DISTRICT OF COLUMBIA COURT OF APPEALS

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

REPLY BRIEF OF THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REPLY TO OEA'S ISSUES ON REVIEW

The OEA has set out a somewhat skimpy set of issues on appeal coupled with misplaced argument. Mr. Dargan does not consider himself bound by the OEA's enumeration of its issues on appeal and does not believe this Court should either.

REPLY TO OEA'S STATEMENT OF THE CASE

The OEA has set out a generally correct review of how we got where we are now after a 13 year journey through the agency and the Courts, OEA's most significant issue before this Court is whether "Fire and EMS terminated appellant Harold Dargan in 2012 because he failed to maintain his DOH Certification." This "failure" resulted, however, from subterfuge preceded by months of failed FEMS efforts to secure Mr. Dargan's voluntary resignation from his EMT position. Mr. Dargan did every thing necessary to "maintain" his certification and it was Medical Director Miramontes' refusal to sign Mr. Dargan's recertification application which doomed his recertification. Dr, Miramontes agrees, but claims that he had no choice.

REPLY TO OEA'S STATEMENT OF FACTS

Rule 28 provides that Appellees may include in their brief "a statement of facts relevant to the issues submitted for review with appropriate references to the record." OEA, however, has added a novel provision in "Facts" designated " Legal Background" in which it lays out its legal position including authorities. Rule 28 also provided that Appellees may include in their Brief a Summary of the Argument , which must contain a succinct, clear, and accurate statement of the

arguments, and the Argument itself. This is where Appellees' "Legal Argument" belongs. Appellant must now utilize his 20 pages to reply to Appellees` redundancy.

REPLY TO OEA'S "LEGAL BACKGROUND"

The OEA provides a correct although not necessarily relevant description of the four EMT and Paramedic ranks and some of each rank's scope of practice. OEA also provides a thorough review of the design and requirements for certification by the National Registry of Emergency Medical Technicians (NREMT). The D.C. Department of Health (DOH) has required NREMT certification before granting DOH certification and while employed by FEMS. Mr. Dargan maintained NREMT certification at all time relevant here. As well. The NREMT testing protocol, as adopted by FEMS, is also described in detail by the OEA. Mr. Dargan was certified by both organizations for decades until his DOH certification expired.

FEMS then goes into an extensive discussion of Dr, Miramontes's responsibilities as Medical Director and why in that role he could not sign Mr. Dargan's recertification application. This has never been at issue in light of Dr. Miramontes months-long articulation of Mr. Dargan's abilities as reflected in the Record. However Dr. Miramontes' refusal to sign Mr. Dargan's recertification application was critical for two reasons. First, it was another indicia of Dr. Miramontes' part professional and part personal, months-long vendetta against Mr. Dargan. (Reviewed below) Second, and more important, the date or dates Dr. Miramontes knew or should have known that he would refuse to sign Mr. Dargan's

recertification application was more than 90 days (not including Saturdays, Sundays, or legal holidays) prior to the date Mr. Dargan's DOH certification expired. *See* D.C. Code § 5-1031 for the time constraints.

REPLY TO OEA's FACTUAL BACKGROUND

In simpler times Daniel Patrick Moynihan, a lawyer in all but degree, said "Everyone is entitled to their own opinions, but not to their own facts." The mantra now appears to be, thanks to a Presidential press secretary, that there are facts and there are "alternative facts." The task in replying to OEA's "Facts" is to set out the discrepancies and leave Mr. Dargan's responses primarily to his opening Brief.

Some clarification and some amplification is needed for OEA's description of Mr. Dargan's remedial course. Following an incident on June 14, 2011 Mr. Dargan was removed from his duties in the field and assigned to the FEMS Training Academy. This was a common practice; indeed it was so common that there was a printed form to do so. Rec 53-55; Rec. 1296, ¶16 His Critical Remediation Action Plan at the Training Academy indicated that his" Primary Area **of** Weakness" and his "Secondary Area of Weakness" were the "airway placement" of an Endotracheal Tube and associated skills, Rec. 53-55 All agree that this transfer to the Training Academy was appropriate. OEA's recitation adds to this description "and the patient later passed away." OEA Br. at 7 No one believes that there was any association between Mr. Dargan's performance and the patient subsequently passing away yet this effort to poison the well has persisted since Mr. Dargan's termination.

OEA discusses Mr. Dargan's remediation process in a perfunctory manner which clumps together the different elements of the process. They are: (1) the remediation process at the Training Academy, (2) an exit examination by the Medical Director following remediation at the Training Academy, (3) a field test to ensure general competence in the field (4) and (optional) a second examination by the Medical Director.

Only the Training Academy provided "remediation" through actual skills training and testing. Mr. Dargan's Remediation protocol at the Training Academy, true to its name, was guided by a seven page list of skills which indicated those which needed to be remediated and when the remediation was accomplished. Rec. 53-57 This process took place from June 14, 2011 when Mr, Dargan reported to the Training Academy until July 14, 2011 when the Training Academy completed his remediation and scheduled his exit examination by the former Medical Director. Mr, Dargan spent 4 weeks and 2 days at the Training Academy. There is no credible evidence in the Record concerning the reasonableness of this period time.

The remainder of the time was spend waiting to be scheduled for the two examinations by Dr. Miramontes (the first of which Mr. Dargan passed), the field examination (which Mr. Dargan passed in full *See* Attachment A), and a make-work assignment at the Training Academy while waiting for the new Medical Director (Dr. Miramontes) to arrive. (This consisted of taking several NREMT Paramedic sample tests and a self-directed random review of *Emergency Care in the Streets* (6th

Edition) by Nancy L. Caroline an 1,800 page, 8 pound general medical text.) Thus the non- remedial time occupied was 29 weeks as contrasted with 4 weeks and two days of actual remediation, Mr. Dargan has provided a time line which clearly indicates the time utilized during Mr. Dargan's remedial period.

More important, as we are dealing with "facts," the OEA relies on Dr. Miramontes for the conclusion that Mr. Dargan's remediation represented "an exceptionally long time period for remediation." OEA Br. 8. As discussed throughout Dr. Miramontes often strayed from the truth in his effort to require Mr. Dargan to self-downgrade. In fairness however Dr. Miramontes also said that most remediations are accomplished within two to four weeks or up to "12 weeks in an extreme case." Rec. 850 (cited almost at OEA Br. at 9). Since Mr. Dargan's actual remediation period occupied 4 weeks and 2 days it clearly fell within Dr. Miramontes' customary remediation period. Dr. Miramontes in his rush to judgment must have been confused because inefficiencies in his Office could not seriously be added to Mr. Dargan's remediation period.

The second inaccuracy suggested by OEA is that "after extensive remediation" Mr. Dargan failed two "interviews" with Dr. Miramontes. The specifics of the "interviews" are only documented by Dr. Miramontes, but all agree that Mr, Dargan's performance was unsatisfactory. The nature of the remediation between the February 2, 2012 and February 14, 2012 "interviews" in particular and thereafter is highly contested and discussed in derail in Mr. Dargan's opening Brief. One point

not discussed in Mr. Dargan's opening Brief , but apparently important to OEA, is that "Dr. Miramontes concluded that he could not sponsor Dargan at his current level certification level' until such time as he completed a fully accredited *Paramedic* Course, gains *NREMT-Paramedic certification* , and completes an assessment by this agency.'" (Emphasis supplied) OEA Br. at 10 citing Rec. 1103. Further OEA acknowledges that "*on May 30, 2012*, Dargan sent an application for DOH recertification as at his current level o Dr, Miramontes for his signature even though Dr. Miramontes *had already stated* that he would no longer sponsor Dargan at this level. (Cit. Omitted)(Emphasis supplied) OEA Br. at 11 *See also* further discussion at OEA Br. at 11

As OEA points out "[o]n April 24, 2013, Fire and EMS's Chief, Kenneth B. Ellerbe, issued a Notice of Final Decision sustaining Dargan's removal." Cit. omitted. The Chief referenced D.C. Code § 7-2341,15(d) which prohibits Fire and EMS from employing person who no longer possessed the required certification." OEA Br. at 13 The citation and its import is erroneous. The statute reads in pertinent part.

> D. C. Code § 7-2341.15. Denial, suspension, and revocation of license or certification.
>
> (a) The Mayor, *subject to the right to a hearing* as provided in § 7-2341.17, *may deny issuance of, deny renewal of, suspend, or revoke a license or certification to operate an emergency medical services agency, an emergency medical response vehicle, or an emergency medical services training facility to a person or entity which is found to have:* * * *

> (d) Upon suspension, revocation, or termination of a certification *to perform the duties of emergency medical services personnel* or an emergency medical services instructor, the individual so certified shall immediately surrender his or her certification, and shall immediately *cease to perform emergency medical services or instruction duties.* No person, entity, or government agency shall employ the individual, or permit the individual to *act, in that capacity.* (Emphasis supplied)

Thus the statute clearly precluded Mr. Dargan acting as an EMT or providing other medical services, but did not preclude other continued employment or being remediated. That is how Mr. Dargan remained a FEMS employee after Dr. Miramontes removed his right to perform as an EMT between November 2, 2011 until June 30, 2012 and subsequently until April 24, 2013 after he was terminated. The statue clearly provided as well that Mr. Dargan was entitled to a due process hearing. D. C. Code § 7-2341.15. (a) Concern about the result of such a hearing persuaded Dr. Miramontes in particular and the FEMS powers that be in general to avoid taking any action under the statute.

Finally OEA devotes 10 pages of its Brief to a blow-by-blow review of the 14 year history of these proceedings misstating Mr. Dargan's position on occasion and spending needless time on the irrelevant Superior Court holdings. .

Contrary to its extensive "Legal Background," "Factual Background," and "Procedural Background," OEA devotes less than a page to its perfunctory consideration of the "Standard of Review." The origin of this appeal results in subtleties which are addressed in Page 25-29 of Mr. Dargan's opening Brief . Since OEA fails to address these subtleties they are either not opposed by OEA or are left for consideration by this Court.

REPLY TO OEA'S SUMMARY OF ARGUMENT

The 20-page limitation imposed on a Reply Brief requires Mr. Dargan to reply to OEA's Summary of Argument and argument together. No forfeit is intended.

REPLY TO OEA'S ARGUMENT

A. The Constitution (Now You See it; Now You Don't)

As a threshold complaint OEA argues that Mr. Dargan forfeited any Federal constitutional due process claims for failure to raise them in a judicial fashion prior to his brief. There are three variants of these sins. Most common "where an appellant makes an argument for the first time in a reply brief or at oral argument" as their opponent is denied "a fair opportunity to respond" to the new argument. *See, e.g. Buitrago v. D.C. Dep't of Emp. Servs.*, 320 A.3d 332, 337-38 (D.C. 2024). This was not the case here. The Constitutional argument was addressed in Mr. Dargan's opening brief and OEA responded. Less common is when the appellant makes an argument for the first time in its opening brief, but had not raised it in a prior proceeding. T his was not case here either. Indeed an identical argument was made by Mr. Dargan to this Court in the progenitor proceeding. (17-CV-0253) (Attachment A) That appeal was remanded and the prior decision vacated by this Court.)

OBE raises the question of whether the issue was presented to the agency. This Court "may show a measure of flexibility [as to contentions not urged at the administrative level] when the interests of justice so require." *Moore v. D.C. Dep't of Empl. Servs.*, 813 A.2d 227, 229 n.5 (D.C. 2002). Even here there are complication rendering OEA's argument improper. The "Fifth Amendment Due Process Clause of

the United States Constitution" was raised and argued by Mr. Dargan before the OEA in his "Employee's Prehearing Statement" for *Dargan I*. Rec. 298 at 302. Further, and critically detrimental to OEA's argument, the Senior Administrative Judge intentionally in an effort to prejudicially suppress facts and issues previously raised in the remanded *Dargan I*, narrowed the issues in Dagan II by disqualifying virtually all of Mr. Dargan's witnessted and evidence over Mr. Dargan's counsel's strenuous objection. . *See* opening Brief at 24 &45; Rec. 516-548, 753-820, 835

B. Mr. Dargan Was Not Afforded Due Process

OEA argues that it correctly determined that Mr. Dargan was afforded "all the process that he was due under District law." "Due Process"simply means the process which is due. The OEA flounders as it tries to justify FEMS' engineering of Mr. Dargan's termination without proper due process..

Judicial and agency review of the provision of due process, unlike statutory analysis, is transactional and fact-bound. *District of Columbia v. Jones*, 442 A.2d 512 (D.C. 1982) is helpful and worth the block quotation. (Mildly restated)

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understanding that secure certain benefits and that support claims of entitlements to those benefits. *See also Bishop v. Wood,* 426 U.S. 341, 344(1976); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). * * * Statutory employment rights have previously been held to fall within the liberty and property concept of the Fifth Amendment. *See, e.g., Fitzgerald v. Hampton,* 467 F.2d 755, 762 (1972) We are accordingly compelled to consider whether the procedures accorded Officer Jones provide all the process that is constitutionally due before he could be deprived of his protected interest. *See Mathews v. Eldridge,* 424 U.S. 319, 332-33 (1976). The question remains what

> process was due. * * *"Due process is flexible and calls for such procedural protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481(1972). *See also Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 162 (U.S. 1951) ("'Due process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place, and circumstances.") In any given situation, a balance must be struck to accommodate the competing interests of government and the individual.

The analysis is thus re-framed. OEA argues that Mr. Dagan was provided all due process available under District Law because of the broad authority of Dr. Miramontes as Medical Director to ignore its provision. Dr. Miramontes is entitled to essentially absolute discretion, short of discriminatory animus, to determine who is permitted to practice under his license. That is why the relief Mr. Dargan requested was *not* judicial authorization to practice under Dr. Miramontes' license. Instead the requested carefully constructed relief was to be rehired by FEMS and to be provided with properly comprehensive remedial training supervised by FEMS' Clinical Quality Program Manager. (Opening Brief at 49) If successful the normal post-remediation path would be followed and due process consistent with the circumstances would be preserved, This preserves the prerogatives of the Medical Director, the appropriate FEMS procedures, and public safety. [1]

How Dr. Miramontes' authority was wielded is the question and the challenge before this Court as it was before the OEA. Thoughtful guidance at all steps of the

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[1] A fair outcome is likely since Medical Director Miramontes has resigned and been replaced, FEMS Chief Ellerbe has resigned and been replaced, and the Clinical Quality Program Manager, a nurse and a lawyer, has resigned (and sued FEMS). This is why her written testimony and deposition were suppressed.

way can be extracted from *Johnson v. United States*, 398 A.2d 354, 364 (D.C. 1979) even though it was a criminal case. The same standard applies, *inter alia*, to this Court's review.

> The act of compiling and preserving a factual record enables the reviewing court to determine whether the decision-maker's choice was both reasonable and proper in the specific factual context. In the words of one court: "[The] reasons for exercising discretion should not only be spelled out so a reviewing court can tell the basis of the Court's decision, but also so that counsel can know the basis of such decision." *Woodruff v. Woodruff*, 7 Ohio Misc. 87, 217 N.E.2d 264, 268 (1965) (emphasis omitted).* * * The facts may foreclose one or more of the options otherwise available to the trial court. Indeed, the facts may leave the trial court with but one option it may choose without abusing its discretion, all the others having been ruled out. *Brown v. United States*, 372 A.2d 557, 561 (1977).
>
> To exercise its judgment in a rational and informed manner the trial court should be apprised of all relevant factors pertaining to the pending decision. *United States v. Lewis*, 482 F.2d 632, 643 (1973). The court reviewing the decision for an abuse of discretion must determine "whether the decision maker failed to consider a relevant factor, whether he relied upon an improper factor, and whether the reasons given reasonably support the conclusion." Note, Perfecting the Partnership, supra at 95

The resulting corollary is that the "facts" must be true. This is where OEA fails. OEA believes, relies upon and credits Dr. Miramontes' conclusions even when contradicted by contrary and unchallenged documentation. testimony, and common sense. For example OEA argues that "Dr. Miramontes withdrew his sponsorship only after Dargan received ***extensive remediation*** and was afforded multiple opportunities to pass his skills assessment." OEA. Br. at 32-33, Not even close to truthful. As set out in Mr. Dargan's opening Brief and at every prior opportunity Mr. Dargan pointed

out that Dr. Miramontes specifically ordered that he **not** receive "**extensive remediation**," if any, at the Training Academy immediately following the February 2, 2012 skills examination. *See* Dargan Opening Brief at 12. *See also* Dargan Opening Brief at 8-17, 33-34, 39-44. [2]

Here is the directive unchallenged by OEA.

> 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
>
> Dr. Miramontes replied:
>
> [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

Faced with this all too visible smoking gun OEA tries several temporal tacks to erase its import. While the February 2, 2012 directive from Dr. Miramontes clearly referred to the period following Mr. Dargan's first February examination and barred "extensive remediation" thereafter OEA

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[2] According to the American College of Emergency Physicians of which Dr. Miramontes is a member: "Both MDs and DOs meet rigorous standards, undergo *extensive clinical preparation*, and are held to the same high expectations in residency, board certification, and clinical practice." (Emphasis supplied)

advances the following Record citations in support of the claim of "**extensive** remediation." OEA Br. At 33

> Classroom education, assignment testing, and 'field ride-outs' [field evaluation] R 53 (Critical Remediation Action Plan), 393-395 (5/26/15) Joint Statement of Material Facts ¶¶ 17-27), 846-47 [? Rcc 1296-1297] (8/4/21 Tr. 25-26), 1104-05) 2/14/12 Letter at 2-3,

However the past is not prologue. Most of these references do not refer to extensive remediation. Only the documents prepared by Dr. Miramontes and a potion of Dr. Miramontes' transcript in which he appeared oblivious to the fact that remedial training took place at the Training Academy (hence its name) is in point and does not support or imply "extensive remediation." Dr. Miramontes credibility, and lack of it, is discussed throughout.

More inappropriate, and in violation of due process, OEA admits to and condones what can only be described as administrative extortion following Mr. Dargan's initial February examination. As OEA puts it.

> After Dargan failed his skills assessment...Dr. Miramontes still offered to sponsor Dargan at an EMT-Advanced level. That path would have required certification for the provision of only basic, and not advanced, life support services, "until such time as [Dargan] completes a fully accredited Paramedic Course, gains NREMT-Paramedic certification , and completes an assessment by this agency." Notably had Dagan taken Fire and EMS up on this offer, he would have received much of the relief he now seeks: additional remediation and a further attempt to demonstrate his ability to provide advance life support services. Yet Dargan steadfastly refused to apply for an EMT-Advances certification. Rec. 307

So there we have it. If Mr. Dargan "voluntarily"accepted a downgrade he would be permitted to return to the field at that lower level. He would never be permitted to return to the field at his current higher level. Until he agreed to the downgrade Mr. Dargan was barred from further remediation and the retesting to which he was entitled under due process,. OEA spends a considerable amount of time exploring other hypothetical methods for Mr. Dargan to be restored to the field, but all required Mr. Dargan agreeing to a downgrade and all ignore his Due Process rights to the post- February 2, 2012 remediation and training he was entitled to and which Dr. Miramontes falsely claimed he received.

In any event, regardless of the etiology, the testing process is meant to offer candidates (1) the opportunity to demonstrate relevant skills and (2) a full opportunity to remediate, over several visits if necessary to the Training Academy as described in the testimony Anita Massengale, EMS Clinical Quality Program Manager and Agency Resp. Rec. 1043; Dargan Attach. 1-5[3]

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[3]OEA strenuously defends the exclusion of Ms. Massengale's sworn testimony and associated exhibits concerning FEMS' skills testing procedures after a failed skills examination as discussed elsewhere. This evidence was as relevant to Mr. Dargan's OEA proceeding as it was to his OHR proceeding. Both dealt with the due process standard practices to which he was entitled. The excluded trial Exhibits are attached tp this Reply Brief. This Court can simply examine the Exhibits and, if they should have been admitted, judicially note their contents.

A lack of Due Process is much easier to find. For example, as here, denying an EMT the opportunity to remediate his performance errors after he provided the reasonable excuse that he was unfamiliar with new testing equipment (a computerized mannequin) and a new testing methodology suggests the deprivation of Due Process. Add to that is the termination of his property interest in continued employment and the ulterior motive for his treatment. Finally the relatively minimal cost of the remedy by providing due process completes the prescription. The search for the specific remedy in "District law," as suggested by OEA at Page 36 , suggests a degree of acumen not previously observed in D.C. lawmakers.

OEA further misunderstands Mr. Dargan's position concerning the refusal of Dr. Miramontes to sign his recertification application. Under the circumstances Dr. Miramontes' refusal to sign was but one indication of how he "knew or should have known" that Mr. Dargan's DOH certification would lapse on June 30, 2012 as it resulted from his failure to sign. OEA also fails to understand how Mr. Dargan is not challenging the ***right*** of Dr, Miramontes to (fairly and honestly) evaluate his performance, but rather Mr. Dargan's **right** to have an evaluation consistent with due process guarantees. That is why Mr. Dargan requested the relief he did. Twenty pages are not sufficient to address all the erroneous readings of Mr. Dargan's position by the OEA.

There are many more. Just as with abuse of process this Court 'must determine whether the decision maker failed to consider a relevant factor, whether the decision maker relied upon an improper factor, and whether the reasons given reasonably support the conclusion.'" *Bishop v. United States*, 310 A.3d 629, 641 (D.C. 2024).

C. FEMS Knew Far In Advance of 90 Days that Dr. Miramontes Would Not Permit Mr. Dargan to Obtain DOH Recertification on June 30, 2012

To remind, the relevant statute provides in pertinent part:

> [N]o... adverse action against any sworn member or civilian employee of the Fire and Emergency Medical Services 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...*knew or should have known* of the act or occurrence allegedly constituting cause. (Emphasis supplied) D. C. Code § 5-1031

OEA argues first that "[there is nothing in the record that suggests the 90-day period could have begun before June 30 2012 " because what Dr. Miramontes knew or did was unrelated to the expiration of Mr. Dargan's DOH certification.[4] OEA Br. at 41, citing the superceded Superior Court decision and ignoring this Court' s *de novo* review authority. The OEA then lists a litany of instances and acts which were indicia of Dr, Miramontes'

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[4]OEA suggests that this Court previously agreed with its position in its MOJ. What the Court actually said was "[w]e agree that **if** FEMS's notice obligation was not triggered until the date Mr. Dargan's DOH certification lapsed, then FEMS's notification was timely under the statute." (Emphasis supplied) Fn. 3, Rec. 1262 OEA overlooked the subordinating conjunction"If." This Court merely confirmed the arithmetic "if" OEA's theory of the case was correct–it wasn't.

unrelenting vendetta targeting Mr. Dargan and his refusal to voluntarily request a downgrade. The evidence is clear and not denied by OEA that Dr. Miramontes since February 3, 2012 refused to take any steps which would have advanced or even permitted Mr. Dargan to be recertified by DOH at his EMT grade level. Dispositively Dr. Miramontes knew that Mr. Dargan's DOH certification would lapse on June 30, 2012 if he as Medical Director refused to sign Mr. Dargan's mandatory application for DOH recertification. He refused. Rec. 450-451, 867, 941-944, 1150. 1169, 1101, 1227-1229.[5]

Once again OEA relies on prior Superior Court rulings for the proposition that the date Mr. Dargan's certification expired was not only the date FEMS *knew* that Mr. Dargan's DOH certification expired but simultaniously the date that FEMS *should have known* that Mr. Dargan's DOH certificate expired thereby making the phrase "should have known" superfluous. Statute are not supposed to contain wastage. OEA relies on *Bussineau v. President and Drs. Of Georgetown Coll.,* 518 A.2nd 423, 425 (D.C. 1984) for the proposition that "[l]imitation periods generally begin to run at the time injury occurs." And they generally do, but *Bussineau* excludes itself from the general rule.

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[5]OEA reminds that Dr. Miramontes had the apparent authority to act as he did. It is not agreed that he had he authority to do so deceitfully with the ulterior motive of violating Mr. Dargan's Due Process rights.

To the contrary the phrase "knew or should have known" (or its equivalent) populates the law in a number of instances. In Torts whether the result was "foreseeable" dominates the landscape.

> A master has a duty to control the conduct of his servant if he (I) *knows or has reason to know* that he has the ability to control his servant, and (ii) knows or should know of the necessity and opportunity for exercising such control. Restat .2d of Torts, § 317
>
> Since the possessor is not an insurer of the visitor's safety, he is ordinarily under no duty to exercise any care until he *knows or has reason to know* that the acts of the third person are occurring, or are about to occur. Restat. 2d of Torts, § 344 comment f

Indeed whether the tortious result could have been foreseen is most often the required precursor of liability. We find the same term in procedural matters such as evaluating a motion to intervene which considers, *inter alia,* "the time that has passed since the applicant *knew or should have known* of his or her interest in the suit...." *See Mokhiber v. Davis*, 537 A.2d 1100, 1104 (D.C. 1988); *see also Farina v. Janet Keenan Housing Corp.*, 335 A.3d 537, 544 (D.C. 2025) Criminal cases are replete with "knew or should have known" obligations. An outstanding example is *District of Columbia v. Wesby*, 583 U.S. 48 (2018) . Justice Thomas in his decision used the phrase "*knew or should have known*" six times in holding that "most homeowners do not [live in a "near barren"] house and invite people over to use their living room as a strip club, to have sex in their bedroom, to smoke marijuana inside, and to

leave their floors filthy." Consequently "the partygoers knew [in advance that] their party was not authorized." *Id* at 59

OEA is also confused about the FEMS termination process, The notice referred to in the 90-day rule is the first step in what can be a years-long process ending in actual termination as here. As OEA also points out, partially by implication, utilizing its interpretation would allow circumstances such as Mr. Dargan's involving a carefully organized institutionalized ruse meant to deprive a party of his due process rights could be ignored. But this result should not be judicially encouraged.

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 a Medical Director to judge whether or not the EMTs under his or her charge are qualified.

Third, to preserve the FEMS 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.

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 and with simultaneous 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.

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.

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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 4th day of November, 2005. 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

Statement of Anita Massengale

Harold Dargan v. DC Fire & EMS
Docket No. 12-174-DC(CN)

Taken by Jaime Wojdowski, Investigator

Thursday, October 4, 2012, at DC Fire & EMS
Present: Respondent General Counsel and Respondent EEO Officer

Do you swear or affirm that the statements or answers you provide during this interview are true to the best of your knowledge and belief? ***Yes.***

1. How do you racially identify? ***African American.***

2. What is your position with Respondent? ***Clinical Quality Program Manager***

3. How long have you been in this position? ***Since June of 2009.***

4. What are your main duties? ***I 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. My supervisor is the Medical Director.***

5. When and how did you first come to know Mr. Dargan? ***Through the routine CQI process. Just reviewing EMS records/charts and transports. I had encountered him before he was removed from the field. I had been involved with him in other incidents.***

6. What was your role in setting up Mr. Dargan's remediation plan when Mr. Dargan was initially removed from patient contact? ***Just to develop the plan, looking at the skills that were needed and writing the plan for the training academy to follow/implement so that he could meet those needs and goals.***

7. What did Mr. Dargan's remediation plan entail? ***Review of airway insertion and proper maintenance, respiratory assessment skills, scene management; really wanted to tweak him on the skills needed to be a medic.***

8. Did you receive updates on Mr. Dargan's progress while he was at the training academy? ***The training academy handles the handoff, then weekly/monthly I check on status. I would just become involved when it was time for selection of an evaluator: would he be paired with someone in the field, and I believe he requested it be an instructor.***

9. Did you receive updates about whether he was meeting his goals at the training academy? ***No, just about what was happening, what module he had completed, but not about actual grading, no.***

10. Did you receive updates from Dr. Miramontes about Mr. Dargan's progress? ***Just whether he was to return to duty or for me to start tracking him.***

11. How do you make determinations when you start tracking someone when that person is referred for remediation? ***They are referred for remediation, sent to training academy, it's carried out and then the liaison from the training academy consults the two of us together, looks for the best evaluating unit in the city to put that person on, and before they go before the doctor for their in-person interview, we have all that in place. Then they do the simulated code and once they have passed with Dr. Miramontes, then it would be okay let's go to the next step. We're anticipating they're going to pass when we send them to their simulation with Dr. Miramontes.***

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: What if they don't pass again? ***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. Fallion went down to ask what he was not getting. But we also let him know the concerns we had.***

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.***

RESPONSE:

Respondent objects to this request on the ground that the information sought by this request is protected by "peer review" under D.C. Official Code § 44-801, *et seq.*

2. Provide the name, race, and position title of each employee from whom Medical Director removed his sponsorship during his tenure as Medical Director for Respondent **(August 1, 2011-October 31, 2014)**.

RESPONSE:

a) Henry Dent (Caucasian); revoked sponsorship (6/3/2014)
b) Norris Jackson (African American); revoked sponsorship (12/17/2014)

For purposes of clarification, Complainant was terminated after his Department of Health certification expired on June 30, 2012. Complainant's sponsorship was not revoked. Revocation of sponsorship, which is discretionary, triggers a separate process as prescribed in 29 DCMR §§ 504.3, 563.4, and 564.1, *et. seq.*

3. Provide the name, race, and position title of each individual whose certification level was lowered as a result of Medical Director's recommendation during his tenure as Medical Director for Respondent **(August 1, 2011-October 31, 2014)**.

RESPONSE:

a) James Stapleton (Caucasian); certification lowered 6/18/2012
b) Christopher Howard (Caucasian); certification lowered 6/18/2012
c) Geoffrey Davis (Caucasian); certification lowered 3/14/2014

4. Provide a copy of all of Respondent's policies and procedures relating to remediation training, involuntary removal from the field, and restoration to unsupervised work in the field following remediation training and/or involuntary removal from the field. If any of these policies or procedures has not been reduced to writing, please state what Respondent's policies and procedures are in each of these areas.

RESPONSE:

Respondent has no knowledge of any past or current *written* policies relating to remediation. Below is a detailed explanation of the current policies and procedures that have previously not been reduced to writing. Additionally, the individuals who prescribed remediation plans at the time of Complainant's termination are no longer employed by Respondent.

Respondent's Office of the Medical Director ("OMD") investigates and monitors quality in patient care delivery via its Clinical Quality Improvement ("CQI") Division. CQI conducts patient care related interviews under the Medical Records Act of 1978, effective September 29, 1978 (D.C. Law 2-112; D.C. Official Code § 44-801, *et seq.*).

160

Concerns about patient care may be referred to CQI via numerous routes, e.g., EMS field providers, emergency department staff of hospitals, patients and family members, and from CQI's routine review of patient care reports. Typically, these concerns center around deficiencies in care noted during a specific case or a pattern of deficiencies observed in a specific provider over several cases.

The following are steps in the process:

1. CQI receives information sufficient to warrant an initial investigation.
2. CQI collects and reviews all information relevant to the case(s) such as hospital records, 911 recordings from the Office of Unified Communications, and Metropolitan Police Department bodycam footage.
3. CQI staff interview the subject providers in either the CQI office or the firehouse.
4. After the interview, the CQI staff forms conclusions on the appropriateness and quality of the patient care provided. Deficiencies in provider performance and the need for remediation, retraining, or reevaluation are determined.
5. The CQI manager submits (1) a written report of case conclusions and (2) a written corrective action plan to the Medical Director ("MD") for approval.
6. Recommendations for reeducation/retraining may vary from review of protocol and reading assigned exercises tailored towards specific objectives to referral of the provider to the Training Academy for re-training. The reeducation/retraining of the provider is followed by some form of evaluation to confirm that the provider has learned the content related to the deficiencies identified and can perform adequately. This may include reviews of written assignments, reviews of future provider charts, field evaluations by a selected evaluator, and simulation case scenario evaluations. The specific plan and time for remediation are determined based on the gravity of the clinical issue and deficiencies identified.
7. If re-training at the Training Academy is recommended and the MD approves the written plan, the following steps occur:
    a) Operations Division is notified to pull provider out of service and report to the Training Academy;
    b) The OMD Liaison to the Training Academy ("OLTA"), who is positioned at the Training Academy, receives a copy of the written corrective action plan approved by the MD (the OLTA does not receive a report of the case specifics);
    c) The OLTA coordinates completion of the corrective action plan as recommended and submits required documentation of completion of assignments and/or follow-up evaluations to CQI/the MD;
    d) If the provider has demonstrated successful completion of the corrective action plan, the MD releases the provider to Operations to resume patient care;
    e) If the provider is unable to complete the corrective action plan successfully, the provider will receive additional time to complete the plan successfully or a revised remediation plan to try to help the provider gain competence. If the provider continues to fail to show competence and could pose a threat to patient safety, then the MD may remove permission for the provider to function under his license.

29-8 SEE PAGE 5

THE DISTRICT OF COLUMBIA
BEFORE THE OFFICE OF EMPLOYEE APPEALS 5/2/2014

In the matter of:	)	
HAROLD DARGAN Employee	)	OEA Matter No. 1601-0091-13
v.	)	
D.C. FIRE AND EMERGENCY MEDICAL SERVICES AGENCY Agency	)	

EMPLOYEE'S PREHEARING STATEMENT

I. Facts

The facts most relevant to this appeal appear below. Most are uncontested and can be stipulated.

1. Harold Dargan was hired by the D.C. Fire and Emergency Medical Services Department (FEMS) in 1991 to provide emergency medical services.

2. Mr. Dargan was first an EMT and then became a paramedic seven years prior to removal.

3. Mr. Dargan was certified as a paramedic by all District and national certifying entities until June 2012.

4. In June 2011, Mr. Dargan was involved in an incident in which the then Medical Director concluded there were errors in the performance of members of the responding EMS team.

5. As a result, Mr. Dargan was assigned to the FEMS Training Academy for remedial training.

6. This remedial training took place pursuant to a Critical Remedial Action Plan.

7. Mr. Dargan was not permitted to familiarize himself on the equipment on which his proficiency would be tested.

7. Mr. Dargan's remedial training necessary to satisfy his Critical Remedial Action Plan was terminated in February 2012 by Dr. Miramontes.

8. Mr. Dargan's requested recertification training outside the Training Academy, but the request was denied.

9. The Medical Director, prior to February 3, 2012, told Mr. Dargan that he lacked "maturity" and did not have the "cognitive and psycho-motor skills to practice as [a paramedic].", that he would not sponsor his recertification, and that he would so advise the Dept of Health.

of the terms "cause," "just cause," "inefficiency," and "efficiency," the phrase "cause to promote the efficiency of the service," or any other predecessor statute, regulation, or rule. § 1603.6, D.P.M. In addition, "[a]ll notices issued in connection with an adverse and corrective action under this chapter shall conform to all requirements of the Fifth Amendment Due Process Clause of the United States Constitution." An employee's due process rights in relation to his or her termination are clear. *See, e.g., Sanders v. C.C.,* 522 F. Supp. 2d 83, 90-91 (D.D.C. 2007)

As discussed above, an employee offense and the penalty imposed as a result must meet certain relevant statutory and regulatory criteria. In summary:

1. In selecting the appropriate penalty the mitigating or aggravating circumstances must be considered. (§ 1603.9, D.P.M.; *Stokes v. District of Columbia*, 502 A. 2d 1006, 1010 (D.C. 1985), incorporating by reference *Douglas v. Veterans Administration*, 5 M.S.P. B. 313, 328, 5 M.S.P.R. 280, 301 (1981))

2. The agency and its penalty must provide a more positive approach towards employee discipline. (D.C. Code § 1-616.51)

3. The agency must attempt to correct inadequate performance through training, separating only those employees whose inadequate performance cannot be corrected. (D.C. Code §1-601.02(b)(3) and (b)(4))

4. The agency's disciplinary process must satisfy due process requirements. § 1603.06, D.P.M.; *Sanders v. C.C.,* 522 F. Supp. 2d 83, 90-91 (D.D.C. 2007)

FEMS has issued its own General Orders and Rules and Regulations to implement the DHR regulations and the DPM, but all are required to be consistent with those issued by DHR. Indeed, the D.C. Personnel Regulations adopted to implement OPRAA provide that

III. Witnesses

1. Harold Dargan. Mr. Dargan, the terminated employee, will testify concerning the circumstances of this matter.

2. David Miramontes, M.D. will testify concerning his evaluation of the employee and the action he took in terms of the employee's remediation as well as his decision to no longer sponsor the certification of the employee.

3. Anita Massengale, R.N., J.D will testify in general about the EMS quality control program and specifically about Mr. Dargan's Critical Remedial Action Plan which she prepared and monitored under that program.

4. Kenneth Lyons or Steven Chasin, Union Officials who will testify about meetings they attended with Dr. Miramontes, and correspondence sent to Dr, Miramontes, concerning Mr. Dargan.

5 Individuals identified through discovery may be named when discovery is fully completed.

6. Individuals who are signatories to reports relevant to this matter which are contained in the agency's file if not called by the agency.

7. Mr. Dargan reserves the right to call all witnesses listed in the Agency's Pre-Hearing statement and amendments.

A request for subpoenas for all named witnesses except Mr. Dargan will be made when addresses are obtained.

IV. Exhibits

The relevant exhibits, properly marked and contained in a three ring binder, will be submitted following discovery.

V. Motions

The parties appear to be in agreement that certain dispositive ruling can be made following cross-motions without a hearing. Counsel are prepared to discus this question with the Administrative Judge at the Prehearing Conference.

Respectfully submitted,

Frederic W. Schwartz, Jr.
Suite 800
1001 G St., NW
Washington, DC 20001
Ph: (202) 463-0880

Certificate of Service

I hereby certify that a copy of the foregoing was e-mailed this 2nd day of May, 2014 to Eric Huang, Esquire, Office of the Attorney General for the District of Columbia. Personnel and Labor Relations Section, 441 4th Street, N.W., Suite 1180-N, Washington, D.C. 20001.