

**BEFORE THE
MERIT SYSTEM PROTECTION BOARD
FOR
MONTGOMERY COUNTY, MARYLAND**

IN THE MATTER OF

[REDACTED],

APPELLANT,

AND

**BETHESDA FIRE
DEPARTMENT,**

APPELLEE

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CASE NO. 22-36

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FINAL DECISION

This appeal involves the removal of Appellant from both the Board of Directors (BOD) and the membership rolls of the Bethesda Fire Department (BFD).

The Board has considered and decided the appeal.

PROCEDURAL BACKGROUND

On April 28, 2022, Appellant filed this appeal challenging the decision of the BFD Board of Directors to dismiss him as an active member of the BFD and as a member of the BFD Board of Directors. The BFD issued eight charges against Appellant which we summarize as follows: (1) Job Abandonment and Insubordination; (2) Failure to Act on Emergency Medical Technician (EMT) Training Concerns and Making Discriminatory Remarks; (3) Failure to Ensure Proper Training; (4) Acting Outside the Scope of Authority; (5) Failure to Report Vehicle Damage and Take Steps Necessary to Address the Situation; (6) Use of Tobacco in a Vehicle of the BFD; (7) Failure to Act in Good Faith as a Corporate Director; and (8) Improper Use of a Fictitious Social Security Number for a Volunteer.¹ Appellant also sought reimbursement for the value of various items he alleged to have purchased for the BFD.

The parties filed prehearing submissions and on August 31, 2022, the parties appeared by video before the Merit System Protection Board (MSPB or Board) for a prehearing conference.

¹ The charges are detailed in a memorandum of February 22, 2022, (BFD Exhibit 1) and in BFD's submission dated June 1, 2022, (received June 7, 2022).

At the prehearing conference the BFD argued that the MSPB did not have jurisdiction over Appellant's removal from the BFD Board of Directors but does have jurisdiction over Appellant's removal as a member of the BFD. A Prehearing Order was issued by the Board on September 7, 2022, scheduling the merits hearing and addressing various matters such as discovery, exhibits, and witnesses. The order also asked the parties to brief the jurisdictional issues, and on October 13, 2022, the Board issued an order finding that it did not have jurisdiction over Appellant's removal from the BFD Board of Directors. The Board further held that because Appellant was considered by BFD to be a volunteer firefighter or rescuer the Board has jurisdiction to hear Appellant's appeal of his dismissal as a volunteer firefighter or rescuer. The Board also determined that it had jurisdiction to resolve a claim by Appellant for reimbursement of the value of certain items he had purchased for BFD. This claim was resolved by the parties after settlement discussions. Day 1 Tr. 22-24; Affidavit of Appellant, November 9, 2022; Appellant Email, November 9, 2022.

FINDINGS OF FACT

The Board held a merits hearing on October 24 and 26, 2022, hearing testimony from nine witnesses, including Appellant. The following witnesses testified and are identified by their initials, or as "Appellant," elsewhere in this decision:

1. [REDACTED], BFD Fire Chief (VE)
2. [REDACTED], BFD Secretary (BC)
3. [REDACTED], BFD Treasurer (JP)
4. [REDACTED], BFD Vice President (JM)
5. [REDACTED], Appellant (MK)
6. [REDACTED], Former BFD Member (RM)
7. [REDACTED], former BFD Board Member (GD)
8. [REDACTED], former BFD Board Member (JPM)
9. [REDACTED], retired Personnel Information Management System (PIMS) manager, MCFRS division of volunteer services (RB)

On April 8, 2022, the BFD issued a notice of removal to Appellant. BFD Exhibit 1.² There were eight (8) charges against Appellant, outlined in a charging memorandum dated February 22, 2022. BFD Exhibit 1.

² BFD Exhibits 1 through 11 were admitted into the record. The BFD Exhibits are as follows:

- Exhibit 1 - MSPB Appeal Documents
- Exhibit 2 - Bethesda Fire Department Constitution and Bylaws, approved and adopted 5/7/20
- Exhibit 3 - [REDACTED] email 12/3/21
- Exhibit 4 - Executive Regulation 22-00 AM, Code of Ethics & On-Duty Personal Conduct, effective 7/9/02
- Exhibit 5 - R [REDACTED] M [REDACTED] Memorandum 9/30/21
- Exhibit 6 - Emails related to 2/16/20 incident
- Exhibit 7 - Documents related to July 2019 collision
- Exhibit 8 - Documents related to tobacco use violation in local fire and rescue department (LFRD) vehicle
- Exhibit 9 - MCVFRA meeting minutes 12/1/21 & supporting Title of the Maryland Code
- Exhibit 10 - Documents related to fictitious Social Security Number
- Exhibit 11 - Appellant response to Statement of Charges, 4/7/22

After hearing testimony and reviewing the exhibits³ the Board made the following factual findings.

Appellant has volunteered with the BFD since 2004. Day 1 Tr. 195. During that time Appellant has held various positions of responsibility, including serving as President of the Board of Directors and Fire Chief. Day 1 Tr. 186, 195-96. In 2019 BFD appointed Appellant as a Life Member in the BFD, a class of membership that recognizes ten years of active service with the organization. Appellant Exhibit 1 and BFD Exhibit 2, p. 4, §2.2D; Day 1 Tr. 196; Day 2 Tr. 83.

Due to Appellant's longstanding involvement and leadership roles, it was undisputed that he was considered an authority figure among the volunteers at the BFD and that he was aware of that role. Day 1 Tr. 186.

The BFD Board appointed VE as Acting Fire Chief on December 2, 2021. Day 1 Tr. 109.⁴ Immediately after VE's appointment as Acting Fire Chief Appellant made known his displeasure with the appointment by sending the following email on December 3, 2021, at 10:56 pm to all the Board Members and active members of the BFD. Day 2 Tr. 10; BFD Exhibit 3. The email's subject line was "A706 Officially Out Of Service."⁵ In its entirety the content of the email read:

Dear Fellow Board Members,

I and others expressed our concerns last night should Victor be appointed Acting Chief of the Department, but our words fell on deaf ears. I will be unavailable to staff A706 until this issue is resolved.

The unfortunate causality of this entire situation is that the citizens within our first due will have to rely on others to assist them in their time of need.

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BFD Exhibit 3.

³ Appellant Exhibits (AX) 1 through 8 were admitted into the record. Appellant's exhibits are as follows:

- AX 1 - Bethesda Fire Department Bylaws, May 7, 2020
- AX 2 - BFD Response to Appellant Request for Trial Board 2/2/22
- AX 3 - Integrated Emergency Command Structure (IECS) Removal, email dated 3/1/22
- AX 4 - Montgomery County Executive Regulation 21-06AM Certification Standards for Training, Experience, & Credentialing Requirements, effective date 11/6/07
- AX 5 - Separation Reason from BFD, emails, 4/18/22
- AX 6 - Montgomery County Volunteer Fire Rescue Association Bylaws - July 2021
- AX 7 - PIMS_CHAIR_HELP-Updated 4/20/16
- AX 8 - BFD Policy 21-01_Standby Meal Reimbursement Program_201201 & Meal Reimbursement Evaluation 12/1/20

In addition to the exhibits of the parties, the Board requested certain documents and they were entered into the record Board Exhibits (BX) 1-5 are the following:

- BX 1 - Appellant's Length of Service Award Program Annual Certification, 2019-21
- BX 2 - Appellant's Length of Service Award Program Annual Certification, 2019-21, signed
- BX 3 - Return to Duty Email, January 4, 2022
- BX 4 - Memorandum from ██████████, February 3, 2022
- BX 5 - BFD Board of Directors Meeting Minutes, April 7, 2022

⁴ VE's acting capacity ended when he was appointed Fire Chief a month later. Day 1 Tr. 109.

⁵ The BFD's sole ambulance was referred to as A706.

By stating that he would “be unavailable to staff A706” Appellant was saying that he would not be driving or otherwise serving on the BFD’s only ambulance until VE was removed as Chief. BFD Exhibit 3; Day 1 Tr. 217; Day 2 Tr. 13, 17, 22-23. Appellant acknowledged that the other volunteer firefighter/rescuers at BFD understood his meaning. Day 2 Tr. 23. Appellant also admitted that he knew his actions would probably cause the BFD to be unable to provide ambulance services. Day 2 Tr. 49.

After Appellant’s December 3rd email other BFD volunteers declined to staff the ambulance and consequently it was out of service for several weeks. Day 1 Tr. 110-12, 129-30, 147-48. Shortly thereafter, a number of volunteers resigned from BFD and joined the Glen Echo Volunteer Fire Department where Appellant also volunteered. Day 1 Tr. 111. Some volunteers called as witnesses by Appellant said that they had resigned from the BFD due to their belief that Chief VE lacked integrity. Day 1 Tr. 177, 182; Day 2 Tr. 71, 79.

Chief VE appealed to the volunteers to immediately return to their duties at the BFD. Day 1 Tr. 112. In response to the continuing widespread refusal of BFD volunteers to staff the ambulance, Chief VE issued a 30-day suspension to the volunteers who were participating in the walk out charging them with willful dereliction of duty, abandonment, putting the community at risk, and tarnishing the image and reputation of the BFD. Day 1 Tr. 112, 130.

However, before the volunteers had fully served their 30-day suspensions, Chief VE attempted to get volunteers to return by rescinding the suspensions and ordering them to return to duty. On January 4, 2022, Chief VE testified that he sent an email to all the volunteers who had refused to staff the ambulance, including Appellant, rescinding the suspensions. Day 1 Tr. 112-13; Board Exhibit 3. The Chief’s email notified the recipients that he was lifting the suspension and ordering them to return to duty. Board Exhibit 3. The Chief’s email also warned that “Failure to return to duty, per this directive, the department’s staffing and standby policies, and various related BFD Chief’s Orders and Informational Bulletins, shall result in disciplinary action, including the possibility of dismissal.” Board Exhibit 3.

In his testimony at the second day of the hearing Appellant did not deny that he received the Chief’s January 4th email:

I’m not going to say I didn’t receive it. I will say I don’t recall receiving it. There were several times that my email account was suspended so I’m not going to say that I did not physically receive it. . . . I do know that I did receive correspondence, certainly at the end of December because I had attended the January board meeting. So I must have gotten -- my email would have been back on by then.

Day 2 Tr. 14 -15. At no time did Appellant report for duty or notify Chief VE that he was ready to return to duty. Day 2 Tr. 41-42.

Firefighters and rescuers receive training on the nature of their responsibilities. Day 1 Tr. 125. Appellant asserted that he had no responsibility to the community and that his actions only harmed the community “slightly” in that “there were no deaths because of a delayed response” due to the BFD ambulance being out of service. Day 2 Tr. 133.

Oaths of service are routinely administered to firefighters and rescuers. Day 1 Tr. 39-40; 84, 90-91; 117-18; 124-25; 161; 164-65; Day 2 Tr. 88. Some firefighters and rescuers did not recall

taking an oath. Day 2 Tr. 53. Appellant testified that he has never taken an oath of service. Day 1 Tr. 199.

A September 30, 2021, memorandum from then BFD member RM to Montgomery County Fire and Rescue Service (MCFRS) Captain ██████████ expressed his concerns about EMT classroom instruction. BFD Exhibit 5. RM, the author of the September 30, 2021, memorandum, testified and denied that Appellant made any discriminatory and disparaging comments about his age. Day 2 Tr. 55-56.

On February 16, 2020, the BFD ambulance crew dropped a patient during a transfer at Suburban Hospital. BFD Exhibit 6; Day 1 Tr. 119; Day 2 Tr. 66. Appellant was President of the BFD when the incident occurred. Day 1 Tr. 88. Appellant was not the Fire Chief at that time. Day 1 Tr. 119; Day 2 Tr. 67.

A dinner event for certain members of the BFD was scheduled for December 10, 2021, at Morton's Steak House. BFD Submission, p. 5. BFD funds were used to secure a reservation and when the event was cancelled the BFD lost about \$3,000. Day 1 Tr. 90. BC testified that Appellant may have had some involvement in the planning for the event. Day 1 Tr. 51 - 54. Former BFD BOD member GD testified credibly that planning for the event involved the BFD executive committee but not Appellant. Day 2 Tr. 70.

Chief VE testified that Appellant had retained possession of the BFD Fire Chief's vehicle after he was no longer the Fire Chief. Day 1 Tr. 113-114. Chief VE further testified that Appellant did not promptly respond to instructions to return the vehicle and when he did return it the vehicle was in poor condition from Appellant smoking in the vehicle. Day 1 Tr. 114-15. Appellant admitted that he violated County and BFD policy by smoking in the vehicle. Day 1 Tr. 207 ("yes, I did. It was wrong"); Day 1 Tr. 213-14; Day 2 Tr. 134 ("I used bad judgment regarding smoking.").

Chief VE testified that the vehicle also suffered approximately \$2,000 in unreported collision damage. Day 1 Tr. 115-16. Because there had not been a timely accident report the damage was not covered by the BFD's insurance. Day 1 Tr. 115-17. Appellant acknowledged that the damage occurred when he had an accident in 2019, but testified that he had promptly reported it to a prior Fire Chief and was disciplined by not being allowed to drive a BFD vehicle for two weeks. Day 1 Tr. 206, 231. *See* BFD Exhibit 7. Appellant's testimony on that issue was corroborated by former BFD Board member GD. Day 2 Tr. 70, 78.

Appellant was a member of the Montgomery County Volunteer Fire- Rescue Association (MCVFRA) Board while serving in his capacity as a member of the Board of Directors of the BFD. At a December 1, 2021, meeting of the MCVFRA Board, Appellant made a motion to remove \$4,579 of funding for a BFD ambulance from a Senator William Amoss State grant funding request. BFD Exhibit 9. Appellant's motion to deduct \$4,579 from the Amoss State grant funding request was passed by the MCVFRA Board. BFD Exhibit 9; AX 2; Day 1 Tr. 58. Appellant testified that the funding was not really eliminated, it was just delayed. Day 2 Tr. 134. A February 1, 2022, email from the President of the BFD to Appellant concerning this issue questions Appellant's action and says, "There will be a motion to remove you from the board on Thursday." AX 2.

When Appellant was Fire Chief of the BFD in 2020 he entered an alternative Social Security Number (SSN) for a BFD member who was not a U.S. citizen and had not yet been issued an official SSN in the Local Fire and Rescue Department (LFRD) Personnel Information Management System (PIMS). BFD Exhibit 10. The PIMS users guide permitted entry of an alternate SSN under certain circumstances. AX 7, p. 17; Day 1 Tr. 74-76.

The use of an incorrect SSN meant that the member was unable to obtain a Maryland Income Tax credit for his volunteer firefighter work. Day 1 Tr. 81-84; BFD Ex 10. Although Appellant attempted to change the member's SSN in PIMS to the correct one he was unsuccessful. Day 1 Tr. 80; BFD Exhibit 10. BC received notice that there was a continuing issue with the member's tax credit due to the SSN situation. Day 1 Tr. 79-80. BC then contacted the Length of Service Awards Program (LOSAP) administrator, and the incorrect SSN was promptly corrected. Day 1 Tr. 83-84.

BC, the Secretary of the BFD Board of Directors as well as the coordinator of the LOSAP, testified that on April 7, 2022, the BFD Board of Directors voted to remove Appellant as a member of the BFD. Day 1 Tr. 35-36. The vote to remove Appellant was 8-1 with one abstention, sufficient to meet the requirements of the BFD Bylaws for removal of a Life Member. Day 1 Tr. 37, 46; BFD Ex. 2 (p. 12, §9.3B). Appellant does not dispute that the vote concerning his termination based on the charges outlined above was properly conducted. Day 1 Tr. 46.⁶

ANALYSIS AND CONCLUSIONS

The Montgomery County Code provides the MSPB with jurisdiction over the discipline of volunteer firefighters and rescuers. The County Code, § 21-7(a), provides that “the Merit System Protection Board must hear and decide each appeal filed by a volunteer firefighter or rescuer aggrieved by an adverse final action of the Chief or a local fire and rescue department involving the removal, demotion, or suspension of, or other disciplinary action applied specifically to, that individual as if the individual were a County merit system employee.”

Under the County Code, § 21-1(c), a “volunteer” is defined as “an individual who, without salary, performs fire, rescue, emergency medical, or related services as provided in this Chapter with the Montgomery County Fire and Rescue Service.” Because this definition does not encompass membership on a local fire and rescue department's governing board, on October 13, 2022, the Board dismissed for lack of jurisdiction Appellant's appeal insofar as it concerned his removal from the BFD corporate Board of Directors.

We now address the charges that apply to Appellant as a volunteer firefighter or rescuer and an operational member of the BFD. Based on our October 13, 2022, jurisdictional ruling the elements of any charges that relate solely to Appellant's status as a member of the BFD Board of Directors must be dismissed.

⁶ Appellant requested a Trial Board under the BFD's Constitution and Bylaws, Article X. However, that request was rendered moot once the suspension was rescinded. We note also that the right to a Trial Board does not apply in cases involving removal or termination of BFD membership under §9.3 of the Constitution and Bylaws. Unlike disciplinary actions such as suspensions under §9.5, removal of membership is under the sole authority of the BFD Board of Directors. Membership in the BFD may be terminated by the Board for violation of law, breach of the Constitution and Bylaws or corporate charter, or “for other just cause supported by sufficient evidence.” §9.3A.

Charge 1 – Job Abandonment and Insubordination

Charge 1 pertains to Appellant’s alleged job abandonment and insubordination beginning on December 3, 2021. The BFD’s prehearing submission stated the charge as:

Violation of Oath of Service, that during the month of December 2021, along with other members who have since been dropped from the rolls of the Bethesda Fire Department, Incorporated, you engaged in an act of insubordination by participating in a volunteer work walkout, abandoning your duties in relationship to providing operational service to the community served by the Bethesda Fire Department, Incorporated.

BFD Submission, p. 2.

Immediately after VE was appointed as Fire Chief by the BFD Board of Directors Appellant sent an email to the BFD Board and all members of the BFD expressing his disapproval and stating that until the “issue is resolved” Appellant would refuse to staff the BFD ambulance. BFD Exhibit 3. Appellant admits that he “was not happy” with the Board’s decision to appoint VE. Day 1 Tr. 198-99.

By advising the entire BFD that he would “be unavailable to staff A706” Appellant was saying that he would not be serving on the BFD’s only ambulance until Chief VE was removed from his post. BFD Exhibit 3; Day 1 Tr. 217; Day 2 Tr. 13, 17, 22-23. Appellant acknowledged that the other volunteer firefighter/rescuers at BFD understood his meaning. Day 2 Tr. 23. Appellant also admitted that he knew his actions would be harmful to the BFD’s ability to provide ambulance services. Day 2 Tr. 49. Appellant’s testimony that his actions only harmed the community “slightly” because “there were no deaths because of a delayed response” due to the BFD ambulance being out of service is, at the least, unprofessional, callous, and insensitive to the unnecessary health and safety suffering his actions could have caused. Day 2 Tr. 133.

Appellant’s December 3rd email resulted in other BFD volunteers refusing to staff the ambulance and consequently it was out of service for several weeks. Day 1 Tr. 110-12, 129-30, 147-48. After Chief VE’s efforts to get volunteers to resume their duties he issued 30-day suspensions to all volunteers participating in the work stoppage, charging them with willful dereliction of duty, abandonment, contributing to putting the community at risk, and tarnishing the image and reputation of the BFD. Day 1 Tr. 112, 130.

In an attempt to get the ambulance back in service Chief VE rescinded the suspensions and ordered active members to return to duty.⁷ On January 4, 2022, Chief VE sent an email to various volunteers who had refused to staff the ambulance, including Appellant, rescinding the suspensions. Day 1 Tr. 112-13; Board Exhibit 3. The Chief’s email notified the recipients that he

⁷ We considered and rejected the possibility that because Appellant’s dismissal followed a suspension that he might be able to claim that the dismissal was barred by the principle of double jeopardy. Even assuming that the rescinded suspension was disciplinary, “‘administrative double jeopardy’ has not been recognized in Maryland.” *Montgomery County v. Krieger*, 110 Md. App. 717, 732 (1996). *C.f. Guide to MSPB Law and Practice* (2022) pp. 3020-28. Administrative double jeopardy for non-bargaining unit Montgomery County employees or volunteer firefighters and rescuers would likely require legislative or regulatory action. *See, e.g.,* MD Code Ann., State Personnel and Pensions, §11–103(b) (“After taking a disciplinary action against an employee, an appointing authority may not impose an additional disciplinary action against that employee for the same conduct unless additional information is made known to the appointing authority after the disciplinary action was taken.”).

was lifting the suspension and ordering them to return to duty. Board Exhibit 3. The Chief's email also warned that "Failure to return to duty, per this directive, the department's staffing and standby policies, and various related BFD Chief's Orders and Informational Bulletins, shall result in disciplinary action, including the possibility of dismissal." Board Exhibit 3.

Appellant does not deny that he refused to staff the ambulance but asserts that he never encouraged other BFD members to leave the BFD. Day 1 Tr. 199. However, Appellant's email, copied to all BFD members, states that "the citizens within our first due will have to rely on others to assist them in their time of need." BFD Exhibit 3. Appellant admitted his meaning and intent was not just that he would not staff the ambulance, but that no volunteers at BFD would and that as a consequence citizens who called for emergency services would have to rely on responders from other fire companies. Day 1 Tr. 224. We find that Appellant not only refused to serve in the BFD's only ambulance but that he also played a leadership role in a walk out by other BFD volunteer firefighters and rescuers that significantly impaired the operational status of that ambulance.

Although Appellant claims that he never took an oath of service, Day 1 Tr. 199, we do not credit his denial. Such oaths are routinely administered to firefighters and rescuers, Day 1 Tr. 39-40; 84, 90-91; 117-18; 124-25; 161; 164-65; Day 2 Tr. 88, although it is possible that some firefighters and rescuers do not recall taking an oath. Day 2 Tr. 53.

Although an oath is a meaningful and solemn act, taking an oath is not the only reason a public safety responder would be aware of their obligations and responsibilities to the organization and the community they serve. Firefighters and rescuers receive training on the nature of their responsibilities. Day 1 Tr. 125. Given Appellant's extensive service in positions of significant responsibility we have no doubt that he understood the importance of order and discipline to a volunteer fire department, and was aware of his responsibilities and obligations to the BFD and the community it serves. Appellant's assertion that his oath was not to the community and that his actions only harmed the community "slightly" because "there were no deaths because of a delayed response" due to the BFD ambulance being out of service rings hollow. Day 2 Tr. 133. Rather than striving to protect life, health and safety, Appellant knew that as a leader in the BFD, his refusal to serve would provide encouragement to others to join him in the walk out and would put the public at greater risk. Appellant's petulant action is unquestionably a betrayal of the oath and obligations of his position, and a fundamental ethos of a public safety position.

Appellant may have had a First Amendment right to raise concerns about what he may have believed to be the public safety impact of the appointment of Chief VE. *See Goldstein v. Chestnut Ridge VFD*, 218 F.3d 337 (4th Cir. 2000). However, it is the Appellant's actions in refusing to serve in the BFD's only ambulance and playing a leadership role in encouraging others in a walk out that impaired the operational status of that ambulance that is the offense. These actions did not constitute protected First Amendment speech. Even if his December 3, 2021, email could be characterized as speech addressing a matter of public concern, what he did differs markedly from the behavior discussed in *Goldstein v. Chestnut Ridge VFD*. In that case, the speech in question was protected because the volunteer fire company made only generalized and unsubstantiated allegations of disruption.

Insubordination is a serious offense that disrupts the workplace and threatens the ability of the organization to perform its functions. The adverse impact is particularly serious in a volunteer

fire company where prompt obedience to lawful orders is essential. In this case, there was a clear refusal to obey the lawful order of the Fire Chief to return to duty.

Appellant not only was insubordinate by refusing to return to duty, but he also acted in an unjustified manner designed to undermine the operations of the BFD. Due to Appellant's actions the BFD's only ambulance was put out of service because he and many volunteer members deserted their responsibilities. Appellant's actions were expressly designed to pressure the BFD Board of Directors to remove Chief VE from his position. Appellant intentionally disrupted the operations of the BFD and put public safety at risk because he disagreed with the Board of Director's hiring decision.

Even if Appellant's concern over the appointment of Chief VE had some validity it would not excuse his disruptive behavior that undermined the operational status of the BFD. Appellant is entitled to his opinions, but he is not permitted to defy the Chief's authority and abandon his responsibilities to the BFD without consequence. It is a fundamental and long-standing tenet of the public sector workplace that an employee must "obey first, grieve later", *i.e.*, obey valid orders and then file a grievance. MSPB Case Nos. 07-14 & 15 (2007); MSPB Case No. 98-03 (1998) ("Employees are expected to obey the lawful directions [and] file a grievance after the incident instead of disobeying supervisory directions."). *See Wyche v. United States Postal Serv.*, 208 F. App'x 858, 861 (Fed. Cir. 2006) (Even when an employee believes that an order is not proper they must first comply with the order and then register a complaint or grievance); *Perron v. Department of Transportation*, 16 M.S.P.R. 382 (1983) (employee must follow an authorized order and raise any objection through the grievance process). This principle is particularly apt where an employee occupies an essential position as an emergency responder.⁸

Appellant does not allege that he was refusing to obey an illegal order, that Chief VE was not duly appointed and authorized to issue orders, or that staffing the ambulance would unreasonably endanger his health or safety. Refusing to obey Chief VE's lawful authorized order to return to work is the very definition of insubordination. MSPB Case No. 98-03 (1998) (Employee guilty of insubordination for failure to follow supervisor's lawful directions"). *See Bieber v. Department of the Army*, 287 F.3d 1358, 1364 (Fed. Cir. 2002) (Insubordination is a "willful and intentional refusal to obey an authorized order of a superior officer which the officer is entitled to have obeyed.").

Appellant's egregious behavior of withholding his services in concert with others was unjustified, irresponsible, and harmful to the volunteer fire company he served. There can be no question that BFD's decision to dismiss Appellant was necessary to protect the organization and was based on just cause. MSPB Case Nos. 07-14 & 15 (2007) (refusal to follow instructions and disruption of the workplace justify dismissal). *See Bieber v. Department of the Army*, 287 F.3d 1358, 1364-65 (Fed. Cir. 2002) (insubordination and workplace disruption justify dismissal). *Cf.*

⁸ Appellant's assertion that as a Life Member of BFD he could choose when he wished to staff the ambulance is of no merit. Day 1 Tr. 196; Day 2 Tr. 23-24, 41-42. Appellant was not merely deciding whether he wanted to volunteer on certain shifts or days or take a vacation. He was riding on an ambulance for another volunteer fire company. Day 1 Tr. 214. He issued a defiant ultimatum to the BFD that no matter the impact on public safety he would not staff the BFD ambulance until the BFD Board was forced to reverse its appointment decision and Chief VE was removed from his post. And he clearly had a significant role in a work stoppage that crippled the BFD's operational effectiveness for a certain period of time.

Goldstein v. Chestnut Ridge VFD, 218 F.3d at 355. (“volunteer fire companies have a strong interest in the promotion of camaraderie and efficiency” and “in promoting internal harmony, trust, and camaraderie amongst [their] members”); 218 F.3d at 359 (concurrence) (“Police and fire departments cannot effectively protect public safety without some measure of order and discipline in their ranks.”).

For the reasons discussed above we sustain Charge 1 and find that by itself it provides a reasonable basis for dismissal.

Charge 2 – Failure to Act on EMT Training Concerns and Making Discriminatory Remarks

Charge 2 involves a September 30, 2021, memorandum from a BFD member setting out his concerns about EMT classroom instruction and alleged remarks by Appellant concerning the age of the memorandum’s author. BFD Exhibit 5. The BFD’s prehearing submission states the charge as:

Violation of the “Constitution and Bylaws of the Bethesda Fire Department, Incorporated,” Article VIII, Section 8.1 (Fire Chief), Subsection (I)(8) [now (H)(8)], which states, “Establishing and enforcing guidelines to ensure the training of all Members of the Department to perform their duties competently.” That after receiving correspondence from a [RM], who had recently completed the Emergency Medical Technician training reporting disparities between the training provided in the structured classroom environment and the in-station supporting training provided by members of the Bethesda Fire Department, Incorporated, you failed to take any proactive action upon such notification of concern, and according to writer, you’re your [*sic*] receipt of the correspondence you made discriminatory and disparaging remarks based upon the writer’s age.

BFD Submission, p. 3.

As part of the justification for Charge 2, the prehearing submission further states: “As a BFD leader, [Appellant], who even after no longer serving as ‘Administrative Fire Chief,’ acted as a senior operational advisor, received a copy of the memorandum penned by [RM], did not respond to the concerns, and inflamed the situation by his comments about the age of [RM].”

The BFD moved to withdraw Charge 2, but the Board decided to defer a decision on dismissal because the charge was considered by the BFD Board of Directors when it made its decision to dismiss Appellant. Day 1 Tr. 156; 189, 206.

Appellant called RM, the author of the September 30, 2021, memorandum, as a witness. RM credibly testified that Appellant made no discriminatory and disparaging comments about his age. Day 2 Tr. 55-56.

It is unclear whether for purposes of Charge 2 the BFD considered Appellant’s status as a “senior operational advisor” to have been acting in his capacity as a member of the Board of Directors or as a volunteer firefighter/rescuer. Further, the charge is based on an alleged violation of a provision in the BFD Constitution and Bylaws that concerns the duties of the Fire Chief, but the charge suggests that Appellant was not serving as Fire Chief at the time of the alleged offense.

For the reasons stated above, the Board dismisses Charge 2.

Charge 3 - Failure to Ensure Proper Training and Counselling

Charge 3 concerns a February 16, 2020, incident in which the BFD ambulance crew dropped a patient. The charge as stated in the BFD prehearing submission is as follows:

Violation of the “Constitution and Bylaws of the Bethesda Fire Department, Incorporated,” Article VIII, Section 8.1 (Fire Chief), Subsection (I)(8) [now (H)(8)], which states, “Establishing and enforcing guidelines to ensure the training of all Members of the Department to perform their duties competently.” That after the incident of February 16, 2020, upon learning of a serious incident involving the mishandling of a patient, wherein, the patient was dropped, as President and Assistant Fire Chief, you failed to appropriately act to ensure the involved members were immediately removed from service, immediately retrained, and returned to service based on clear review/confirmation that the circumstance did not stem from intentional negligence, or inability to perform based on other factors. Additionally, after learning of the potential need for critical incident stress counselling for the involved members, you did not act.

BFD Submission, p. 4.

It is unclear whether for purposes of Charge 3 the BFD considered Appellant to have been acting in his capacity as a member of the Board of Directors or as a volunteer firefighter/rescuer. Further, the charge is based on an alleged violation of a provision in the BFD Constitution and Bylaws that concerns the duties of the Fire Chief, but the charge itself suggests that Appellant was not serving as Fire Chief at the time of the alleged offense.

For these reasons Charge 3 cannot be sustained and must be dismissed.

Charge 4 - Acting Outside the Scope of Authority.

Charge 4 involved allegations that Appellant directed the expenditure of BFD funds for an unapproved dinner event scheduled for December 10, 2021, without BFD Board approval. The BFD’s prehearing submission stated the charge as follows:

Violation of the “Constitution and Bylaws of the Bethesda Fire Department, Incorporated,” Article VIII, Section 8.1 (Fire Chief), wherein, you acted outside of the scope of your authority related to the financial activities of the Department. Specifically, you wrongfully ordered the Department’s Administrator Specialist (JM) to expend funds for an unapproved December 10, 2021, social function involving only a small portion of the membership. Further, as the minimum amount required by Morton’s Steak House was far more than reasonable based on the numbers of attendees, the expenditure was fiscally imprudent and was not approved by the Board of Directors, nor is it likely that it would have been if appropriately presented to the Board.

BFD Submission, p. 5.

The BFD sought to withdraw Charge 4. Day 1 Tr. 150-151, 153; 204. The Board decided to defer a decision on dismissal as the charge was considered by the BFD BOD in dismissing Appellant. Day 1 Tr. 156; 204, 206.

The testimony concerning Charge 4 does not support a finding of impropriety by Appellant. Former BFD BOD member GD testified with confidence that planning for the event involved the BFD executive committee but not Appellant. Day 2 Tr. 70. Witness BC's testimony that Appellant may have had some involvement in the planning for the event lacked certainty. Day 1 Tr. 51 – 54.

Moreover, it appears that if Appellant was involved in planning for the event he was most likely doing so in his capacity as a member of the Board of Directors rather than as a volunteer firefighter/rescuer. Accordingly, we find that the Board lacks jurisdiction over Charge 4.

For the reasons stated above, the Board cannot sustain and must dismiss Charge 4.

Charge 5 - Failure to Report Vehicle Damage and Take Steps Necessary to Address the Situation

Charge 5 concerns Appellant's alleged failure to report an accident and damage to the Chief's vehicle. The BFD's submission laid out the charge as follows:

Violation of Montgomery County Fire and Rescue Service Policy and Procedure No. 24-02, dated June 15, 2012, (Vehicle Collision Investigation and Reporting Policy), multiple sections. After plainly visible vehicle damage occurred involving a Bethesda Fire Department, Incorporated vehicle under your control, which was consistent with a vehicle collision, you failed to:

- Properly report the vehicle collision/damage;
- Appropriately make arrangements for the timely filing of an insurance claim; and
- Take the steps necessary to effect the repairs required to restore the vehicle to proper condition.

***It should be noted that although the specific policy provides for the enforcement of the policy to be handled by the County Fire Chief, the Bethesda Fire Department, Incorporated and its respective members are required to follow and comply with the conditions set forth and your actions are not consistent with this requirement.

BFD Submission, p. 6.

BFD alleged that Appellant did not follow the proper policy for reporting damage to the Chief's vehicle. Chief VE testified that the vehicle also suffered approximately \$2,000 in unreported collision damage. Day 1 Tr. 115-16. Because there had not been a timely accident report the damage was not covered by the BFD's insurance. Day 1 Tr. 115-17.

Appellant acknowledged that the damage occurred when he had an accident in 2019 but testified that he had promptly reported it to a prior Fire Chief and was disciplined by not being allowed to drive a BFD vehicle for two weeks. Day 1 Tr. 206, 231; BFD Exhibit 7. Although there are no documents in the record reflecting the two-week driving suspension other than Appellant's written statement, BFD Exhibit 7, Appellant's testimony was corroborated by former BFD Board member GD. Day 2 Tr. 70, 78.

BFD did not attempt to dispute Appellant's testimony that he reported to a prior Chief and BFD did not discredit the testimony of GD supporting Appellant's version of events. It is not difficult to imagine that Chief VE was simply unaware of the events that occurred in 2019 or what action his predecessor took to address the accident.

We conclude that BFD has not carried its burden of proof and thus Charge 5 cannot be sustained.

Charge 6 - Use of Tobacco in a Vehicle of the BFD

Charge 6 alleges that Appellant violated the Montgomery County Fire and Rescue Services policy prohibiting the use of tobacco in LFRD vehicles, BFD Exhibit 8, as well as Montgomery County Code, §24-9(b)(6), which prohibits smoking in any County government workplace.⁹ The BFD's prehearing submission stated the charge as follows:

Violation of Montgomery County Division of Fire and Rescue Service Policies and Procedures No. 806, dated May 30, 2001, (Use of Tobacco Products), which although applies to career employees, makes reference to the prohibition outlined in "Policy 5.1 Use of tobacco is prohibited in all County and LFRD vehicles." This is supported by Montgomery County's overall smoking ban law (Bill 33-12, MC Code 24-9), which "prohibits smoking on County owned or leased property. This includes smoking in County vehicles; County buildings; and bus stops with or without shelters, as well as County owned parking garages." As Local Fire and Rescue Department (LFRD) vehicles belonging to the Bethesda Fire Department, Incorporated are supported by tax funds, they are considered quasi "County vehicles," and those entrusted with the care of these vehicles must comply with both law and policy. Upon your return of the Bethesda Fire Department, Incorporated vehicle entrusted in your care, it was determined that smoking of tobacco products had taken place within the vehicle.

BFD Submission, p. 7.

Chief VE testified that when Appellant returned the vehicle to the BFD it was in poor condition from Appellant smoking in the vehicle. Day 1 Tr. 114-15. Appellant admitted that he violated County and BFD policy by smoking in the vehicle. Day 1 Tr. 207 ("yes, I did. It was wrong"); Day 1 Tr. 213-14; Day 2 Tr. 134 ("I used bad judgment regarding smoking.").

Under the MCFRS policy prohibiting the use of tobacco products in LFRD vehicles an employee in violation of the policy is "subject to disciplinary action up to and including dismissal." §5.2. *See* §5.3 ("Employees . . . must not use tobacco products while on-duty or while off duty. Personnel who violate this section are subject to termination under the conditions of employment.").

It is undisputed that Appellant used tobacco in the BFD's vehicle in violation of County law and policy. We therefore sustain Charge 6. Appellant's violation warrants disciplinary action and, although this offense alone may not justify dismissal, it serves to buttress our finding that he should be dismissed under Charge 1.

Charge 7 – Failure to Act in Good Faith as a Corporate Director

Charge 7 concerns an incident that occurred at the December 1, 2021, meeting of the Montgomery County Volunteer Fire- Rescue Association (MCVFRA) Board where Appellant

⁹ §24-9(a) defines "Workplace" to include "a motor vehicle owned or leased by the employer."

made a motion to remove \$4,579 of funding for a BFD ambulance from a State grant funding request. BFD Exhibit 9. The specifics of the charge are set out in the BFD's prehearing submission:

Deviation from the tenets of Maryland Code, Corporations and Associations, § 2-405.1(d)(2), which states, "A director is not acting in good faith if the director has any knowledge concerning the matter in question which would cause the reliance to be unwarranted." During the Board of Directors meeting of the Montgomery County Volunteer Fire and Rescue Association (MCVFRA), held on December 1, 2021, you as both a member of the MCVFRA Board of Directors and the Bethesda Fire Department Board of Directors, represented without consultation that the Bethesda Fire Department, Incorporated would agree to the elimination of Senator William H. Amoss (aka "508") funding in the amount of \$4,579 for the FY 2022 distribution cycle. You had no reason to believe that the Bethesda Fire Department, Incorporated would independently and voluntarily make such an offer, and thereby, your actions were not in good faith as a Board of Directors member of the Bethesda Fire Department, Incorporated.

BFD Submission, p. 8.

Appellant's motion to deduct \$4,579 from an Amoss State grant funding request was passed. BFD Exhibit 9; AX 2; Day 1 Tr. 58. Appellant claims that the funding was not really eliminated, it was just delayed. Day 2 Tr. 134.

It is clear from the charge that it seeks to punish Appellant as a BFD BOD member. The charge states that Appellant's "actions were not in good faith as a Board of Directors member." The charge includes references to a section of the Corporations and Associations Article of the Maryland Annotated Code concerning the obligation of a director of a corporate board to act in good faith. Furthermore, a February 1, 2022, email from the President of the BFD to Appellant concerning this issue questions Appellant's action and says, "There will be a motion to remove you from the board on Thursday." AX 2.

Because Charge 7 solely concerns Appellant's responsibilities as a member of the BFD Board of Directors rather than as a volunteer firefighter/rescuer we find that the Board lacks jurisdiction. Accordingly, Charge 7 must be dismissed.

Charge 8 – Improper Use of a Fictitious Social Security Number

Charge 8 concerns an allegation that Appellant improperly provided a fictitious Social Security Number for a member of the BFD to State agencies. The BFD prehearing submission sets forth the charge as follows:

In violation of Federal law, as an official of the Bethesda Fire Department, Incorporated, you knowingly and erroneously provided Maryland State Government Agencies with a fictitious Social Security Number (SSN) on behalf of a subordinate member of the Bethesda Fire Department, Incorporated. In addition to this being an unlawful act, the ensuing circumstances have caused hardship, harm, and legal concerns for the member.

BFD Submission, p. 9.

A BFD member was not a U.S. citizen and had not yet been issued an official SSN. When Appellant was Fire Chief of the BFD, he entered a fictitious SSN for that member in the LFRD Personnel Information Management System (PIMS). Appellant introduced evidence showing that the PIMS users guide permitted entry of an alternate SSN under certain circumstances. AX 7, p. 17; Day 1 Tr. 74-76.

The BFD takes the position that the use of an alternate SSN caused problems for the member when he tried to obtain the Maryland Income Tax credit for his volunteer firefighter work. Day 1 Tr. 81-84; BFD Ex 10. The record reflects that although Appellant attempted to change the member's SSN in PIMS to the correct one he was unsuccessful. Day 1 Tr. 80; BFD Exhibit 10. Ultimately, Ms. BC received notice that there was a continuing issue with the member's tax credit due to the SSN situation. Day 1 Tr. 79-80. Ms. BC then contacted the LOSAP administrator, and the incorrect SSN was corrected soon thereafter. Day 1 Tr. 83-84.

Appellant's use of a fictitious SSN in PIMS does not appear to have been improper, but his failure to take steps necessary to remedy the situation once the member obtained an official SSN was an unfortunate deficiency in performing his duties. As Fire Chief he should have asked individuals more familiar with PIMS to assist him in resolving the problem.

Appellant's administrative shortcoming does not, however, rise to the level of an offense warranting discipline. The charge against him is that he violated Federal law and caused hardship to a member of the BFD. We do not find evidence in the record showing that Appellant violated 42 U.S.C. §408 or intentionally provided false information to government agencies. At most Appellant simply did not exert the appropriate effort necessary to remedy the situation or show the initiative to contact someone who could. We do not view his incompetent behavior as misconduct. *See Public Service Commission v. Wilson*, 389 Md. 27, 77-79 (2005).

For the reasons discussed above we do not sustain Charge 8.

Fewer Than All Charges Sustained

As discussed above, we have sustained only Charges 1 and 6. In prior cases where the Board has sustained fewer than all of the agency's charges, the Board has mitigated the agency's discipline to the maximum reasonable penalty. MSPB Case No. 20-17 (2021); MSPB Case No. 18-02 (2017); MSPB Case No. 13-04 (2013). *Cf.*, *LaChance v. Devall*, 178 F.3d 1246, 1260 (Fed. Cir. 1999).

Here, given the egregious nature and seriousness of Appellant's unjustified and irresponsible misconduct that put the public health and safety at risk, and the violation of County regulations, the Board has determined that the maximum reasonable penalty is dismissal.

ORDER

Based upon the foregoing analysis, the Board finds that Appellant's dismissal as a volunteer firefighter/rescuer with the Bethesda Fire Department was reasonable and justified and therefore **DENIES** the appeal.

If any party disagrees with the decision of the Merit System Protection Board, pursuant to Montgomery County Code, §21-7(f), *Appeals of Board decisions*, Montgomery County Code, §33-15, *Judicial review and enforcement*, and MCPR, §35-18, *Appeals to court of MSPB decisions*, within 30 days of this Order a petition for judicial review may be filed with the Circuit

Final Decision
MSPB Case No. 22-36
Page 16

Court for Montgomery County, Maryland in the manner prescribed under the Maryland Rules,
Chapter 200, Rule 7-202.

For the Board
August 31, 2023



Harriet E. Davidson
Chair