GOVERNMENT OF THE DISTRICT OF COLUMBIA

Attorney General
Fire Chief

November 16, 2007

The Honorable Phil Mendelson
Council of the District of Columbia
The John A. Wilson Building
1350 Pennsylvania Avenue, N.W.
Suite 402
Washington, D.C. 20004

Re: Recommendations to Strengthen Fire/EMS Disciplinary Process

Dear Councilman Mendelson:

Pursuant to the Task Force on Emergency Medical Service Report and Recommendations dated September 27, 2007, the Office of Attorney General (OAG) and the Department of Fire and Emergency Medical Services (FEMS, Fire/EMS or Department) submit their recommendations to strengthen Fire/EMS's disciplinary process for medical malfeasance and misconduct. While the Department believes that legislative reform to strengthen its disciplinary process in connection with employees found to have committed medical malfeasance or misconduct, we believe management reforms should take place first. As a result, FEMS is initiating and implementing reforms that will improve its ability to carry out the mission of the Department. Each proposed management reform is addressed below.

Currently, a major impediment is that the Fire Chief does not have ultimate personnel authority within FEMS because he is unable to adjust the recommendation of the Trial Board upward. OAG and FEMS are pleased to report that contract negotiation with the appropriate unions is well underway to provide the Fire Chief with the ultimate personnel authority, subject to appeal rights, within FEMS to terminate employees found to have committed medical malfeasance and misconduct. At this time, we do not believe that the period of time within which FEMS must initiate disciplinary action is an impediment. However, FEMS will create checks and balances to specifically track when a potential infraction has risen to a level that provides management with notice that the time within which FEMS must take disciplinary action has been initiated.

Review of applicable legal authority

The Department is in the process of undertaking a comprehensive review of the legal authority in the D.C. Official Code, District of Columbia Municipal Regulations and the Collective

Bargaining Agreements (CBA) between the District of Columbia and Local 36 and Local 3721 for the purpose of determining legal authority and any apparent inconsistencies in the management and operation of the Department. Once this review is completed and the Department has had an opportunity to pursue management reforms, I may have additional recommendations for legislative reform.

By way of background, there are three separate disciplinary processes for Fire and EMS employees.

Firefighters: All sworn members at the rank of Captain and below are subject to discipline pursuant to Article 32 of the CBA. In accordance with the CBA, the Department has seventy-five (75) days to conduct an investigation once it knows or should be aware of an act or occurrence that warrants disciplinary action. All sworn members must be provided with written notice that they are the subject of an investigation within this same 75 day period.[1] The Department has an additional sixty (60) days to issue its Proposed Notice of disciplinary action.[2] The member is entitled to an adverse action hearing before a Trial Board.[3] The Department has the burden of proof and must establish by a preponderance of the evidence that there was "cause" to take disciplinary action.[4] If the Trial Board finds that there is "cause" and determines that the appropriate penalty is removal, the sworn member may: 1) file a Petition for Appeal (PFA) with the Office of Employee Appeals (OEA); or 2) submit the matter to arbitration pursuant to the negotiated grievance procedure.

Career Service Employees: This category includes single-role civilian Emergency Medical Service employees DS-10 and below, sworn members above the rank of Captain (except Battalion Fire Chief and Deputy Fire Chief who are Excepted Service) and other non-supervisory civilian personnel. Pursuant to D.C. Code § 5-1031(a) Fire/EMS has ninety (90) calendar days to commence disciplinary action once it knows or should know of an act or occurrence that allegedly constitutes "cause" for disciplinary action.[5] Pursuant to the CBA with Local 3721 discipline is to be imposed in a manner consistent with the CMPA and Chapter 16 of the DPM. Accordingly, Fire/EMS issues a 15 day advanced written notice of its proposal to remove him/her from service.[6] An administrative review of the proposed removal is scheduled before a "hearing officer." After conducting its review, the hearing officer issues a written report and makes a recommendation to the deciding official.[7] If the deciding official determines that the appropriate penalty is removal, the employee may: a) file a Petition for Appeal with the OEA; or b) submit the matter to arbitration pursuant to the negotiated grievance procedure.

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[1] It is important to note that pursuant to D.C. Official Code § 5-1031(a) Fire/EMS has 90 calendar days to commence action once it knows or should know of an act or occurrence that allegedly constitutes "cause" for disciplinary action. Pursuant to the CBA, Fire/EMS commences disciplinary action within 75 days and is therefore, in tandem with applicable provisions of the D.C. Code.

[2] CBA, Article 32 (B).

[3] D.C. Official Code § 5-1001; CBA, Article 32 (F); Reorganization Order No. 39.

[4] 16 DPM § 1603.10.

[5] The "90 day rule" only applies to uniformed and civilian employees of the Metropolitan Police Department and Fire/EMS.

[6] 16 DPM § 1608

[7] 16 DPM § 1612

At will employees: This category includes the Fire Chief, any senior manager hired from outside the agency, and any non-career service Battalion Fire Chief, Deputy Fire Chief, Assistant Fire Chief, Excepted Service appointee, Probationary employee, Term employee and all civilian employees in the Management Supervisory Service (MSS). These employees serve at the pleasure of the Mayor and/or the Fire Chief and may be separated from service for any reason or no reason at all.[8]

There are significant differences in the disciplinary processes for civilian and sworn members. First, the Fire/EMS Chief has the final decision making authority over civilian terminations, but he does not have authority to terminate a sworn member unless a Trial Board finds him or her guilty and imposes the penalty of termination. Under the terms of the CBA, the Fire/EMS Chief cannot increase any penalty.

Second, the disciplinary process for sworn members is conducted pursuant to the CBA, whereas the disciplinary process for EMS employees is governed by the CMPA and its implementing regulations. Practically speaking, however, the disciplinary process for sworn members is often times protracted when compared to the process in place for EMS workers.

Recommendations

1. Convene Trial Boards only for demotion and termination cases.

Currently, all proposed penalties of 120-hour suspension or more including termination are referred to a Trial Board. The Department believes that Trial Boards should be convened only when the penalty recommendation is termination or demotion. We believe this will create a more efficient disciplinary process and strengthen the Department's ability to terminate employees for medical malfeasance and misconduct. Under the CBA sworn members retain their right to seek review of the final agency action before OEA or through the negotiated grievance process.

2. Hire additional legal staff with specific expertise and experience in the area of personnel law.

By December 1, 2007, the Department will hire a Deputy General Counsel with extensive knowledge of District of Columbia and federal personnel laws, particularly laws governing employee discipline, Equal Opportunity Employment Commission (EEO), and workers' compensation. The new hire should also have extensive experience before administrative agencies such as the D.C. Office of Employee Appeals, the D.C. Office of Human Rights and the Equal Opportunity Employment Commission. Once this individual comes on board, s/he will be tasked with providing training to all Trial Board panel members, developing standard operating procedures and creating a Trial Board Handbook for use by all Trial Board panels. This should improve the disciplinary process by decreasing the length of time between a charging document and a decision on the merits from the Trial Board.

[8] D.C. Official Code § 5-401 et seq. (2001)

3. Change functions of the Compliance Unit

The Department cannot implement changes to the disciplinary process without also examining and restructuring the operations and procedures of the Office of Compliance (OC). The OC is the unit within FEMS responsible for drafting a charging document. This review will take place immediately. We have already implemented changes in the manner in which we review for legal sufficiency all proposed disciplinary actions for both sworn members and civilian employees, the way in which we track the workload within the OC and the manner in which we schedule and continue Trial Board and other adverse action hearings affecting civilian employees.

4. Improve case tracking

The Department has not fully leveraged information technology to compile data on employee misconduct and grievances filed by or against members of the Department. We intend to develop matter management and case tracking systems which will enable us to come into substantial compliance with D.C. Official Code § 5-1032 which requires the Fire Chief to report misconduct and grievances to the Mayor and the Council by January 15 of each year.

We believe that the successful implementation of the above management reforms will allow the Department to operate and manage its disciplinary process. We will continue to monitor any obstacles that will impede our ability to take swift and immediate action.

We hope this information is helpful. We remain available to answer any additional questions regarding this matter.

Sincerely,

Dennis L. Rubin

Dennis L. Rubin
Fire Chief
Department of Fire and Emergency Medical Services

Linda Singer
Attorney General for the District of Columbia