravened.

As we demonstrate below, FEMS has established a carefully structured remedial retraining process—rather then (at least initially) a disciplinary process—to protect its investment in its emergency medical personnel. Thus, if a skills-based error by medical personnel is made, the employee is removed from active duty in the field and reassigned to the FEMS Training Academy for remedial training. Rec. 393 This is particular important because the scarcity of

trained, experienced and certified EMT has required FEMS to hire a private ambulance transportation contractor at an annual cost approaching $12 million. https://fems.dc.gov/release/fems-expands-district%E2%80%99s-ambulance-capacity-through-third-party-contract; https://www.washingtonpost.com/local/public-safety/private-ambulance-crews-are-part-of-dcs-911-landscape-but-is-the-change-permanent/2017/06/07/946fce0a-4680-11e7-a196-a1bb629f64cb_story.html?utm_term=.208969c2ffb4

While at the Training Academy the employee no longer provides medical services under the Medical Director's Licensure until satisfactorily remediated in a manner which fully resolves the Medical Director's concerns. If further remedial training fails after the testing and retesting procedures established by FEMS, the Medical Director can request that the employee's certification by the D.C. Department of Health be terminated or not renewed.[1]

This practice, and its ramifications for failure, are set out in FEMS Agency Bulletin No. 83 as discussed below. Rec. 50 The procedures set out in Bulletin No. 83, however, were improperly and prematurely pretermitted in Mr. Dargan's

[1] The Department of Health (DOH) has instituted a complex appeals process if it denies certification or recertification, but it is doubtful it would be utilized in the case of the District of Columbia for the reasons discussed above and consequently would not provide meaningful review in the circumstances existing here. 29 DCMR 564

case by the Medical Director and FEMS as also discussed below. These procedural failures, among others, require reversing Mr. Dargan's termination. Importantly these failures did not and do not require a review of the Medical Director's initial evaluation of Mr. Dargan. They merely require returning Mr. Dargan to the FEMS Training Academy to resume the procedures set out in Agency Bulletin No. 83 and other Agency procedures. This is the remedy requested of this Court

FACTS

A. Facts relevant to the charge.

Mr. Dargan, the employee, worked for the Department of Fire and Emergency Medical Services (FEMS). Rec. 390 He was promoted from Emergency Medical Technician ("EMT") to Basic Paramedic, DS-0699-08, on October 2, 2005. Rec. 390 Mr. Dargan held National and District of Columbia certifications that designated him as an EMT-Intermediate/99 (" EMT 1/99"), which was equivalent to being a Basic Paramedic. Rec. 390 During his employment with FEMS Mr. Dargan maintained all appropriate National and District of Columbia certifications and registrations until the then-current Medical Director, Dr. Miramontes, refused to authorize his recertification by the District of Columbia Department of Health The failure of the Medical Director to permit Mr. Dargan's recertification led to his dismissal under FEMS Agency Bulletin No.

83. Rec. 48, 391 Prior to the Medical Director's refusal to authorize Mr. Dargan's recertification by the District of Columbia Department of Health Mr. Dargan had successfully completed all courses necessary for his re-certifications as an EMT-I/99. Rec. 391 Mr. Dargan had also obtained additional certifications of competency. Rec. 391

FEMS Agency Bulletin No. 83 outlined the Agency's policy for the required certification and recertification of EMTs by the National Registry of EMTs ("NREMT"), a prerequisite to obtaining Department of Health Certification along with sponsorship by the Medical Director. Rec. 391 http://doh.dc.gov/service/ems-provider-certification This policy applied to all FEMS employees like Mr. Dargan who provided medical assistance, medical treatment, first aid, or lifesaving interventions, on the scene of an emergency or in transit from the scene of an emergency to a health care facility or other treatment facility, to a person who is ill, injured, wounded, or otherwise incapacitated. Rec. 391 This policy states that:

> DC Fire & EMS Department employees will be required to complete the National Registry certification process at their respective certification level (EMT-B, EMT-I/99, or EMT-P) and maintain both National Registry certification and District of Columbia (D.C. Department of Health) certification. Rec. 391

Bulletin No. 83 also states that the certification exam consists of two parts: (1) the psychomotor (practical skills) examination and (2) the cognitive (written) examination relating to their position. Rec. 391 Regarding the psychomotor (practical skills) examination, Bulletin No. 83 established the following policy for those at the EMT-Intermediate/99 level:

> Psychomotor (Practical SkIlls) Examination Policies:
>
> EMT-Intermediate/99
>
> EMT-Intermediate/99 candidates are allowed (3) full attempts to pass the psychomotor examination (one "full attempt" is defined as completing all eleven (11) skills and two retesting opportunities if so entitled).
>
> Candidates who fail a full attempt or any portion of a second retest must submit official documentation of remedial training over all skills before starting the next full attempt of the psychomotor examination and reexamining over all eleven (11) skills, provided all other requirements for National Certification are fulfilled. This official documentation must be signed by the EMT Training Program Director or Physician Medical Director of training/operations that verifies remedial training over all skills has occurred since the last unsuccessful attempt and the candidate has demonstrated competence in all skills. DC Fire & EMS Department Employees who fail the third full and final attempt of the National Registry EMT-Intermediate/99 psychomotor examination will be subject to adverse action. Rec. 391

Mr. Dargan until his termination held a Department of Health certification card that designated him as "qualified to serve in the District of Columbia as an EMT-Intermediate, Active" that was issued on June 18, 2010 and expired on June 30, 2012. Rec. 392 While Mr. Dargan's DOH certification expired on June 30, 2012,

he still possessed current EMT 1/99 certification from the Nation al Registry of Emergency Medical Technicians which expired on March 31, 2014, ACLS certification which expired in 2013, and a CPR (course C) certification which expired in July 2013. Rec. 392 Thus, it is undisputed that the reason that Mr. Dargan was unable to renew his DOH certification was that the Agency's Medical Director refused on February 2, 2012 to allow him to remain an EMT 1/99 under his sponsorship and, subsequently, declined to sign Mr. Dargan's May 30, 2012 DOH certification renewal application. Rec. 392

B. The Back Story

On June 14, 2011, while assigned to Medic No. 27, Petitioner and his senior Paramedic partner who was acting as the Ambulance Crewmember in Charge ("ACC") as well as two additional units responded to a call for an unconscious 32-year old female. While the patient subsequently died the parties agree that there is no record of any charges or disciplinary action by the Operations Division against Mr. Dargan in relation to the June 14, 2011 incident.[2] Indeed there is nothing in the

[2]The now retired Superior Court Judge considering this appeal misunderstood the circumstances of Mr. Dargan's referral for remedial training to the Training Academy. It related to his failure to properly insert an endotracheal tube in the patient's windpipe (subsequently reinserted properly). This failure was not related to the patient's death, nor the patient's preexisting condition which necessitated the emergency call, nor when, where and how the patient died.

Record indicating that FEMS took any action against any of the responding FEMS employees. Rec. 393 It is not questioned that Mr. Dargan failed in his paramedic duties with the patient in the manner in which he inserted the endotracheal tube. Rec. 393 Consequently, he was removed from the field by the Office of the Medical Director on that same day and assigned to the Training Academy with a Critical Remediation Action Plan relating to this failure as is customary. Rec. 393

In the ten years prior to June 14, 2011, Mr, Dargan had not been disciplined for a failure in performing or providing medically-related services. Rec. 392 His most recent Performance Review from October 2008 through September 2011 contained no evaluations less than "valued performer." Rec. 392 Indeed, on March 1, 2011, Anita Massengale, the FEMS Clinical Quality Program Manager, notified Mr. Dargan that he would receive a commendation for "continuous outstanding clinical judgment and documentation" in the 2010 DC FEMS Annual Clinical Quality Review. Rec. 393 On May 1 7, 2011, Ms. Massengale e-mailed several employees, including Mr. Dargan, that they were "missed this morning [for the awards presentation]. But fear not, I called your name with pride! Please drop by the OMD...for your commendation and pin. Again, thank you for your consistent dedication to the profession...." Rec. 393

In mid-July 2011, Mr. Dargan completed his classroom training under his Critical Remediation Action Plan. Consequently, he was assigned to an Advance Life Support field evaluations with Paramedic Reginald Paramore, to begin on July 17, 2011 and to end on July 27, 2011. Rec. 393 That field evaluation was cancelled for reasons not clear from the record.

The next step was the evaluation of Mr. Dargan by the newly appointed Medical Director. Dr. Miramontes. This took place on September 28, 2011 . The Medical Director checked the box "Return to Mentor" noting "Close eval. of ability to function in field. Need FISDAP for full release. Re-assessment. Will always be ACA [Ambulance Crewmember Assistant] only under new paramedic partner." Rec. 393 These conditions were customary. On October 6, 2011, Mr. Dargan was assigned to the ALS field evaluation set out by the Medical Director as described above under mentor Sgt. Bachelder. Rec. 393 Coincidentally, the next day (October 7, 2011) Ms. Massengale e-mailed to Mr. Dargan: "I wanted to reach out and let you know that the CQI [Continuous Quality Improvement] department wants to assist you in maintaining the level of excellence you have demonstrated during the past few weeks at TA [Training Academy]." Rec. 394

On January 2, 2012, Paramedic Preceptor Sgt. Bachelder wrote to the Medical Director, noting:

> [Mr. Dargan] has improved and progressed from needing an occasional prompting to needing very few prompts during patient care. He has become a better provider for his patients and the agency. Harold has easily accepted the roll [sic] of a team member and works well with other unit members providing care. Harold is very knowledgeable in patient care and protocols. In my opinion IP Harold Dargan is ready to resume his role as an ACA. JA-22, Rec. 394

Sgt. Bachelder's view was based on his evaluation during the 91 medical emergencies in which Mr. Dargan participated as an ambulance crew member. JA 22, Rec. 394; Rec. 423-449 These circumstances and their course were customary as well and expected.

On February 2, 2012, having received the excellent review by Sgt. Bachelder set out above, the Medical Director tested Mr. Dargan's skills as an Advanced Life Support ("ALS") provider. Mr. Dargan's performance when given a practical skills (psychomotor) scenario was deemed inadequate by the Medical Director. The Medical Director immediately rescinded Mr. Dargan's I/99 certification, but allowed him to continue as an EMT-Advanced.[3] Rec. 394

---

[3]It is not clear precisely from the Record what this meant, since 1/99 certification is equivalent to the EMT-Intermediate designation. *See* above. Nonetheless, Mr. Dargan, as discussed below, was never permitted to resume providing medical services thereafter under Dr. Miramontes' sponsorship.

On February 3, 2012, following Mr. Dargan's first examination by the Medical Director, Captain James Follin requested a status update from the Medical Director stating: "[Mr. Dargan] is due to report to [Ambulance] M-30-2 on Wednesday per his telestaff. Due to current circumstances do you want him removed from operations? He can report to the TA [Training Academy] on a 40 hour work week until the administrative actions are completed." Rec. 394 The Medical Director immediately responded to Captain Follin with copies to other senior FEMS officials:

> [Mr. Dargan] is officially removed from operations. He needs a new certification card. I offered him an option, He chose another path. He can go into light duty/no patient care process on day work or as assigned until he has a certification. His EMT-I-99 will be pulled.
>
> ***He has no training requirements so assigning him to training makes no sense.*** Rec. 135 (Emphasis supplied)

On February 14, 2012, the Medical Director again tested Mr. Dargan's skills as an ALS provider. The Medical Director wrote on the testing documentation that Mr. Dargan had received twelve days of extensive training at the Training Academy since Mr. Dargan's prior examination had been given. Rec. 1156, 1158, 1160 This was untrue. In fact, as demonstrated above, the Medical Director had directed that "assigning him [Mr. Dargan] to training makes no sense" and consequently he was not. Rec. 394

Mr. Dargan's performance in his second practical skills scenario test was again deemed inadequate by the Medical Director. Consequently, the Medical Director did not reinstate Mr. Dargan's I/99 status noting that he did not "have confidence in [Mr. Dargan's] skills as [an] ALS provider." Rec. 395

On the same day, February 14, 2012, the Medical Director sent a confidential e-mail to Dr. Brian Amy of the D.C. Department of Health (DOH). The subject was "Request downgrade of [Mr. Dargan's] Certification after Quality Review." The Medical Director stated:

> My assessment reveals that he does not demonstrate the cognitive nor psycho-motor skills that are required for him to function safely as an independent EMT-1-99 advanced life support provider. His technical skills were poor on my last assessment using a patient simulator with megacode session held on 2 February 2012 and again on 14 February 2012.
>
> Basic Paramedic skills such as medication administration, EKG rhythm recognition, and ACLS protocol compliance were not to an acceptable standard. I have offered him a-BLS level of certification as an EMT-Advanced but cannot support him functioning as an EMT 1-99 "paramedic" until such time as he completes a fully accredited Paramedic Course, gains NREMT-Paramedic certification, and completes an assessment by this agency.
>
> Summary of past interventions listed below when taken in context to my recent assessment supports such a decision. He also has been in training since removal from operations on 6/14/2011 after a very concerning complaint of poor performance during Cardiac Arrest run. Rec. 395

This confidential February 14, 2012 e-mail concluded with the Medical Director asking that Mr. Dargan's Department of Health Certification be dropped to EMT-Advanced. The Medical Director also noted that he could not authorize re-certification of Employee's NREMT 1-99 certification at that time. Rec. 396

Mr. Dargan had offered two explanation, both reasonable, for his unexpected failures. First the simulation mannequin utilized for the examination was newly acquired and computer controlled in a manner to which he was not accustomed. He was, however, only allowed an hour or so of training on the device. No information or details of the mannequin's complexity appear in the record. Second Mr. Dargan explained that the Medical Director's test called for him to perform both the physical manipulation of the mannequin and simultaneously answer questions from the Medical Director. Mr. Dargan stated he was unfamiliar with this form of multitasking as it was neither utilized nor required in the field. Both of these explanations were rejected out of hand.

There is also a unique and troublesome aspect to the Medical Director's rejection of a long standing and previously skilled emergency medical technician's explanation for his failure to carry out what the Medical Director considered to be basic medical tasks. If Mr. Dargan had presented in a clinical context the Medical Director would have been expected to utilize the universal medical analytic technique of differential diagnosis. The parallels

are inescapable. Customarily the symptomatic patient presents with a complaint. Physicians such as the Medical Director will take a detailed history looking for a physical etiology, The physician will then form an initial hypothesis identifying potential explanations for the symptoms consistent with the history. The physician will then tests to gather more data and exclude other explanations. From this process the physician will narrowing down the list of possible diagnoses based on test results and clinical reasoning. The physician will then reach a final conclusion and develop a treatment plan.[4] In Mr. Dargan's case the Medical Director made no attempt to determine the cause of Mr. Dargan's sudden loss of skills. Instead he ordered that they not be remedied at the Training Academy.

On June 25, 2012, the Medical Director again wrote to Dr. Amy of the Department of Health requesting revocation of Mr. Dargan's DOH certification after clinical review. He said:

> I have completed a CQI review for Harold Dargan EMT I-99 (Basic Paramedic) and have noted he has had a serious CQI interaction regarding poor performance during a cardiac arrest. EMT Dargan has been detailed to DCFEMS' Training Academy and was re-trained by a field mentorship provider. Shortly thereafter, I personally tested EMT Dargan on two occasions with a patient simulator and found him to be incompetent despite retraining. I believe EMT Dargan lacks the maturity, cognitive knowledge and skills to perform as an ALS provider. Rec. 396

---

[4]The process an attorney follows when a potential client arrives is coincidentally similar.

The June 25, 2012 letter also stated there were past CQI concerns with Mr. Dargan despite receiving extensive retraining and extended field mentoring. It stated: "On two separate occasions EMT 1-99 (Basic Paramedic) Dargan failed to perform at an acceptable level in patient simulation and multiple cognitive, medication administration and protocol errors were noted despite re-training." Rec. 396 The letter concluded:

> In light of the documented adverse events and previous remediation attempts, I cannot allow this provider to practice under my license and am hereby requesting that DOH decertify EMT Dargan as an ALS EMS provider. I cannot authorize re-certification of his NREMT EMT 1-99 certification at this time and will not sponsor him at the ALS scope of practice. Rec. 396

On July 3, 2012, Mr. Robert W. Austin, through Dr. Amy of the Department of Health, wrote to the Medical Director acknowledging receipt of the Medical Director's letter, pointing out that Mr. Dargan's District of Columbia Department of Health EMT-Intermediate certification (Cert # 1-132) had expired at midnight on June 30, 2012, with no application of renewal signed by the Medical Director pending at DOH.[5] Rec. 396

When Mr. Dargan's D.C. Department of Health certification expired he was no longer eligible to continue his EMT duties with FEMS under Bulletin No. 83 and he was terminated. Rec. 397

---

[5]As discussed herein, the Medical Director had refused to sign and forward Mr. Dargan's DOH certification renewal application.

While the Medical Director had offered Mr. Dargan the opportunity to apply for EMT-Advanced level certification, a demotion with a precarious life span and less salary, he had declined that offer. The Medical Director memorialized that offer in a later e-mail on October 1, 2012. Rec. 397

By letter dated October 31, 2012, FEMS issued to Mr. Dargan an advance written notice proposing his removal from his position as Basic Paramedic, DS-699, Grade 8. The letter set out (1) the specifics of the charge which FEMS claimed led to Mr. Dargan's termination (2) and also a number of of circumstances which FEMS apparently believed formed the background for the termination as well as the date FEMS became aware of them.

> Charge No. 1: Violation of the D.C. Fire and EMS Bulletin No. 83 which reads in relevant part: General Policy "All D.C. Fire and EMS Department employees will be required to complete the National Registry certification process at their respective certification level (EMT-B, EMT-IP [1/99], or EMT-P) and maintain both National Registry certification and District of Columbia (D.C. Department of Health) certification."
>
> This misconduct is defined as cause in Article VII, Section 2(f)(5) of the D.C. Fire and EMS Department Order Book, which states in part: "Any on duty or employment related act or omission that interferes with the efficiency or integrity of government operations, to wit[:] Incompetence and in 16 D.P.M. § 1603.3 (f)(5) (March 4, 2008).
>
> Specification No. 1: In order to practice as a Paramedic or EMT, an employee must maintain D.C. Department of Health (DOH) certification. Your DOH certification expired on June 30, 2012.

On June 14, 2011, while assigned to Medic No. 27, with your partner Paramedic Channel Jones, your unit responded for an unconscious 32-year old female. You failed to adequately prepare all necessary equipment before initiating a critical skill. You deviated from standard practice by placing an endotracheal tube into the patient's airway and placing a non re-breather mask over the tube. You failed to oxygenate the patient before intubation and suctioning. You further failed to initiate ventilations for one minute with the proper use of a bag-valve mask device, and you left the patient's airway unattended while you left to retrieve additional equipment. As it turns out, the bag-valve device was inside the bag adjacent to the patient. The patient did not survive.

On June 14, 2011, at 1530 hours, the Office of the Medical Director immediately removed you from your assigned Medic Unit No. 27, and reassigned you to the Department's Training Academy. You were placed in a critical remediation action plan until further notice.

On February 2, 2012, Medical Director David A. Miramontes, M.D. interviewed your skills as an Advance Life Support (ALS) provider. You were given a medical scenario of a 64-year old patient with a history of chest pain that became unresponsive with a heart rhythm of ventricular fibrillation. You neither recognized the rhythm, nor did you recognize the asystole rhythm placing the patient in cardiac arrest. In light of your inadequate performance, Dr. Miramontes informed you that he would no longer sponsor you to practice as a Basic Paramedic under his medical license, but would allow you to practice as an Advance Level EMT.

On February 14, 2012, Medical Director Miramontes again interviewed your skills as an Advance Life Support provider. You were given another medical scenario of a patient having chest pain with a blood pressure of 204/106, and a pulse rate of 120. You stumbled with your medications and dosages. Dr. Miramontes informed you that he lacked confidence in your skills as an ALS provider, but suggested that you could work as a basic life support provider.

Thus, after having lengthy remediation and numerous evaluations, you continued to demonstrate a lack of maturity, and a deficiency in cognitive psycho-motor skills to practice as a Basic Paramedic. Accordingly, Dr. Miramontes submitted documentation to DOH communicating his decision to withdraw his sponsorship of you to practice as an ALS provider with the Department.

> Your position of record is a Basic Paramedic. Accordingly, you are required to maintain all certification requirements associated with your position. Your DOH certification expired on June 30, 2012. Your inability to meet the requirements of this position renders you incompetent to render services as a Basic Paramedic.
>
> Your lack of certification further places both you and the citizens of the District of Columbia in danger and, therefore, interferes with the efficiency and integrity of government operations.
>
> Because you have failed to maintain your DOH certification, you are precluded from performing the duties of Basic Paramedic in the District of Columbia, as outlined in Bulletin No. 83 "National Registry of EMT's (NREMT) Certification Policy EMT."
>
> Accordingly, this action is proposed. Rec. 91, 397

On April 24, 2013, former FEMS Fire Chief Kenneth B. Ellerbe issued the final decision sustaining the removal. The Chief expressly noted his consideration of D.C. Code § 7-2341.15(d), although that provision does not deal with a failure to renew. Rec. 399

SUMMARY OF ARGUMENT

I. The 90-day Rule

FEMS Bulletin No. 83 requires EMTs to be certified or re-certified by the Department of Health or their EMT employment will be terminated by statute. The final step necessary for Mr. Dargan to be recertified was for the FEMS Medical Director to sign Mr. Dargan's renewal application and forward it to the Department of Health. The Medical Director refused to do so however. Consequently Mr. Dargan's DOH certification was not submitted to the DOH and his certification lapsed on June 30, 2012.

On October 31, 2012, Mr. Dargan was notified by FEMS that he was being charged with violating FEMS Bulletin No. 83 for his failure to have been re-certified by the Department of Health. He was subsequently terminated for this offense.

By statute FEMS had 90 business days after the date that it "***knew or should have known*** of the act or occurrence allegedly constituting cause" to bring disciplinary charges against Mr. Dargan. (Emphasis supplied) D.C. Code § 5-1031

The etiology of the Medical Director's refusal to forward Mr Dargan's recertification application to the Department of Health (DOH) began as early as his determination in February 2012 that Mr. Dargan had failed two attempts at a

medical practicum and therefore his DOH certification needed to be downgraded or cancelled. (For the purposes of this appeal Mr. Dargan's failure in this regard is not being challenged.) From February 2012 through June 2012, and even thereafter, the Medical Director (1) refused to permit Mr. Miramontes to practice as an EMT under his license, (2) sent a series of confidential e-mails to the Department of Health seeking to have Mr. Dargan's certification downgraded or terminated, (3) prohibited the FEMS Training Academy from assigning him [Mr. Dargan] to training, (4) represented on a number of occasions (including sometimes in writing) that Mr. Dargan had "extensive training" at the Training Academy despite the Medical Director's orders that he receive no such training, (5) discussed on a number of occasions with Mr. Dargan his insistence that Mr. Dargan voluntarily accept a down grade or he would refuse to sign Mr. Dargan's recertification application and forward it to the Department of Health, all of which Mr. Dargan rejected.

Since Mr. Dargan was notified on October 31, 2012 of his pending termination all of the acts /circumstances which resulted in the disciplinary charges against him were required to have occurred no earlier than 90 day, not including Saturdays, Sundays, or legal holidays, of that date. The parties quibble over that date so Mr. Dargan will leave the precise date to FEMS as it is its burden.)

FEMS takes the contrary position that it was oblivious to the impending expiration of Mr. Dargan's certification and, in any event, it was solely the actual lapsing of the certification which mattered.[6] It reaches this position by a novel interpretation of the tense of the phrase "or should have known" concluding that the date FEMS "knew" and the date FEMS "should have known" were the same. This reading is contrary to the clear meaning of the statutory phrase, *stare decisis,* regulatory and judicial requirements, and common English as discussed in detail elsewhere.

II. FEMS violated Constitutional, statutory and regulatory constraints: a trifecta of missteps.

The Supreme Court, the D.C. Council, and the Mayor (through the Department of Human Resources and the Department of Health) have made it clear that one's employment is a property right which cannot be terminated without satisfying due process guarantees. *See, e.g., Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 541 (1985); the Comprehensive Merit Personnel Act

---

[6]So no one will be surprised Mr. Dargan concludes that FEMS' representation below (and potentially in this Court) that FEMS was oblivious to the upcoming expiration of Mr. Dargan's DOH certification prior to it actually expiring on June 30, 2012 violated Civil Rule 11(b), as incorporated in the S. C. Agency Rules. This is because FEMS' representation in this regard was not made to the best of FEMS' knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, nor was it warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law

("CMPA"), D.C. Code § 1-623.01, *et seq*.; CDCR 6-B 1603.10; 29 DCMR 564

It is undeniable that Mr. Dargan's two failed attempts at a medical practicum in February 2012 initiated the refusal of the Medical Director to permit Mr. Dargan's recertification months later. As described in detail herein, however, FEMS has institutionalized the process which should be followed when an EMT needs remedial training.[7] In light of the significant investment that FEMS and the District have in skilled and experienced EMTs errors are bifurcated. When Performance flaws in the medical skills demonstrated by an EMT are noted the EMT is referred to the FEMS Training Academy for remedial training. Following customized remedial training the EMT is assigned to an ambulance under the supervision of a senior EMT called a Preceptor to assure that the EMT's performance has been corrected. When the Preceptor is satisfied with the EMT's Performance he or she is released for final testing by the Medical Director, If the Medical Director is unsatisfied the EMT is returned to the Training Academy for further extensive training. If there is still a deficit, which is rare, the EMT is returned again to the Training Academy. This process was confirmed by Anita Massengale, the FEMS Clinical Quality Program Manager on the record. This process also meets FEMS' needs to maintain experienced staffing and is consistent with Constitutional requirements and the District's Due Process, regulatory and

[7]EMT non-medical malfeasance, such as failing to respond to a call, driving drunk, or lying on a report leads to more traditional discipline measures rather than remediation at the Training Academy.

statutory requirements. The abrogation of these procedures negates the termination. A full time-line of Mr. Dargan's successes is set out in the Attachment to this Brief.

III. The OEA Proceeding itself was defective and a violation of Regulation and Due Process.

As discussed fully in the Argument FEMS denied Mr. Dargan the required remedial training at the Training Academy and the Medical Director falsely stated he had received it in the documentation associated with the February 2012 examinations and misrepresented the circumstances in his confidential letters to the Department of Health. In the OEA proceeding the Senior Administrative Judge stripped Mr. Dagan of his right to present his evidence–both through witnesses and documents- in a manner which suggests a remarkable disregard for impartiality in an effort to justify his three previously rejected decisions. The deviation from OEA's own procedural regulations in this regard are delineated in the Argument.[8]

[8]The lack of detail here and in the Argument on this issue does not represent a waiver as an issue adverted to in a perfunctory manner unaccompanied by some effort at developed argumentation, but rather results from the page limitation of this Brief under the Rules of this Court. Its remedy of *de novo* remand is only requested if the substantive errors discussed elsewhere does not require a full reversal.

ARGUMENT

A. Standard of Review (and subtleties often ignored during review)

As this Court explained in *Rodriguez v. D.C. Office of Emp. Appeals*, 145mA.3d 1005, 1008-1009 (D.C. 2016) it reviews agency appeals from the Superior Court "as if the appeal had been taken directly to this court." *Hutchinson v. District of Columbia Office of Emp. Appeals* , 710 A.2d 227, 230 (D.C.1998).

This Court held in *Walker v. Office of the Chief Info. Tech. Officer*, 127 A.3d 524, 529 (D.C. 2015) as it has consistently:

> An OEA decision "must state findings of fact on each material, contested factual issue; those findings must be supported by substantial evidence in the agency record; and the agency's conclusions of law must follow rationally from its findings." *Johnson v. District of Columbia Office of Emp. Appeals, 912 A.2d 1181, 1183 (D.C. 2006) (quoting Murchison v. District of Columbia Dept of Pub. Works*, 813 A.2d 203, 205 (D.C. 2002)). We "must affirm the OEA's decision so long as it is supported by substantial evidence in the record and otherwise in accordance with law." *Dupree v. District of Columbia Office of Emp. Appeals*, 36 A.3d 826, 830 (D.C. 2011) (quoting *Settlemire v. District of Columbia Office of Emp. Appeals*, 898 A.2d 902, 905 n.4 (D.C. 2006)). "Substantial evidence" is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *See Jahr v. District of Columbia Office of Emp. Appeals*, 19 A.3d 334, 340 (D.C. 2011) (quoting *Hutchinson v. District of Columbia Office of Emp. Appeals*, 710 A.2d 227, 230 (D.C. 1998)). We will reverse only if the OEA's decision was arbitrary, capricious, or an abuse of discretion. See *id*. On questions of law, however, our review is de novo. *See Dupree*, 36 A.3d at 831.

But the Division knows all this. Unusual in Agency cases, however, the evidentiary standard *before the OEA* is not "substantial evidence," but rather

"preponderance of the evidence. More important, it is FEMS that burden of proof except for issues of jurisdiction. 6 DCMR 629.3 (Jurisdiction was not challenged here.) Since the OEA must utilize the preponderance of the evidence test, it must determine that FEMS' dispositive evidence is more probably true than untrue. 6 DCMR 629.1 This appeal does not relieve the OEA (and initially FEMS) of that burden.

And utilizing the proper evidentiary standard in OEA appeals is critical. While "preponderance of the evidence" might sound like an easier standard of proof than "substantial evidence," this Court and practitioners know that substantial evidence should more appropriately be called insubstantial evidence. The "more than a scintilla standard" was articulated in *Reyes v. D.C. Department of Employment Services,* 48 A.3d 159, 165 (D.C. 2012), and remains good law. But, as the synonyms for scintilla set out in *Roget's II* make clear: a scintilla is the:

> least amount, lowest amount, smallest, least, lowest, narrowest, modicum, atom, molecule, particle, dot, jot, iota, point, spark, shadow, whit, tittle, soupcon, trifle, gleam, grain, scruple

Thus, the Court is dealing with a measurement as convoluted as topology and particle physics.

As discussed above there are also two special aspects of the standard of review which control this review of OEA decisions. An employer agency before the OEA has the burden of proof except for issues of jurisdiction. 6 DCMR 629.3 The agency must make its case by a preponderance of the evidence, *i.e.,* must submit sufficient evidence to demonstrate that a contested fact is more probably true than untrue. 6 DCMR 629.1 Thus, the agency must prove (1) the facts set out in its charging documents and (2) that, if true, the facts establish the charged infraction. The failure of the agency to meet both these requirements as to the specific cause cited in the notice of termination requires reversal of the decision unless the failure is *de minimis* or irrelevant.

The second special aspect of the standard of review guiding this OEA appeal concerns an agency's interpretation of a statute, its own regulations, or a lesser articulation of policy. This Court ordinarily (at least currently, *but see Loper Bright)* accords great weight to any reasonable construction by the OEA of a statute which it administers. However, as Judge Glickman pointed out in his sage review of the law in *O'Rourke v. D.C. Police & Firefighters' Retirement & Relief Bd.,* 46 A.3d 378 (D.C. 2012)(internal footnotes deleted)

> Our review of the Board's construction of the Retirement and Disability Act is *de novo,* for this court is "the final authority on issues of statutory construction"and "the ultimate interpreter of the statutory provisions from which the Board, as a creature of the legislature, derives its powers."

> Ordinarily, we have good reason to respect an administrative agency or board's informed interpretation of the statute it administers, and we will defer to it "as long as that interpretation is reasonable and not plainly wrong or inconsistent with [the statute's] legislative purpose. But those caveats are important. We owe no deference where the administrative body has not considered the policy underlying the statute and has reached a result that is contrary to the purpose of the legislation and not reasonable. Because we perceive that to be the basic flaw in the Board's interpretation in this case, we do not defer to it and we must reject it.
>
> The first step in construing a statute is to read the language of the statute and construe its words according to their ordinary sense and plain meaning. If the statute is "clear and unambiguous, we must give effect to its plain meaning." But our focus cannot be too narrow, for "[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself," but also by considering "the specific context in which that language is used, and the broader context of the statute as a whole." "It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme. A court must therefore interpret the statute as a symmetrical and coherent regulatory scheme, and fit, if possible, all parts into an harmonious whole." In short, we must construe §§ 5-709 and 5-710 "not in isolation, but together with other related provisions," and derive their meaning "not from the reading of a single sentence or section, but from consideration of [the] entire enactment against the backdrop of its policies and objectives." *O'Rourke, supra* at 383-384

This Court, of course, can reject an agency's interpretation of a statute it administers if it is contrary to the clear meaning of the statute. In this context, statutory interpretation is a matter of law which this Court reviews *de novo. D.C. v. D.C. Office of Employee Appeals*, 883 A.2d 124, 127 (D.C. 2005)

Finally reviewing Courts often do not employ the full range of available remedies when deciding for the employee. As discussed above this Court reviews the OEA determination and ignores the Superior Court's prior visit. The guiding statute provides:

> Any employee or agency may appeal the decision of the Office [of Employee Appeals] to the Superior Court of the District of Columbia for a review of the record and such Court may affirm, reverse, remove, or modify such decision, or take any other appropriate action the Court may deem necessary. D.C. Code § 1-606.03(d)

This Court has the same inherent power.

B. FEMS has failed to prove, by a preponderance of the evidence as it must, that it did not know, or should not have known, of the act or occurrence allegedly constituting cause for its corrective or adverse action against Mr. Dargan, more than 90 days, not including Saturdays, Sundays, or legal holidays, prior to its occurrence.

D.C. Code § 5-1031, part of the Omnibus Safety Agency Reform Amendment Act of 2004, established a "statute of limitations" for disciplinary actions brought against employees of the Police and the Fire and Emergency Medical Services Departments.[9] The requirements is:

[9]The portion of this statute relating to MPD employees has been revised several times, but the portion relating to Fire and Medical Services employees remains as enacted confirming its provenance is good law.

> (a) Except as provided in subsection (b) of this section, no corrective or adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services Department or the Metropolitan Police Department shall be commenced more than 90 days, not including Saturdays, Sundays, or legal holidays, after the date that the Fire and Medical Services Department or the Metropolitan Police Department knew or should have known of the act or occurrence allegedly constituting cause.

There appear to be only a few decisions of this Court on point.

District of Columbia v, District of Columbia Office of Employee Appeals and Jordan, 883 A.2d 124 (D.C. 2005) is important only for its acknowledgment of the statute. Before the OEA, Jordan argued that the statutory period of limitations (then 45 days) began to run on May 22, 1996 when the OIG completed its criminal investigation and issued its report. The OEA Administrative Judge was impressed with this argument, as was the full OEA and the Superior Court on appeal.

This Court, hearing the matter *de novo,* was considerably less impressed. It held that because there was a **criminal investigation** of Jordan the exception to the basic statute of limitation [(not relevant here] was controlling. Further, it ruled that the OIG report was irrelevant and that the U.S. Attorney's ongoing criminal investigation tolled the statute. *Id.* at 127-128 Most important this Court also noted that "[t]he government does not contend that the statute is discretionary, and we see no language in the statute indicating that it is discretionary." *Id.* at 127 note 4

A similar issue was also addressed more recently in *Butler v. Metropolitan Police Department*, 240 A.3d 829, 835 (D.C. 2020), but is of little use here.

More relevant is *D.C. Fire & Med. Services Dep't v. D.C. Office of Employee Appeals,* 986 A.2d 419, 425-426 (D.C. 2010) which dealt with the same statute involved here and a determination of when FEMS "should" have known of the offending act or occurrence, the same issue as here. The Court held, as did the OEA and the Superior Court, that the statute did not require, indeed common sense could not require, reasonable certainty as to the circumstances before FEMS "knew or should have known of the act or occurrence allegedly constituting cause." Further, the Court found that the D.C. Council has consistently articulated a policy of expeditious handling of FEMS adverse actions while amending that portion of the statute relating to the Metropolitan Police Department.

The relevant question before this Court, therefore, is when did FEMS know, or when should it have known, that Mr. Dargan's DOH certification would not be renewed.[10] It is the responsibility of FEMS, as set out in the OEA Rules as discussed above, to prove by a preponderance of the evidence that there was no point prior to the 90 day period at which a reasonable person, considering the

[10]To avoid metaphysical conjecture Mr. Dargan assumes (and agrees with FEMS) that "the act or occurrence allegedly constituting cause" was the expiration of Mr. Dargan's DOH certification).

record as a whole, would have concluded that it was more true than not that Mr. Dargan's DOH certification would expire at midnight on June 30, 2912.

As discussed above certainty was not required. A precise determination of the point at which FEMS knew or should have known (sufficiently to satisfy the statute) that Mr. Dargan's DOH certification would lapse is difficult to determine as there are a number of points at which FEMS was informed in that regard.[11] The clearest indication of the unavoidable fate of Mr. Dargan's DOH Certification renewal was the unqualified refusal of the Medical Director to sign Mr. Dargan's Renewal Application on or about May 27, 2012 after Mr. Dargan had submitted it to him. Rec. 391. 450-451, 1101 This failure to act conclusively precluded the renewal of Mr. Dargan's DOH certification. Further, this refusal to sign Mr. Dargan's renewal application was consistent with, even mandated by, a number of other prior acts by the Medical Director who was the only person authorized to sign the renewal application, These included:

[11]Precision is not required nor even possible in these circumstances. *See* Einstein, A. (1905). *Zur Elektrodynamik bewegter Körper*. Annalen der Physik, 17, 891–921.

1. On February 3, 2012 Captain James Follin e-mailed the Medical Director:"[Mr. Dargan] is due to report to [Ambulance] M-30-2 on Wednesday per his telestaff. Due to ***current circumstances*** do you want him ***removed*** from operations? He can report to the TA [Training Academy] on a 40 hour work week until the **administrative actions** are completed." (Emphasis supplied). Rec. 394

While the "current circumstances" and the forthcoming "administrative actions" are not identified it would be reasonable to believe that they refer to the continuing effort to remove Mr. Dargan from FEMS. That is in fact what occurred.

2. On the same day Dr, Miramontes replied to Captain Follin:

> Mr. Dargan] is officially removed from operations. He needs a new certification card. I offered him an option, He chose another path. He can go into light duty/no patient care process on day work or as assigned **until he has a certification. His EMT-I-99 will be pulled.**
>
> ***He has no training requirements so assigning him to training makes no sense.*** Rec. 394 (Emphasis supplied)

Thus on this date the Medical Director considered Mr. Dargan to be without DOH certification. ("*He needs a new certification card*.") Further the Medical Director knew that Mr. Dargan had refused to be downgraded and to receive a new and lower DOH certification. (*"He chose another path*".)

3. The third well-established date when FEMS knew or should have known of the act or occurrence possibly constituting cause related to the test given to Mr. Dargan on February 14, 2012 by the Medical Director. Thereafter the Medical Director continued to refuse to permit Mr. Dargan to practice as a FEMS EMT.

Further on the same day, the Medical Director wrote a letter to Dr. Brian Amy of the D.C. Department of Health. The subject was "Request downgrade of [Mr. Dargan's] Certification after Quality Review? The Medical Director stated:

> My assessment reveals that he does not demonstrate the cognitive nor psycho-motor skills that are required for him to function safely as an independent EMT— 1-99 advanced life support provider. His technical skills were poor on my last assessment using a patient simulator with megacode session held on 2 February 2012 and again on 14 February 2012. Basic Paramedic skills such as medication administration, EKG rhythm recognition, and ACLS protocol compliance were not to an acceptable standard. I have offered him a BLS level of certification as an EMT-Advanced but cannot support him functioning as an EMT 1-99 "paramedic" until such time as he completes a fully accredited Paramedic Course, gains NREMT-Paramedic certification, and completes an assessment by this agency.
>
> Summary of past interventions listed below when taken in context to my recent assessment supports such a decision. He also has been in training since removal from operations on 6/14/2011 after a very concerning complaint of poor performance during Cardiac Arrest run. Rec. 395

The February 14, 2012 letter concluded with the Medical Director asking that Mr. Dargan's Department of Health Certification be demoted. The Medical Director also noted that he could not authorize re-certification of Employee's NREMT 1-99 certification at that time.

4. 6/25/2012 The Medical Director wrote a confidential follow-up letter to Dr. Amy dated June 25, 2012 with the subject: “Request revocation of Certification after provider Clinical Review Harold Dargan

EMT I-99." The Medical Director stated that he tested Mr. Dargan and found him to be incompetent despite retraining. The Medical Director also stated that he can not allow Employee to practice under his license and will not "sponsor him at the ALS scope of practice." The Medical Director requested that the DOH "decertify" Dargan as an ALS EMS provider. Rec. 40.

This follow up letter was written by the Medical Director because while there had been previous discussion with the Department of Health there had been no action taken on his previous letter and Mr. Dargan's "certification was going to lapse on June 30th." This letter was "basically almost identical to the previous one" except that it clearly requested decertification,

These undeniable signposts on the continuum from the February tests by the Medical Director (suggesting on two occasions that Mr. Dargan was no longer certified by DOH and shouldn't be), to the confidential e-mails to the DOH seeking Mr. Dargan's official decertification and capped by the Medical Director's refusal to sign Mr. Dargan's Application to renew his DOH certification, all of which

occurred prior to the 90 days, not including Saturdays, Sundays, or legal holidays, of the expiration of Mr. Dargan's DOH certification demonstrate FEMS' inability to meet its evidentiary burden. FEMS' suggestion that Mr. Dargan's termination was based solely on his failure "to maintain the required DOH certification...." is clearly untrue and, when presented to the Superior Court, a violation of Rule 11(b)((3) since the factual contention does not have evidentiary support as seen in the chronologically wide ranging termination letter. Rec. 498 Nonetheless, the events in February 2012 and thereafter provided the decisional context for the Medical Director's refusal to forward Mr. Dargan's certification renewal to the Department of Health.

FEMS has argued that it could not bring charges against Mr. Dargan until his Department of Health certification actually expired. Even if this was true FEMS had, at the least, a bit less than 90 business days (approximately 4 month) from when FEMS admits it actually knew of the act resulting in the charge. The statute does not say no *earlier,* it says no *later.* FEMS could easily have met the statutory mandate with months to spare even if it utilized the May 30, 2012 date when the Medical Director refused to sign and send to the DOH Mr. Dargan's application to recertify. Certainly FEMS' Medical Director knew or should have

known at that point that Mr. Dargan would not be recertified. Indeed, it would be insulting the Medical Director to suggest that he did not know what he expended so much effort to achieve. What FEMS cannot do is to insulate the clear precipitating incidents which led to the Medical Director's refusal to forward Mr. Dargan's recertification application from the certification expiration itself by now claiming that they are unrelated. Without these incidents, the record is clear that Mr. Dargan would have been recertified. There is nothing in the record which suggests that FEMS has met its burden to prove the contrary.

The OEA decision clearly failed to address—even ignored—these arguments focusing solely on midnight on June 30, 2012, the day Mr. Dargan's DOH certification expired. *Compare* Rec. 411-417 with Rec. 498-499.

C. FEMS may not under Constitutional, statutory and regulatory constraints terminate Mr. Dargan for an act over which he had no control and which resulted from a continual denial of Due Process. Extending into the OEA Hearing.

The Supreme Court, the D.C. Council, and the Executive have made it clear that one's employment is a property right which cannot be terminated (1) without satisfying due process guarantees and (2) which results from a violation of Agency regulatory and administrative practices. *See, e.g., Cleveland Board of Education v. Loudermill,* 470 U.S. 532, 541 (1985); the Comprehensive Merit Personnel Act ("CMPA"), D.C. Code § 1-623.01, *et seq*.; CDCR 6-B 1603.10

In this instance, it has been jointly agreed that Mr. Dargan, during his employment with FEMS, had maintained all appropriate National and District of Columbia certifications and registrations until the Medical Director refused to authorize the renewal of his certification by the District of Columbia Department of Health. Prior to the Medical Director's refusal to authorize the renewal of Mr. Dargan's certification by the District of Columbia Department of Health Mr. Dargan had successfully completed all courses necessary for the renewal of his certifications as an EMT-I/99. Rec. 391 Mr. Dargan had also obtained additional certifications of competency. Rec. 391 Thus, the procedural failure to obtain the renewal of his certification was not caused by Mr. Dargan, but rather by the Medical Director who refused to forward his application for the renewal of his certification to the Department of Health. It is a violation of Due Process (for those entities providing Due Process guaranties) to terminate an individual for an act which resulted exclusively from (1) the failure to act of another and (2) the violation of Regulations and Statute. And so the question becomes whether FEMS was trying to insulate the real cause of Mr. Dargan's termination from Due Process review through manipulation or was FEMS merely caught up in bureaucratic confusion (either of which would result in the reversal of Mr. Dargan's termination).

It is unavoidable that the decision of the Medical Director not to allow Mr. Dargan to be recertified arose from the Medical Director's prior evaluation of the two Psychomotor (Practical Skills) Examinations he administered to Mr. Dargan in

February 2012. Consequently, a Due Process examination of those two examinations, and the acts of the Medical Director thereafter in relation to perpetuate their result. them, is required. But the conundrum is that FEMS insists it did not rely on the Medical Director's decision and his refusal to sign and forward Mr. Dargan's application for renewal of his DOH certification.

Reliance is also problematic on substantive grounds. The Medical Director concluded that Mr. Dargan's skills could not be remediated because he did not demonstrate the "maturity," "cognitive" and "psycho-motor skills" which were required for him to function safely as an independent EMT 1-99 advanced life support provider. Rec. 395-396 Put another way, Mr. Dargan was too immature, too stupid and too clumsy to be an ALS provider which was as broad an indictment of Mr. Dargan's skills as can be imagined.

The first problem with the Medical Director's evaluation, although not disqualifying, was that it was contrary to the overwhelming evidence. In Mr. Dargan's approximately seven years as an EMT 1-99 advanced life support provider there was only one instance where he failed in performing or providing medically-related services, the instance in June 2011 discussed above. His Performance Review from October 2008 through September 2011 contained no evaluations less than "valued performer." Rec. 393 Indeed, Mr. Dargan receives a commendation for "continuous outstanding clinical judgment and documentation" in the 2010 DC FEMS Annual Clinical Quality Report. Rec. 394 On October 6, 2011, Mr. Dargan was assigned to obtain the ALS field evaluation required by the

Medical Director under mentor Sgt. Bachelder. Paramedic Preceptor Sgt. Bachelder evaluated Mr. Dargan this way.

> [Mr. Dargan] has improved and progressed from needing an occasional prompting to needing very few prompts during patient care. He has become a better provider for his patients and the agency. Harold has easily accepted the roll (sic) of a team member and works well with other unit members providing care. Harold is very knowledgeable in patient care and protocols. In my opinion IP Harold Dargan is ready to resume his role as an ACA. Rec. 394

Sgt. Bachelder's view was based on his evaluation during 91 incidents in which Mr. Dargan participated. Rec. 423-449 Finally, Mr. Dargan had obtained all National and District certifications necessary to act as an EMT-1-99 advanced life support provider. Rec. 392

None of this is conclusive in light of the charged offense, but it raises the issue of how an indisputably skilled and fully competent independent EMT-1-99 advanced life support provider for seven years became totally and permanently incompetent and immature in February 2012. (It is irrelevant of course because Mr. Dargan is not requesting restoration to the field, but rather an opportunity for the required remedial training as discussed in the Conclusion below.) It is not surprising that the Medical Director did not want his determination to be subject to independent review in resolving that question, yet this is precisely the ambit of due process.

This is also true because the Medical Director had a particular responsibility as FEMS' senior medical professional. As discussed in full in the Argument Mr. Dargan had two explanation, both reasonable, for these failures. First the mannequin being utilized for the examination was a newly-acquire and computer controlled dummy with which he was unfamiliar and on which he was only allowed an hour or so of training. No further information or details of the mannequin appear in the Record and they were not considered. Second Mr. Dargan explained that the test called for him to perform both the physical manipulation of the mannequin and simultaneously answer questions from the Medical Director. Mr. Dargan was unfamiliar with this form of multitasking as it was neither utilized nor required in the field. Both of these perfectly reasonable explanations were rejected out of hand.

There is also a unique and troublesome aspect to the Medical Director's rejection of a long standing and previously skilled emergency medical technician's explanation for his sudden failure to carry out what the Medical Director considered to be basic medical tasks. Was there a medical etiology? If Mr. Dargan had presented in a clinical context the Medical Director would have been expected to utilize the universal medical analytic

technique of differential diagnosis. The parallels are inescapable. Customarily the symptomatic patient presents with a complaint. Physicians such as the Medical Director will take a detailed history looking for a physical etiology, The physician will then form an initial hypothesis creating a list of potential explanation for the symptoms consistent with the history. Next the physician will order labs and other tests to gather more data and exclude other explanations. From this process the physician will narrowing down the list of possible diagnoses based on test results and clinical reasoning. The physician will then reach a final conclusion and develop a treatment plan.[12] In Mr. Dargan's case the Medical Director made no attempt to discover the cause of Mr. Dargan's sudden loss of skills and in fact ordered that they not be remediated at the Training Academy until he was terminated.

It could just be that the procedures FEMS chose at the end of the day were meant to avoid embarrassment rather than error. The Medical Director, newly appointed, would likely not want to be considered his misstatement on Mr. Dargan's February 14, 2012 Assessment form that Mr.

[12]The process an attorney follows when a potential client arrives is coincidentally is similar.

Dargan had during the "last 12 days...extensive training @ T[raining] A[cademy] " Rec. 452 since the Medical Director specifically instructed the Training Academy on February 3, 2012, twelve days before the reexamination on February 14, 2012:

> [Mr. Dargan] is officially removed from operations. He needs a new certification card. I offered him an option, He chose another path. He can go into light duty/no patient care process on day work or as assigned until he has a certification. His EMT-I-99 will be pulled.
>
> He has no training requirements so assigning him to training makes no sense. JA-25, Rec. 394

The OEA Administrative Judge (and the Superior Court) found that the failure of "extensive training" at the Training Academy could not be challenged since the e-mail exchange was included in the agreed-upon facts. While the existence of the exchange could not and was not challenged, its contents was untruthful and clearly wrong. In any event, Mr. Dargan cannot be terminated if FEMS itself precluded the renewal of his certification without affording him due process along the way.

Indeed Mr. Dargan was deprived of the Bulletin No. 83 procedures FEMS relied on. FEMS Agency Bulletin No. 83 establishes the recertification protocol which must take place to avoid an adverse action being taken. Once again, it is:

Psychomotor (Practical Skills) Examination Policies:

EMT-Intermediate/99

EMT-Intermediate/99 candidates are allowed (3) full attempts to pass the psychomotor examination (one "full attempt" is defined as completing all eleven (11) skills and two retesting opportunities if so entitled).

Candidates who fail a full attempt or any portion of a second retest must submit official documentation of remedial training over all skills before starting the next full attempt of the psychomotor examination and reexamining over all eleven (11) skills, provided all other requirements for National Certification are fulfilled.

This official documentation must be signed by the EMT Training Program Director or Physician Medical Director of training/operations that verifies remedial training over all skills has occurred since the last unsuccessful attempt and the candidate has demonstrated competence in all skills.

DC Fire & EMS Department Employees who fail the third full and final attempt of the National Registry EMT-Intermediate/99 psychomotor examination will be subject to adverse action. Rec. 391

Mr. Dargan was not even permitted to complete one full attempt to pass his psychomotor examination, much less the three full attempts required under FEMS Agency Bulletin No. 83.

FEMS committed harmful procedural error, and deprived Mr. Dargan of due process, by relying on one part of Bulletin No. 83 to terminate him while ignoring that part of Bulletin No. 83 which establishes the procedures and prerequisites necessary to do so.

FEMS was not alone. The Senior Administrative Judge, having apparently concluded on his third attempt to sustain FEMS' determination that the less said the better, the Senior Administrative Judge reduced his Decision from 26 pages to 13 pages. Rec. 1294 Evidence in the prior Record and the parallel OHR proceeding could prove problematic, however, so he simply refused to permit its introduction. Following Pre-Trial, citing what he considered his judicial prerogative, the Senior Administrative Judge precluded all of Petitioner's designated witness from testifying and barred many of his proposed exhibits. Rec. 1007 Petitioner sought relief from the OEA Appeals Board claiming error and bias arising from the Senior Administrative Judge's prior failures in this and others appeals in which employee' s counsel appeared. Rec. 779 The Board declined to grant relief citing decisions that permitted trial judges to control witnesses and evidence. Each of the cited cases, however, limited the circumstances to a need to avoid redundancy. Rec. 793 This ruling was also contrary to OEA's own Rules which provide:

> 629.1 All material and relevant evidence or testimony shall be admissible, but may be excluded if it is unduly repetitious; 629.2 During an evidentiary hearing, a party shall be entitled to present their case or defense by oral, documentary, or physical evidence, and to conduct reasonable cross examination; 629.3 Objections to the admission of evidence, or to the conduct of the proceeding, may be made orally on the record where an evidentiary hearing has been provided, or by written motion. * * * Rulings on objections shall be made at the time of

the objection or prior to the receipt of further evidence, unless the Administrative Judge orders otherwise, and shall be a part of the record; 629.7 Whenever the Administrative Judge excludes evidence, the offering party may make an offer of proof of what the party expects the evidence to establish. In the case of an evidentiary hearing, if the offer of proof consists of an oral statement, it shall be included in the record. If the offer of proof consists of an exhibit or other documentary evidence, it shall be marked for identification and retained in the record so that it will be available for consideration by any reviewing authority.[13]

While there are a number of additional procedural errors by the Senior Administrative Judge the length of this brief does not permit their full itemization. The most important and conclusive procedural error was the Senior Administrative Judge's refusal to permit Mr. Dargan to introduce evidence relating to the remedial training he was entitled to receive following his failure in the February 2, 2012 examination. Remedial training at the Training Academy which would have almost certainly resulted in Mr. Dargan being able to successfully manipulate the mannequin at the February 14, 2012 examination. Further the Medical Director's untruthful statements on a number of occasions that Mr. Dargan had received extensive remedial training demonstrate the critical importance of this training.

---

[13]The result would have been different in this Court. As Judge Deahl recently put it in his dissent in *Sonmez v. WP Co. LLC,* 330 A.3d 285, 344 (D.C. 2025): "To again draw an analogy to our own profession, if a judge determines that their participation in a case would raise an "appearance of partiality," they should recuse from the case without delay. *In re D.M.*, 993 A.2d 535, 537 (D.C. 2010) (observing that our "ethical canons . . . require recusal when there exists an appearance of partiality on the judge's part").

So why didn't Mr. Dargan introduce testimonial or documentary evidence in this regard? It wasn't for lack of trying. Mr. Dargan's proposed dispositive evidence was to be given by Anita Massengale, FEMS' Clinical Quality Program Manager who was in charge of maintaining the quality of FEMS' EMTs and paramedic. Ms. Massengale was both a Registered Nurse and an Attorney. Her job was to review "clinical incidents for the EMS side, looking for protocol adherence, working closely with training, and any other duties assigned but always in the clinical realm." She gave a sworn statement in a parallel OHR proceeding.[14]

Ms Massengale in relevant part stated:

> 12. *What happens when they don't pass?* Based on the deficits that were noted it goes back to training to work on those again.
>
> 13. Respondent's Counsel: This is the first time, really, that that's happened. When it comes to the third time, this would be totally left up to the physician at that point because the prescription is not working.
>
> 14. Respondent's Counsel: *How do you get notice that they don't pass the exam/simulation?* In this instance when he didn't pass, we decided to send him back, I literally went down to meet with him, went over areas that needed to be addressed and unfortunately they were the same things he was sent down there for in the first place. Me and Capt. Fallon went down to ask what he was not getting. But we also let him know the concerns we had.

---

[14]The ALJ, sensing danger, disqualified Ms. Massengale from testifying and barred the use of her sworn statement. This was clearly improper under OEA regulations.

15. Respondent's Counsel: *Did he explain why he didn't think he was passing the prescription (the training he was sent for)?* When I was down there I wouldn't interfere but I would observe. And sometimes in the training academy I would see him teaching, not observing, so I asked, maybe you're not getting what we sent you here for because you're deviating from it? And made it clear that we didn't want deviation from prescription we had sent. If there were other medics sent for remediation, I would see him at the board explaining, and everyone's taking notes, it was very concerning.

16. Rp Counsel: *How is the person that you sent down to the training academy now teaching?* He shouldn't be. That's why I sat down with Capt. Fallon, he's my liaison, I said what I noted, that Mr. Dargan didn't pass, and then I told Mr. Dargan, we're going to go back through it, we have to justify him being out of the field for this long, and can't do it if we notice you deviating from the plan here and there. He just nodded and said thank you, I appreciate it, and then I saw him behind the dumpster on the phone and that was it. It was just these little deviations. I was a little frustrated.

17. Rp Counsel: *Who makes a determination when an employee is ready to be seen by the Medical Director for a determination*? We set it up by modules. We send you back for those specific areas you need work in, and after we set it up again, you are assigned a one-to-one instructor, we agreed that Mr. Dargan would go back for more training for two or three weeks after he failed the first time. We said to Mr. Dargan, let's get you ready and you'll go back before the Medical Director. Before the second review was when it was even prescribed that he go through a mock code, go through the simulator at least three times prior to meeting with the doctor, that was the recommendation, and that was what Capt. Fallon was to follow up and make sure it happened.

Thus it is clear that Mr. Dargan did not receive the remedial training to which he was entitled. Indeed he did not receive the remedial training established by FEMS.

CONCLUSION

There are important principles to be preserved through this appeal transcending those affecting the parties.

First, to protect the public from unqualified EMTs.

Second, to preserve the right and duty of the Medical Director to judge whether or not the EMTs under his or her charge are qualified.

Third, to preserve the two track system meting out discipline for operational failures and remediation for clinical failures.

Fourth, to provide a full and fair due process remedy for EMTs subject to arbitrary or inappropriate adverse employment action.

Under these circumstances and constraints Petitioner asks this Court under its broad statutory authority recited above to vacate the Superior Court decision and direct the Superior Court to direct the OEA to direct FEMS to take the following action.[15]

1. Restore Petitioner to FEMS employment with full current and past benefits and assign him to the Training Academy for up to four months of remedial training in those areas previously found deficient with an emphasis on experience with the computerized simulation mannequin without additional verbal requirements. The Clinical Quality Program Manager shall oversee this remedial training.

2. If considered successful in his remedial training at the Training Academy Petitioner shall undergo the customary Field Examination.

---

[15]The Superior Court Judge who affirmed the OEA decision has retired.

3. Upon successful completion of the customary Field Examination Petitioner shall present for the customary examination by the current Medical Director.

4. If approved by the Medical Director Petitioner shall be returned to full duty.

5. Upon initial reinstatement Petitioner shall be entitled to back pay and other benefits he would be entitled to under OEA procedures, minus the deductions available to FEMS allowed by OEA procedures, from initial termination.

6. Petitioner's attorney, Frederic W. Schwartz, Jr., shall be entitled to legal fees for services performed on behalf of Petitioner regardless of the jurisdiction at the rate prescribed by the OEA.

Respectfully submitted,

/s/ Frederic W. Schwartz Jr.

Frederic W. Schwartz, Jr.
2600 Virginia Ave., NW
Suite 205
Washington, D.C. 20037

(202) 463-0880 197137

FWS888@aol.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing with Attachment A was transmitted to counsel of record including the Solicitor General, this 15th day of May, 2025, electronically, pursuant to the Rules of this Court.

/s/ Frederic W. Schwartz Jr.

Frederic W. Schwartz, Jr.

ATTACHMENT A

Timeline (for the convenience of the Division)

06/14/2011 Dargan reports to Training Academy

07/14/2011 Remedial efforts at Training Academy completed; Field Evaluation scheduled (AB-69)

07/15/2011 Field Evaluation cancelled by Dr. Mountvarner (former Medical Director); reason unknown (AB-69; Tr. 173, L. 7-13)

07/19/2011 Dargan met with Dr. Mountvarner; issued comprehensive textbook on Emergency Care in the Streets

08/10/2011 Dargan begins series of FISDAP tests

09/27/2011 Dargan ends series of FISDAP tests

09/28/2011 Dargan examined by Dr. Miramontes. Passes. Released for Field Evaluation S(12)

10/12/2011 Field Evaluation begins with Sgt. Bachelder

01/02/2012 Field Examination ends; Mentor Bachelder reports from 91 incidents that indicate Dargan proficient in patient skills and ALS protocols–should be released to operations

02/02/2012 Dargan examined by Dr. Miramontes. Told not I-99 material; I-99 must be rescinded. Only can be EMT-Advanced.

02/03/2012 Follin advises Dr. Miramontes that Dargan scheduled to return to work and asks whether under the circumstances Dargan should report to Training Academy "until administrative actions are complete." (Dr. Miramontes testified that "administrative process" dealt with the HR disciplinary side.) Tr. 84, L. 3-10

02/14/2012 Dargan examined for second time by Dr. Miramontes. Told Dr. Miramontes has no confidence in him as ALS provider. Must be downgraded to EMT Advanced.

02/14/2012 Dr. Miramontes sends confidential letter to DOH requesting Dargan's DOH certification be dropped to EMT-Advanced and advises cannot authorize renewal of his NREMT I-99.

02/14/2012 Dr. Miramontes continues to offer Dargan his sponsorship at a downgraded EMT-Advanced level. Dargan doesn't accept offer.

05/30/2012 Dargan submits DOH renewal Application at I-99. Dr. Miramontes will not sign affirmation at I-99 level.

06/25/2012 Dr. Miramontes writes follow-up letter to Dr. Amy dated June 25, 2012 with the subject: "Request revocation of Certification after provider Clinical Review Harold Dargan EMT I-99." Dr. Miramontes states that he tested Dargan and found him to be incompetent despite retraining. Dr. Miramontes also states that he can not allow Employee to practice under his license and will not "sponsor him at the ALS scope of practice." Dr. Miramontes requests that the DOH "decertify" Dargan Employee as an ALS EMS provider. 40. This follow up letter was written by Dr. Miramontes because while there had been previous discussion with the Department of Health there had been no action taken on his previous letter and Employee's "certification was going to lapse on June 30th." This letter was "basically almost identical to the previous one" except that it requested decertification.

06/30/12 Dargan's EMT-Intermediate DOH certification expires at midnight.

09/31/2012 FEMS issues Dargan an Advance Written Notice/Removal