

STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW

JOHN L. KENNINGTON,

Appellant,

v.

Case No. 12-REM-07-0158

DEPARTMENT OF PUBLIC SAFETY,

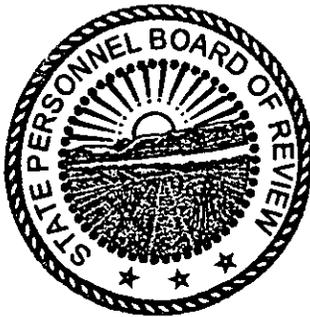
Appellee

ORDER

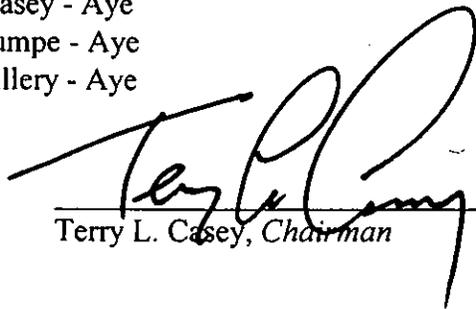
This matter came on for consideration on the Report and Recommendation of the Administrative Law Judge in the above-captioned appeal.

After a thorough examination of the entirety of the record, including a review of the Report and Recommendation of the Administrative Law Judge, along with any objections to that report which have been timely and properly filed, the Board hereby adopts the Recommendation of the Administrative Law Judge.

Wherefore, it is hereby **ORDERED** that Appellee's removal of Appellant Kennington for neglect of duty is **AFFIRMED**.



Casey - Aye
Lumpe - Aye
Tillery - Aye


Terry L. Casey, *Chairman*

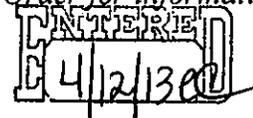
CERTIFICATION

The State of Ohio, State Personnel Board of Review, ss:

I, the undersigned clerk of the State Personnel Board of Review, hereby certify that this document and any attachment thereto constitutes ~~(the original)~~ a true copy of the original order or resolution of the State Personnel Board of Review as entered upon the Board's Journal, a copy of which has been forwarded to the parties this date, April 12, 2013.


Clerk

NOTE: Please see the reverse side of this Order or the attachment to this Order for information regarding your appeal rights.



**STATE OF OHIO
STATE PERSONNEL BOARD OF REVIEW**

John L. Kennington

Case No. 12-REM-07-0158

Appellant

v.

December 28, 2012

Department of Public Safety

Marcie M. Scholl

Appellee

Administrative Law Judge

REPORT AND RECOMMENDATION

To the Honorable State Personnel Board of Review:

This cause came on for record hearing on October 23, 24 and 25, 2012. Present at the hearing were the Appellant, John L. Kennington, represented by Michael A. Moses, Attorney at Law and Appellee Department of Public Safety designees Jim Hogan, Attorney, and Ellen Owens, Executive Assistant for the Division of EMS, represented by Julie B. Smith and Amanda L. Scheeser, Assistant Attorneys General.

The subject matter jurisdiction of the Board was established pursuant to sections 124.03 and 124.34 of the Ohio Revised Code.

Appellant Kennington was removed from his position of Program Administrator 2, effective July 2, 2012. The pertinent part of the removal order states as follows:

It was found that you violated the Department of Public Safety Work Rule 501.03(J)(4)(b), Neglect of Duty. Specifically, as a result of administrative investigation number 2012-0267, it was found that you failed to complete multiple work tasks relating to the certification process over a prolonged period of time. In addition, you failed to ensure your subordinates were processing the sections (sic) workload in an appropriate and timely manner.

Appellant Kennington made a Motion to Make Definite and Certain. Appellee's response to Appellant's motion is as follows:

- There were at least forty (40) instances between March 2008 and May 2012 where an applicant failed to complete a DMA form or answered "yes" to one of the questions on the DMA form, and the Certification Section failed to conduct any follow-up or send denial letter to the applicants. Kennington admitted that he instructed his subordinates to complete incomplete DMA forms and submit them without verifying information with the applicant.
- At least twenty-five (25) applications for renewal certifications, dating back to August 2010, were received but never processed.
- Dating back to May 2008, several initial applications had been submitted where an applicant indicated they did not complete required training. These applications were never processed or sent to EMS Investigations.
- Several renewal applications received throughout 2011 where the applicant's certification had already expired were not updated in the EMS database and were never forwarded by Kennington to the EMS Board for further action.
- At least eight (8) reciprocity applications received during 2011 and 2012 by the Certification Section were not processed by Kennington.
- At least forty (40) requests for medical and/or military exemptions, received between August 2009 and May 2012, were never presented to the EMS Board or Executive Director Learning for approval.
- At least ten (10) instances between January 2009 and May 2012 where Kennington did not process military reinstatement requests, issue certification cards after Fire Board members ordered reinstatement, and/or notify the certification holders whether the requests for extensions were approved or denied.
- At least four (4) requests for reinstatement of expired certifications, dating back to November 2011, were never forwarded to EMS Investigations.
- At least one (1) instance, dating back to May 2011, where an individual surrendered his certifications; however, Kennington never presented this information to the EMS Board or Executive Director Learning, so no action was taken and the individual was listed in the EMS database as an active and current certification holder.
- Kennington was responsible for completing audits of the Firefighter certifications, primarily to ensure that the certificate holders were completing required continuing education. The investigation found at least fifty-one (51)

audits, dating back to August 2011, where Kennington failed to conduct any follow-up or forward the audits to EMS Investigations.

- In addition, Mr. Kennington withheld information found within the investigation from his supervisor.

Prior to the taking of evidence, the parties entered into stipulations that all of the procedural issues were complied with in that Appellant Kennington received his pre-disciplinary hearing notice timely, his waiver to attend that hearing was received timely and he received timely and proper notice of his order of removal.

STATEMENT OF THE CASE

Appellant Kennington testified he has been employed with the State of Ohio for approximately nineteen years, most recently as a Program Administrator 2 for approximately thirteen and one-half years. As a Program Administrator 2, he had the working title of Certification Coordinator, supervising an Administrative Professional 2 and a Customer Service Specialist 1. The purpose of his office is to check certification applications for completion and issue certifications for instructors, EMTs and firefighters. He identified Appellee's Exhibit 1 as his position description, which he stated was an accurate description of his duties. Near the end of Appellant Kennington's tenure, he volunteered to take on the fire audits.

Appellant Kennington testified he wrote policies and procedures regarding how to process initial and renewal applications and he was familiar with the laws governing certifications. He stated approximately ninety-five percent of all EMT applications are done on-line and one hundred percent of the firefighter applications are on-line. He also explained there is an EMS Board comprised of twenty members who meet every other month to approve all the EMT certifications. The exemptions from certification were presented to the Board by Appellant Kennington.

With regard to the on-line applications, there was no approval necessary, as the software system will not accept incomplete applications or if a person marked "yes" to a conviction. In those cases, the application is flagged and is automatically sent to the investigation section. There are several different types of applications: for EMS, there is initial, renewal, reinstatement and reciprocity. For firefighter, the only difference is instead of reciprocity, there is equivalency. The paper applications that are received in the office usually came in a group from a school, such as a firefighter school. He and his employees checked those for

completeness and correctness, then entered the application into the system. Appellant Kennington only became involved if there was a problem or if he filled in for one of his employees.

A medical exemption request was a form attached to the application which had to be taken before the Board for approval. Appellant Kennington explained that these were submitted when a person wanted to maintain his or her certification but due to a medical problem, the training could not be completed. This was also true for a military exemption and for excusal from the continuing education requirement. If someone surrendered his or her certificate, those were sent to investigations. The reciprocity applications could not be done electronically, so those were verified manually. Appellant Kennington testified there are approximately 58,000 certification holders and approximately 100,000 certifications, renewable every three years. Initial applications are filed at the approximate rate of 3,500 to 4,500 yearly. The goal was to process the applications as timely as possible and since approximately 2001, the section had been working with a four working day turn-around time. Generally that time frame was met.

If there was a problem with an application, then Appellant Kennington's office would email, call or send a letter to the applicant. When the budget became tight, the mailing stopped and they would just call. A comment was put in the database to reflect the call. The system automatically sent a reminder email every week for thirteen weeks when a certification was about to expire. Appellant Kennington's office developed a process for one renewal for people who held both an EMT and a firefighter certification. The new process allows for one renewal on the person's birth date.

Appellee's Exhibit 3 was identified as a table of organization which Appellant Kennington testified was accurate at the time of his removal. Appellee's Exhibits 12, 13 and 14 were identified as his acknowledgements of receipt of work rules in different years and Appellee's Exhibit 15 was identified as a record of his trainings. Appellee's Exhibits 17 through 27 were identified as different policies regarding the certification process and Appellant Kennington testified he wrote a few of them. He explained that the Declaration of Material Assistance (DMA) came into being after the passage of the Patriot Bill. He stated it is administered by the State Homeland Security section and an applicant had to complete the form declaring if he or she was a terrorist or gave any material assistance to a terrorist organization.

In April, 2011, Appellant Kennington volunteered to take over the fire audits, as the supervisor, John Sands, was going out on a medical leave and he was the person who normally processed them. Approximately ten percent of the applicants were randomly chosen for audit of the number of hours of training. A notice is sent to the person that he or she has been chosen for audit and the first notice was automated. The second notice was generated and if there was no response from the person, they were put into a pile as Appellant Kennington testified he did not know what to do in those instances as John had not trained him on that aspect. He stated he was waiting for Mr. Sands to return to train him on those files. Appellant Kennington also testified he did not ask anyone else what to do with them.

With respect to the DMA forms, Appellant Kennington testified he did not know what to do with the DMA forms that were not completed or that were the wrong ones. He stated he initiated a conversation in late 2010 with the Director about what they should do with these forms. He contacted Homeland Security and they told him they did not want them. Appellant Kennington testified that if an application came in without a DMA form, his office tried to contact the person and if the person was not reachable or did not contact the office back, then the forms just sat in the office. In July, 2011, Director Leaming told Appellant Kennington to catch up on those applications, as there were several hundred of them sitting in the office. Appellant Kennington testified they were broken down by year and his staff starting calling all of the people again. If the person could not be contacted, then a letter of denial of the application was sent out. He testified it took approximately one month to clear up all the files.

Appellant Kennington testified he was told, and always operated under the axiom, that if any process was not fulfilled by the division or if a process hurts the applicant, then it is to be resolved in favor of the applicant and that the employees are to call no one a liar. He explained there was a glitch in the system, in that if someone hit a button twice while completing the application, the software system would allow the application to be completed without completing the DMA form and an error message would appear. Sometimes applicants submitted the DMA form by fax, but there was no way to link it with the on-line form. So, IT set up a note system on the database to note that the DMA form had been submitted. In order to keep processing the applications, Appellant Kennington testified that if an applicant had been erred out by the system, and they had previously completed a DMA form, then his section would complete the DMA for the person based on the previous DMA form.

The DMA form that Appellant Kennington's office completed on-line for the applicant did not contain an attestation paragraph. There was a comment box and they entered a note in that box stating they completed the DMA form for the applicant, or self-populated the form. Appellant Kennington's staff began this practice in early 2012, approximately March to May. He stated many EMTs and firefighters are not computer savy and would get kicked out of the computer system frequently. He also stated his office received many complaints about DMA forms from the first responders, as to why they had to complete those forms and many of them were insulted that they had to do so. Appellant Kennington testified he did not see the purpose in the form, as to his knowledge, not one terrorist or anyone providing assistance to a terrorist organization was ever identified by the form. He stated that the Legislature just recently repealed the law on the DMA forms and they are no longer required.

Appellant Kennington identified Appellant's Exhibits A, B, C and D as personnel actions, his performance evaluations, his awards and the DMA forms, respectively. He reiterated he was never told of the process to use to deny an application based on the DMA forms. When he tried to return them to Homeland Security, he was told they did not want them, so he was told by Mr. Rucker to hold onto them and to continue to try to reach the applicant. Eventually, the denial letters were mailed out to the applicants. He stated he periodically went back to Mr. Rucker and asked what he should be doing and was told to keep doing what he was doing until someone gave them some answers. It was not until Mr. Leaming told them to send out the denial letters that the backlog from 2007 and forward was diminishing. Appellant Kennington identified Appellant's Exhibit O as minutes of the August 17, 2011 Board meeting where he apprised them that applications without the DMA forms attached, from 2007-2010, had not been processed due to having no established procedure to deal with those. The minutes state that "Legal counsel advised Mr. Kennington to contact the individuals with one last chance to submit a DMA."

Appellant Kennington identified Appellant's Exhibit R as portions of the Ohio Administrative Code, 4765-20-04, 4765-8-02 and 4765-18-14, which state that if an application is deemed incomplete, they should be returned to the applicant informing the applicant that the application is incomplete. He testified he was not of the understanding that the incomplete applications required a denial letter.

When questioned about initial applications with no training mentioned, Appellant Kennington testified he would have called the school on these although he stated he didn't understand what these would be as it would make no sense for a person to submit an application saying they had no training. He also testified his office was under no obligation to do anything with applications after the certification date had expired as the person would have to apply for reinstatement. Appellant Kennington stated the EMS Board had no power to do anything with an expired certification.

Military exemptions were always immediately processed according to Appellant Kennington, unless the person was in Iran or Afghanistan and they were waiting on their return, as there were no time limits given for those exemptions. He testified that with respect to the renewal applications, he took those to the Fire Board and once approved, he gave the lists to one of his employees to process.

Appellant Kennington identified Appellee's Exhibit 30 as a letter he put together to address the problem with the DMA forms, dated November 30, 2006, and Appellee's Exhibit 19 as a policy which he wrote. He also testified that two days before his pre-disciplinary hearing, he received a three-ring binder full of the investigation documents. Appellant Kennington testified he only had two days to go through the material when Ms. Vermillion has said that it has taken her weeks to go through the material. He testified he did not see many of the documents that Appellee has alleged he did not process so he cannot address the allegations corresponding to all of the documents.

Appellee's next witness was John Sands, Chief of Operations with the Division of EMS. He was Appellant Kennington's direct supervisor from the latter part of 2008 until his removal. Mr. Sands testified he and Appellant Kennington talked daily and he felt Appellant Kennington kept him apprised of the activity in his section. He stated that in the case of an incomplete electronic application, Appellant Kennington's section would try to contact the person to make corrections or to tell them they need a DMA form. If the "yes" box is marked as to a conviction, then it is sent to investigations. If the person doesn't respond on an incomplete application then a letter is sent to the applicant and a note placed in the database. At some point a disposition has to be made by either sending it to investigations or back to the individual.

Mr. Sands identified Appellee's Exhibit 28 as a draft he authored in April, 2011 outlining duties with respect to fire audits. He testified he presented the document at a staff meeting and then it became final. He explained that a new database was put in place for the fire audits and due to the problems with the database, the audits fell behind. He talked with Appellant Kennington about it for several months and Appellant Kennington volunteered to take them over. Mr. Sands testified there were too many for Appellant Kennington to do alone so he told him to involve his staff, but he never did. He testified that shortly after Appellant Kennington took over the audits, he went out on medical leave. Mr. Sands stated he only expected to be out for a short time and he told Appellant Kennington he would help him catch up on the audits and show him how to process the second notices, as Appellant Kennington had only been trained on the completed and successful completion notices. Mr. Sands was out on medical leave longer than expected, from March to May. He stated he felt responsible for the non-processing of the second notice audits.

In July, 2011, Mr. Sands testified he attended a meeting with Mr. Leaming and others, not including Appellant Kennington, where he learned that the DMA forms were behind. He stated he did not have any idea that the applications were not being processed. A plan was devised at that meeting to catch up all the applications. If the database kicked an applicant out, the section was to work with the person to get the DMA completed. After every avenue of contact was exhausted, then the application would be sent to investigations. In early 2012, Mr. Sands testified he became aware that there was still a backlog of DMA's. He also stated he had no idea there was an electronic DMA as he did not have access to that database. He received access to the database in May, 2012.

In looking at Appellant Kennington's performance evaluations, Mr. Sands stated he exceeded or met all of the expectations. He also stated he knew that Appellant Kennington's section was taking a DMA form on file for a person that had completed it for a firefighter application and using the same form if that same person was an applicant for EMS, as long as it was within a one year period. Mr. Sands testified that at the time of Appellant Kennington's termination, the DMA goal had not yet been reached. He also stated he received a three day suspension for failing to supervise and for the non-processed audits and applications.

Appellee's next witness was Melissa Vermillion, Chief of Investigations since approximately 2004. As such, she oversees all investigations for the EMS division and had daily interaction with the certification section. Ms. Vermillion testified that on April 17, 2012, the education coordinator brought her nine audits that had no second letters sent out. She contacted Mr. Learning and Appellant Kennington and Appellant Kennington told them he had not sent out any second letters, as he did not know the process. Mr. Learning then directed Ms. Vermillion to conduct a management review of the audits, starting with the fire audits. During that process, Ms. Vermillion testified she found some DMA issues, which she apprised Mr. Learning of, and on May 3, 2012, documents were collected from Appellant Kennington's desk.

Ms. Vermillion identified Appellee's Exhibit 4, subsections one through 29, as spreadsheets showing the audits and other documents relating to the application process that she worked on. On April 25, 2012, more documents were removed from Appellant Kennington's desk that he had not turned over previously. She testified that ninety-seven percent of her time since April, 2012 has been spent working on cleaning up the documents and she is still not finished. Ms. Vermillion testified that the problem with the initial applications not being processed is that the applicant cannot be working or getting paid until the application is processed. The renewal applications are a problem as some of the applicants were already beyond their three year renewal and should not be working. Some of the exemption applicants ended up with a break in their service that they should not have had due to the lack of approval and those with audit issues who did not complete the education requirements should not be working.

On cross examination Ms. Vermillion testified that the investigations section was not involved at all with the DMA forms. The denial letters went out and then the file was forwarded to legal or to Homeland Security. She stated that the nine audits that started this whole process were given to Mr. Sands to process upon his return to work and they are not listed in Appellee's Exhibit 29. Ms. Vermillion testified it is a criminal offense to work without a valid certification and there were approximately twenty-five to thirty cases referred for prosecution for practicing without a certification. She also stated Mr. Learning left his position in May or June, 2012.

Appellee's next witness was Kathleen Bourke-Botos, Investigator Supervisor. Mr. Leaming asked her to conduct an investigation into this matter and she identified Appellee's Exhibit 4 and subsections as her investigation packet. She testified she had Ms. Vermillion and Ms. Owens do a spreadsheet showing the problems, which consisted of work items not being completed in the course of a year. With respect to the DMA forms, she found procedures were not followed, as employees were completing the forms for applicants and attesting the information was true without talking to the person. Ms. Bourke-Botos testified the time period she looked at for the DMA forms was from March to May, 2012. She stated they found applications for certification renewals that were sent in, received and never processed. The applications just sat and some of them should have been taken before the Board but were not. At least forty military and medical exemption requests were found that had not been presented to the Board for approval. There were fifty-one audits that had no indication of follow-up or forwarded to anyone by Appellant Kennington and no second letters were sent. Ms. Bourke-Botos testified that as a result of her investigation, she found Appellant Kennington failed to supervise.

Appellee's next witness was Julie Ann Lee, Labor Relations Officer. She explained she is involved in recommending discipline of an employee to the Director. In the instant case, she testified all three Labor Relations Officer recommended termination for Appellant Kennington. Ms. Lee testified they took into consideration his tenure, prior discipline, performance evaluations, the severity of the violation and the fact that it was an on-going issue. Termination was recommended due to excessive misconduct and neglect over a prolonged period of time and for failing to keep his subordinates informed of the processes in place. She stated Appellant Kennington's actions showed a pattern of a wide range of serious misconduct.

Appellee's final witness was Ellen Owens, Executive Assistant for the Division of EMS for approximately twenty years. She has been employed with EMS for approximately twenty-six years and in her current position, oversees programs, is the public records administrator and acts for the director in his absence. Ms. Owens testified that in July, 2011, she attended a meeting with Mr. Leaming, Mr. Sands and legal counsel in which Mr. Leaming told them he had been apprised of a backlog with the DMA forms and he wanted them cleaned up as soon as possible. He also told her at some point to work with Ms. Vermillion to look at Appellant Kennington's fire audits and he directed Appellant Kennington to provide them with all of the

audits. Ms. Owens testified Appellant Kennington seemed fine with the review and immediately gave them a stack of audits, stating those were all of the audits that needed to be completed. While going through the stacks, Ms. Owens testified they found other documents such as certification cards that had been returned approximately five months earlier, reinstatement requests, etc. She went back to Mr. Leaming and told him the issue may be bigger than just the audits. They then took other papers from Appellant Kennington's desk, described as a stack approximately ten to twelve inches high, and went through them. They found some documents which needed to be filed and others which should have been processed.

Ms. Owens stated she felt they needed help, so she asked Mr. Leaming for outside help and that is when investigators were sent in.

The fact gathering was done by Ms. Vermillion and Ms. Owens assisted. She stated it took approximately six weeks to review the documents and they are still working on clearing up the backlog. She testified she concurred with the recommendation to remove Appellant Kennington due to the amount of work that went undone and the level of the infraction. She explained that the unprocessed applications could have negative impacts by having people work who were not properly certified or by having people who were properly certified not being able to work since they are waiting on their approvals. On cross examination Ms. Owens stated she was not aware of anyone who was actually injured by Appellant Kennington's nonfeasance.

Appellant's first witness was James N. Steele, fire chief for the city of Van Wert since 1997 and the current chairman of the fire safety committee. He testified that once a person's card expires, they should stop working until their card is renewed. He stated some departments still allow people to work with an expired card however. Mr. Steele testified there were many problems with the implementation of the database but the committee was told the problems would be worked out.

Appellant's next witness was Renee Manneh, a Customer Service Assistant 1, who reported to Appellant Kennington. She has been employed with Appellee for approximately fifteen years. Her duties include processing initial applications, reciprocities and reinstatements. Ms. Manneh testified she received calls from applicants telling her they were having problems completing the paperwork on-line. When she told Appellant Kennington, he told her to complete the DMA form for them, asking the person on the telephone what the answers should be and she

filled in the answer they gave. She stated the new database was operational in January 2011 and there were problems from day one. On cross examination, Ms. Manneh testified she completed the DMA forms every day for people, as she only had four days to process the applications. She testified she never filled out the form without having the person on the phone while she completed the form.

Appellant's next witness was Janice Greenlee, Administrative Professional 2 for approximately nine years and an employee with Appellee for approximately eighteen years. Appellant Kennington was her supervisor and her duties included processing the renewal and initial applications, monitoring the on-line system and reviewing the applications to ensure completeness and forwarding them to Ms. Manneh for input into the system.

Ms. Greenlee testified the workload quadrupled when the on-line processing began. She completed the initial problem letter on every application without a DMA form and for those who did their applications on-line, she tried to call the people. For the paper applications, a problem letter was always sent out and she would send out multiple letters and receive no responses. For the on-line applicant, if the button was hit two times, the system would skip the DMA form and the applicant thought they were done when they weren't. IT could not replicate the problem, as they figured it had something to do with the firewall since the word "terrorist" is used.

The DMA form looked different when she tried to complete it than what it looked like when the applicant pulled it up. Ms. Greenlee testified she filled in an applicant's information from what she already had in the database as when a person completed a form for fire but not for EMS. She also did this if she received a hard copy of the form in the mail and she would put in the comment section that she took the answers from the hard copy. For the ones that she did not have a hard copy of, she entered the information on the form based on a past DMA form and commented in the system "system failure". She tried to contact the person or sometimes she held on to the application. Mr. Rucker was the director then and he told her to hold the application and wait for the applicant to contact them. When Ms. Learning took over he told them to get rid of those on hold so she called the applicants or denied them.

Ms. Greenlee testified that toward the end of 2011, she was instructed to contact the person and if she was not able to reach them, she was to complete the DMA form. She stated the vast majority of these were renewals, as only one to two percent of the applications received are initial applications. She testified that both Appellant Kennington and Mr. Sands told her to do this. Ms. Greenlee testified the attestation paragraph did not show up when she completed the DMA forms, only the comment box. She was not able to process the form without entering a comment and she entered "DMA system failure". Ms. Greenlee testified she was disciplined for completing the DMA form and for using the driver license database to get an applicant's social security number or driver's license number to complete the incomplete forms. She had access to the database given to her by Mr. Sands and Ms. Vermillion and the discipline was grieved and resolved. She testified Appellant Kennington told her she could rely on a previous DMA form filed within a one year period. Ms. Greenlee testified that since the answers on the DMA form are system-populated, she does not know if the answers are true or not. She also stated that all of the renewal applications that she did had previous DMA forms on file.

Appellant's last witness was Douglas Orahood, State Fire Coordinator for approximately thirteen years. Mr. Sands is his direct supervisor. He is responsible for teaching fire training and developing the curriculum for the training and testing. He stated he knows Appellant Kennington and worked closely with him for approximately eight years.

Mr. Orahood testified that problems with DMA forms and the on-line system came up many times at Board and committee meetings. There was much confusion in the field and the applicants were angry that their certifications were being delayed. Mr. Orahood testified Mr. Rucker always told Appellant Kennington to just get the applicants certified and to never call any applicant a liar. Mr. Orahood told Mr. Rucker there was a process to follow, but Mr. Rucker told him to just get the paperwork done. Mr. Orahood testified he took over the fire audits in 2012, then they went back to Mr. Sands, then Appellant Kennington took them over and now they are back with Mr. Orahood. He stated he did not receive any training on how to perform the audits, so he tries to copy what the education section does with the EMS audits.

Appellee's rebuttal witness was Jeff Leaming, currently Chief Deputy State Fire Marshall. Prior to that he was Executive Director from July, 2011 to June, 2012, overseeing all of EMS and its operations. In that capacity, he interacted with Appellant Kennington on a daily and weekly basis. He testified that in July, 2011, there was a box or boxes of renewal applications and initial applications that were not completed, dating back to 2007, which amounted to approximately one hundred certificate holders. His reaction was "How could this happen?" He contacted his superiors and was worried about all of the applicants being in limbo. Mr. Leaming told them to contact each applicant to receive the information they needed and if the applicant did not respond, then a letter would be sent notifying them their application was incomplete. They were to start with the oldest and move forward. He stated he received daily and weekly updates and it appeared the project was progressing rapidly. Mr. Leaming stated he felt the most egregious delay involved applicants for medical and military exemptions, as these people had served our country and were waiting in limbo. He also thought that the multitude of DMA issues had been resolved when they had not.

Mr. Leaming testified he was not aware of DMA forms being auto-populated at the time they were. When he found out, it was his opinion that Appellant Kennington was falsifying documents. Mr. Leaming also stated he did not realize there was no process for follow-up on audits until all these problems arose. He also confirmed he was not aware of any specific harm to any specific person.

FINDINGS OF FACT

After thoroughly reviewing the testimony of the witnesses and the documents which were admitted into evidence, I find the following facts:

1. At the time of his removal, effective July 2, 2012, Appellant Kennington was a Program Administrator 2 with nineteen years of service and no previous discipline. All of his recent performance evaluations were good, with the ratings at the "exceeds expectations" or "meets" level. John Sands was his direct supervisor from 2008 until his removal.
2. Appellant Kennington worked in the EMS Certification section. He and his two subordinate employees were responsible for checking certification applications of EMTs and firefighters for completeness and issuing

certifications. He also volunteered toward the end of his tenure to do the fire audits for Mr. Sands.

3. The different types of applications were initial, renewal, reinstatement and reciprocity or equivalency. There were also requests for medical and military exemptions.
4. Appellant Kennington had knowledge of the policies and procedures governing the processing of the applications and he wrote several of the policies. He also received copies of and was familiar with Appellee's work rules.
5. Appellant Kennington did not receive any training from Mr. Sands as to the processing of fire audits that had second letters generated. He put those audits in a pile, waiting on Mr. Sands' return from medical leave. Mr. Sands admitted he did not train Appellant Kennington on those procedures and he took responsibility for those audits not processed due to that reason.
6. Applicants were required to complete a DMA form. Appellant Kennington did not know what to do with forms that were not complete or were the wrong form. There were many processing problems that arose when the on-line database came into existence.
7. Appellant Kennington spoke with then Director Rucker and Homeland Security about the non-processed applications with a DMA problem and Homeland Security told him they did not want the form. The forms and applications, dating from 2007, sat until July, 2011, when Appellant Kennington was directed by then director Leaming to contact those persons and if no contact could be made, to send out denial letters.
8. Due to the errors in the system with the DMA form, Appellant Kennington directed his staff to complete the DMA form with the applicant on the telephone supplying the answers, or if there was a previous year's form on file, to complete the current year's DMA form with information on the previously filed DMA form. His staff processed the DMA forms in this manner beginning the latter part of 2011.

9. In early 2012, a backlog of DMA forms and applications still existed.
10. Ms. Vermillion reviewed and summarized all of the documents that had not been processed by Appellant Kennington and his staff, excluding the fire audits that were waiting for Mr. Sands to return. She began processing them in April, 2012, and as of the date of hearing, she had not yet completed them.
11. It is a criminal offense to work without a valid certification. Ms. Vermillion referred approximately twenty-five to thirty cases for prosecution due to having no valid certification because of the delay in processing them. She had no knowledge as to if the cases were or were not prosecuted.
12. The military and medical exemptions were to be presented to the Board by Appellant Kennington for approval or disapproval. There were approximately fifty requests not presented to either the EMS or Fire Board or they were presented but then not followed up on.
13. Appellant Kennington was provided was a copy of all of the investigation documents two days prior to his pre-disciplinary hearing. He waived his right to the pre-disciplinary conference.

CONCLUSIONS OF LAW

In order for Appellee's removal of Appellant Kennington to be affirmed, Appellee had the burden of proving by a preponderance of the evidence the allegations contained in the removal order. Appellee has met its burden.

The removal order alleged Appellant Kennington "failed to complete multiple work tasks relating to the certification process over a prolonged period of time." The evidence established that this is a true statement. Appellee's response to Appellant's Motion to Make Definite and Certain categorized the documents that were not processed over a prolonged period of time. The most egregious of these involved the DMA forms.

The evidence established there were a backlog of DMA forms dating back to 2007. Mr. Leaming directed Appellant Kennington to get all of those cleaned up by trying to contact the person and if no response, then denial letters were to be sent out. The evidence established that as of the hearing date, that backlog had not yet been completely cleared up. Appellant Kennington was removed in July, 2012, which means that applications with DMA problems sat for approximately five years. By any standard, that is a prolonged period of time to process a document. Appellant Kennington testified he asked numerous times what should be done with these documents, stating Homeland Security did not want them and the previous director, Mr. Rucker, told him to continue to hold them until they were given some guidance on what to do with them.

The Appellee must share some of the blame with these documents in that it seems no one could or would make a decision about these DMA forms and applications until it was brought to Mr. Leaming's attention just how far the backlog went. Mr. Sands, as Appellant Kennington's supervisor, did not seem to be in the loop for whatever reason and he should have known about the backlog and made some decision. If he couldn't, then Mr. Rucker should have made a decision, although since Mr. Rucker did not testify, it is only hearsay evidence as to what his actual direction was. It is inconceivable that there were people in supervisory positions that could not make a decision as to how to clear out these documents over the course of five years. Appellant Kennington was the supervisor of the section and he testified he wrote several policies and procedures regarding the processing of the certifications. Certainly he could have written a policy or procedure to alleviate the backlog. He obviously felt he had the authority to decide how to handle forms as he instructed his staff to self-populate the DMA forms. If he felt he had the authority to do that, then he could have devised a policy or procedure to deal with the backlog. While others must share in the blame, Appellant Kennington is primarily responsible as he was the only person to know the extent of the backlog and as a supervisor of the section, he should have put forth a plan to clear up the backlog.

Appellant's Exhibit L contains a memo from Appellant Kennington, dated July 28, 2011 to Mr. Leaming informing him of the amount of the backlog, which numbered approximately 324. This was no small backlog and it was Appellant Kennington's responsibility to "formulate & implement program policy" and to "act for the deputy director to independently review & process applications for certification &/or certification renewal...". (Appellee's Exhibit 1, Appellant's position description).

It was Appellant Kennington's responsibility to ensure that these certifications were processed in a timely manner and he clearly failed to do so.

Appellant Kennington argued that there was no standard of time set for the processing of the certifications. Appellant Kennington stated his section had been working on a four day turnaround time that was established sometime ago and that generally they had met that timeframe. Even if there was no standard, a standard of reasonableness would be in place and five years is not reasonable. The evidence established that the certifications were only good for a three year period of time, so to have applications sit for over the amount of time that a certification was good for is not a reasonable amount of time.

There was also much discussion regarding the self-populating of the DMA forms. It is clear there was a glitch in the system which prohibited applicants from being able to access or complete the DMA forms on-line. It is also clear that the majority of people did not like having to complete the form and felt it was useless. The evidence established that the requirement to complete the DMA forms no longer exists, as the law requiring such was repealed. Until the law was repealed however, the requirement to complete the form still existed. To complete a form for another person, without that person's knowledge or consent, is not a practice that should be condoned and could amount to falsification of a document. The testimony from Ms. Manneh was that she never completed a form for a person without that person being on the phone with her and answering the questions. While that is not the ideal, at least the person is the one supplying the answers. To complete a form based on answers a person gave a year ago on the same form is unacceptable. The answers could have changed. No matter how unlikely, the fact remains that until the person is asked, no one knows if the answers have changed from one year to the next. The software system should have been fixed or a note could have been put on the system that there was a problem with the DMA form and directed applicants to mail in the form. Anything would have been better than completing a form for a person without their knowledge.

As for the fire audits, Mr. Sands accepted the blame for those not being processed as he testified he did not train Appellant Kennington on how to do so for those needing second letters. Therefore, while Appellant Kennington cannot be held solely responsible for the non-processing of those audits, he must share in the blame. His testimony was that he did not know what to do with those audits, so he was holding them until Mr. Sands returned. Unfortunately Mr. Sands did not return

as quickly as he had anticipated, so the audits sat longer. Again, Appellant Kennington did not take any action to inform anyone that he had audits sitting with no action nor did he seek anyone out to ask how to process them until he was ordered to get them processed. At any time in the process, he could have asked the education section how to process them, or he could have asked Ms. Vermillion or he could have apprised Mr. Leaming of the situation and let him tell him what to do with them. To take no action was a neglect of duty.

With respect to the remainder of the allegations listed in Appellee's response to Make Definite and Certain, Appellant Kennington testified he could not respond to the allegations as he did not understand the terminology or he did not see the exact documents that were alleged to not have been processed. The evidence established that Appellant Kennington received copies of the documents prior to his pre-disciplinary conference. There was no evidence presented that he requested a continuance of the pre-disciplinary conference to have more time to review those documents so that he could rebut any of the allegations. In fact, he waived his right to attend the conference. The documentary evidence and the testimony of witnesses established that there were many files or applications that went unprocessed and Appellant Kennington did not deny this. He only stated that if files were sitting on his desk, he was waiting to process them as they must have had a problem that he was trying to clear up or he stated he did not know what documents were being referenced. All of the documents were identified in the spreadsheets entered into evidence, as were the actual documents themselves on a CD. Ms. Vermillion's testimony was that she went through each and every document and listed what was wrong with it on the spreadsheet. Appellant Kennington did not rebut any information on the spreadsheet but stated what the process is with each category of application that was not processed.

Appellant Kennington testified as to what is supposed to happen with each application but he did not testify as to what actually did occur with each document. Appellee proved files of unprocessed applications were found on Appellant Kennington's desk, some dating back to May 2008, which in and of itself proves a neglect of duty for not processing a document for approximately four years.

Appellee proved the allegation of neglect of duty, spanning a period of years, and there has been no evidence to show an abuse of discretion on the part of Appellee in removing Appellant Kennington from his position despite his nineteen years of service and no prior discipline. He was in a supervisory position and had the authority to promulgate policies and procedures. Instead of promulgating such to alleviate backlogs and the holding of applications for prolonged periods of time, he held documents and completed DMA documents for people without their knowledge. It was not just one or two or even several applications that were held and DMA forms completed, but there were hundreds. Appellant Kennington argued Appellee did not know of any instances where a specific person was harmed by his neglect of duty, but there is no "no harm, no foul" rule which is applicable. The charge was "neglect of duty", not one of harm to others. The evidence established Appellant Kennington neglected his duty and in doing so, he failed in his supervisory duties and did not take the necessary action to rectify situations which were clearly in his purview to rectify.

Therefore, it is my **RECOMMENDATION** that Appellee's removal of Appellant Kennington for neglect of duty be **AFFIRMED**.

Marcie M. Scholl

Marcie M. Scholl
Administrative Law Judge

mms