No. 24-CV-1001

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

HAROLD DARGAN,
APPELLANT,

V.

DISTRICT OF COLUMBIA OFFICE OF EMPLOYEE APPEALS, *et al.*,
APPELLEES.

ON APPEAL FROM A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

# BRIEF FOR APPELLEE THE DISTRICT OF COLUMBIA FIRE AND EMERGENCY MEDICAL SERVICES DEPARTMENT

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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES*

*Cases*



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* Authorities upon which we chiefly rely are marked with asterisks.

*Statutes and Regulations*



*Other Authorities*

## STATEMENT OF THE ISSUES

The District of Columbia Fire and Emergency Services Department (Fire and EMS) terminated Harold Dargan based on the expiration of his advanced life-support certification from the Department of Health (DOH). Dargan's certification expired after he repeatedly failed skills assessments for that certification level and after Dargan opted not to seek a lesser, basic life support certification. The Office of Employee Appeals (OEA) affirmed Dargan's termination.

1. Whether Dargan was denied any process required by either the U.S. Constitution or District law when Fire and EMS provided Dargan with advance notice of his termination and an opportunity to respond, Dargan challenged his termination in the OEA, the Superior Court, and this Court, and Dargan has identified no District law, including Bulletin No. 83, that would have required additional process before the Fire and EMS Medical Director withdrew his sponsorship of Dargan's advanced life-support certification.

2. Whether Fire and EMS timely commenced an adverse action against Dargan for failing to maintain his DOH certification, which was a mandatory prerequisite for his position, within 90-business days after Fire and EMS "knew or should have known of the act or occurrence allegedly constituting cause," in accordance with D.C. Code § 5-1031(a) (2012), when Dargan's certification expired

on June 30, 2012, and the adverse action commenced on October 31, 2012, only 84 business days later.

## STATEMENT OF THE CASE

Fire and EMS terminated appellant Harold Dargan in 2012 because he failed to maintain his DOH certification. R. 397-99 (5/26/15 Joint Statement of Material Facts ¶¶ 36, 40).[1] Possession of a DOH certification was a mandatory requirement for emergency medical services personnel like Dargan under Fire and EMS written policy, which required all emergency medical services providers in the District to "maintain both [a] National Registry certification and [a DOH] certification," R. 48 (Bulletin No. 83 at 1), and under District law, *see* D.C. Code § 7-2341.05.

Dargan challenged his termination, appealing to the OEA, and the OEA affirmed. R. 1243-56 (10/20/15 OEA Decision). The Superior Court affirmed the decision of the OEA. Supplement Appendix (SA) 1-15. On December 20, 2019, this Court reversed and remanded. R. 1259-63 (12/20/19 DCCA Decision). The OEA then issued an initial decision on remand and again affirmed Dargan's termination. R. 1323-50 (3/4/22 OEA Decision). The Superior Court remanded the case back to the OEA for further consideration. R. 1355-59 (1/27/23 Super. Ct. Order). The OEA then issued a second decision on remand affirming Dargan's

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[1] R. __ citations are to the bates-stamped page number appearing on the bottom right-hand corner of the record PDF.

termination, R. 1625-39 (11/29/23 OEA Decision), which was affirmed by the Superior Court on September 27, 2024, SA 16-32. This timely appeal followed on October 27, 2024.

## STATEMENT OF FACTS

### 1. Legal Background.

#### A. District law requires that emergency medical services personnel be licensed by the Department of Health.

To provide emergency medical services in the district, individuals must be certified by DOH. D.C. Code § 7-2341.05. During the relevant time period, emergency medical services personnel could hold four possible certifications from DOH, in ascending order: Emergency Medical Technician (EMT or EMT-Basic), Advanced Emergency Medical Technician (EMT-Advanced), Emergency Medical Technician – Intermediate (EMT-Intermediate or EMT-I/99), and Paramedic. R. 1172 (DOH Policy at 1), 919-20 (8/4/21 Tr. 98-99).[2] Each certification qualified providers to engage in a different scope of practice. R. 921-22 (8/4/21 Tr. 100-01), 1172-78 (DOH Policy). EMT-Basic and EMT-Advanced providers were qualified to provide only basic life support. R. 1174-76 (DOH Policy at 3-5). EMT-Intermediate and Paramedic providers were qualified to provide advanced life

[2] The District was, however, in the process of phasing out the EMT-Intermediate or EMT-I/99 certification level. R. 857 (8/4/21 Tr. 36); *see* DOH, EMS National Education Standards Transition Procedures at 4 (Aug. 1, 2011), tinyurl.com/37zjfujn (detailing transition plan for current certificate holders).

support (ALS) services, including intubation, administering medicine, starting IVs, and shocking the heart. R. 843-44 (8/4/21 Tr. 22-23), 922 (8/4/21 Tr. 101), 1177-78 (DOH Policy at 6-7).

### B. Emergency medical services personnel must also complete the National Registry certification process.

Following the passage of the Emergency Medical Services Act of 2008, Fire and EMS instituted a policy to align "emergency medical services training and certification" in the District "with the industry accepted standard as provided through the National Registry of EMTs (NREMT)." R. 48 (Bulletin No. 83 at 1). Accordingly, as of mid-2009, all emergency medical services providers were required to "present a valid NREMT card" to receive a DOH certification. R. 48 (Bulletin No. 83 at 1). Issued on February 3, 2010, Fire and EMS Bulletin No. 83 memorialized this new policy, which further specified that all Fire and EMS employees would 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 [a DOH] certification." R. 48 (Bulletin No. 83 at 1). The National Registry examination "consists of two components, the psychomotor (practical skills) examination and the cognitive (written) examination." R. 49 (Bulletin No. 83 at 2). Bulletin No. 83 specified "examination policies," i.e., procedural guidelines, for both components of the

National Registry examination, including the number of attempts employees would be afforded to pass the exam components. R. 48-50 (Bulletin No. 83 at 1-3).

### C. District law spells out the process for DOH certification.

The DOH Director oversees the DOH certification process and is authorized to "deny issuance of, deny renewal of, suspend, or revoke a certification to perform the duties of emergency medical services personnel." D.C. Code § 7-2341.15(b); *see id.* § 7-2341.05 (detailing certification requirements); Mayor's Order 2009-89, 56 D.C. Reg. 6831 (June 1, 2009) (delegating authority to the DOH Director). To be certified or recertified, an applicant must "[s]ubmit an application to [DOH] on a form approved" by DOH, along with all required supporting documentation, including "proof of required education, training, [and] competency evaluation." D.C. Code § 7-2341.05(c), (d), (i), (j).

Individuals applying for EMT-Intermediate certification (at issue in this case), in 2012 had to submit a "valid National Registry EMT-[I/99] (or greater)" certification, along with Advanced Cardiac Life Support (ACLS) and CPR certification cards, and an application fee payable to the District Treasurer. R. 1416 (DOH Application Instructions). Applications also had to list the "Sponsoring [emergency medical services (EMS)] Agency," and be signed by the Medical Director, whose signature constituted an "attest[ation] that the applicant . . . currently demonstrate[s] competence in all the skills outlined by the

NREMT at the level for which the applicant is certified, as well as any additional skills included in th[e] organization's protocols." R. 1106-07 (DOH Application), 1418 (same).

This last requirement—sponsorship by the relevant EMS agency's medical director—reflects the broad responsibility medical directors have over EMS agencies. Medical directors are licensed physicians who "[p]rovide medical oversight for all aspects of pre-hospital medical services" including "[m]edical training" and "[q]uality assurance of medical services." D.C. Code § 5-404.01(b), (d). In the case of Fire and EMS, for example, the "provision of pre-hospital medical care by [Fire and EMS's] certified emergency medical technicians and paramedics" is conducted "under the license of the Medical Director." D.C. Code § 5-404.01(e)(1). Accordingly, the Medical Director "[s]upervise[s] the administration of pre-hospital medical care," and may be "personally liable" for "death or injury that results from the provision of pre-hospital medical care by the Department's certified emergency medical technicians or paramedics practicing under the license of the Medical Director" if the "death or injury is the result of willful misconduct or gross negligence of the Medical Director." D.C. Code § 5-404.01(d)(2), (e)(2).

When DOH "denies an application for initial or renewal licensure or certification," the affected individual is entitled to written notice and a hearing

before the Office of Administrative Hearings (OAH), D.C. Code § 7-2341.17, and may appeal the OAH decision to the District of Columbia Court of Appeals (DCCA), *id.* § 7-2341.18.

**2. Factual Background.**

**A. Dargan works as a "Basic Paramedic" at Fire and EMS but is removed from duty and placed on a "Critical Remediation Action Plan" in 2011.**

In 2011, Dargan worked for Fire and EMS as a "Basic Paramedic," who, unlike an Emergency Medical Technician (EMT), was authorized to provide advanced life support services. R. 390 (5/26/15 Joint Statement of Material Facts ¶¶ 2, 3), R. 843-44 (8/4/21 Tr. 22-23), 922 (8/4/21 Tr. 101), 1179-83 (Position Description). Like all other Fire and EMS employees, Dargan had to comply with Bulletin No. 83. R. 391 (5/26/15 Joint Statement of Material Facts ¶ 6). To do so, he had a NREMT certification at an EMT-I/99 level, which expired on March 31, 2014, and a DOH certification at an EMT-Intermediate level, which expired on June 30, 2012. R. 391-92 (5/26/15 Joint Statement of Material Facts ¶¶ 6, 9-10).

On June 14, 2011, however, Fire and EMS's Office of the Medical Director removed Dargan from his paramedic duties. R. 393 (5/26/15 Joint Statement of Material Facts ¶ 16). That day, Dargan responded to a call for an unconscious 32-year-old female. Dargan "failed in his paramedic duties," and the patient later passed away. R. 393 (5/26/15 Joint Statement of Material Facts ¶ 15), 1114-15

(Advance Written Notice at 1-2). Fire and EMS concluded that Dargan "deviated from standard practice by placing an endotracheal tube into the patient's airway and placing a non re-breather mask over the tube," failing "to oxygenate the patient before intubation and suctioning," failing to "initiate ventilations for one minute with the proper use of a bag-valve mask device," and leaving the "patient's airway unattended." R. 1114-15 (Advance Written Notice at 1-2).

Accordingly, Fire and EMS reassigned Dargan to its training academy and issued a "Critical Remediation Action Plan," which established a "checklist of items" that he needed to complete to ensure he had adequate "knowledge, skills, and abilities to take care of patients" at his current certification level. R. 53 (Critical Remediation Action Plan), 393 (5/26/15 Joint Statement of Facts ¶ 17), 845-46 (8/4/21 Tr. 24-25), 1296 (11/29/21 Joint Statement of Facts ¶ 16). The plan called for a range of classroom education, assessment testing, and field ride-outs and evaluations, which were ultimately completed over an approximately six-month period from June 2011 to January 2012, culminating in an exit interview with Fire and EMS Medical Director David Miramontes, M.D. R. 53 (Critical Remediation Action Plan), 393-95 (5/26/15 Joint Statement of Facts ¶¶ 17-27), 846-47 (8/4/21 Tr. 25-26); *see* R. 1104-05 (2/14/12 Letter at 2-3). This was an "exceptionally long time for remediation in the District." R. 848 (8/4/21 Tr. 27). By way of comparison, Dr.

Miramontes testified that most remediations are accomplished within two to four weeks or up to "12 weeks in an extreme case." R. 848 (8/4/21 Tr. 27).

### B. After extensive remediation, Dargan fails two interviews with Fire and EMS's Medical Director, and his DOH certification expires.

Dargan's protracted remediation process was not successful. On February 2, 2012, Dr. Miramontes tested Dargan's skills as an advanced life support provider. R. 394 (5/26/15 Joint Statement of Material Facts ¶ 23). This evaluation was meant to be the "final checkoff" to ensure Dargan could safely serve as an advanced life support provider in the District. R. 849 (8/4/21 Tr. 28). Dr. Miramontes presented Dargan with a scenario of a 65-year-old with a history of coronary disease and chest pain. R. 851 (8/4/21 Tr. 30). Dargan did not perform at an acceptable level. He failed to provide the patient with shocks as necessary and "didn't have the adequate skill to access the dosage of the medication [required] and provide it." R. 851 (8/4/21 Tr. 30). Dr. Miramontes provided on-the-spot counseling, walking Dargan through his errors. R. 394, 852 (8/4/21 Tr. 31).

To ensure Dargan was not penalized for simply having a "bad day," however, Fire and EMS sent Dargan back to the training academy. R. 395 (5/26/15 Joint Statement of Material Facts ¶ 26), 853 (8/4/21 Tr. 32), 1023 (8/4/21 Tr. 202) (detailing additional training Dargan received), 1029 (8/4/21 Tr. 208) (same). Dr. Miramontes then reinterviewed Dargan on February 14, 2012. R. 395 (5/26/15 Joint Statement of Material Facts ¶ 27), 853-54 (8/4/21 Tr. 32-33). This time, Dr.

Miramontes put Dargan through a typical advanced cardiac life support scenario that "any Advanced Life Support provider . . . should be able to zing through." R. 855 (8/4/21 Tr. 34). Again, however, Dargan "could not perform safely," R. 855 (8/4/21 Tr. 34), and Dr. Miramontes deemed his performance "inadequate," R. 395 (5/26/15 Joint Statement of Material Facts ¶ 27).

That same day, Dr. Miramontes wrote a letter to DOH requesting a "downgrade" of Dargan's certification to a basic life support level of certification. R. 395 (5/26/15 Joint Statement of Material Facts ¶ 28), 1103-05 (2/14/12 Letter). Dr. Miramontes explained that after reviewing Dargan's files and training records and observing his skills assessment, he believed Dargan could not "function safely as an independent EMT-[I/99] advanced life support provider," because "Basic Paramedic skills such as medication administration, EKG rhythm recognition, and ACLS protocol compliance were not to an acceptable standard." R. 1103 (2/14/12 Letter at 1). Accordingly, Dr. Miramontes concluded that he could not sponsor Dargan at his current certification level "until such time as he completes a fully accredited Paramedic Course, gains NREMT-Paramedic certification, and completes an assessment by this agency." R. 1103 (2/14/12 Letter at 1).

After both the February 2 and 14 assessments, Dr. Miramontes told Dargan that his performance had been inadequate, and Dr. Miramontes underscored that he would no longer sponsor Dargan's certification at the EMT-Intermediate level.

R. 938 (8/4/21 Tr. 118), 1021-22 (8/4/21 Tr. 200-01), 1029-31 (8/4/21 Tr. 208-210). Dr. Miramontes did, however, offer to sponsor Dargan with a "[basic life support] level of certification as an EMT-Advanced," which has a more restricted scope of practice, but would have allowed Dargan to continue working at Fire and EMS. R. 397 (5/26/15 Joint Statement of Material Facts ¶¶ 28, 35, 36), 857 (8/4/21 Tr. 36), 1103 (2/14/12 Letter at 1), 1150 (9/11/12 Email). At no point did Dargan apply for an EMT-Advanced certification, however. R. 397 (5/26/15 Joint Statement of Material Facts ¶ 35), 865-66 (8/4/21 Tr. 44-45), 1037-38 (8/4/21 Tr. 216-17).

Instead, on May 30, 2012, Dargan sent an application for DOH recertification as an EMT-Intermediate to Dr. Miramontes for his signature—even though Dr. Miramontes had already stated that he would no longer sponsor Dargan at this level. R. 392 (5/26/15 Joint Statement of Material Facts ¶ 11), 938 (8/4/21 Tr. 117), 1031 (8/4/21 Tr. 210), 1036-37 (8/4/21 Tr. 215-16), 1106-07 (DOH Application). Dargan left the field for sponsoring agency blank on this application. R. 1040-41 (8/4/21 Tr. 219-20), 1106 (DOH Application at 1), 1202 (same). Per agency protocol, applications were checked by training academy staff for completion and were only sent to DOH if they were complete and signed by the Medical Director. R. 865-66 (8/4/21 Tr. 44-45), 941-42 (8/4/21 Tr. 120-21). Dr. Miramontes did not sign Dargan's application and, accordingly, it was not sent to DOH. R. 867 (8/4/21 Tr. 46).

On June 25, 2012, Dr. Miramontes wrote to DOH again requesting revocation of Dargan's current certification. R. 1108-09 (6/25/12 Letter). He did so because DOH and Fire and EMS had concluded that Dargan's certification could not be automatically downgraded—as Dr. Miramontes had previously requested in his February 14 letter to DOH—it could only be revoked. R. 913 (8/4/21 Tr. 92). To justify his request, Dr. Miramontes underlined that Dargan had been found "incompetent despite retraining" and concluded that he could not allow Dargan to practice under his license and would not sponsor him "at the [advanced life support] scope of practice." R. 1108-09 (6/25/12 Letter at 1-2). Revocation soon became a moot point, however, because Dargan's certification expired on June 30, 2012, before DOH acted. R. 392, 396-97 (5/26/15 Joint Statement of Material Facts ¶¶ 9, 33), 1110 (7/3/12 Letter).

### C. Fire and EMS terminates Dargan for failing to maintain a DOH certification.

After Dargan's certification expired, Fire and EMS once again offered to sponsor him at a basic life support level of certification, as an EMT-Advanced. R. 397 (5/26/15 Joint Statement of Material Facts ¶ 35), 912 (8/4/21 Tr. 91), 1038 (8/4/21 Tr. 217). But Dargan never took the agency up on this offer. R. 397 (5/26/15 Joint Statement of Material Facts ¶ 35), 1037-38 (8/4/21 Tr. 216-17). Accordingly, on October 31, 2012, Fire and EMS sent Dargan a 15-day advance written notice to remove him from his position as a Basic Paramedic, DS-699, Grade 8. R. 397

(5/26/15 Joint Statement of Material Facts ¶ 36). The notice charged him with violating Bulletin No. 83 by failing to maintain both a National Registry certification and a DOH certification. R. 397-98 (5/26/15 Joint Statement of Material Facts ¶ 36). The notice stated that this misconduct violated Article VII, Section 2(f)(5) of Fire and EMS's Department Order Book, and also Section 1603.3(f)(5) of the District Personnel Manual because it interfered with the efficiency of government operations and constituted incompetence. R. 397-99 (5/26/15 Joint Statement of Material Facts ¶ 36). The notice informed Dargan of his right to an administrative hearing review by a hearing officer. R. 1116 (Advance Written Notice at 3). Dargan submitted a written response to the hearing officer and, on April 5, 2013, the hearing officer issued a written decision recommending Dargan's removal, finding that Fire and EMS's proposal to terminate him was supported by the evidence and that the penalty of termination was reasonable. R. 1122-29 (Hearing Officer Decision).

On April 24, 2013, Fire and EMS's Chief, Kenneth B. Ellerbe, issued a Notice of Final Decision sustaining Dargan's removal. R. 266-68 (Final Decision), 399 (5/26/15 Joint Statement of Material Facts ¶ 40). The Chief referenced D.C. Code § 7-2341.15(d), which prohibits Fire and EMS from employing persons who no longer possess the requisite certifications. R. 267 (Final Decision at 2), 399 (5/26/15 Joint Statement of Material Facts ¶ 40). Dargan appealed his termination to the OEA, kicking off this more than ten-year-long legal challenge.

### 3. Procedural History.

#### A. The OEA affirms Dargan's termination.

Dargan challenged his termination as untimely, R. 411-16 (6/15/15 Dargan Br. 11-16), claimed that Fire and EMS violated his due process by terminating him "for an act over which he had no control," i.e., the Medical Director's refusal to sponsor his recertification application, R. 418 (6/15/15 Dargan Br. 18), and argued that he had been improperly terminated without receiving the procedural protections afforded by Bulletin No. 83, R. 420-21 (6/15/15 Dargan Br. 20-21). On October 20, 2015, the OEA issued a decision, based on the parties' motions for summary disposition, affirming Fire and EMS's removal of Dargan and rejecting Dargan's arguments. R. 1243-56 (10/20/15 OEA Decision).

The OEA determined that Fire and EMS acted in a timely fashion by sending Dargan advance notice of his termination on October 31, 2012, within 90 business days of the June 30, 2012 expiration of Dargan's license. R. 1251-52 (10/20/15 OEA Decision at 9-10); *see* D.C. Code § 5-1031(a) (2012). In reaching this conclusion, the OEA rejected Dargan's arguments that Fire and EMS knew or should have known of the act or occurrence constituting cause for the termination earlier. R. 1251 (10/20/15 OEA Decision at 9).

Next, the OEA concluded that Dargan's termination complied with each "applicable law, rule, or regulation." R. 1252 (10/20/15 OEA Decision at 10). The

OEA rejected Dargan's argument that his Bulletin-No.-83-based procedural rights were violated when he was denied additional opportunities to pass his assessment with Dr. Miramontes. R. 1252-54 (10/20/15 OEA Decision at 10-12). Further, the OEA held that the procedural guidelines outlined in Bulletin No. 83 for NREMT certifications governed the assessments administered by Dr. Miramontes for DOH recertification and concluded that Fire and EMS had complied with those procedures. R. 1252-54 (10/20/15 OEA Decision at 10-12).

### B. The Superior Court affirms the OEA.

On appeal to the Superior Court, Dargan reiterated both his timeliness and due process arguments. The Superior Court concluded that the OEA's finding that Fire and EMS's charges were timely was supported by substantial record evidence. SA 9-11. The Court also rejected Dargan's contention that his due process rights had been violated and concluded that the OEA's interpretation of Bulletin No. 83 was not arbitrary or capricious. *Id.* 11-14.

### C. This Court reverses and remands the case for reconsideration of Bulletin No. 83's relevance.

On appeal, this Court disagreed with the OEA's interpretation of Bulletin No. 83. In a decision on December 20, 2019, the Court noted that Bulletin No. 83 "set forth the procedures for the new obligation adopted in 2009 for all emergency services providers to maintain NREMT certification in addition to DOH certification." R. 1260 (12/20/19 DCCA Decision at 2). By its "plain language,"

the Court emphasized, the "testing procedures of Bulletin No. 83 . . . apply *only* to" NREMT certification, not DOH certification. R. 1261 (12/20/19 DCCA Decision at 3) (emphasis added). Furthermore, even as to NREMT certifications, it is "unclear whether Bulletin No. 83's testing procedures apply to NREMT *re*certification," for employees like Dargan who already had an NREMT certification. R. 1261 n.2 (12/20/19 DCCA Decision at 3).

This Court emphasized that "Dargan was terminated, not for failing to maintain his NREMT certification (which, as the OEA . . . found, was still current at the time of his termination), but rather for failing to maintain his DOH certification." R. 1260 (12/20/19 DCCA Decision at 2). Indeed, there was "no indication" in the record that the February 2 and 14 assessments conducted by Dr. Miramontes "were in connection with the NREMT exam." R. 1260 & n.1 (12/20/19 DCCA Decision at 2). So this Court remanded for further assessment of (1) what procedures, if any, should have been followed to deny Dargan's DOH recertification before his termination and (2) whether those procedures had been followed. R. 1261-62 (12/20/19 DCCA Decision at 3-4). The Court noted several sources of authority that might govern the DOH recertification process. These included both the DOH appeals process, which Dargan had "allude[d] to . . . in his brief to the OEA," and a DOH regulation, 29 DCMR § 563.17(z), which provides that "[s]ufficient grounds for denial, suspension, or revocation of certification granted to

an emergency medical services provider . . . shall include: Withdrawal of sponsorship by the sponsoring medical director." R. 1261 & n.3 (12/20/19 DCCA Decision at 3-4).

The Court also underlined that "the answer to these questions could impact whether [Dargan] was given proper notice of an adverse action under D.C. Code § 5-1031, i.e., whether Fire and EMS denied him notice of a decision not to recertify him, if he was entitled to such separate notice." R. 1262 (12/20/19 DCCA Decision at 4). But the Court underscored its agreement that "if [Fire and EMS's] notice obligation was not triggered until the date [Dargan's] DOH certification lapsed, then [Fire and EMS's] notification was timely under the statute." R. 1262 n.5 (12/20/19 DCCA Decision at 4). Accordingly, the Court vacated the Superior Court's judgment and instructed that the case be remanded to the OEA for further proceedings "consistent with this order." R. 1262 (12/20/19 DCCA Decision at 4).

### D. The OEA issues an initial remand decision, which the Superior Court rejects for failure to comply with this Court's opinion.

On August 4, 2021, the OEA held an evidentiary hearing and received testimony from Dr. Miramontes, Dargan, and James Follin, who oversaw remediation at the training academy. R. 824 (8/4/21 Tr. 3), 945 (8/4/21 Tr. 124), 977 (8/4/21 Tr. 156). Before the hearing, on June 29, 2020, the OEA had excluded several of Dargan's proposed witnesses—including Anita Massengale, who had worked for Fire and EMS as a Clinical Quality Program Manager. *Compare* R.

530-31 (6/29/20 Order), *with* R. 521-22 (5/26/20 Joint Response at 1-2). During the hearing, the OEA excluded several exhibits, the bulk of which contained materials produced in a parallel case that Dargan had brought before the District of Columbia Office of Human Rights (OHR), which challenged his termination as discriminatory and retaliatory. R. 1006-16 (8/4/21 Tr. 185-95). Specifically, the Court excluded statements by Fire and EMS personnel that had been produced in the OHR proceeding and that were made by individuals that Dargan would not be calling as witnesses in this case, including Massengale. R. 1007 (8/4/21 Tr. 186).

Thereafter, on March 4, 2022, the OEA issued its initial decision on remand and upheld Dargan's termination. R. 1323-50 (3/4/22 OEA Decision). The OEA again applied Bulletin No. 83's procedural requirements to the facts of this case and concluded that Fire and EMS "complied with all the required procedures" "under Bulletin [No.] 83." R. 1339-44 (3/4/22 OEA Decision at 17-22). The OEA also rejected Dargan's attempt to "re-argue that [Fire and EMS] violated the ninety-day rule . . . in its removal of [Dargan]." R. 1346 (3/4/22 OEA Decision at 24). The OEA reasoned that "this issue has been resolved in [the] Agency's favor in my October 20, 2015 [decision] and the [Superior Court] has affirmed th[at] holding." R. 1346 (3/4/22 OEA Decision at 24). Further, the OEA concluded that this timeliness argument "is not within the scope of the D.C. Court of Appeals' remand and will thus not be reconsidered." R. 1346 (3/4/22 OEA Decision at 24).

Dargan petitioned the Superior Court for consideration of the OEA's decision and Fire and EMS moved to remand the case to the OEA to correct errors. R. 1355 (1/27/23 Super. Ct. Order), 1360-69 (Remand Mot.). Fire and EMS argued that "the DCCA instructed OEA on remand to explain why or how the testing procedures of Bulletin No. 83 apply to the District of Columbia Department of Health's . . . recertification process. The OEA did not do so," and it made factual errors. R. 1360 (Remand Mot.). The Superior Court agreed with Fire and EMS and remanded to the OEA to comply with this Court's "prior directive." R. 1359 (1/27/23 Super. Ct. Order at 5).

### E. The OEA's second decision on remand complies with this Court's opinion and again affirms Dargan's termination.

On remand the OEA focused on five issues: (1) whether a NREMT certification is relevant for a DOH recertification; (2) whether Bulletin No. 83's requirements regarding NREMT certification apply to DOH recertification; (3) what the DOH recertification process is for an EMT-I/99 (EMT-Intermediate) who no longer has a current DOH certification; (4) whether the DOH recertification process was followed before terminating Dargan's employment; and (5) if the DOH recertification process was followed, whether Dargan's termination should be upheld. R. 1627 (11/29/23 OEA Decision at 3).

The parties broadly agreed as to the first three issues. There was no dispute as to the relevance of a NREMT certification: all emergency medical personnel

needed a valid NREMT certification to receive a DOH certification and Dargan had a valid NREMT certification at the time of his termination. R. 1393-95 (6/13/23 Fire and EMS Br. 6-8), 1439 (6/16/23 Dargan Br. 6), 1455-56 (6/16/23 Dargan Br. 22-23). And the parties agreed that Bulletin No. 83's procedural requirements did not apply to the DOH recertification process. Specifically, Fire and EMS underscored that Bulletin No. 83 is relevant only in so far as it required employees to maintain both an NREMT and DOH certification. R. 1394-95 (6/13/23 Fire and EMS Br. 7-8). And the testing procedures outlined in Bulletin No. 83 "apply solely to NREMT certification." R. 1394 (6/13/23 Fire and EMS Br. 7). For his part, Dargan stated "[n]o," "Bulletin 83's requirements regarding NREMT certification" do not apply to "DOH recertification." R. 1456 (6/16/23 Dargan Br. 23); *see* R. 1614 (5/20/23 Dargan Objection at 4) ("If the question is whether the NREMT testing procedures also apply to DOH certification Fire and EMS does not carry out testing on behalf of DOH, nor does DOH itself test. Instead it relies on the NREMT certification.").

The parties also agreed, at least in part, on the relevant DOH recertification process. Specifically, Fire and EMS noted that to be recertified by DOH an employee had to fill out the appropriate application, which had to be signed and dated by Fire and EMS's Medical Director. R. 1395-96 (6/13/23 Fire and EMS Br. 8-9). Dargan did not dispute that employees were "required to present to DOH an

Application attested to by the Medical Director of the entity with which the Employee was affiliated." R. 1456 (6/16/23 Dargan Br. 23). And he agreed this process applied to recertifications. R. 1456 (6/16/23 Dargan Br. 23). Fire and EMS also reiterated that, as a general rule, it did not "forward incomplete or unsigned applications to DOH and there was no authority under which it would have been required to do so." R. 1397 (6/13/23 Fire and EMS Br. 10). And Dargan identified no authority that required Fire and EMS to forward an incomplete application to DOH. R. 1434-68 (6/16/23 Dargan Br. 1-35).

Even as to the fourth issue—whether the DOH recertification process was followed in Dargan's case—there was remarkable overlap between the parties' positions. Fire and EMS argued that the recertification process had been followed and that Dr. Miramontes's decision not to sign Dargan's application was entirely within his discretion and was not arbitrary. R. 1396-97 (6/13/23 Fire and EMS Br. 9-10), 1617 (6/29/23 Fire and EMS Reply 2). To the contrary, Fire and EMS noted, Dr. Miramontes's decision was based on a careful assessment of Dargan's skill level after robust remediation efforts. R. 1397 (6/13/23 Fire and EMS Br. 10), 1617-20 (6/29/23 Fire and EMS Reply 2-5).

Dargan likewise conceded that the Medical Director's signature on a DOH recertification application is "an affirmation by the Medical Director of the competence of the EMT at the requested level" and that this decision "is

discretionary since the Medical Director is responsible for and affirms the competence of the EMT." R. 1459-60 (6/16/23 Dargan Br. 26-27); *see* R. 1473 (6/16/23 Dargan Br. 40) (reiterating the "right and duty of the Medical Director to judge whether or not the EMTs under his or her charge are qualified"). And Dargan further conceded that the "OEA cannot order the Medical Director to sponsor the EMT and return him to patient care." R. 1473 (6/16/23 Dargan Br. 40). Indeed, Dargan admitted that his requested relief was to be returned to employment, assigned to the training academy, and to "undergo such testing as the current Medical Director believes is appropriate to assure his willingness to sign the affirmation on his DOH Advance Life Support Application"—implicitly conceding that the Medical Director's decision as to both testing and sponsorship is discretionary. R. 1473 (6/16/23 Dargan Br. 40). Yet Dargan also contended that the recertification process had not been followed because Dr. Miramontes "refused to sign the required attestation" for Dargan's application. R. 1456-57 (6/16/23 Dargan Br. 23-24). And Dargan attacked the "factual beliefs of Dr. Miramontes" underlying his refusal to sign Dargan's application. R. 1462-68 (6/16/23 Dargan Br. 29-35).

Finally, as to whether Dargan's termination should be upheld if the DOH recertification process was followed, Fire and EMS noted that Dargan's failure to maintain a DOH certification constituted cause for his termination and that Fire and EMS timely issued an advance notice within 90 days of the expiration of Dargan's

certification. R. 1397-98 (6/13/23 Fire and EMS Br. 10-11), 1620-22 (6/29/23 Fire and EMS Reply 5-7). Dargan disagreed, repeating his contention that his termination was untimely because Fire and EMS failed to initiate the adverse action within 90 days of when it knew or should have known that Dargan's certification would expire. R. 1469-72 (6/16/23 Dargan Br. 36-39).

The OEA held that "both parties agree that Bulletin No. 83's requirements regarding NREMT certification do not apply to DOH certification," so Bulletin No. 83 is "only relevant because it requires all Agency employees to maintain DOH certification." R. 1631-32 (11/29/23 OEA Decision at 7-8). Further the OEA concluded Dr. Miramontes "has the discretion whether or not to sign" an application based on his "evaluation of [an employee's] EMT skills." R. 1633 (11/29/23 OEA Decision at 9). And here, Dr. Miramontes's refusal to sign Dargan's application was supported by "his real-time observation of [Dargan] during the skills exams." R. 1633 (11/29/23 OEA Decision at 9). Further, the OEA concluded that Dr. Miramontes was under no obligation to submit Dargan's unsigned application to DOH or to take "any specific action" before "withdraw[ing] his sponsorship" of Dargan's certification. R. 1634-35 (11/29/23 OEA Decision at 10-11). Finally, the OEA held that the timeliness of Dargan's termination had already been decided in its October 20, 2015 decision. R. 1635 (11/29/23 OEA Decision at 11).

### F. The Superior Court upholds the OEA's second decision on remand.

In September 2024, the Superior Court upheld the OEA's second decision on remand. It held that the OEA's findings were supported by substantial evidence and "fulfill[ed] the Court of Appeals' directive to determine whether [Fire and EMS] (1) complied with the 90-day time limit for commencing a corrective or adverse action against an employee under D.C. Code § 5-1031(a) and (2) terminated [Dargan] from service in accordance with applicable law, rule, or regulation including [B]ulletin No. 83's certification testing requirements." SA 32 (internal quotation marks omitted).

As to the timeliness of Dargan's termination, the Superior Court reiterated that the "[]act or occurrence" allegedly constituting cause "is the expiration of [Dargan's] DOH certification on June 30, 2012." SA 26. And the Court rejected Dargan's argument that the 90-day period "began *before* the 'act or occurrence allegedly constituting cause.'" SA 29. Instead, the Court reasoned that the plain text of Section 5-1031(a) "does not contemplate that the 90-day period would begin when the 'act or occurrence' merely starts to be anticipated." SA 29.

As to Dargan's process arguments, the Court found that there was substantial evidence in the record to support the OEA's finding that Dargan received additional training after he failed his February 2, 2012 skills assessment. SA 30. And the Court underlined that Dargan failed to "set forth any legal authority that would have

required [Fire and EMS] to provide him additional training during this period." SA 30. The Court also declined to consider evidence, including a statement by Anita Massengale that the OEA had excluded from the August 2021 hearing, and noted that, even if consideration of such evidence was proper, "it is unclear how those statements support [Dargan's] conclusion that he was not offered adequate training." SA 31-32.

## STANDARD OF REVIEW

This Court "review[s] agency decisions on appeal from the Superior Court the same way [it] review[s] administrative appeals that come to [it] directly." *Dupree v. D.C. Dep't of Corr.*, 132 A.3d 150, 154 (D.C. 2016). "Thus, in the final analysis, confining [itself] strictly to the administrative record, [this Court] review[s] the OEA's decision, not the Superior Court's, and [it] must affirm the OEA's decision so long as it is supported by substantial evidence in the record and otherwise in accordance with law." *Id.* (quoting *Settlemire v. D.C. Off. of Emp. Appeals*, 898 A.2d 902, 905 n.4 (D.C. 2006)). To be upheld, "an administrative agency 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." *Murchison v. D.C. Dep't of Pub. Works*, 813 A.2d 203, 205 (D.C. 2002). "Questions of law, including

questions regarding the interpretation of a statute or regulation, are reviewed de novo." *Dupree*, 132 A.3d at 154.

## SUMMARY OF ARGUMENT

This Court should affirm the OEA's decision upholding Dargan's termination as a Basic Paramedic for the expiration of his required DOH certification.

1. Dargan was not denied due process under either the U.S. Constitution or District law. For starters, Dargan forfeited any federal constitutional due process argument by failing to preserve it before the OEA or develop it before this Court. Even if such an argument were preserved, Dargan has not identified a protected property interest in his continued employment after his DOH certification expired. Moreover, Dargan has not identified the denial of any constitutionally required due process. A failure to abide by state regulations does not equate to a constitutional due process violation. In terms of the constitutional minimum, Dargan received notice of his termination, responded to the notice, and had repeated opportunities to challenge his termination before the OEA, the Superior Court, and this Court. At base, Dargan has not pointed to any violation of due process under the U.S. Constitution, nor could he in light of the extensive review proceedings he has invoked.

Dargan's District-law-based procedural arguments fare no better. Dargan concedes that the Fire and EMS Medical Director must have an "absolute right—

short of discriminatory animus" to decide whether to sponsor EMTs and paramedics. Br. 3 (emphasis omitted). This discretion makes good sense because sponsorship of a DOH application requires the Medical Director to attest to the applicant's fitness for the certification at issue. Further, Dargan has identified no legal authority requiring the Medical Director to take *any* action before withdrawing his sponsorship, nor has Dargan identified any law requiring Fire and EMS to forward Dargan's application to DOH.

And, regardless, the record does not support Dargan's claim that he was denied any required procedural protection. Dargan has forfeited any argument that the procedural protections detailed in Bulletin No. 83 apply to his case—and by a plain-text reading, Bulletin No. 83 is inapposite. Further, before Dargan's DOH certification expired, Fire and EMS provided Dargan six months of remediation and multiple opportunities to pass his skills assessment. Even after Dargan repeatedly failed his assessment, Dr. Miramontes offered to sponsor Dargan as a basic life support provider so that Dargan could keep working for Fire and EMS. Dr. Miramontes renewed this offer even after Dargan's advanced life support (EMT-Intermediate) certification expired. District law does not mandate any further opportunities.

2. The adverse action against Dargan was commenced within 90 business days of the "act or occurrence allegedly constituting cause" in accordance with D.C.

Code § 5-1031(a) (2012). The "cause" for the adverse action was Dargan's failure to maintain his DOH certification as an EMT-Intermediate, which was a mandatory requirement of his position as a Basic Paramedic. Dargan's DOH certification expired on June 30, 2012, and he was given an advance written notice proposing his removal on October 31, 2012, only 84 business days later. Accordingly, the OEA correctly found that Dargan's termination complied with Section 5-1031(a).

Each of Dargan's arguments to the contrary lack merit. Dargan's argument that the period commenced at some unspecified earlier date because Fire and EMS "should have known" that his certification would likely expire in the future makes no sense. The statute's reference to what an employer "should have known" speaks to situations where the agency does not have *actual* knowledge of the event constituting cause, but nevertheless should have learned about the event through the exercise of its reasonable diligence at some point. It does not suggest that the limitations period can begin to run *before* the event allegedly constituting cause occurs. Adopting Dargan's interpretation of Section 5-1031(a) would lead to absurd consequences. It would incentivize Fire and EMS to terminate employees when there is some possibility that cause may arise in the future rather than giving them the benefit of the doubt. Nothing in the statute suggests that was the Council's desired outcome.

## ARGUMENT

### I. Dargan Was Afforded All The Legally Required Process Before And After His Termination.

#### A. Dargan has forfeited any constitutional due process claim, which in any event would fail on the merits.

To the extent Dargan argues that he was denied procedural due process as a matter of federal constitutional law, he failed to develop that argument before the OEA and it has accordingly been forfeited. *See* R. 1434-74 (6/16/23 Dargan Br. 1-41). "It is a principle of long standing that administrative and judicial efficiency require all claims be first raised at the agency level to allow appropriate development and administrative response before judicial review." *Sims v. District of Columbia*, 933 A.2d 305, 309 (D.C. 2007) (cleaned up); *see Kalorama Heights Ltd. v. D.C. Dep't of Consumer & Regul. Affs.*, 655 A.2d 865, 873 n.11 (D.C. 1995) (holding that a petitioner "should have presented all available arguments," including its due process challenge, to the administrative agency). Likewise, Dargan has not developed any constitutional argument in his opening brief. Accordingly, the argument has been forfeited twice over. *Gabramadhin v. United States*, 137 A.3d 178, 187 (D.C. 2016) ("[I]t is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones.").

Even if the argument were not forfeited, Dargan undisputedly was given ample due process. First, he does not establish a protected property interest in his

continued employment, especially given his failure to maintain the required certification. *See Burton v. Off. of Emp. Appeals*, 30 A.3d 789, 798 (D.C. 2011) ("[t]o trigger due process protection in the area of public employment, an employee must have a legitimate claim of entitlement to [the right or benefit]" (internal quotation marks omitted)); *Nunez v. Simms*, 341 F.3d 385, 389-92 (5th Cir. 2003) (holding that a public school teacher who was terminated for failure to maintain her certification for the position had no property interest in continued employment under the Due Process Clause). Indeed, as Fire and EMS noted in Dargan's termination notice, it was statutorily required to terminate Dargan's employment once his DOH certification expired. *See* R. 267 (Final Decision at 2), 399 (5/26/15 Joint Statement of Material Facts ¶ 40) (citing D.C. Code § 7-2341.15(d)); D.C. Code § 7-2341.15(d) ("No person, entity or government agency shall employ" an individual whose certification has been "suspen[ded], revo[ked], or terminat[ed]").

Second, even assuming Dargan had a protected property interest, he does not identify the denial of any constitutionally required process. He does not contend, for example, that he was denied notice of his termination or an opportunity to contest his termination. *See* Br. 22-24, 37-48. Further, the failure to abide by state-law-mandated processes is not a *constitutional* due process violation. *See 1417 Belmont Cmty. Dev., LLC v. District of Columbia*, 302 A.3d 512, 517-18 (D.C. 2003) (concluding that a litigant "ha[d] not established a constitutional claim simply

because the District did not comply with . . . statutory provisions" governing notice) (collecting additional authorities).

And, regardless, Fire and EMS afforded Dargan ample process both before and after his termination. Fire and EMS provided Dargan with advance notice of his termination and afforded Dargan an opportunity to respond to the notice. *See* R. 1114-16 (Advance Written Notice at 3), 1122-29 (Hearing Officer Decision); *see Walker v. D.C. Off. of Emp. Appeals*, 310 A.3d 597, 603-06 (D.C. 2024) (holding that employee was afforded sufficient process when she had an opportunity to "present [her] side of the story before she was removed from office" (cleaned up)); *Baldwin v. D.C. Off. of Emp. Appeals*, 226 A.3d 1140, 1146 n.12 (D.C. 2020) (denying due process challenge when litigant "was provided with an advanced written notice of his proposed removal"). At that time, Dargan was free to present any challenge that he had to the proposed termination.

Dargan was then able to appeal his termination to the OEA, where he received an evidentiary hearing, and subsequently to the Superior Court and this Court (multiple times over). That pre- and post-termination process more than suffices to clear any constitutional floor. *Davis v. Univ. of D.C.*, 603 A.2d 849, 853 (D.C. 1992) (emphasizing that due process requires only "notice and opportunity to be heard"). Indeed, this Court has clarified that "the requisite" process need not always "precede the taking of an administrative action"; it is "sufficient if somewhere in the

administrative-judicial process, due process was afforded." *Holmes v. D.C. Bd. of Appeals & Review*, 351 A.2d 518, 522 (D.C. 1976). It was afforded in spades here.

### B. The OEA correctly concluded that Dargan was afforded all the process that he was due under District law.

To the extent Dargan argues that District law entitled him to some additional process, even if not constitutionally mandated, he is also wrong. It is undisputed that the Fire and EMS "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 licens[e]." Br. 3 (emphasis omitted); *see* D.C. Code § 5-404.01(e)(1) (explaining that EMTs and paramedics practice under the Medical Director's license); *id.* § 5-404.01(d) (explaining that the Medical Director is responsible for "[m]edical training" and "[q]uality assurance of medical services"); *id* § 5-404.01(e)(2) (explaining that the Medical Director can be "personally liable" in some instances for "death or injury" caused by EMTs and paramedics practicing under his license). And, as the OEA held, Dargan has pointed to no legal authority that required the Fire and EMS Medical Director to take "any specific action" before withdrawing sponsorship for Dargan's recertification application. R. 1634-35 (11/29/23 OEA Decision at 10-11).

Regardless, Dr. Miramontes withdrew his sponsorship only after Dargan received extensive remediation and was afforded multiple opportunities to pass his skills assessment. Specifically, Dargan was placed in extensive remediation,

including classroom education, assessment testing, and field ride-outs and evaluations. R. 53 (Critical Remediation Action Plan), 393-95 (5/26/15 Joint Statement of Material Facts ¶¶ 17-27), 846-47 (8/4/21 Tr. 25-26), 1104-05 (2/14/12 Letter at 2-3). He was also afforded multiple opportunities to pass the required skills assessment, R. 394-95 (5/26/15 Joint Statement of Material Facts ¶¶ 23, 27), 849-55 (8/4/21 Tr. 28-34), with further remediation after his first failed attempt, R. 395 (5/26/15 Joint Statement of Material Facts ¶ 26), 1023 (8/4/21 Tr. 202), 1029 (8/4/21 Tr. 208). After Dargan failed his skills assessment for a second time and Dr. Miramontes decided to withdraw his sponsorship for an EMT-Intermediate certification, Dr. Miramontes still offered to sponsor Dargan at an EMT-Advanced level. R. 397 (5/26/15 Joint Statement of Material Facts ¶ 35), 856-57 (8/4/21 Tr. 35-36), 865 (8/4/21 Tr. 44), 1103 (2/14/12 Letter at 1), 1150 (9/11/12 Email). 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." R. 1103 (2/14/12 Letter at 1). Notably, had Dargan 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 advanced life support services. *See* Br. 2-3. Yet Dargan

steadfastly refused to apply for an EMT-Advanced certification. R. 397 (5/26/15 Joint Statement of Material Facts ¶ 35); R. 1037-38 (8/4/21 Tr. 216-17).

Further, under D.C. Code § 7-2341.15(b) and Mayor's Order 2009-89, it is DOH, and not the Fire and EMS Medical Director, who may "deny renewal of" or otherwise "suspend, or revoke" a DOH certification. R. 1633-34 (11/29/23 OEA Decision at 9-10). When DOH denies an application, affected individuals may challenge that decision before OAH. *See* D.C. Code § 7-2341.17. But that provision, and the additional process it affords, was never triggered here. Dargan has identified no authority that required Fire and EMS to forward his incomplete application to DOH, nor is Fire and EMS aware of any such authority. Further, Dargan has waived any reliance on the DOH appeals process by repeatedly insisting that it is inapposite. *See, e.g.*, Br. 4 n.1; R. 1261-62 n.3 (12/20/19 DCCA Decision at 3-4). Regardless, even if Dargan had preserved this argument and DOH had initiated the revocation process, the result would be the same. Current regulations make clear what has always been true as a matter of common sense: "[s]ufficient grounds for denial, suspension, or revocation of a certification granted to an emergency medical services provider . . . shall include" "[b]eing adjudicated incompetent" and "[w]ithdrawal of sponsorship by the sponsoring medical director." 29 DCMR § 563.17(d), (z).

At base, Dargan has not challenged the factual grounds for his termination—that he failed to maintain a DOH certification—or that incompetence constituted sufficient cause for his termination. Br. 31 n.10; R. 1635 (11/29/23 OEA Decision at 11). And Dargan's DOH certification expired through no fault but his own, after he was afforded extensive process. To remain employed at Fire and EMS, Dargan was required only to maintain a DOH certification at either a paramedic or EMT level, not specifically an EMT-Intermediate certification. R. 48 (Bulletin No. 83 at 1). Yet Dargan declined Dr. Miramontes's repeated offers to sponsor Dargan at an EMT-Advanced level of certification until Dargan could pass an advanced life support assessment. *See* R. 397 (5/26/15 Joint Statement of Material Facts ¶ 35), 912 (8/4/21 Tr. 91), 1038 (8/4/21 Tr. 217), 1103 (2/14/12 Letter at 1). That should end the Court's inquiry.

### C. Dargan's contrary arguments are unavailing.

Dargan makes three arguments to the contrary, each of which lacks merit.

*First*, Dargan argues that he did not receive "the full extent of testing and training provided for in" Bulletin No. 83. Br. 1. But Dargan waived this argument before the OEA, where he conceded that Bulletin No. 83's procedural requirements do not apply to DOH recertification. R. 1456 (6/16/23 Dargan Br. 23), 1614 (5/20/23 Dargan Objection at 4). Because Dargan conceded this issue below, he may not relitigate it before this Court. *See Sims*, 933 A.2d at 309-10. Even if this argument

was preserved, it does not pass muster. As this Court has already suggested, the "testing procedures of Bulletin No. 83 . . . apply *only* to [NREMT]" certification, not DOH certification. R. 1261 (12/20/19 DCCA Decision at 3) (emphasis added). And "Dargan was terminated, not for failing to maintain his NREMT certification (which, as [the OEA] found, was still current at the time of his termination), but rather for failing to maintain his DOH certification." R. 1260 (12/20/19 DCCA Decision at 2). So, as the OEA found, Bulletin No. 83 is relevant only in so far as it requires Fire and EMS emergency medical services providers to maintain a DOH certification. R. 1631-32 (11/29/23 OEA Decision at 7-8). Dargan's reliance on Bulletin No. 83 is thus misplaced.

To the extent that Dargan gestures at some additional entitlement to remedial training flowing from Fire and EMS "practices and procedures," Br. 1, he never specifies the source of any such requirement or explains why the remediation he received falls short. For example, Dargan requests "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." Br. 49; *see* Br. 2 (requesting "remedial training on a computerized mannequin"). But he does not point to any provision of District law that would require such accommodation above and beyond the remediation Dargan already

received, which in the words of the then- Fire and EMS Medical Director had already been "exceptionally long." R. 848-50 (8/4/21 Tr. 27-29).

Finally, Dargan also repeatedly accuses Dr. Miramontes of misrepresenting the remediation that Dargan received. *See* Br. 24, 43, 46. But the OEA reasonably found that Dargan "underwent an extensive six (6) month remediation process involving classroom education, laboratory education, and numerous field evaluations," R. 1628 (11/29/23 OEA Decision at 4). The record and Dargan's own briefing confirms as much. R. 53 (Critical Remediation Action Plan), 393-95 (5/26/15 Joint Statement of Material Facts ¶¶ 17-27), 846-47 (8/4/21 Tr. 25-26), 1104-05 (2/14/12 Letter at 2-3); Br. Attach. A. Further, the OEA's conclusion that Dargan received 12 additional days at the training academy after he failed his February 2, 2012 assessment, R. 1629 (11/29/23 OEA Decision at 5), is supported by the record, R. 395 (5/26/15 Joint Statement of Material Facts ¶¶ 26, 27), 1023 (8/4/21 Tr. 202), 1029 (8/4/21 Tr. 208). Indeed, Dargan even appears to concede that this challenge was forfeited below. *See* Br. 43 (admitting that Dargan "could not" and did "not" challenge a February 3, 2012 email exchange that noted Dargan was being "detailed to the [training academy]"); R. 395 (5/26/15 Joint Statement of Material Facts ¶ 26).

*Second*, Dargan argues that his termination was improper because he had no control over Dr. Miramontes's withdrawal of his sponsorship. Br. 38. But, again,

Dargan has admitted, both before this Court and the OEA, that Dr. Miramontes's sponsorship decision was discretionary. Br. 3; R. 1459-60 (6/16/23 Dargan Br. 26-27), 1473 (6/16/23 Dargan Br. 40). This discretion makes good sense because, as Dargan notes, sponsorship is akin to an "affirmation by the Medical Director of the competence of the EMT at the requested level." R. 1460 (6/16/23 Dargan Br. 27); *see* R. 1107 (DOH Application at 2), R. 47 (same). Further, in Dargan's case, Dr. Miramontes's withdrawal of sponsorship was supported by clear and extensive record evidence—including Dargan's repeated inability to pass an advanced life support skills assessment that EMT-Intermediate certificate holders should have been able to "zing" through. R. 855 (8/4/21 Tr. 34); *see* R. 1634 (11/29/23 OEA Decision at 10).

*Third*, Dargan challenges the merits of Dr. Miramontes's assessment that Dargan was not qualified to serve as an advanced life support provider. Br. 14-15, 38-42. He contends, for example, that he had reasonable excuses for his poor performance and that Dr. Miramontes should have applied a "medical etiology" to identify the cause of Dargan's poor performance. Br. 41-42. But in the next breath, Dargan insists that his "challenge is not to the conclusion of the Medical Director concerning [Dargan's] performance" on his skills assessments, Br. 3, which he concedes is "irrelevant" because he is "not requesting restoration to the field," only remedial training. Br. 40. Even setting this internal contradiction aside, this line of

attack is undercut by Dargan's admission that the Fire and EMS Medical Director has an "absolute right" short of discriminatory animus to decide whether or not to sponsor an EMT, and that the "substantive correctness" of Dr. Miramontes's sponsorship decisions "is likely too sophisticated to be reviewed successfully by those without medical training." Br. 3.

*Fourth*, Dargan contends that the OEA denied him due process by excluding the testimony of Anita Massengale. Br. 23, 45, 47-48. Far from it. After a pre-hearing status conference on June 29, 2020, the OEA excluded Massengale from the list of approved witnesses, *compare* R. 530-31 (6/29/20 Order), *with* R. 521-22 (5/26/20 Joint Response at 1-2); *see also* R. 765-67 (9/5/20 Dargan Br. 8-10). The OEA acted well within its purview in doing so. OEA judges are allowed to convene prehearing conferences to consider whether to "order an evidentiary hearing to expedite the presentation of evidence, including, but not limited to, restricting the number of witnesses." 6-B DCMR § 623.1(d) (2021). And, as the OEA explained, it excluded witnesses and exhibits that "pertained solely to [Dargan's] allegations of discrimination and retaliation, which are not within OEA's jurisdiction and ha[d] in fact been raised by [Dargan] before the Office of Human Rights." R. 775 (10/13/20 OEA Order at 1).

At the August 2021 OEA hearing, Dargan again tried to admit written statements by individuals produced as part of the OHR proceeding. Fire and EMS

objected to the relevance of that evidence, and the OEA properly excluded it. R. 1007-17. That ruling was sound. The OEA rules make clear that only "material and relevant evidence or testimony shall be admissible." 6-B DCMR § 626.1 (2021). And even now on appeal, Dargan does not clearly articulate the relevance of Massengale's testimony. Br. 47-48. To the extent Dargan takes issue with the exclusion of other witnesses or exhibits besides Massengale, Br. 24 & n.8, he has forfeited any such challenge by failing to identify the relevant witnesses or exhibits or otherwise develop this argument.

## II. Dargan's Termination Complied With The 90-Day Rule In D.C. Code § 5-1031.

At the time of the underlying events, D.C. Code § 5-1031(a) stated that "no corrective or 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 Emergency Medical Services Department . . . knew or should have known of the act or occurrence allegedly constituting cause." D.C. Code § 5-1031(a) (2012). Dargan's DOH certification expired on June 30, 2012, and he concedes that this was the "act or occurrence allegedly constituting cause." Br. 31 n.10. Dargan received an advanced written notice of his termination on October 31, 2012—84

business days after his certification expired.[3] So, as the OEA found, his termination was timely. R. 499 (10/20/15 OEA Decision at 10).

There is nothing in the record that suggests the 90-day period could have begun before June 30, 2012. It is undisputed that Dargan was terminated for failing to maintain a DOH certification. R. 397-99 (5/26/15 Joint Statement of Material Facts ¶ 36). Dargan has identified no authority that required Dr. Miramontes to take any "specific action" before he withheld his sponsorship. R. 1634-35 (11/29/23 OEA Decision at 10-11). Nor did Dr. Miramontes deny Dargan's recertification application or revoke his existing certification on June 25 when Dr. Miramontes wrote to DOH, or in late May when he declined to sign Dargan's recertification application, or at any prior point in time. So Dargan could not be charged with failing to maintain his DOH certification—and Fire and EMS's notice obligation was not triggered—until his certification actually lapsed on June 30, 2012. As this Court previously recognized, that means Fire and EMS's "notification was timely

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[3] In 2012, there were 20 business days in July (July 3, 5, 6, 7, 10, 11, 12, 13, 14, 17, 18, 19, 20, 21, 24, 26, 26, 27, 28, 31); 23 business days in August (August 1, 2, 3, 4, ,7, 8, 9, 10, 11, 14, 15, 16, 17, 18, 21, 22, 23, 24, 25, 28, 29, 30, 31); 20 business days in September (September 1, 5, 6, 7, 8, 11, 12, 13, 14, 15, 18, 19, 20, 21, 22, 25, 26, 27, 28, 29); and 21 business days in October (October 2, 3, 4, 5, 6, 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, 24, 25, 26, 27, 30, 31)—a total of 84 business days.

under the statue." R. 1262 n.5 (12/20/19 DCCA Decision at 4). Indeed, Dargan does not dispute that the adverse action was timely if measured from June 30, 2012.

Dargan argues that Fire and EMS "should have known" of the "act or occurrence allegedly constituting cause" at a date earlier than June 30, 2012. He points to several purportedly relevant dates: (1) February 3, when Dargan failed his initial assessment and was remanded back to the training academy for further remediation; (2) February 14, the date of his second skills assessment, which he failed; and (3) June 25, when Dr. Miramontes asked DOH to revoke Dargan's certification. Br. 33-35. The OEA properly held that the 90-day limitations period did not begin to run on February 14 because "the loss of [Dargan's] DOH certification had not yet occurred then." R. 498 (10/20/15 OEA Decision at 9). The same holds true for the February 3 and June 25 dates.[4] As the Superior Court underlined, "[t]he statute does not contemplate that the 90-day period would begin when the 'act or occurrence' merely starts to be anticipated," SA 29—to the contrary, it begins to run only *after* the event constituting cause has occurred.

Dargan's remaining arguments are unpersuasive. He points to the "should have known" language in the statute to argue that the 90-day period began to run as

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[4] It is worth noting, regardless, that even if June 25, 2012 were the date of the "act or occurrence," the adverse action would still have been timely commenced on October 31, 2012, because this date is only 89 business days after June 25. *See supra* note 2.

soon as Fire and EMS knew there was some possibility that his certification would expire on June 30. Br. 29-37. The use of "should have known" in a statute of limitations does not allow a limitations period to begin *before* the act in question occurs. *See Bussineau v. President & Dirs. of Georgetown Coll.*, 518 A.2d 423, 425 (D.C. 1986) (explaining that a limitations periods generally begin to run "at the time injury occurs"). Instead, the phrase "should have known" speaks to situations where the agency does not have actual knowledge of the event constituting cause, but nevertheless should have later learned about the event through the exercise of its reasonable diligence. *See id.* at 426-27 (interpreting "knew or should have known" in a statute of limitations). Thus, if Fire and EMS did not know that Dargan's certification had lapsed on June 30, the 90 days would begin to run on the date, on or after June 30, that Fire and EMS—through the exercise of reasonable diligence—should have discovered the lapse. But that is of course not what happened here. Dargan's reliance on *D.C. Fire & Medical Services Dep't v. D.C. Office of Employee Appeals*, 986 A.2d 419 (D.C. 2010), and *District of Columbia v. D.C. Office of Employee Appeals*, 883 A.2d 124 (D.C. 2005), is similarly misplaced. Br. 30-31. Both cases assessed how soon *after* an event allegedly constituting cause an employer "should have known" that it had cause for an adverse action. That analysis does not suggest that the 90-day period could begin *before* the event constituting cause.

Dargan's interpretation also runs counter to the statutory text. Under his interpretation of Section 5-1031(a), the 90-day period could (and often would) commence before the "act or occurrence allegedly constituting cause" because the agency may know that the "act or occurrence" is likely to happen. But, as the Superior Court underscored, the plain text of Section 5-1031(a) confirms the 90-day window begins to run only "after" the event constituting cause occurs. SA 29; D.C. Code § 5-1031(a). Further, the statute contemplates only a single date for the act or occurrence constituting cause—not the range of dates that might trigger the 90-day period under Dargan's preferred reading of the statute. *See* Br. 32 (suggesting there are "a number of points" in time that might trigger the 90-day period). Dargan's interpretation is also contrary to the interpretative principle that "[s]tatutes of limitation sought to be applied to bar rights of the Government[] must receive a strict construction in favor of the Government." *Badaracco v. Comm'r*, 464 U.S. 386, 391 (1984) (internal quotation marks omitted).

Dargan's reading would also lead to absurd consequences—it would incentivize, if not require, Fire and EMS to terminate employees on the mere possibility that cause will arise at some point in the future. The facts of Dargan's own case indicate why that outcome would be problematic. Fire and EMS did not know Dargan would be left without *any* DOH certification before June 30, 2012 because Dr. Miramontes offered to sponsor Dargan's application for a basic life

support certification. *See supra* pp. 11, 12. If Dargan had accepted that offer, there would have been no cause for his termination. Further, Dargan's termination was by no means a foregone conclusion before June 30 because, as Dr. Miramontes noted, Dargan could have "complete[d] a fully accredited Paramedic Course, gain[ed] [a] NREMT-Paramedic certification, and [then] complete[d] an assessment by [Fire and EMS]" to demonstrate his fitness to serve as a Basic Paramedic. R. 1103 (2/14/12 Letter at 1).

Dargan also argues that Fire and EMS could have simply acted earlier, Br. 36, but nothing compels Fire and EMS to act faster than the 90-day window prescribed by statute. He also suggests that Fire and EMS has violated Super. Ct. Civ. R. 11(b)(3) by making the "clearly untrue" statement that his termination "was based solely on his failure 'to maintain the required DOH certification.'" Br. 36. But that statement is plainly true as a factual matter, as it was the cause specifically cited in his notice of termination. R. 1114 (Advance Written Notice at 1), 266 (Final Decision at 1). Dargan does not even dispute that the expiration of his DOH certification was the "act or occurrence allegedly constituting cause." Br. 31 n.10. To the extent Dargan means that the expiration of his certification occurred not in isolation, but rather after a series of precipitating events, and that Fire and EMS, accordingly, should have known before June 30 that his certification might expire on that date, Fire and EMS has already explained why knowledge of a possible future

cause does not trigger the 90-day period based on a plain-text and common-sense reading of Section 5-1031(a). *See supra* pp. 40-45.

## CONCLUSION

For the foregoing reasons, the OEA's decision should be affirmed.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that on September 19, 2025, this brief was served through this Court's electronic filing system to:

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